No. 2021-2022

IN THE

Supreme Court of the United States

WILLIAM DENOLF

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether Congress exceeded its authority under the Commerce Clause when it enacted the Polio Vaccination Act authorizing the President to order compulsory polio vaccinations?

2. Whether the President's mandatory vaccine order violates Petitioner's rights to liberty and privacy protected by the Due Process Clause of the Fifth Amendment, including whether *Jacobson v. Massachusetts* should be revisited?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns challenges to the Polio Vaccination Act (PVA) of 2021 and subsequent executive action pursuant to the Act. The Act authorizes the President to

> order the vaccination of all persons in the United States who are engaged in or move in interstate commerce. This shall include persons whose health may affect the channels or instrumentalities of interstate commerce as well as whose health may affect intrastate commerce in a manner that substantially affects interstate commerce.

The full text of the Act can be found in Appendix II of the record below. *Record* at 19–20. President Joseph R. Biden Jr.'s Executive Order 15,000 orders pursuant to § 4(a) that

> [a]ll persons in the United States of America who are engaged in or move in interstate commerce, including persons whose health may affect the channels or instrumentalities of interstate commerce as well as whose health may affect intrastate commerce in a manner that substantially affects interstate commerce, shall be fully vaccinated. . .

It further stipulates that

> any individual who fails to be fully vaccinated in accordance with Section 1 of this order shall be fined $500.

The full text of the Order can be found in Appendix III of the record below. *Id.* at 21.

Petitioner challenges the Act and Executive Order 15,000 under two constitutional provisions: the Commerce Clause and the Fifth Amendment's Due Process Clause. The Commerce Clause states:

> The Congress shall have Power. . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . .

The Due Process Clause states:

> . . .nor [shall any person] be deprived of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

I The poliovirus

Polio is among the most infectious diseases known to mankind. *Record* at 3. For between 2% and 10% of individuals who contract it, it is fatal. *Id.* Those that survive are frequently left with lifelong complications, including paralysis, muscle weakness, and brain damage. *Id.*

During the 20th century, outbreaks of the virus struck the United States with devastating frequency and scale. *Id.* at 4. The effects of polio were not limited to its human toll: severe outbreaks led to restrictions on travel and commerce as well as quarantines of homes and even entire towns. *Id.* High vaccination rates and vaccination mandates for schoolchildren are now prevalent across the nation, and the last known instance of polio transmission in the United States occurred in 1979. *Id.* at 3. 32.8 million Americans remain unvaccinated against the disease. *Id.*

II The PVA and Executive Order 15,000

On June 15, 2021, news outlets began reporting the existence of polio outbreaks in at least five countries. *Id.* at 2. These outbreaks occurred in major cities that see significant travel to and from the United States. *Id.* On June 28, 2021, the President's Pandemic Preparedness Czar Dr. Geronimo Gusmano informed the President that "there was a great likelihood that persons with polio had or would soon travel to the United States. *Id.* at 3. Subsequent to this, Congress enacted the Polio Vaccination Act on July 6, 2021, authorizing the President to order compulsory polio vaccination. *Id.* at 4 The President promptly did so, issuing Executive Order 15,000 pursuant to the Act's authorization. *Id.*

III Procedural history

William DeNolf is a self-employed resident of the state of Olympus. *Id.* 4–5. Though he is largely self-reliant, DeNolf engages in various forms of intrastate and interstate commerce. *Id.* at 5. He is not vaccinated for polio. *Id.* at 4. He refuses to be vaccinated on the grounds that to do so "would violate his personal right to make life-shaping medical decisions and to preserve the privacy and integrity of his body." *Id.* at 5. He does not claim any medical or religious justification for his refusal. *Id*,

DeNolf filed suit in the United States District Court for the Central District of Olympus, alleging the PVA exceeds Congress' authority under the Commerce Clause to enact and that mandatory vaccination violates his rights under the Fifth Amendment's Due Process Clause. *Id.* He sought a preliminary injunction enjoining the enforcement of the PVA against him. *Id.* The district court denied DeNolf's request and granted the government's motion to dismiss the case. *Id.* at 1. DeNolf appealed to the Fourteenth Circuit. *Id.* The Fourteenth Circuit affirmed the judgment of the district court. *Id.*

SUMMARY OF ARGUMENT

The Polio Vaccination Act (PVA) is a permissible exercise of Congress' plenary authority to regulate interstate commerce. Congress may enact three "broad categories of regulation" under the Commerce Clause: regulation of the "use of the channels of interstate commerce," regulation and protection of the "instrumentalities of commerce, or persons or things in interstate commerce," and regulation of "those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–559 (1995).

By setting down a safety standard that stipulates all those who engage in or move in interstate commerce must be vaccinated against the highly infectious poliovirus, the PVA mitigates a substantial adverse effect to the national economy and the health of those within it. Safety standards of this kind are well within Congress' established power and have been repeatedly upheld by this Court in the past. *See, e.g.*, *Southern Railway Co. v. United States*, 222 U.S. 20 (1911), as cited by *Lopez*; *United States v. Darby*, 312 U.S. 100 (1941), as cited by *Perez v. United States*, 402 U.S. 146 (1971).

Even if this Court views the PVA as a vaccination mandate removed from its economic context, it may still be sustained under the Commerce Clause. This Court has upheld regulations of even noneconomic, local conduct in the past when regulation of that conduct is necessary to maintain the orderly operation of an interstate market. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gonzales v. Raich*, 545 U.S. 1 (2005).

Because the PVA possesses several sufficient nexuses with interstate commerce, this Court then looks to whether the statute meets rational basis scrutiny. Rational basis requires (1) that Congress have a "rational basis for [finding an effect on commerce from some evil]" and (2) that "the means it select[s] to eliminate that evil are reasonable and appropriate." *Heart of Atlanta*

Motel, Inc. v. United States, 379 U.S. 241, 258 (1964). Here, Congress made extensive findings in consultation with public health experts about both the likelihood and severity of a polio pandemic absent intervention. *Record* at 4, 19. A full course of vaccination provides more than 99% immunity against the poliovirus, and a vaccination mandate is thus a "reasonable and appropriate" means of combating the spread of the disease. *Id.* at 3.

Finally, this Court's more recent Commerce Clause precedents of *United States v. Lopez* (1995) and *United States v. Morrison* (2000) do not bear on the PVA's constitutionality. Unlike the statutes at issue in *Lopez* and *Morrison*, the PVA has an "express jurisdictional element" that circumscribes its application to commercial activities: Section 4(a). Second, no attenuated "but-for causal chain" is required to discern the effect of polio transmission on the national economy: past experience foretells the direct and immediate effect of a polio pandemic on business closures, travel restrictions, and unemployment. *United States v. Morrison*, 529 U.S. 598, 615 (2000); *Record* at 2.

The spread of a highly infectious pathogen that knows neither state nor international borders is a "concern that affects the states generally," and is thus appropriate for Congress to address. *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824). Its chosen means of addressing that concern, the Polio Vaccination Act, should be upheld accordingly.

The President's Executive Order 15,000, authorized pursuant to the PVA, does not implicate a fundamental right. Even if the Court finds that a fundamental right was implicated, the Order passes even the highest standards of scrutiny — the act has the overwhelmingly compelling purpose of preserving lives and protecting public health and it is narrowly tailored to meet that aim.

Jacobson v. Massachusetts ruled that vaccination mandates were permissible so long as they are not "arbitrary, unreasonable" or go "far beyond what [is] reasonably required for the safety of the public." *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905). Though the *Jacobson* Court did

not yet have the language of scrutiny, this ruling is most analogous to the rational basis standard of review, which requires only a "reasonable relationship to a legitimate state interest." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

The central ruling of *Jacobson* meets all four prongs of the *Casey stare decisis* analysis. *Jacobson* is not unworkable (it has been in place for more then a century); "the overwhelming majority of states require the vaccine in order to attend public school," constituting significant reliance interests; *Jacobson*'s central holding has been further cited and confirmed, not overruled; and the underlying facts regarding disease and vaccination are unchanged. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992); *Record* at 3.

More recent due process jurisprudence further supports *Jacobson*'s conclusion that only a rational basis test is required to mandate vaccination. *Washington v. Glucksberg* requires Petitioner to assert a liberty interest with a "careful description." *Glucksberg*, 521 U.S. at 721. The right to "make life shaping medical decisions and to preserve the privacy and integrity of [one's] body" fails to meet this standard, as do a variety of other rights petitioner may assert. *Record* at 5. This is because they leave out the centerpiece of Petitioner's claim: Petitioner does not wish to make an abstract medical decision or refuse some hypothetical medication. Petitioner seeks to refuse vaccination. This Court has historically treated the liberty interest in refusing vaccination differently from the interest in refusing medical treatment. *See generally Jacobson*, 197 U.S. at 31 n. 1. Were the Court to rule in favor of Petitioner, this Court would need to "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *Glucksberg*, 521 U.S. at 723.

Even if the Court were to find that the right to refuse vaccination was in some way fundamental, the President's executive order passes any standard of scrutiny. The Order aims at the

overwhelmingly compelling interest of preserving life. "In most cases, the individual's constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the State's interest in preserving human life." *Id.* 742 (Stevens, J., concurring in the judgement)

Finally, the President's Order is also narrowly tailored to this interest. The Order is based on the explicit recommendations of the nation's foremost infectious disease experts. *Record* at 2. It was promulgated specifically in order to mitigate the imminent risk of a polio pandemic and is the result of a considered policy judgement that vaccinations are the most effective way to save lives and avert crisis. Given the weight of the government's interest and the imminence of the threat, Congress and the President acted to protect the nation from polio without unduly burdening individual liberties.

ARGUMENT

I Congress may authorize mandatory polio vaccination for those engaged in interstate commerce under the Commerce Clause.

Congress' power to regulate interstate commerce is plenary. *Gonzales*, 545 U.S. at 29. This Court has outlined three "broad categories of regulation" that Congress may permissibly enact under the Commerce Clause. *Lopez*, 514 U.S. at 558. First, Congress may regulate the "use of the channels of interstate commerce." *Id.* Second, Congress can "regulate and protect the instrumentalities of commerce, or persons or things in interstate commerce, even [if] the threat. . . comes[s] only from intrastate activity." *Id.* Finally, Congress may "regulate those activities that substantially affect interstate commerce." *Id.* 558–559.

The PVA is targeted towards preventing an evil that both threatens the instrumentalities of commerce and substantially affects the national economy as a whole: the transmission of polio in interstate commerce. To achieve that end, the PVA sets down a safety standard: those who engage in interstate commerce must be vaccinated against the poliovirus, one of the most contagious diseases known to humanity.

Under this Court's precedents, a law that possesses a sufficient nexus with interstate commerce may be sustained if it passes rational basis scrutiny. *See Gonzales*, 545 U.S. 1. Because Congress had a rational basis for concluding that there existed the risk of a polio pandemic with grave economic consequences and the means employed by the PVA are "reasonable and appropriate" to address that risk, the PVA is a legitimate exercise of the plenary commerce power. *Heart of Atlanta*, 379 U.S. at 258.

A. The Polio Vaccination Act regulates an economic class of activities.

In examining the constitutionality of a law under the Commerce Clause, this Court looks not to specific applications of the law but rather whether "the class of activities regulated [as a whole]. . . is within the reach of federal power." *Perez*, 402 U.S. at 154. Here, the PVA is targeted at an economic class of activities, well within the bounds of Congress' regulatory authority.

1. The PVA specifically regulates those engaged in interstate commerce, or whose health substantially affects it.

Section 4(a) of the PVA makes apparent the class of activities targeted by the Act: engagement or movement in interstate commerce of unvaccinated individuals. *See Record* at 20 ("[T]he President is authorized to order the vaccination of all persons in the United States who engage in or move in interstate commerce."). The PVA dictates that those who engage in this plainly commercial class of activities must do so safely; namely, they must be vaccinated against a deadly, highly infectious pathogen. For over a century, this Court has consistently upheld Congress' authority to set standards governing the safety and conditions of economic activities. *See, e.g.*, *Southern Railway Co.*, 222 U.S. 20, as cited by *Lopez* (upholding a law regulating the safety of vehicles, including those that moved only within a single state); *Darby*, 312 U.S. 100, as cited by *Perez* (upholding labor standards for all businesses that produced goods "for interstate commerce").

Whatever Petitioner may contend about the effects of his particular activities on polio transmission, it is undisputed that he engages in interstate commerce. *Record* at 3. And as this Court has said in the past, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to 'excise, as trivial, individual instances of the class." *Perez*, 402 U.S. at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). The Court instead looks to the "total incidence" of the regulated practices on commerce. *Perez*, 402 U.S. at 154.

The example of *Perez v. United States* is illustrative of this principle. 402 U.S. 146 (1971). In *Perez*, the Court upheld a congressional ban on loan sharking, including those transactions that took place entirely within a single state. *Id.* at 154. In so doing, it accepted the congressional rationale that local loan sharking constituted "one of the principal sources of revenue for [interstate] organized crime." *Id.* at 150 (internal quotations omitted). To the extent this Court views the PVA as regulating the local activity of vaccination rather than engagement in commerce, this rationale likewise holds. An individual's vaccination status is determinative of their ability to spread polio or not, and in this sense acts as the source or resolution of an interstate problem: the transmission of polio and its associated economic consequences.

Respondent freely concedes that Section 4(a)'s provisions are broad in application and cover large portions of the American population. But this Court has consistently upheld such broad applications of Commerce Clause authority in cases such as *United States v. Darby* and *Heart of Atlanta Motel, Inc. v. United States*. Both of these cases concerned laws that applied to nearly every business in the United States and by extension their workers or customers. The PVA's broad applicability is a function of the diffuse nature of the threat it confronts: polio transmission that can occur in nearly every facet of interstate commerce and travel.

2. The PVA regulates existing commercial activity, not inactivity of the kind discussed in *Nat'l Fed'n of Indep. Bus. v. Sebelius*.

The dissent below asserts that the PVA's safety standard constitutes a regulation of "inactivity" proscribed by this Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius*. *Record* at 13. But this comparison is inapt, for it fails to recognize the exceptional features of the statute concerned in *Sebelius* not present here.

Notably, the Court in *Sebelius* confronted an individual mandate to purchase health insurance that regulated Americans regardless of their past or current status in any market or commerce. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). In other words, the law regulated individuals at best because of their "prophesied future activity" and at worst solely because of their refusal to enter the health insurance market. *Id.* at 557 (opinion of Roberts, C.J.). But while Chief Justice Roberts' controlling opinion rejected the insurance mandate as a permissible use of Commerce Clause authority, he emphasized that the unprecedented classification of a law as a regulation of inactivity stemmed from the "legislative novelty" of the implicated statute. *Id.* at 549 (opinion of Roberts, C.J.). To overread the applicability of that classification to other cases would be inconsistent with both the ruling in *Sebelius* and this Court's previous precedents.

Almost any regulation read sufficiently myopically can appear to compel one on the basis of one's inactivity. Certainly, the Civil Rights Act challenged in *Heart of Atlanta Motel, Inc. v. United States* could be understood to compel businesses into serving Black customers, a market they had consciously chosen not to enter. 379 U.S. 241 (1964). The *Wickard v. Filburn* Court contemplated the idea that capping a farmer's personal wheat cultivation had the permissible effect of "forcing some farmers into the market to buy what they could [otherwise] provide for themselves." *Wickard*, 317 U.S. at 129. But in each instance, the compulsion of an individual into some unwanted activity was preconditioned upon their engagement in some other commercial activity: the operation of a public accommodation in *Heart of Atlanta Motel*, and the cultivation of wheat in *Wickard*.

So too, here. The PVA regulates those that presently engage in or move in interstate commerce while unvaccinated. *Record* at 19. Indeed, the measure it prescribes — vaccination — is tailored to eliminate the risk posed by those individuals' *existing* commercial activity, ensuring that the economy does not suffer the multifarious effects of widespread polio transmission.

Unlike the laws concerned in *Heart of Atlanta Motel*, *Wickard*, and the instant case, the individual mandate in *Sebelius* had no such precondition for coverage under the statute. *See Sebelius*, 567 U.S. at 556 (opinion of Roberts, C.J.) ("The individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity."). The inactivity question with which *Sebelius* concerned itself is thus not pertinent to the PVA.

3. This Court has repeatedly upheld federal regulation of even local, noneconomic activities where a nexus with interstate commerce exists.

The PVA is most properly read to regulate a class of economic activities for the purpose of preventing polio transmission in interstate commerce. But even if this Court were to view the Act as a vaccination mandate removed from that economic context, it would still be a permissible use of the commerce power.

Several precedents of this Court establish that Congress may reach even local, noneconomic subjects, such as the decision to get vaccinated against polio. In *Wickard v. Filburn*, this Court upheld a quota on the amount of wheat a farmer could grow on his own farm for his own consumption. 317 U.S. 111 (1942). There, the Court recognized that though Filburn's cultivation of wheat was both entirely intrastate and noncommercial, Congress could regulate it because of its potential to affect the wheat market as a whole. *Id.* at 27. This Court similarly upheld a ban on noncommercial, local cultivation of marijuana in *Gonzales v. Raich*, explaining that allowing local cultivation "would undermine the orderly enforcement of the entire regulatory scheme" targeting controlled substance markets. *Gonzales*, 545 U.S. at 28.

Vaccination mandates like the PVA fit into the paradigm laid out by *Wickard* and *Gonzales*. Where the risk of an economic emergency is significant, Congress may regulate even noneconomic conduct such as vaccination in the service of averting it. In order to prevent the transmission of polio

in interstate commerce, it is not sufficient to regulate only the commerce itself, but additionally the vaccination that ensures it can take place safely. *See generally Westfall v. United States*, 274 U.S. 256, 259 (1927), as cited by *Perez* ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.").

This Court has historically accorded Congress broad deference in determining whether a law has a sufficient nexus with interstate commerce. In *Heart of Atlanta Motel*, the Court upheld Title II of the 1964 Civil Rights Act, which banned discrimination in public accommodations. *Heart of Atlanta*, 379 U.S. 241. In doing so, it affirmed the law's declaration that "any. . . establishment which provides lodging to transient guests affects commerce *per se*," and found that to be a sufficient nexus with commerce. *Id.* at 247. The Court went further yet in *Katzenbach v. McClung*, as cited by *Perez*, when it considered the same statute's application to restaurants for which "a substantial portion of the food which [they] serve. . . has moved in commerce." *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964). Under *McClung*, so long as Congress establishes *some* nexus to interstate commerce, it is afforded wide latitude to regulate different aspects of the targeted class of activities, even if those aspects differ from the original nexus, as was the case with racial discrimination and the purchase of food.

B. Congress acted rationally to prevent the substantial effect on commerce that a polio pandemic would have.

The Polio Vaccination Act is intended to avert the substantial effect that a polio outbreak could inflict on the national economy. To determine the validity of laws under the effects doctrine laid out by this Court, this Court applies rational basis review. *See Gonzales*, 545 U.S. at 22. Under this analysis, the Court asks "(1) whether Congress had a rational basis for finding [a substantial effect on commerce], and (2) if it had such a basis, whether the means it selected to eliminate that evil are

reasonable and appropriate." *Heart of Atlanta*, 379 U.S. at 258. This is a deferential standard of review, and one that the PVA easily clears.

1. Detailed epidemiological and economic findings indicate the severe impact of a polio outbreak absent intervention.

Backing the PVA are thorough empirical findings about the potential impact of a polio pandemic on the nation. Section 2 of the PVA details the risk conditions under which the law would be invoked: the likelihood of more than 25,000 deaths annually and an economic impact of a 1% drop in GDP or a rise in unemployment of more than 10%. *Record* at 19.

Congress made its findings based on the recommendations of the bipartisan Blue-Ribbon commission and testimony from public health experts. *Id.* at 1, 4. The President, in consultation with government scientists, issued Executive Order 15,000 on the finding that "persons with polio had or would soon travel to the United States" and that the "risks loss of life and damage to the economy are significant." *Id.* at 3, 21. At each stage of the process, both public health experts and democratically elected officials determined that there existed a need for urgent action.

This Court has often emphasized that its duty is to ensure that process is rational, not conduct its own. *See Gonzales*, 545 U.S. at 22 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a rational basis exists for so concluding"). Here, in view of the exhaustive factual record concerning the impact of disease outbreaks and the aforementioned deliberative process underlying the PVA's findings, there is every reason to find the law rationally rooted.

2. Compulsory polio vaccination is a reasonable and appropriate means of protecting the vitality of interstate commerce and public health.

The second prong of the rational basis test requires that Congress' means of addressing an effect on commerce be "reasonable and appropriate." *Heart of Atlanta*, 379 U.S. at 258. Faced with the threat of economic crisis from a polio pandemic, a vaccination mandate unquestionably meets that standard.

The polio vaccine is safe and highly effective, with a full course of vaccination providing more than 99% immunity against the virus, making vaccination status almost entirely determinative of an individual's likelihood to contract and transmit the virus. *Record* at 3, n.5. When considering the exponential spread of a virus like polio, vaccination of those who are active participants in the national economy is a proven means of preventing the mass death, quarantines, and economic crises seen in epidemics past.

3. *United States v. Lopez* and *United States v. Morrison* are inapposite to the instant case.

Petitioner may contend that two of this Court's more recent Commerce Clause cases, *United States v. Lopez* (1995) and *United States v. Morrison* (2000), represent a pullback in Congress' regulatory power over commerce. 514 U.S. 549; 529 U.S. 598. But comparisons between those cases and the case at bar misapprehend the specific nature of the laws concerned there and the reasoning behind the Court's rulings.

In *Lopez*, the Court struck down the Gun-Free School Zones Act, which made the possession of a gun near a school a federal crime. *Lopez*, 514 U.S. 549. Five years later, Court in *Morrison*

invalidated a statutory provision creating a federal cause of action for victims of gender-motivated violence. *Morrison*, 529 U.S. 598.

In both cases, the Court identified four factors as relevant to the determination of whether a law is an impermissible exercise of Commerce Clause authority: (1) whether the statute "by its terms has nothing to do with commerce or any sort of economic enterprise," (2) whether "the statute contain[s] no express jurisdictional element that might limit its reach to a discrete set of [covered activities] that additionally have an explicit connection with or effect on interstate commerce," (3) whether "legislative history contain[s] express congressional findings as to the substantial burdens that an activity has on interstate commerce," and (4) whether "the link between [the activity] and a substantial effect on commerce [is] attenuated." *Id.* at 609–612. None of these four factors apply to the PVA.

First, Section 4(a)'s circumscription of the law's application to unvaccinated individuals who are "engaged in or moving in interstate commerce," or whose health substantially affects it establishes both a relation to commerce and an "express jurisdictional element" tying the statute to activities connected to commerce. *Record* at 19. As discussed above, the record contains detailed findings as to both the likelihood and severity of a polio pandemic as well as the efficacy of vaccination to mitigate one.

Finally, unlike gun possession in *Lopez* and gender-motivated violence in *Morrison*, the linkage between a polio pandemic and a severe negative effect on interstate commerce is direct and immediate. Past outbreaks of polio have led to restrictions on commerce and travel. And as the recent COVID-19 pandemic demonstrates, infectious disease outbreaks can lead to lockdowns, mass unemployment, and business shutdowns. *Id.* at 3. Unchecked by universal vaccination, polio would continue to threaten disruption of large sectors of the economy. *See id.* at 4 ("Studies have found

that a high percentage of unvaccinated adults are employed in the farming and food preparation industries.") It requires no attenuated "but-for causal chain" to understand the myriad ways in which a pandemic can disrupt an economy. *Morrison*, 529 U.S. at 615.

Since the founding, this Court has understood the commerce power to embody Congress' role in the nation's system of federalism: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally." *Gibbons*, 22 U.S. at 195, as cited by *Perez*. The spread of a highly infectious pathogen that knows neither international nor state borders is exactly such a concern that "affects the States generally." Congress' means of addressing that concern was reasonable and appropriate, and the PVA should be upheld accordingly.

II Executive Order 15,000 does not implicate a fundamental right; even if it were to, the order would be Constitutional because it meets even the highest standard of scrutiny.

This Court's Due Process Clause jurisprudence has always sought to balance the liberty of the individual with the demands of an ordered society. This is true today and it was true over one hundred years ago when *Jacobson v. Massachusetts* was decided. Though the language used in *Jacobson* may be different, the law remains the same. Modern substantive due process jurisprudence has not overruled *Jacobson*, it has built on it. An application of the *Planned Parenthood v. Casey stare decisis* analysis confirms this conclusion as well.

This Court's precedents have acknowledged in broad terms an individual's liberty interest in refusing unwanted medical treatment. *See, e.g.*, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990); *Glucksberg*, 521 U.S. 702. But it has never encompassed within that classification a right to refuse vaccination, a choice with unique implications for the public health. When considering cases such as this, this Court has required a "careful description of the asserted fundamental liberty interest." *Id.* at 721 (internal quotations omitted). Petitioner's asserted right therefore may not be articulated as a broad "right to make life-shaping medical decisions" or even a right to refuse medical treatment; rather, the Court must instead describe the interest as the right to refuse vaccination. This asserted right has no basis in "this Nation's history and tradition," and thus cannot be treated as fundamental. *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)).

What this Court has always treated as of paramount importance is the state's interest in preserving the most fundamental right of all: the right to life. *See Martin v. Commonwealth*, 184 Va. 1009, 1018–1019 (Va. 1946) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable."). This Court has always been clear that an individual's right to refuse unwanted medical treatment is not absolute, citing *Jacobson* as an

example of a circumstance in which state interest in life clearly outweighed the individual interest. *See also Glucksberg*, 521 U.S. at 742 (Stevens, J., concurring in the judgment) ("In most cases, the individual's constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the State's interest in preserving human life.").

The government's actions today seek to preserve human life. While the state may implicate individuals' liberty interests in refusing vaccination in the process, the state interest at hand far exceeds the individual's liberty interest. The state's actions are narrowly tailored to the interest of protecting life, and does not burden substantially more liberty than is necessary to meet its compelling interest.

A. *Jacobson v. Massachusetts* is still the law, and its ruling supports the conclusion that the state's interest in preserving life can outweigh an individual's interest in refusing medical treatment.

In the century since this Court's ruling in *Jacobson v. Massachusetts*, the language the Court uses to discuss the Due Process Clause has changed. However, the law has not. Modern due process precedents do not overrule *Jacobson*; they clarify it using new tools and methods of analysis. An application of the *Casey* analysis of stare decisis confirms that there is no reason to overturn *Jacobson*. An analysis of the ruling shows that *Jacobson* confirms the state's right to impose vaccination mandates when it is necessary to protect public health and preserve life. This principle underpins the actions that the government seeks today, and if the Court accepts that *Jacobson* is still precedential, that alone would be dispositive.

1. *Jacobson* satisfies all prongs of the *Casey* analysis of *stare decisis*, strongly indicating that it should not be revisited.

Before analyzing the decision in *Jacobson* under the *Casey* test, it is important to clarify the decision in *Jacobson* so that it can be analyzed with the greatest specificity. The core of the ruling in *Jacobson* is that state vaccination mandates are permissible as long as they are not imposed in an "arbitrary, unreasonable manner" or go "far beyond what [is] reasonably required for the safety of the public." *Jacobson*, 197 U.S. at 28.

In *Planned Parenthood v. Casey*, this Court outlined a *stare decisis* analysis — a series of four pragmatic and prudential questions to consider before deciding to revisit a decision:

> [whether the] rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left [the ruling] a doctrinal anachronism discounted by society; and whether [the rule]'s premises of fact have so far changed... as to render its central holding somehow irrelevant. *Casey*, 505 U.S. at 855.

Jacobson has survived and has been applied for over a century; any unworkability argument can be refuted by its longevity and stability alone. Furthermore, there are strong reliance interests upon *Jacobson*: "The overwhelming majority of states require the [polio] vaccine in order to attend public school." *Record* at 3. If this Court's ruling in *Jacobson* were to be overturned, these and thousands of other local vaccination policies that are critical for public health would suddenly be called into question.

There is no doctrinal anachronism in *Jacobson*. The central ruling in *Jacobson* has not been explicitly or implicitly overruled by any case in the record. More recent due process cases continue to refer to *Jacobson*, further confirming its precedential status. *Cruzan v. Director* cites *Jacobson* as one of the foundational cases the liberty to refuse unwanted medical treatment. *Cruzan*, 497 U.S. at 278,

The facts underlying *Jacobson* remain true today. Pandemics are still deadly, vaccines continue to be safe and effective, and communities retain the right to protect themselves against disease.

The answer to all four of these questions point in the same direction: that *Jacobson v. Massachusetts* should not be revisited. Its fundamental ruling that upholds vaccination mandates except when imposed in an "arbitrary, unreasonable manner" or go "far beyond what [is] reasonably required for the safety of the public" is still good law and may be applied by this Court to the case at bar today. *Jacobson*, 197 U.S. at 28.

2. The ruling in *Jacobson* shows that an individual's interest in refusing vaccination is not absolute, and can be overridden in order to protect the public health.

The *Jacobson* Court did not deny that a vaccination mandate implicated an person's liberty. In fact, this Court explicitly states that there is always "a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government." *Id.* at 29.

While acknowledging that the petitioner could, under many circumstances, legitimately assert his liberties, this Court emphasized the state's right and duty to protect public health and safety. The *Jacobson* Court had not yet developed the modern language used to adjudicate due process clause claims today. Instead, the Court pointed to the widespread acceptance of medical quarantines

and the draft in order to illustrate some of the circumstances when state interest in life or national security might overwhelm otherwise sacred protections. *Id.*

The Court thus concluded that the overwhelming importance of public health and safety justified the state's intrusion into Jacobson's liberties. For this reason, the Court found that state-imposed vaccination mandates were permissible so long as they are not imposed in an "arbitrary, unreasonable manner" or go "far beyond what [is] reasonably required for the safety of the public." *Id.* at 28.

B. There is no fundamental right to refuse vaccination.

Petitioner's asserted liberty interest to "make life-shaping medical decisions and to preserve the dignity of his body" clearly fails the *Glucksberg* requirement of careful description. *Record* at 8. The Petitioner could attempt to assert a narrower interest in refusing unwanted medical treatment, but this right has only been implied by the Court, never formally defined, and it is clear that vaccination would fall outside of the scope of such a right. The appropriate liberty interest that Petitioner may assert is the interest in refusing vaccination. There is no fundamental liberty interest in refusing vaccination.

1. Petitioner's asserted liberty interest is impermissibly broad under *Glucksberg*'s "careful description" requirement.

In *Glucksberg*, this Court states that it has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. *Glucksberg*, 521 U.S. at 721. While the Court does not give this phrase a specific meaning, it does articulate some examples of this principle. The Court clarifies that *Cruzan*, often described as a "right to die" case, is more appropriately about a "constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* at 723, citing

Cruzan, 497 U.S. at 279. In *Glucksberg* itself, the Court clarifies the asserted "liberty to choose how to die" to a much more specific "right to commit suicide which in itself includes a right to assistance in doing so." *Glucksberg*, 521 U.S. at 722–723. Heeding the spirit of these illustrative examples would lead this Court today to narrow Petitioner's assertion from the "right to make life-shaping medical decisions and to preserve the dignity of his body" to the "liberty interest in refusing vaccination" *Record* at 8.

2. The liberty interest to refuse unwanted medical treatment does not include an interest in refusing vaccinations.

The legal treatment of vaccinations is different than that of other kinds of medical treatments. Unlike other kinds of medical treatment, an individual's decision regarding vaccination may impose a greater risk of harm upon the innocent third parties around them. In *Cruzan*, this Court noted that, while the right to refuse medical treatment generally permits competent to refuse treatment, many of the cases that have held otherwise have involve the state's "interest in protecting innocent third parties." *Cruzan*, 497 U.S. at 273 (quoting *In re Conroy*, 98 N.J. 321, 353-354 (1985)). In addition, when developing the right to refuse unwanted treatment, the Court cites back to *Jacobson* as a permissible example of state law, further suggesting that vaccinations are to be treated differently from medical treatment as a whole. *Cruzan*, 497 U.S. at 278.

The history of vaccination also sets it apart from the right to refuse many other kinds of unwanted medical treatment. The *Glucksberg* Court emphasized that the liberty interest in refusing unwanted medical treatment has grounding in American history and traditions. *Glucksberg*, 521 U.S. at 725.

But the legal and historical tradition in the case of vaccination stands in stark relief. Since *Jacobson*, vaccination mandates have been recognized as well within the police powers of the state.

Even today, "the overwhelming majority of the states require the vaccine in order to attend public school," and this practice has been in place since before *Jacobson* itself. *Record* at 3, *Jacobson*, 197 U.S. at 32. In England, the source of the common law from which the liberty interest in refusing medical treatment is derived, compulsory vaccination laws had been the norm since 1853. *Id.* 31 n.1 The long-standing acceptance of compulsory vaccination and conditioning public education on the basis of vaccination makes it clear that the liberty interest in refusing vaccination has much less historical support than the liberty interest in refusing medical treatment. Just as in *Washington v. Glucksberg*, holding for Petitioner means that the Court "would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *Glucksberg*, 521 U.S. at 723. Here, "[t]he mere novelty of such a claim is reason enough to doubt that substantive due process sustains it." *Reno v. Flores*, 507 U.S. 292, 303 (1993).

C. The President's executive order aims at the compelling interest of preserving life and is appropriately tailored to meet that interest.

Because Petitioner's appropriately construed liberty interest in refusing vaccination is not fundamental, the appropriate standard of review is rational basis. *Glucksberg*, 521 U.S. at 722. The rational basis standard requires only a "reasonable relation to a legitimate state interest." *Id.*

The president's executive order far exceeds the rational basis standard and, in fact, meets any standard of review up to and including the strict scrutiny standard, which is described in *Washington v. Glucksberg*. In *Glucksberg*, this Court explained that due process "forbids the government to infringe on certain 'fundamental' liberty interests... unless the infringement is narrowly tailored to serve a compelling government interest. *Flores*, 507 U.S. at 502 as cited in *Glucksberg*, 521 U.S. at 721.

The president's executive order greatly furthers the government's compelling interest in saving lives. The order is clearly narrowly tailored in its sweep; it does not burden substantially more liberty than is necessary to achieve the government's vital end. The order is only enacted on the urging of public health officials, who uniformly warn of the significant risk and calamitous consequences of another unmitigated pandemic sweeping through the United States.

Furthermore, the existence of some possibly less restrictive version of the law does not immediately invalidate the law that has been passed by Congress. Congress and the President have acted based on advice from the foremost public health experts in the nation. The question is not whether Congress could have exercised omniscience to make the law less restrictive. The question is whether Congress took care to ensure that their actions were specific and focused on meeting the interest at hand, and whether their actions to not seem to burden in excess of what is necessary to achieve its end.

1. The government has an unqualified interest in preserving human life and an especially strong interest in the lives of the public at large.

This Court's precedents show that even when an individual actively seeks to end their life, either through the refusal of further care (as in *Cruzan*) or physician-assisted suicide (as in *Glucksberg*), the state still has an overwhelming interest in preserving life. In *Cruzan*, this interest justified placing greater restraints upon the decision-making process for withdrawing lifesaving hydration and nutrition, and in *Glucksberg*, this justified the continued illegality of suicide and physician involvement in suicide.

The government's interest is still greater when the lives at stake include not only the person to whom the law applies but also the public at large. In *Cruzan*, this Court notes that, although "the right to self-determination" (analogous to the right to refuse treatment) sometimes outweighs

state interests, many cases that held otherwise "involved the interest in protecting innocent third parties," *Cruzan*, 497 U.S. at 273, which is precisely what the state seeks to do today. The federal government's interest in this case is uniquely strong — pandemics do not heed state boundaries, and the federal government must act to protect the lives of those endangered by a pandemic.

A polio pandemic is likely to kill more than 25,000 people per year. *See Record* at 20, 21. The president has determined that the "risk of a polio pandemic exists and that the risks of loss of life and damage to the economy are significant." *Id.* at 21. Clusters of unvaccinated people in the United States may provide footholds for the disease to spread to and become established within the country. *Id.* at 3. Polio infection carries serious consequences, including lifelong complications and even death. *See id.* The government has a compelling interest in preserving life and protecting health, and the evidence on the record confirms that an unmitigated polio pandemic would cause serious harm and loss of life.

As this Court has made clear in its Commerce Clause jurisprudence, the relevant question that it must ask is not whether the Court would draw precisely the same conclusions from the evidence in the record. Rather, the appropriate question to ask under a heightened scrutiny standard is whether relevant findings of fact are reasonable and strongly supported given the evidence and expertise available. Given the statements of public health experts and the growing prevalence of polio abroad, the President and Congress had strong reasons to believe that unmitigated polio spread would cause preventable, premature death and serious health consequences for the public.

2. The government's actions are proportional and narrowly tailored to saving lives.

The president's vaccination order is narrowly tailored to the government's interest in saving lives. While "narrowly tailored" is never defined in explicit terms on the record, Justice Souter's concur-

rence in *Glucksberg* draws on several precedential sources to argue that the stringency of heightened scrutiny — "how compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also the extent of the burden placed upon it." *Glucksberg*, 521 U.S. at 772 (Souter, J., concurring) While the Court must ensure that the government's means are appropriate and do not overburden the relevant liberty interests, the fact that the government's interests are commensurate with and greater than the individual's interest suggests that more leeway should be afforded the state than might be offered under different circumstances.

The president's actions today are made based on the recommendations of a bipartisan, Blue-Ribbon panel containing some of the nation's foremost infectious disease experts. *Record* at 2. The polio vaccine is among the most safe and effective vaccines available. *Id.* at 19. A vaccine mandate is the safest, most effective, and most immediate measure available to the government.

If the COVID-19 pandemic has taught the nation anything, it is that travel restrictions and mask mandates are not sufficient to protect against extremely infectious diseases. Congress has correctly determined that vaccinations are this nation's strongest hope against the threat of a pandemic, and it is within Congress' power to take the steps that are necessary to save lives.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

Counsel for Respondent