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 RESPONDENT

Team 26
Counsel for Respondent

Date: January 31, 2021

QUESTIONS PRESENTED

1. Whether a sixty-foot buffer zone and group-size limitation, designed to prevent the spread of a deadly disease around federal facilities, complies with the Free Speech Clause; and
2. Whether a mandated contact-tracing program that requires every citizen to obtain a government-issued SIM card, except those sixty-five or older and those with severe medical conditions, is neutral and generally applicable and thereby complies with the Free Exercise Clause.

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STATEMENT OF JURISDICTION

The district court had jurisdiction to decide this case pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. This Court's jurisdiction is properly invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Free Speech and Free Exercise Clauses of the First Amendment to the United States Constitution, which 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." U.S. Const. amend. I.

STATEMENT OF THE CASE

I. Factual Background

The Hoof and Beak pandemic has affected millions of people. R. at 1. This highly contagious disease causes severe flu-like symptoms which can, in some cases, result in death. R. at 1. To date, over 230 thousand deaths have been attributed to the disease. R. at 1. To control the pandemic, governments have resorted to economy-halting lockdowns, while scientists diligently persevere to develop effective vaccines. R. at 1.

Within months of the initial outbreak, Congress passed the Combat Hoof and Beak Disease Act (the "Act"), which mandated contact tracing through mobile phones and government-provided SIM cards. R. at 1. To enhance the Act's efficacy, the government provides mobile phones to those who do not own one. R. at 2. The contact-tracing program

applies to all citizens except those in two categories: (1) senior citizens over the age of sixty-five; and (2) case-by-case health-related exemptions. R. at 2. The Act makes the Federal Communications Commission ("FCC") responsible for enforcing the Act, and the FCC has begun distributing phones and SIM cards at federal facilities in each state. R. at 2. After the Act's passage, protest activity increased around federal distribution facilities, threatening the health of those entering the facility to retrieve a mobile phone or SIM card. R. at 2. In response, Congress passed an amendment to the Act that barred protest activity within sixty feet of a facility and limited protest groups to six people. R. at 2. As before the amendment, social distancing and masks are required at all times. R. at 2.

Petitioner, Levi Jones, is the leader of the Delmont Church of Luddite; he and other Delmont Luddites refuse to comply with the contact-tracing mandate because it contradicts a community order that applies to their congregation. R. at 2–5. Community orders are sets of rules promulgated by individual congregations—the church of Luddite does not have a central authority. R. at 4. Therefore, not all Luddite churches have community orders against technology. R. at 4–5. To voice his opposition to the contract-tracing mandate, Jones organized protests outside the Delmont federal distribution facility. R. at 2. Twice he was arrested. R. at 2–3. On the first occasion, Jones was accompanied by six other Luddites, for a total of seven individuals. R. at 2, 7. The Luddites were stationed outside the sixty-foot boundary zone but entered the boundary to speak to individuals entering the facility. R. at 2, 7. Another group, Mothers for Mandates ("MOMs") was also present. R. at 8. Some MOMs were a few feet within the sixty-foot boundary, but unlike the Luddites, the MOMs did not approach individuals entering the facility. R. at 8. Based on the Luddites' seven-member size and their activity within

the buffer zone, law enforcement asked that they leave the area. R. at 8. But Jones refused to leave, so the Federal Facilities Police arrested him for violating the Act. R. at 8.

On the second occasion, Jones led a group of six Luddites, including himself, to protest outside the same facility, stationing themselves outside the sixty-foot boundary but again entering the zone to speak with individuals entering the facility. R. at 8–9. The MOMs were also present and advocated in a group of seven, positioned five feet within the buffer zone. R. at 9. Once again, Federal Facilities Police asked Jones to leave, he refused, and Jones was arrested. R. at 9. The Court granted Jones' petition for writ of certiorari on both issues. R. at 42.

II. Proceedings Below

Mr. Jones brought this lawsuit against Christopher Smithers, in his official capacity as Commissioner of the FCC, seeking a declaratory judgment that the FCC violated the First Amendment's Free Exercise and Free Speech Clauses by enforcing the Act against him. R. at 3. The district court granted summary judgment in favor of the FCC on the free speech issue, but against the FCC on the free exercise issue. R. at 20. The court of appeals reversed both holdings, instructing the district court to grant the FCC's motion for summary judgment on the free exercise issue and deny the FCC's motion for summary judgment on the free speech issue. R. at 40. The Court granted Jones' petition for writ of certiorari on both issues. R. at 42.

SUMMARY OF ARGUMENT

Faced with an accelerating pandemic, Congress swiftly enacted the Combat Hoof and Beak Disease Act to control an alarming public health crisis that has caused over 230 thousand American deaths. The Act's cornerstone is a contact-tracing program that uses government-issued SIM cards, enabling the government to quickly react to localized breakouts and slow the spread of the deadly disease. To operationalize the contact-tracing program, SIM cards and, in some cases, mobile phones, must be disbursed to the public in record volumes and pace. Federal

distribution facilities in each state are faced with this daunting task. In response to an uptick in protest activity surrounding federal distribution facilities, Congress amended the Act to impose health include a sixty-foot buffer zone and six-person group-size limit. This, in addition to ordinary social distancing and mask requirements, guard public safety, health, and access to federal facilities during the distribution phase.

Mr. Jones, the leader of Delmont Church of Luddite, organized protests opposing the contact-tracing program, based on his church's community order against technology. In doing so, he and his group violated the Act's buffer zone provision. After being lawfully arrested twice, Jones brings this suit, claiming violations under both the Free Speech and Free Exercise clauses of the First Amendment to the Constitution. Both claims are meritless.

As to the free speech issue, he alleges that the sixty-foot buffer zone is an invalid time, place, and manner restriction. But the buffer zone is content-neutral, narrowly tailored to a significant government interest and leaves ample alternative channels of communication. The government interests here differ from those in *McCullen*, thus the court of appeals' reliance on *McCullen*'s reasoning is misplaced. Public health necessitates a fixed boundary in this instance, an interest absent in *McCullen*.

Jones' free exercise claim also fails. The contact-tracing mandate is a neutral and generally applicable law, as such, it does not abridge Jones' right to free exercise of religion. Undoubtedly, Jones sincerely believes that technology use is incompatible with his faith, but, applying *Smith*, the Act complies with the Free Exercise Clause, which permits neutral governmental regulation of practices that do not target religion. The Act is neutral because it is aimed at curbing the spread of a deadly disease and does not discriminate against religious practices either facially or covertly. And all citizens, except two distinct groups—senior citizens

and those with severe medical conditions—must comply with the mandate, making the Act generally applicable.

To be sure, constitutional rights do not evaporate in a pandemic, but neither does the government's interest, duty, and authority to address a historic public health crisis. Both the Act, and the FCC's enforcement of the Act, comply with the First Amendment. Therefore, we respectfully request that the Court reverse the court of appeals' decision regarding the free speech issue and affirm the court of appeals' decision regarding the free exercise issue.

ARGUMENT

Amid a deadly pandemic, the federal government acted swiftly by enacting and enforcing the Combat Hoof and Beak Disease Act. Under the Constitution, two principles—individual liberty and enumerated federal power—must be construed together. Over a century ago, during a smallpox epidemic, the Court recognized the interplay between these principles:

> There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government . . . . But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905).

The reasonable regulations imposed by the Act serve the government's interests of preserving health, safety, and access to federal facilities, and do so in a neutral and generally applicable manner. Accordingly, the court of appeals should be reversed in its holding that the buffer zone abridges the freedom of speech because the court erroneously concluded that the buffer zone was not narrowly tailored to the government's interests of health, safety, and access. Conversely, the court of appeals should be affirmed in its holding that the contact-tracing mandate is a neutral and generally applicable law, complying with the Free Exercise Clause.

I. The statutory buffer zone is a valid time, place, and manner restriction that safeguards public health.

To prevent the spread of Hoof and Beak Disease at federal facilities, Congress amended the Act to include a buffer zone, protecting those who visit a facility to retrieve a SIM card. In traditional public fora,[1] like the Delmont Federal Facility, content-neutral speech restrictions must be "narrowly tailored to serve a significant government interest[] and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The district court correctly held that the buffer zone met these requirements. Accordingly, the court of appeals should be reversed on this issue.

A. The buffer zone is a content-neutral public health regulation.

To begin, the Act's buffer zone is content neutral. In *Reed v. Town of Gilbert, Arizona*, the Court explained that whether a speech restriction is content neutral is determined both the face of the statute and its underlying justifications. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163–64 (2015). Facially, a statute is content neutral if it does not "define regulated speech by particular subject matter [or] by its function or purpose." *Id.* Another way to view facial content-neutrality is whether law enforcement authorities need to "examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotations omitted). Beyond its face, a statute's content neutrality is confirmed when it is "justified without reference to the content of the regulated speech" and was not "adopted by the government 'because of disagreement with the message the speech conveys.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (alteration adopted).

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[1] Both parties agree that the Delmont Federal Facility is a traditional public forum. Stipulation ¶ 5.

The Act's buffer zone is facially content neutral because whether a violation occurs depends not on *what* is said, but rather *where* it is said. *See McCullen*, 573 U.S. at 479. The statute does not define regulated speech by its content, function, or purpose. Rather, it defines regulated speech by its location and number of speakers. Thus, federal authorities need not "examine the content of the message that is conveyed to determine whether a violation has occurred." *Id.* (internal quotations and citation omitted). Instead, to enforce the buffer zone, law enforcement authorities only need to know where protestors are gathered and how many are in the group. Neither inquiry turns on the content of protestors' speech, making the buffer zone content neutral.

Even if the "inevitable effect" of the buffer zone is to disproportionately restrict speech relating to the contract-tracing mandate, it is only impermissible if it cannot be "justified without reference to the content of the regulated speech," *id.* (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986), or was implemented because the government "disagree[d] with the message [the speech] conveys." *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (quoting *Ward*, 530 U.S. at 719).

Here, the buffer zone is easily justified without reference to the speech's content. The Court's decision in *McCullen v. Coakley* is instructive. There, the Court held that a fixed buffer zone around abortion clinics was content neutral because it addressed the safety concerns raised by large crowds that "compromise[d] safety, impede[d] access, and obstruct[ed] sidewalks." *McCullen*, 573 U.S. at 481. Notably, the same congestion and access concerns are present here, but are exponentially more important in this case because they are paired with the additional public health interests caused by the pandemic. Like the state law in *McCullen*, the buffer zone was installed in response to a record of crowding and protesting. But here, those concerns serve

an even greater content-neutral purpose because they are directly connected to curbing the spread of a contagious disease.

Neither was the buffer zone created because the government disagreed with the messages conveyed by protestors. The sixty-foot buffer zone serves the interests of "access . . . and providing the police with clear guidelines[, which] are unrelated to the content of the demonstrator's speech." *Hill*, 530 U.S. at 720. Lives are jeopardized by overcrowding regardless of the crowd's message. The government is fully justified in its efforts to limit the spread of the Hoof and Beak disease inside and outside federal facilities.

To be sure, the government's interests in implementing a buffer zone apply, in varying degrees, to all federal facilities. But the government's choice to focus on SIM card distribution facilities, rather than federal facilities at large, does not make the buffer zone content-based simply because a certain type of speech is more prevalent in these areas. In *McCullen*, the Court made clear that "the First Amendment does not require [the government] to regulate for problems that do not exist." *Id.* (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion). As in *McCullen*, the government responded to a crowding problem at a particular type of facility that threatened the public's safety and health. The First Amendment does not require the government to address crowding where crowding does not exist. Instead, the government may implement laws that only target the problem areas (in *McCullen*, abortion clinics; here, federal distribution facilities). Such a response is content neutral, "even if it has an incidental effect on some speakers or messages but not others." *McCullen*, 573 U.S. at 480 (quoting *Ward*, 491 U.S. at 791). Because the buffer zone is a content-neutral law, strict scrutiny does not apply. Instead, intermediate scrutiny applies—a standard easily met here.

B. The buffer zone is narrowly tailored to a significant government interest.

The buffer zone was designed to prevent the spread of a deadly contagion, which is undoubtedly a significant government interest. *See Jacobson v. Massachusetts*, 197 U.S. 11, 19 (1905) (recognizing the "unquestioned power to preserve and protect the public health"); *Liberian Cmty. Ass'n of Conn. v. Lamont*, No. 17-1558, 44 (2d Cir. Aug. 14, 2020) ("[T]he government surely has a compelling interest in preventing the spread of disease."). This is a point of agreement between the parties. R. at 14, 37.

The court of appeals erred, however, in reversing the district's court's finding that the buffer zone was narrowly tailored to the government's interests of health, safety, and access. A content-neutral regulation need not be the least restrictive method to achieve the government's goals. *McCullen*, 573 U.S. at 486. Instead, it simply cannot "burden speech more than necessary." *Hill*, 530 U.S. at 729. This occurs when "a *substantial* portion of the burden on speech does not serve to advance [the government's] goals." *McCullen*, 573 U.S. at 486 (quoting *Ward*, 573 U.S. at 799) (emphasis added).

Relying on *Hill v. Colorado*, the district court concluded that the buffer zone was "sufficiently narrowly tailored to the Government's substantial interest in protecting Americans from the spread of Hoof and Beak." R. at 15. In *Hill*, the Court upheld a "floating buffer zone" that prohibited nonconsensual communication within eight feet of another person. The floating buffer zone applied within one hundred feet of the facility.

As the district court held, the buffer zone has a "similar ultimate impact" because it requires spacing between individuals. Even though the buffer zone here also includes a sixty-foot fixed zone, this additional precaution is necessitated by a factor not present in *Hill*: a deadly contagion. And here, visitors are *required* to collect a SIM card, whereas in *Hill* visitors *voluntarily chose* to visit the facility. Functionally then, the buffer zone at issue here is nearly

identical to the buffer zone upheld in *Hill*. The addition of a fixed boundary is justified by the unique circumstances presented by Hoof and Beak Disease.

Compared to other speech restrictions that have been upheld by this Court, the Act's buffer zone is actually quite limited. It only requires spacing through a fixed boundary and group-size limits. The Act does not prohibit amplification or visual displays, like signs or banners. By using only a fixed zone and group-size limit, foregoing other speech restrictions upheld elsewhere, the buffer zone is narrowly tailored to the public health crisis facing the country. *See Hill*, 530 U.S. at 726 (noting, as factors favoring constitutionality, that the challenged law did not affect signage or amplification devices).

In reversing the district court, the court of appeals erroneously held that the sixty-foot buffer zone only served as a matter of convenience. R. at 38. But the buffer zone serves to protect the public health amid a deadly epidemic. Preventing the spread of a contagious disease is not a matter of mere convenience; it is a matter of life and death.

To be sure, the First Amendment does not permit silencing speech "associated with particular problems" simply because it is "the path of least resistance." *McCullen*, 573 U.S. at 486. But here, the "particular problems" present life-threating danger to the citizenry, overshadowing the problems of congestion, safety, and access faced in *McCullen* and *Hill*.

The court of appeal's hypothetical line of fifteen people also misses the mark. Whether a line at a federal distribution facility extends beyond the sixty-foot boundary does not change the analysis. The buffer zone offers a bright line for both law enforcement and protestors so that at all times spacing of six feet is maintained. By amending the Act, Congress expressed its view that federal distribution facilities required breathing room—avoiding congestion around the facility that makes social distancing and proper law enforcement difficult. Such prophylactic

policies are permitted under the First Amendment. *Hill*, 530 U.S. at 729 ("A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.").

The buffer zone, then, should be upheld like the floating buffer zone in *Hill* and distinguished from *McCullen* because the government is facing significantly different public concerns. The *McCullen* Court invalidated Massachusetts's fixed buffer zone because it was not narrowly tailored to the government's interests. But combating a pandemic was not an issue faced by the government. It is now. And it directly justifies a fixed buffer zone to ensure public health and safety. In short, the buffer zone does not burden a substantial amount of speech that does not advance the government's interest; therefore, it is narrowly tailored to a significant government interest.

C. The buffer zone leaves open ample alternative channels for communication.

Finally, the buffer zone leaves open ample alternative channels for communication. The district correctly concluded that protestors may reach their intended audience by complying with the Act's lawful time, place, and manner restriction. R. at 15–16. Additionally, groups like the Church of Luddite and Mothers for Mandates may reach their intended audience—those using the government SIM cards—through general channels of communication including television, radio, newspapers, and others. In this unusual circumstance, the intended audience is nearly the entire United States population, so targeted communication at federal distribution facilities is not needed to reach the intended audience.

D. The Act was not selectively enforced against Jones.

Petitioner raised—and the district court rejected—a selective enforcement claim. R. at 12–13. The court of appeals did not address this argument; thus, it is not appropriate for the

Court to entertain the issue here. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 (2010).

Even if it were properly before the Court, Jones' argument lacks merit. For one, any allegations of selective enforcement here do not affect the Act's validity but rather raise an as-applied challenge.[2] *See McCullen*, 573 U.S. at 484 ("While [selective enforcement] allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act."); *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) (discussing facial and as-applied challenges in the context of alleged selective enforcement). To prevail on a First Amendment selective enforcement claim, a plaintiff must demonstrate that law enforcement acted in bad faith. *Cameron v. Johnson*, 390 U.S. 611, 619–20 (1968). Even if the statute causes a chilling effect, that alone does not make "good-faith enforcement of a valid statute . . . an impermissible invasion of protected freedoms." *Id.* at 619.

Here, the record establishes that law enforcement had ample justification for arresting Jones and not MOM members. The district court concluded that law enforcement reasonably arrested Jones on both occasions. R. at 12–13. Two reasons support the district court's finding. First, the Luddites actively entered the zone and approached individuals entering the facility, while the MOMs remained near the boundary. R. at 12–13. The Luddites' aggressive activity

[2] In some cases, allegations of selective enforcement may also support a void-for-vagueness (facial) challenge. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement."). However, the Act does not contain vague terms, nor does the Petitioner contend otherwise. Therefore, "if selective enforcement has occurred, it has been a result of prosecutorial discretion, not the language of the statute." *Spence v. State of Wash.*, 418 U.S. 405, 415 (1974).

endangered the health of those entering the facility—the primary concern of the buffer zone. Second, the Act grants discretion to the FCC to enforce the buffer zone location-by-location. By arresting Jones the second time, the law enforcement officers were preventing a continuation of violative conduct that endangers public health. Furthermore, following his first arrest Jones was well aware of the government's interests in protecting health, and his actions demonstrated intentional reckless disregard for both the law and the lives of others. In all, the FCC enforced the Act in good faith, eliminating the basis for any as-applied selective enforcement claim.

II. The contact-tracing mandate is neutral and generally applicable.

Petitioner also raises a Free Exercise challenge to the Act's contact-tracing mandate—a program that enables the government to rapidly address Hoof and Beak outbreaks. This claim also fails, as the court of appeals correctly held. The contact-tracing mandate is a neutral and generally applicable law under the Court's Free Exercise Clause jurisprudence;[3] therefore, the judgment of the court of appeals should be affirmed.

The First Amendment's Free Exercise Clause bars the government from "prohibiting the free exercise [of religion]." U.S. Const. amend. I. The "exercise" of religion includes not only religious "belief and profession" but also "performance of (or abstention from) physical acts." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). But the constitutional right to free exercise is not absolute. Because "[l]aws are made for the government of actions . . . they cannot interfere with mere religious belief and opinions, [but] they may [interfere] with practices." *Reynolds v. United States*, 98 U.S. 145, 166 (1878). If it were otherwise, the Constitution would "permit every citizen to become a law unto himself." *Id.* at

[3] Congress expressly exempted the Act from the Religious Freedom Restoration Act, CHBDA § 42(f)(8). Thus, Jones' claim proceeds solely under the First Amendment.

167. For these reasons, the Court held in *Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Smith*, 494 U.S. at 879 (internal quotations omitted).

This view is not a recent invention—*Smith* is reflective of early political philosophy underlying our nation's founding. For example, John Locke, widely regarded as one of the most influential philosophers upon the American founding, wrote that the "private Judgment of any Person concerning a Law enacted in Political Matters, for the publick good, does not take away the Obligation of that Law, nor deserve a Dispensation." John Locke, A Letter Concerning Toleration (1689). Over a century later, Thomas Jefferson echoed Locke's view, remarking that a citizen "has no natural right in opposition to his social duties." Thomas Jefferson, Letter to the Danbury Baptists (1801). Both Locke and Jefferson recognized that civil duties, when generally applicable and for the public good, could not be evaded by religious objection. This principle, traceable to our nation's founders, is protected by the Supreme Court's subsequent jurisprudence, culminating in *Smith*. *See generally* Philip A Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 947–48.

Importantly, the government does not question the sincerity of Jones' religious beliefs, an inquiry inappropriate for the judiciary. *Smith*, 494 U.S. at 887 ("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). But as in *Smith*, the presently challenged statute is a neutral and generally applicable law. As such, Jones cannot escape its requirements by claiming religious objection.

A. The contact-tracing mandate is neutral.

Both the district court and court of appeals held that the Act's contact-tracing mandate was a neutral law because it does not discriminate on the basis of religion either facially or covertly. R. at 18–20, 39.

"A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The Act does not contain any language referencing the Luddites' religious practice. Thus, it does not facially discriminate on a religious basis.

Neither does the Act subtly depart from neutrality—measured by an inquiry based on the "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 decision-making body." *Id.* at 540. The district court concluded that "[t]here is no factual support for the proposition that the mandate specifically targeted the Luddites." R. at 19. This conclusion was affirmed by the court of appeals. R. at 39.

At all times, the government's sole focus was combating a public health crisis. The Act's historical background supports this conclusion. Congress passed the Act with the goal of preventing the spread of Hoof and Beak disease. Unlike in *Lukumi*, there is no evidence of decisionmakers targeting a religious practice with government regulation. *Id.* at 540–41 (reviewing city council deliberations and noting that the challenged ordinances were enacted "because of . . . their suppression of [religion]").

B. The contact-tracing mandate is generally applicable.

On appeal, the court of appeals reversed the district court's erroneous holding that the Act was not generally applicable. The district court reasoned that the availability of secular exemptions was dispositive to the general applicability inquiry. R. at 20 ("The Luddites cannot apply for an exemption because their objection is religious in nature."). In reversing, the court of appeals held that "[t]he government must not provide every possible exemption. It has the authority to choose which ones to grant and which ones not to, as long as it is logical. The

exemption for health concerns but not religious concerns is perfectly logical." R. at 40. The court of appeals correctly applied the law.

The Free Exercise Clause prohibits the government from selectively "impos[ing] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Because "all laws are selective to some extent," the First Amendment is only violated when "a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542–43. An exemptionless law is straightforwardly neutral and generally applicable. Only when a law contains secular exemptions does it become susceptible to a general applicability challenge. *See Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884. Although laws that use "subjective assessment systems that 'invite consideration of the particular circumstances' behind an applicant's actions . . . trigger strict scrutiny," this Act does not use such a system. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006) (quoting *Smith*, 494 U.S. at 884).

To be sure, the Act does contain two categorical exemptions: individuals over the age of sixty-five and individuals with severe medical conditions. But there is not a per se rule that the presence of such exemptions transgresses *Smith*'s generally applicability standard. *Grace United*, 451 F.3d at 651. An important distinction lies between an *individualized* system of exceptions, which may trigger strict scrutiny, and a *categorical* exception. The latter exempt "strict categories" of people from a law's coverage, avoiding a subjective test that is constitutionally suspect. *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998). Here, two defined categories of people are exempted from the Act's the contact-tracing mandate: those over a certain age and those with certain medical conditions. Therefore, the government does not engage in a subjective test that draws greater constitutional

scrutiny. That the health-related exemptions are procedurally granted "case-by-case" does not change the outcome. Severe medical conditions are the predicate for assessing an individual's case. For example, exemptions have been granted for individuals with "late-stage cancer, Ischemic heart disease, and Alzheimer's disease." R. at 22. The general public is not permitted to request case-by-case exemptions, which would place immense discretion in the government's hands; rather, the government's discretion here is narrowly restricted to those applicants who are suffering from severe medical conditions.

Put simply, the presence of secular exemptions does not mean that religious objectors are being singled out. Undoubtedly, many citizens would prefer not to carry a government SIM card or mobile phone when they otherwise would not have done so. Beyond the general and universal burden imposed by the Act, there are many other secular exemptions that have not been granted. For example, it is likely that some citizens would prefer the government does not have access to their whereabouts, even for critical public health purposes. Or perhaps some citizens may need to travel large distances to retrieve a mobile phone or SIM card, only to return to a remote area of the nation where they face little, if any, danger of encountering Hoof and Beak. The imaginative mind can develop scores of rational, secular exemptions that are absent from the Act. Religious groups, like the Church of Luddite, have not been singled out by the Act—they must comply along with every other citizen. Because the mandate applies to the general population, it satisfies the second prong of the *Smith* test. As a neutral and generally applicable law, the mandate must only survive rational basis review. *See Grace United*, 451 F.3d at 649. The government clearly has a rational basis in preserving the health and the lives of its citizens, so this standard is easily satisfied here, and is even uncontested by Jones. The mandate should therefore be upheld and the court of appeals' decision affirmed.

CONCLUSION

For the reasons stated above, the court of appeals should be affirmed as to the free exercise issue and reversed as to the free speech issue.

Respectfully submitted,

Team 26
Counsel for Respondent

Date: January 31, 2021

CERTIFICATE OF COMPLIANCE

Team 26 certifies that the following statements are true: (i) the work product contained in all copies of Team 26's brief is in fact the work product of Team 26's members; (ii) Team 26 has complied fully with its school's governing honor code; and (iii) Team 26 has complied with all Rules of the Competition.

Team 26
Counsel for Respondent