No. 20-9422

In The

Supreme Court of the United States

March Term 2021

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 12
Counsel for Respondent
January 31, 2021

QUESTIONS PRESENTED

1. Under the Free Speech Clause of the First Amendment, is Congress' emergency enactment of a sixty-foot buffer zone around federal facilities tasked with distributing contact tracing devices to protect the American public during a wide-spread pandemic a permissible time, place, and manner regulation when the purpose for its enactment was to promote public health and preserve safe access to the facilities?

2. Under the Free Exercise Clause of the First Amendment, is emergency legislation mandating contact tracing through the use of mobile phones for all individuals under the age of sixty-five during a wide-spread pandemic neutral and generally applicable when the only exemptions are for severely sick individuals whose compliance would be burdensome and unnecessary?

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The opinion of the United States District Court for the District of Delmont is unpublished and can be found at *Jones v. Smithers*, C.A. No. 20-CV-9422 (D. Delmont Oct. 30, 2020). The opinion of the United States Court of Appeals for the Eighteenth Circuit is unpublished and can be found at *Jones v. Smithers*, C.A. No. 20-CV-9422 (18th Cir. 2020).

STATEMENT OF JURISDICTION

Jurisdiction is proper in this case under 28 U.S.C. § 1331. The District Court had jurisdiction pursuant to 28 U.S.C. § 1343. The judgment of the United States District Court for the District of Delmont was entered on October 30, 2020. The United States Court of Appeals for the Eighteenth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Procedural History

On June 1, 2020, Petitioner Levi Jones brought suit against Respondent FCC Commissioner Christopher Smithers in the United States District Court for the District of Delmont alleging that the Act and its enforcement by the FCC through the Amendment violated his First Amendment rights to Free Speech and Free Exercise. R. at 9. On October 5, 2020, both parties filed cross motions for summary judgment with the court. R. at 3. The court held that the Amendment was a valid time, place, and manner restriction, granting summary judgment for Mr. Smithers on the Free Speech claim, while denying Mr. Jones's motion on the same. R. at 20. Conversely, the court held that the Act was neutral but not generally applicable, granting summary judgment for Mr. Jones on the Free Exercise claim, while denying Mr. Smithers's motion on the same. R. at 20.

The Eighteenth Circuit reversed the judgment of the District Court on all counts, holding that the Amendment was not narrowly tailored to prevent the spread of Hoof and Beak, despite its being a content-neutral law. R. at 30. Moreover, the court held that the Act was neutral and generally applicable under the *Smith* standard. R. at 30. Following Petitioner's appeal of the Eighteenth Circuit's ruling, this Court granted certiorari to assess (1) whether the sixty-foot buffer zone was narrowly tailored to a significant governmental interest and (2) whether mandated contact tracing through the use of technology is neutral and generally applicable, despite religious objections to its use. R. at 42.

B. Statement of the Facts

In the United States alone, the novel Hoof and Beak disease that has swept across the globe has to date resulted in 70 million confirmed cases and 230,000 deaths. R. at 1. Due to the highly contagious nature of the disease, Congress enacted the Combat Hoof and Beak Disease Act ("CHBDA" or "the Act") on April 15, 2020, which sanctioned contact tracing through government-issued SIM cards for use in each person's individual cell phone. R. at 1. "The Act mandates that '[e]ach person living in the United States shall participate in a mandatory contact tracing program.'" R. at 5. "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). To obtain the SIM card, each person, while wearing a mask and social distancing, was required to go to a federal facility to pick up his card. R. at 6. Because of the severity of the pandemic, individuals who did not comply with the Act by October 1, 2020, could be subject to jail time or a fine. R. at 6. These efforts were to be overseen by the FCC. R. at 5. The Act only applied to individuals under sixty-five years of age, with the exception of those

who had approval for non-compliance due to debilitating illnesses or disabilities such as Alzheimer's, ischemic heart disease, and late-stage cancer. R. at 2, 19–20, 22. To allow for efficient and timely implementation of the mandate, Congress, with proper authority per 42 U.S. Code § 2000bb–3, declared the Religious Freedom and Restoration Act inapplicable to the mandate. R. at 6.

Some individuals were openly opposed to the Act and objected by protesting at the federal distribution facilities. R. at 7. To address concerns regarding the spread of Hoof and Beak, physical safety, and efficient distribution of the SIM cards, Congress issued an emergency amendment ("the Amendment") prohibiting protestors "within sixty feet of the facility entrance, including public sidewalks, during operating hours" and limiting such groups to a maximum of six people. CHBDA §42(d). The Amendment instructed that these zones must be "clearly marked and posted" and that decisions as to how to do so be left to the "discretion of local facility officials in acknowledgment of the varied location characteristics for each center." CHBDA §§ 42(d)(2), (e).

On behalf of his church, the Delmont Church of the Luddite, Pastor Levi Jones demanded that his congregation be granted an exemption due to his church's "Community Orders" prohibiting the use of technology in most forms, including the use of cell phones. R. at 5. While other Luddite communities allow for the use of mobile phones, the Delmont church is skeptical of technology because it "provide[s] 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." R. at 5. These beliefs led him and six other Luddites to protest at the Delmont Federal Facility on May 1, 2020, seventy-five feet from the entrance. R. at 7. Because their beliefs regarding technology prohibit the production of pamphlets and signage, use of the internet, or use of amplification devices, a few of the Delmont Luddites briefly entered the zone to speak with

individuals in line. R. at 6–7. Upon noticing this behavior and after giving the Luddites a chance to leave, police officers arrested Mr. Jones who refused to comply with the protesting regulations. R. at 8. After returning to the facility several days later with one less member, officials recognized Mr. Jones and arrested him again. R. at 9. Both of these arrests occurred while another group, the Mothers for Mandates (the "MOMs"), were also violating the protesting rules. R. at 8–9. The refusal to arrest the MOMs while he was arrested, jailed, and fined caused Mr. Jones to file this action against FCC Commissioner Christopher Smithers. R. at 9.

SUMMARY OF THE ARGUMENT

Congress's emergency Amendment to the Combat Hoof and Beak Disease Act is a permissible time, place, and manner restriction. Time, place, and manner restrictions are permissible provided that the restrictions are (1) content-neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. First, the Amendment is content-neutral. The Amendment applies evenhandedly to all, irrespective of the content of a speaker's message. Additionally, the Amendment furthers the legislative purpose of promoting public health, ensuring public safety, and preserving safe, orderly, and effective access to federal SIM card distribution centers; therefore, it is justified without reference to the content of incidentally restricted speech. Second, significant governmental interests of public health, public safety, and safe, orderly, and effective access to federal SIM card distribution centers would be achieved less effectively absent the regulation; therefore, the Amendment is not substantially broader than necessary. Finally, the Petitioner may continue to reach his intended audience without being forced to convey "a message quite distinct from" a message he would deliver absent the regulation; therefore, the Amendment leaves open ample alternative channels for communication.

The Act, mandating contact tracing through the use of mobile phones and government-issued SIM cards, does not violate the First Amendment Free Exercise Clause because it is neutral and generally applicable, despite allowing for non-religious health exemptions. The Act is formally neutral because it does not facially discriminate against the Luddites by specifically mentioning "religion," "Luddite," or the Luddite's prohibition against technology. The Act is also not gerrymandered to effectuate religious suppression against the Luddites or religion in general. Additionally, the Act is generally applicable because the exemptions are not "so extensive" as to effectively single out religious conduct for disfavored treatment. Moreover, the purpose of the exemption aligns with the purpose of the Act; therefore, the Act and its exemptions treat religion as favorably as any other secular purpose. Thus, the Act is neutral and generally applicable.

ARGUMENT

A. The Emergency Amendment to the Act is a permissible time, place, and manner restriction under the Free Speech Clause of the First Amendment.

The right to free speech under the First Amendment does not guarantee that anyone with opinions or beliefs may address a group at any place, at any time, and in any manner that may be desired. *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 657 (1981); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Rather, it is well settled that the right to free speech, even in a traditional public forum, may be subject to reasonable time, place, and manner restrictions, provided that the restrictions are (1) content-neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Here, the Amendment prohibiting protests

within a sixty-foot area surrounding federal SIM card distribution center entrances and limiting protests to six individuals is a permissible time, place, and manner restriction on speech.

1. The Amendment is facially content-neutral, and it serves public health and safety purposes that are justified without reference to the content of incidentally restricted speech.

For a regulation to be a valid time, place, and manner restriction on speech, the regulation must be content-neutral as opposed to content-based. *See Ward*, 491 U.S. at 791. A regulation may fail to be content-neutral where the regulation "on its face" draws content-based distinctions on the message a speaker conveys. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Additionally, a regulation that does not "on its face" draw content-based distinctions may nevertheless be treated as content-based if the regulation cannot be justified without reference to the content of the incidentally regulated speech or if it was adopted by the government because of a disagreement with the message the speech conveys. *Id. See McCullen v. Coakley*, 573 U.S. 464, 479–80 (2014).

In *McCullen*, this Court examined the content neutrality of a Massachusetts statute that criminalized the act of knowingly standing on a "public way or sidewalk" within a fixed thirty-five foot buffer zone erected around an entrance or driveway to any place, other than a hospital, where abortions were performed. *Id.* at 469. The thirty-five foot buffer zone applied only "during a facility's business hours" and the area was required to be "clearly marked and posted." *Id.* at 472. This Court held that the statute was neither content nor viewpoint based, but rather content-neutral. *Id.* at 485.This Court reasoned that the statute did not draw content-based distinctions "on its face" because according to the plain language of the statute, the violation depended not on the content of an individual's speech; rather, it depended on the location where that speech was conveyed. *Id*. Additionally, this Court found that the regulation was justified without reference to the content of the incidentally regulated speech because the statute served content-neutral purposes

of ensuring public safety and patient access to healthcare. *McCullen*, 573 U.S. at 464. Notably, this Court reasoned that the fact that the statute established buffer zones only at abortion clinics did not render the statute content-based despite the "inevitable effect" of restricting abortion-related speech more than speech on other subjects. *Id.*

Here, similar to the content-neutral "buffer zone" in *McCullen*, the Amendment does not draw content-based distinctions on its face. Rather, the plain language of the Amendment applies evenhandedly to all who congregate within sixty feet of facility entrances, irrespective of the content of a speaker's message. Therefore, it is facially content-neutral. Expressed simply, what matters under the Amendment is not *what* is said but *where* the speech is delivered. Indeed, an individual can violate the Amendment merely by standing in the buffer zone, without uttering a word. Additionally, here, similar to *McCullen*, the problem the legislature sought to address was limited to specific locations. Therefore, consistent with this Court's reasoning in *McCullen*, narrowing the Amendment's application to specific locations such as federal SIM card distribution centers does not render the act content-based, despite the possibility of restricting mandate-related speech more than speech on other subjects.

Furthermore, similar to the buffer zone in *McCullen*, here the Amendment is justified without reference to the content of the incidentally burdened speech. The principal justification for the Amendment is found in the Act's explicit purpose which is to "protect Americans, their families, and their communities by letting people know they may have been exposed to Hoof and Beak and should monitor their health for signs and symptoms of Hoof and Beak." R. at 6. The Amendment furthers these public health and safety purposes while ensuring an additional purpose of orderly, safe, and efficient access to federal facilities, which is particularly important during a time when maintaining safety and order is essential for preventing the spread of a highly

contagious disease. Thus, if the principal justifications of ensuring public health, safety, and access to facilities rendered the buffer zone in *McCullen* content-neutral, those same governmental interests at stake here require a conclusion that the Act and its subsequent Amendment are both justified without reference to the Petitioner's incidentally burdened speech and are also, therefore, content-neutral.

2. The Amendment does not burden substantially more speech than is necessary to promote public health, ensure public safety, and preserve safe access to federal facilities and is therefore narrowly tailored.

The Amendment meets the second requirement for a proper time, place, and manner restriction—it is "narrowly tailored to serve . . . significant governmental interest[s]." Ward, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293). A regulation is narrowly tailored "so long as [it] . . . promotes a [significant] government interest that would be achieved less effectively absent the regulation" and is "not substantially broader than necessary to achieve the government's interest." *Id.* at 799–800. Additionally, the regulation "'need not be the least restrictive or least intrusive means of' serving the government's interest." *Id.* at 798. As a result, restrictions on the time, place, and manner of protected speech are not invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Id.* at 797.

a) Promoting public health, ensuring public safety, and preserving safe access to federal SIM card distribution facilities are all significant governmental interests.

A valid time, place, and manner regulation must serve a significant governmental interest. *Heffron*, 452 U.S. at 657. As an initial matter, the Petitioner does not appear to quarrel with the proposition that the governmental interests at stake here—particularly promoting public health and safety by preventing the spread of Hoof and Beak and ensuring access to the federal facilities—are all legitimate and significant interests. R. at 14, 37. Moreover, it cannot be sincerely contested

that combatting the spread of a global pandemic is a significant, if not compelling, governmental interest. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Kavanaugh, J., dissenting) (recognizing the undoubted compelling interest in combating the spread of a global pandemic and protecting the health of citizens).

However, assuming this point is in contest, this Court's precedent requires a finding that the governmental interests here are, at a minimum, significant. This Court has previously recognized the government's significant interest in ensuring public safety, health, and order. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 767–768 (1994); *Hill v. Colo.*, 530 U.S. 703, 715 (2000). The Amendment's buffer zone combats the public health and safety emergency created by Hoof and Beak by ensuring effective and orderly implementation of a federal contact-tracing mandate. Given the highly contagious nature of the disease, there is a significant physical danger in allowing individuals to congregate within the buffer zones around federal SIM card distribution centers while individuals most vulnerable to the disease, such as children, risk exposure while standing in line. Thus, by fixing a moderate zone in which congregating is prohibited, the Amendment serves significant governmental interests.

> *b) The Amendment is not substantially broader than necessary to promote public health, ensure public safety, and preserve safe access to federal facilities.*

While it is clear the Amendment promotes significant governmental interests, to be narrowly tailored, the Amendment also must not be substantially broader than necessary to achieve these governmental interests. *Ward*, 471 U.S. at 799. Stated otherwise, the Amendment must not burden substantially more speech than necessary to achieve the government's interests. *McCullen*, 573 U.S. at 486. Restrictions on the time, place, and manner of protected speech are not

insufficiently narrowly tailored simply because there is some imaginable alternative that might be less burdensome. *Ward*, 491 U.S. at 797.

In *McCullen*, this Court found an amended Massachusetts statute restricting access within thirty-five feet of the entrance to an abortion facility to be substantially broader than necessary. *McCullen*, 573 U.S. at 491. The prior statute, upheld by the First Circuit in *McGuire v. Reilly*, 386 F. 3d 45 (1st Cir. 2004), had only defined an eighteen-foot area around the entrances of abortion facilities in which anyone could enter, provided the individual didn't come within six feet of another person. *Id.* at 470. This Court reasoned that the revised thirty-five foot buffer zone burdened "substantially more speech than necessary" considering the effectiveness of the prior eighteen-foot buffer zone. *Id.* at 466, 491. Although the government claimed the eighteen-foot buffer zone was inadequate in achieving the interests of health and safety, there was no record that there had been any prosecution or injunction against any individual outside of an abortion clinic for several decades. *Id.* This Court found, therefore, that Massachusetts failed to demonstrate that alternative measures, such as the previously enacted and effective eighteen-foot buffer zone which burdened substantially less speech than the thirty-five foot buffer zone, would fail to achieve the government's interests. *Id.*

Here, in contrast to *McCullen*, there is no obvious, less burdensome alternative that could serve Congress's interests just as effectively, such as a previously enacted and effective buffer zone of smaller dimension. The Petitioner might assert that the obvious, less burdensome alternative is the previously unamended Act. However, while the Petitioner might rightfully conclude that the Amendment's justifications and accompanying governmental interests overlap with those of the Act, the interests secured by the Act and the emergency Amendment do not

overlap to the point of becoming identical—unlike the eighteen foot buffer zone and subsequently amended thirty-five foot buffer zone examined in *McCullen*.

Thus, the Amendment here does not fall prey to the same central tailoring issue in *McCullen*, and as a result, there is nothing remarkable about the conclusion that the Amendment is narrowly tailored. Indeed, the Amendment is not substantially broader than necessary, but rather "eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485–486 (1988). The emergency state created by Hoof and Beak and the need to prevent its spread justifies the use of the buffer zone because every person who stands right outside the facilities necessarily contributes to the overall problem the Act and the Amendment sought to combat. Here, individuals are *required* to go to the facility, risking exposure to Hoof and Beak. Consequently, there is a significant physical danger in allowing individuals to congregate and protest within the buffer zone outside the Delmont Federal Facility. Notably, Congress could have chosen more burdensome means to alleviate the danger of exposure and conflict from protests, such as implementing a stay-at-home order applicable to all except those explicitly traveling to and from facilities to comply with the contact tracing mandate. Yet, Congress chose to restrict access to a moderately sized area to promote public health, public safety, and orderly access to federal facilities. That legislative choice cannot be deemed substantially broader than necessary just because there may be some imaginable alternative that is less burdensome.

3. The Petitioner can continue to reach his intended audience without deviating from the message he wants to deliver; therefore, the Amendment leaves open ample alternative channels of communication.

The Amendment satisfies the third requirement of this Court's time, place, and manner test—it leaves open "ample alternative channels of communication." *Ward*, 491 U.S. at 791. A regulation fails to leave open ample alternative channels of communication when the speaker is

not permitted to reach the intended audience or if the speaker is forced to convey "a message quite distinct from" the one that they would deliver without the regulation. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994). *See Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009). Here, there are alternative channels of communication available to the Petitioner. He could stand right outside the buffer zone and still reach precisely the same target audience without being forced to convey "a message quite distinct from" the one that he would deliver if he could enter the buffer zone. Accordingly, this is not a case in which "[t]he alternatives . . . are far from satisfactory." *Linmark Assocs., Inc. v. Willingboro Tp.*, 431 U.S. 85, 93–94 (1977).

In *McCullen*, this Court held that a "buffer zone" around abortion clinics prevented sidewalk counselors from engaging in speech with the only people to whom their speech was directed—women voluntarily entering an abortion clinic. *McCullen*, 573 U.S. at 489. This Court found that the buffer zone effectively stifled the counselors' message and substantially affected their ability to reach their intended audience because the counselors could not readily identify clinic patients from passersby before the patients entered the zone and became off-limits. *Id.* at 467, 489. While this Court did not attribute its analysis to a determination of "ample alternatives," its analysis is nonetheless consistent with the modern "ample alternatives" analysis.

Here, unlike the counselors in *McCullen*, Mr. Jones is sufficiently able to reach his intended audience. Unlike the target audience in *McCullen* which consisted solely of women voluntarily entering an abortion clinic, here the target audience is comprised of nearly every citizen within the State of Delmont. Therefore, unlike *McCullen*, there is nothing necessarily unique about the Petitioner's intended audience in relation to the location in which the buffer zone is established indicating that speech within the buffer zone is necessary.

Instead, the Petitioner's intended audience more closely resembles the intended audience in *Evans v. Sandy City*, 944 F.3d 857 (10th Cir. 2019). In *Evans*, the Tenth Circuit examined a Utah ordinance making it illegal for any person "to sit or stand, in or on . . . any median of less than 36 inches." *Id.* at 853. While the petitioner in *Evans*, Mr. Evans, contended that non-restricted areas were inadequate for reaching his target audience, drivers in vehicles, the court held that the statute left ample alternatives. *Id.* at 860. The Court found that there was nothing unique or indistinguishable about Mr. Evans's target audience indicating that speech on restricted medians was necessary as opposed to speech on unrestricted medians. *Id.* The Court reasoned that Mr. Evans could communicate his same message to drivers from the unrestricted *safe* medians, from the sidewalks, or from inside public parks. *Id.* The Court further noted that although Mr. Evans may have "preferred" to stand on narrow or unpaved medians, that does not render all other available alternatives inadequate. *Id.* Put succinctly, burdening Mr. Evans's *preference* to communicate his message from unsafe medians was not the same as burdening his *ability* to communicate his message to his intended audience.

Here, similar to the target audience in *Evans*, there is nothing unique about the Petitioner's target audience indicating that speech within the buffer zone is necessary. The Petitioner's target audience is effectively all citizens of Delmont, as the Act requires all citizens to comply with the contact tracing mandate. Thus, the fact that the Petitioner may prefer to stand within sixty feet of the Delmont Distribution Center does not render all other available alternatives—such as the unaffected sidewalks or public parks noted in *Evans*—inadequate. The burden on the Petitioner's *preference* to communicate his message from unsafe areas is not the same as burdening his *ability* to communicate his message to his intended audience. While it is true that the Amendment prohibits congregating within a limited area surrounding facility entrances during operating hours,

outside of that limited area, all forms of lawful communication can, and do, take place within the sight, hearing, and presence of Petitioner's preferred audience—the citizens of Delmont. For these reasons, the Amendment leaves open ample alternative channels of communication.

Ultimately, the Amendment does not violate the Free Speech Clause. First, the Amendment is justified without reference to the content of incidentally restricted speech and is therefore content-neutral. Second, the Amendment is narrowly tailored to achieve significant governmental interests of public health and safety. Third, the Amendment leaves open ample alternative channels of communication. Accordingly, the Amendment fits comfortably within existing First Amendment precedent, and should, therefore, join the significant line of similar restrictions upheld by this Court. *See generally Hill*, 530 U.S. 703; *Schenck*, 519 U.S. 357; *Madsen*, 512 U.S. 753.

B. The Act, mandating contact tracing through the use of mobile phones and government-issued SIM cards, does not violate the First Amendment Free Exercise Clause because it is neutral and generally applicable, despite allowing for non-religious health exemptions.

The test for Free Exercise claims that currently stands was established in *Employment Division v. Smith*, a case involving a religious exemption from state drug laws to ceremonially ingest peyote without work-related retribution or loss of benefits. *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). In resolution of the petitioner's claim to an exemption, this Court held that "free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" simply because the law places a burden on his religious practice. *Id.* at 879. This resolution flowed from the understanding that for the protection of society, certain actions could be subject to regulation. *Id.* at 904. Thus, to prevent citizens from "becoming a law unto [them]selve[s]," "while [laws] cannot interfere with mere religious belief and opinions, they may with practices." *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878). *See Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). A few years after penning the majority

opinion in *Smith*, Justice Scalia acknowledged that "neutral" and "general applicability" are "interrelated" and "substantially overlap." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 557 (1993). Thus, while the analyses of both terms are distinctive, the "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

1. The Act passes the requirement of formal neutrality as evinced in *Smith*.

Although Justice Scalia's majority opinion in Smith failed to define neutrality, his later opinions brought clarification to the term by advocating for "formal" neutrality. Kelsey Curtis, *The Partiality of Neutrality*, 41 Harv. J. L. & Pub. Pol'y 935, 951 (2018). Formal neutrality means that "[a]s long as a law does not single out a religious group for special limits—either explicitly or by evident legislative intent—it passes free exercise examination, even though its consequences may in fact put very severe limitations on the practices of a particular religious minority." Stephen V. Monsma, *Substantive Neutrality as a Basis for Free Exercise-No Establishment Common Ground*, 42 J. Church & St. 13, 24 (2000). Determining whether the purpose of a law is for religious suppression begins with an examination of the text of the law itself—the test of facial neutrality. *Lukumi*, 508 U.S. at 533.

a) The Act is facially neutral as it does not reference religion as a whole, nor does it reference the Luddite community specifically.

"A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* In *Lukumi*, city ordinances prohibiting the ceremonial slaughter of animals failed the test of facial neutrality because of their explicit use of the words "sacrifice" and "ritual." *Id.* at 533–34. This Court found that these words were a clear reference to the killing of animals in the religious context, because despite the city's concerns regarding cruelty to animals and the disposal of animal carcasses, "many types of animal deaths

or kills for nonreligious reasons [we]re either not prohibited or approved by express provision." *Id.* at 522. Considering that the Santeria religion was the only group in the area to engage in such practices, this Court determined that the "ordinances' various prohibitions, definitions, and exemptions demonstrate[d] that they were 'gerrymandered' with care" to suppress ritual sacrifice that is central to the Santeria religion. *Id.* at 521.

Unlike the clear textual infringements upon constitutional rights in *Lukumi*, there are no such textual violations present in the Act. The language of the Act simply reads: "Each person living in the United States shall participate in a mandatory contact tracing program." CHBDA § 42(a). Nowhere in the Act do the words "religion" or "Luddite" appear. Nowhere in the Act does Congress demonstrate that it was even aware of the existence of the Luddite religion, let alone the existence of a particular sect of Luddites living in Delmont whose Community Orders require skepticism of technology. The only time that the word "religious" is used is to specify that the Religious Freedom and Restoration Act does not apply "[i]n an effort to allow for quick and effective implementation of the mandate." R. at 33. Here, the lack of explicit language in the Act referencing religious practices in general or the skepticism of the Luddite community regarding technology greatly differs from the explicit language found in the ordinances in *Lukumi*. While the ordinances in *Lukumi* referenced specific practices or actions only undertaken by a religious group, here the Act fails to even mention the word "technology" or recognize that some individuals may object to its use. Thus, the law passes the test of "facial neutrality" with flying colors.

b) In effect, the Act does not operate as a covert gerrymander aimed to burden religion as a whole or the Luddite community.

Although the Act complies with facial neutrality, that alone is not determinative of whether the law violates the Free Exercise Clause. *Lukumi*, 508 U.S. at 534. "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* As such, laws that

operate as "religious gerrymanders" will not pass First Amendment scrutiny, regardless of whether they appear neutral on their face. *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). Thus, to determine whether a law is hostile toward religion, courts often look to "the effect of a law in its real operation [as that] is strong evidence of its object." *Lukumi*, 508 U.S. at 535.

In *Lukumi*, this Court found that the ordinances not only failed to be facially neutral, but it also found that the ordinances failed to operate in a neutral way because their effect suppressed only the Santeria killings. *Id.* at 542. To ascertain the city's object in enacting the ordinances, this Court utilized factors from equal protection cases, including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). This Court considered the effect of the multiple ordinances taken together, as well as statements made by city councilmen, the city attorney, and police officials during city council meetings. *Lukumi*, 508 U.S. at 541–42. These statements included calling for the church's demise, labeling the Santeria religion as "demon" worship, and announcing that the "community will not tolerate religious practices which are abhorrent to its citizens." *Id.* at 542. Thus, after applying the *Arlington* factors, this Court was convinced that "the ordinances were enacted '"because of," not merely "in spite of,"' their suppression of Santeria religious practice." *Id.* at 540.

Here, applying the *Arlington* factors results in the opposite conclusion from *Lukumi*. While the numerous ordinances in *Lukumi* amounted to a pattern of animosity towards the Santeria religion, here, by contrast, Congress passed only the Act, which cannot be said to be a "pattern"

of any sort. The event leading up to the Act was the expanding reach of the deadly Hoof and Beak disease. R. at 1. The legislative history does not suggest any discriminatory intent or motive, nor were there any anti-Luddite statements made by government officials. R. at 39. Thus, unlike the legislature's gerrymandering in *Lukumi*, Congress did not specifically set out to harm the Luddite community by drafting the Act.

To be fair, the Act does impose a burden on the Delmont Church of Luddite because it is against the Delmont Community Orders to have a mobile phone. R. at 31. Yet just because a law imposes a burden on religion does not mean that the law is unconstitutional. "For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination." *Lukumi*, 508 U.S. at 535. *See McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Here, the Act's object was to promote health and safety from the spread of a disease during a global pandemic. Combatting the Hoof and Beak disease is high on the government's priority list considering the "70 million confirmed cases and 230 thousand deaths" and growing. R. at 1. In times of emergencies such as this, great deference is given to the government to act in a way that is best for the people. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding mandatory vaccinations for smallpox because emergency situations allow a governing body to make decisions for the safety of the people during a pandemic). Given the highly contagious nature of Hoof and Beak, it is reasonable for Congress to have mandated contact tracing for the purpose of "protect[ing] Americans, their families, and their communities by letting people know that they may have been exposed . . . and should therefore monitor their health for signs and symptoms" of the disease. CHBDA § 42(a)(1).

Furthermore, it is worth noting that the burden is not all that substantial on the community in the first place. The reason that the Delmont Luddites do not use mobile phones is because

"mobile phones provide ready access to outside ideas and values that might break down the family or community by serving as distractions" while "eliminating the need to rely on others in the Luddite community." R. at 31. The Act does not specify what type of mobile phone is to be used or will be handed out. The Act does not specify *how* the phone should be used, just that it should be carried on one's person. For instance, the Act applies to all those under age sixty-five, which necessarily includes small children. Surely these children are not expected to know how to operate a mobile phone in a specific manner. Moreover, it is reasonable to conclude that the specifications were meant to be minimal, as requiring the government to issue smart phones with cellular service would be a hefty cost. A simple pay-as-you-go type phone installed with the SIM card would likely accomplish the government's purpose, despite the absence of internet capabilities. As such, the Act does not require the Delmont Luddites to use the phone in a way that would expose them to outside ideas and values, nor does it require that the Luddites use the phones to contact or rely on others outside of their own community. Thus, the burden of carrying a mobile phone does not truly go against their beliefs. Accordingly, the Luddites could easily have amended their Community Orders to allow for such use. R. at 4. While the judiciary is prohibited from distinguishing particulars of a community's religious beliefs, this reasoning does show that the Luddites were not forced to choose between practicing their religion and conforming with the law. *See Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (noting the seriousness of a choice between forsaking a religious practice or subjecting oneself to criminal prosecution). Because of the gravity of the health crisis, coupled with the incidental burden on the Luddites absent any purpose of the legislature to discriminate, the Act was not gerrymandered to burden religion. Thus, the law passes formal neutrality in compliance with *Smith*.

2. The Act is generally applicable, because the mandate does not treat religion or the Luddite community favorably under either a broad or narrow view.

While general applicability is quite similar to neutrality, it can, and often does, demand a separate analysis. Just as there is much confusion surrounding the correct definition and application of "neutrality" after *Smith*, there is also much confusion surrounding the correct definition and application of "general applicability." Throughout the years, "general applicability" has fallen into two camps: (1) the law is generally applicable if it does not specifically single out a religious entity for disparate treatment—the narrow view or (2) the law is generally applicable if it does not grant exemptions to one class but not another—the broad view. "According to the first view, general applicability only requires that religion not be treated worse than practically *all* secular activities under a given law." Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 Calif. L. Rev. Online 282, 286 (2020). "According to the second view, general applicability demands that religion not be treated worse than almost *any* secular activity under the law." *Id.*

These two definitions of general applicability were at war in *South Bay United Pentecostal Church v. Newsom*, where this Court held that restrictions on places of worship during the COVID-19 pandemic did not violate the Free Exercise Clause. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). The concurrence clung to the narrow view, comparing houses of worship to secular venues that had not been exempt, including concerts, sporting events, and theatres. *Id.* at 1613. On the other hand, the dissent clung to the broad view, comparing houses of worship to secular venues that *were* exempt, including restaurants, shopping malls, and cannabis dispensaries. *Id.* at 1614. Despite this Court's silence as to which definition of general applicability is to be applied, here the Act will satisfy both.

a) The mandate is generally applicable under a narrow view because it does not single out the Luddite religion for special treatment.

The narrow view is merely "an extension of *Smith's* neutrality rule, triggered only when exemptions for secular reasons are so extensive that the omission of an exemption for religious objectors can be understood as purposeful discrimination against religion." Rothschild, *supra* at 287. As previously discussed, the Act does not on its face discriminate against religion, let alone the Luddite religion specifically. The Act simply requires compliance of all individuals under the age of sixty-five, unless health or disability concerns make compliance impracticable. R. at 22. These specifically enumerated exemptions are not "so extensive" because they only apply to a very small percentage of the population—individuals with late-stage cancer, Alzheimer's, ischemic heart disease, and certain disabilities.

To put it in perspective, an estimated 50–70% of all cancers occur in individuals over the age of sixty-five—individuals to whom the law already does not apply.[1] If a conservative estimate is that half of all cancers are in the late stages, that means that only 15–25% of the 5.5%—a mere 0.825–1.375% of the U.S. population—would fall under this exemption. Similarly, only people with early-onset Alzheimer's, 5–6% of all people with the disease, will be able to take advantage of the exemption.[2] Likewise, only a mere 7% of the population between ages eighteen to sixty-four could receive the exemption for ischemic heart disease.[3] Although the record is not clear as

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[1] Mary C. White, *Age and Cancer Risk*, National Center for Biotechnology Information, (Jan. 31, 2021, 11:52 AM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4544764/.

[2] *Young-onset Alzheimer's: When symptoms begin before age 65*, Mayo Clinic, (Jan. 31, 2021, 11:56 AM), https://www.mayoclinic.org/diseases-conditions/alzheimers-disease/in-depth/alzheimers/art-20048356#:~:text=About%205%25%20to%206%25%20of,onset%20form%20of%20the%20disease.

[3] *Summary Health Statistics: National Health Interview Survey, 2018*, National Center for Health Statistics, (Jan. 31, 2021, 11:59 AM), https://ftp.cdc.gov/pub/Health_Statistics/NCHS/NHIS/SHS/2018_SHS_Table_A-1.pdf.

to what type of disabilities would impair the use of a mobile phone, many of those individuals would already be exempt due to being over the age of sixty-five. This is keeping in mind that for every one of these categories, the exemptions are only granted on a case-by-case basis. Thus, these exemptions were not "so extensive" that the Luddite religion was specifically being singled out.

Additionally, the exemptions were simply put into place to care for the health concerns of these patients, directly aligning with the original stated purpose of the Act. R. at 19. Furthermore, contact tracing for the exempted individuals would not only be burdensome, but it would actually be unnecessary. Many of these patients are likely to never leave their homes or hospital beds, as the pain and fatigue they face on a daily basis is often quite extreme.[4] This leaves exposure to Hoof and Beak and the possibility of passing it on to others improbable. For these reasons, the mandate is generally applicable according to the first school of thought.

> *b) The mandate is generally applicable under a broad view because the Luddite community was not treated worse than any secular exemptions given.*

The broad view, according to then-Judge Alito in *Fraternal Order of Police v. City of Newark*, finds that "the general applicability test only fails when an exception for a secular activity or entity undermines the purported governmental *purpose* for the rule." Rothschild, *supra* at 284. In *Fraternal Order of Police*, the court held that the failure to extend religious exemptions from the police department's no-beard policy while extending exemptions for medical reasons violated the free exercise rights of Sunni Muslims. *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999). The court came to this conclusion because the department's purpose for the rule was to "foster[] a uniform appearance" to the general public, yet

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[4] *Physical Changes as You Near the End of Life*, American Cancer Society, (Jan. 31, 2021, 12:01 PM), https://www.cancer.org/treatment/end-of-life-care/nearing-the-end-of-life/physical-symptoms.html.

the department allowed exemptions for those with medical conditions and for those who worked undercover. *Id.* The court found that the exemption for medical reasons undermined the department's stated purpose, as the exemption's purpose was regarding health concerns, not uniformity. *Id.* On the other hand, exemptions for undercover work did not undermine the department's stated purpose because undercover officers were not held out to the public as being part of the police forces. *Id.* Thus, granting a medical exemption that undermined the purpose for the department's policy while failing to grant a similar religious exemption failed the general applicability test.

Unlike the medical exemption in *Fraternal Order of Police*, here the medical exemption does align with the Act's stated purpose—protecting the health of the general public. The exemption's purpose is in alignment with the Act's purpose because "the burden of obtaining and/or carrying a cell phone exceeds the public health benefit" for "individuals suffering from a debilitating illness." R. at 19. The exemption does not contain any underlying economic concerns like in *South Bay* where churches were clearly restricted from gathering, while shopping malls and other secular venues were not so restricted. *South Bay*, 140 S. Ct. at 1614. The exemption merely shows mercy to those who are likely already confined to a spot of isolation, and whose fatigue, pain, cognitive decline, or other symptoms make it impractical and unnecessary to impose on them the burden of compliance.

Certainly, the exemption for this purpose is understandable. "In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604–05 (2020). "When those officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S.

Ct. 10, 11–12 (2020). In the midst of a health crisis, health-related exemptions do not go beyond the latitude of public officials entrusted with the health of the people.

To allow an unqualified exception for a minority religion would not only open the Act to a host of Establishment Clause concerns, but it would also require the Act to allow for exemptions for other non-religious purposes. To open the door to such broad exceptions would severely curtail Congress's purpose in stopping the spread of the disease. For these reasons, the limited exemptions enumerated in the Act do not go against the Act's stated purpose, satisfying the second school of thought. Thus, the Act is generally applicable under both the broad and narrow views.

CONCLUSION

The Amendment is a permissible time, place, and manner restriction. First, the Amendment applies evenhandedly to all, irrespective of the content. Second, significant governmental interests would be achieved less effectively absent the Amendment; therefore, the Amendment is not substantially broader than necessary. Third, the Petitioner may reach his intended audience without conveying "a message quite distinct from" that which he would deliver absent the regulation; thus, the Amendment leaves open ample alternative channels for communication.

The Act is formally neutral because it does not facially discriminate against the Luddites, nor is it gerrymandered to do so. The Act is generally applicable because the exemptions are not "so extensive" as to single out the Luddites for disfavor and the exemption's purpose aligns with the Act's. For these reasons, Respondent Christopher Smithers prays that this Court grant Respondent's motion for summary judgment, holding that the Amendment is narrowly tailored to achieve a significant governmental interest and that the Act is neutral and generally applicable.

Respectfully submitted,

TEAM 12
Counsel for Respondent

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I states in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

42 U.S. Code § 2000bb–3 – "Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter."

CERTIFICATE OF COMPLIANCE

We, counsel for Respondent, hereby certify that all work product contained in all copies of our team's brief is our own work product. We further certify that our team has fully complied with our school's governing honor code. Finally, we acknowledge that we have complied with all Rules of the Competition.

TEAM 12
Counsel for Respondent