No. 2021-2022

IN THE

SUPREME COURT OF THE UNITED STATES

William DeNolf,

Petitioner

v.

The United States of America,

Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF OLYMPUS

BRIEF FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

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

2. Whether the President's mandatory vaccine order violated 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

U.S. Constitution, Article 1, Section 8, Clause 3.

The Congress shall have Power to regulate commerce with foreign Nations, and among the several States, and within the Indian Tribes.

U.S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The following facts have been stipulated by both parties. In 2021, President Joseph Biden produced a bipartisan, Blue-Ribbon Panel to study and create "a comprehensive national plan that would enable the country to better identify and prepare for potential future pandemics," in response to this nation's experience with the COVID-19 global pandemic. *The Record*, at 3-4. The Panel consisted of seven specialists in the field of infectious disease, including two prominent public health experts, Drs. Bobbi Bronner and Chester Comerford, as well as six politicians, three Republicans and three Democrats. *The Record*, at 4. The Blue-Ribbon Panel created and submitted the Bronner-Comerford Report to Congress that consisted the creation of a Pandemic Preparedness Czar authorizing the President, with the approval of the Congress, to order mandatory vaccinations for all persons if the President deems that there is a risk of a pandemic and a substantial loss of life and damage to the economy exists. *Id*. In attempt to be proactive, the Department of Health and Human Services (DHHS) was ordered to stockpile vaccines for particularly infectious diseases that do not mutates, such as polio and measles. *Id*.

On June 15, 2021, media outlets reported outbreaks of polio in 5 countries and various major cities who had international airports and whose planes and ships frequently traveled to the United States. *The Record*, at 4. The Centers for Disease Control and Prevention (CDC) reports that polio was eradicated decades ago as the most recent reported case of polio transmission in the United States took place in 1979. *Id.* Furthermore, when polio was a current threat and travelers entered the United States with polio in 1993, there was no transmission of the disease. *Id*. However, on June 28, 2021, the President's Czar for Pandemic Preparedness, Dr. Geronimo Gusmano, advised President Biden that a great likelihood exists that persons with polio have already, or will soon travel, to the United States. *The Record*, at 5. Given that polio does not

mutate, the DHHS had stockpiles of polio vaccines to fully vaccinate the unvaccinated population, estimating roughly bout 32.8 million individuals or 10% of the American population, that are good for a lifetime. *Id.*

The Centers for Disease and Prevention (CDC) reports that polio has a reproduction number, or $R0^3$, of 5 to 7, making it "one of the most infectious diseases in existence. *The Record*, at 4. In other words, "every person with polio will potentially expose at least five to seven susceptible persons." *Id*. Such a disease can be controlled and reduce the number of persons exposed through preemptive measures, such as vaccines and quarantines. Further, the CDC reports that of the individuals who contract polio, 72% will be asymptomatic, meaning that they will show no signs of being infected with the disease. *Id*. Moreover, only 25% will demonstrate signs of flu-like symptoms and 3% will experience symptoms such as paresthesia, paralysis, or meningitis. *Id*.

Studies have demonstrated that two forms of polio exist – paralytic and non-paralytic polio. *The Record*, at 5. Individuals who become infected with paralytic polio, approximately 66% of persons, have permanent weakness in their arms and/or legs, however, 34% of individuals do not experience any permanent affects. *Id*. While death is a possible outcome, the mortality rate for paralytic polio is 5% to 10%, however less extreme outcomes include muscle spasms and pains, deformed limb, and loss of muscle reflex. *Id*. Those who suffer from non-paralytic polio merely experience flu-like symptoms or develop meningitis, with a morality rate of 2%. *Id*. Additionally, 25% to 40% of adults who suffered from polio as children will experience post-polio syndrome (PPS). *Id*. According to the CDC, some long lasting effects of polio include muscle pain, paralysis, difficulty breathing, eating, and drinking, as well as sleeping. *Id*. In more severe cases,

people will lose the ability to live independently as they will require assistance with daily activities. *Id*.

The United States has never required mandatory vaccinated at the federal or state level. Most importantly, 90% of children, roughly around 19 to 35 months of age, are already protected against polio due to states efforts in requiring the vaccine in order to attend public schools. *The Record*, at 5. The remaining 10% of unvaccinated individuals reside in clusters and are in large cities as well as rural areas where children are primarily homeschooled. Id. The poliovirus is typically transmitted through "food or water, the shared use of utensils, or through droplets of aerosols from the throat." *Id*. Considering that unvaccinated people are free to travel and work in the United States and are employed in the farming and food industry, this increases the likelihood of polio to spread. *The Record*, at 6.

On July 2, 2021, an advocate for vaccinations, Jacqueline Renee, along with Dr. Samantha Beauchamp, a leading scholar in the area of infectious disease, spoke before Congress about the polio outbreak that had occurred in New York City back in 1916 that resulted in 27,000 cases and 6,000 deaths. *The Record*, at 6. Four days later, on July 6, 2021, Congress enacted the Polio Vaccination Act (PVA) authorizing the President to mandate the vaccinations of all persons in the United States. *Id*. Moreover, on July 7, 2021, President Biden deemed that the risk of a polio pandemic as well as an economic emergency existed and issued the PVA. *Id*. It is important to note that vaccinations have never been order at the federal level, but were rather left to the states and the District of Columbia. *Id*. Under the Polio Vaccination Act, all people who refuse to be fully vaccinated, unless exempted for religious or health reasons, face a $500 fine under Section 4(e). *Id*.

Petitioner, Mr. William DeNolf is self-sufficient as he is self-employed, working from the comfort of his home. *The Record*, at 6. Mr. DeNolf lives alone, has no children, and has never been vaccinated for polio primarily due to the fact that he attended private school from grades K-12. *Id*. Furthermore, Mr. DeNolf does not deny that he engages in intrastate and interstate commerce as a consumer to a limited extent – DeNolf orders goods to his home and has people come to his home to fix his appliances. *Id*. His friend Sommerville drops off car parts to his doorsteps from a local junk yard or local auto parts. *The Record*, at 7. Since COVID-19, Mr. DeNolf has managed his dealings purely local and has arranged all foods and goods to be delivered at his door-step. Id. Additionally, DeNolf does not need to travel out of state for his work and uses Zoom for work meetings with a computer that he built himself. *The Record*, at 7. He pays for internet and cable from a national provider, pays his bills along with his taxes electronically, and uses a local credit union and a local post office with a drive through service. *Id*.

Mr. William DeNolf refuses to receive the polio vaccine on the grounds that Congress exceeded its authority under the Commerce Clause by enacting the PVA, and that the PVA violates his personal right under the Due Process Clause of the Fifth Amendment to make life-shaping medical decisions. *The Record*, at 7. The Fourteenth Circuit District Court found the PVA within Congress' power to mandate vaccines and Mr. William DeNolf appealed the lower court's decision.

SUMMARY OF ARGUMENTS

Congress exceeded its authority under the Commerce Clause by enacting the Polio Vaccination Act (PVA) requiring all persons in the United States to be fully vaccinated. Furthermore, the PVA violates Mr. William DeNolf's personal right under the Due Process Clause of the Fifth Amendment to make life-shaping medical decisions.

This Court has recognized that Article I, Section 8, Clause 3 grants Congress the power to regulate interstate commerce. However, Congressional authority has never been extended to regulate inactivity of this sort. In *National Federation of Independent Business v. Sebelius*, the Court held that not purchasing health insurance is a form of inactivity, outside congressional legislation. Mr. William DeNolf's refusal to be vaccinate cannot be considered an activity that triggers congressional regulation as he has done nothing by refusing to participate in interstate commerce. When there is activity to regulate, however, the activity must be clearly interstate or substantially affect interstate commerce.

The Court in *Perez v. United States* outlines 3 areas in which Congress can appropriately regulate under the Commerce Clause – the use of channels of interstate commerce, the instrumentalities, and activities that substantially affect interstate commerce. One's decision not to be vaccinated does not fall within any of the three categories. While the Polio Vaccination Act has copied and pasted this Court's jurisprudence to justify a blanket mandate, the PVA is not nearly specific as any person, regardless of their engagement status in commerce, is subject to the mandate. Further, this Court in *United States v. Lopez* and *Jones v. United States* explained that participating in commerce in any way is not the threshold that, when met, grants Congress the power to regulate. In *Lopez*, this Court clarifies that the regulated activity cannot merely have an effect on commerce, but must rather have a substantial effect on interstate commerce.

Moreover, just as the house in *Jones* was involved in elements of interstate commerce, it does not make a house regulatable by Congress under Section 844(i) as such broad interpretation of a building used in commerce would extend the power of Congress to regulate everything and everyone.

Today, Congress is forcing Americans to receive a vaccine, something that is neither an economic activity nor a market. When discussing cases where congressional acts were upheld as it regulated intrastate economic activities that substantially affect interstate commerce such as *Wickard v. Filburn*, *Heart of Atlanta Motel Inc. v. United States,* and *Gonzales v. Raich*, it is crucial to note that in these three cases, Congress was regulating commodities and businesses who willingly engaged in interstate commerce and part of a broader regulatory scheme. Mandating polio vaccines for the remaining 10% of the population cannot be said to be part of a broader regulatory scheme as they pose no threat to this nation's economy as there is no current outbreak. Moreover, the federal government is regulating on speculation alone that there may possibly be an outbreak in the future, rather than having a rational basis to mandate vaccines.

This Court has established a variety of rational basis when assessing Congress' authority under the Commerce Clause. In *Heart of Atlanta Motel Inc. v. United States*, the Court held two prongs that must be satisfied in order to support Congressional legislation under the Commerce Clause. First, whether Congress had a rational basis for finding the regulated activity affect commerce. Second, whether the means it selected are reasonable and appropriate.

Turning to the first prong, Congress cannot claim to have a rational basis to support its assumption that requiring vaccines will help the economy in part because there is no current outbreak, but most importantly, while the interest of wanting to prevent disease is an important one, it not one that the federal government is authorized to address in the manner it has chosen.

Should this Court allow the federal government to expand its authority to ruthlessly invade a general police power that legally belongs to the states, it would set a precedent that would allow Congress to dangerously expand its power under the Commerce Clause, removing all limits set forth in *United States v. Lopez* and *United States v. Morrison*.

Even if this Court were to find Congress had a reasonable basis for concluding that inactivity was within the scope of Congress' authority to regulate the market, the means are not reasonably related to achieve its end. Congress seeks to require every Americans who does not wish to become vaccinated, become vaccinated. Given that 90% of the country is already protected against polio, this ensures that no pandemic size outbreak is even possible that would affect the market the way COVID has. *The Record*, at 3. While traditionally the federal government has never had to wait for an economic tragedy to occur before taking action, it must act within an enumerated power. The Polio Vaccination Act does nothing to address the root of the problem, the boarders, and should the federal government require testing at the boarders or mandate vaccine for interstate travelers, it would be acting within its prescribed constitutional bounds.

Lastly, upholding the Polio Vaccination Act will set a precedent that would allow Congress to obtain a power it was never intended to have. If the act of doing nothing can be regulated under a clause specifically intended to regulate activity, then we have reached a point where regulation of commerce is truly a power without end. *The Record*, at 14.

Not only does the Polio Vaccine Act exceed Congressional authority under the Commerce Clause, but it also violates the Due Process Clause of the 5th Amendment by infringing on each citizen's right to medical choice.

Strict scrutiny applies in the case at bar because the results affect DeNolf's fundamental right to medical choice. In the case of *Washington v. Glucksberg,* the Court found that the asserted right of assisted suicide was not a fundamental right by outlining a two-prong test. The *Glucksberg* test is a two-part test that determines whether a right is fundamental and therefore protected by Due Process. A right must pass both prongs to be considered fundamental. First, the right must be rooted in Nation's history and tradition. Second, the right must be carefully described and defined. The Court looked at fundamental rights even more broadly in *Obergefell v. Hodges* and reasoned that the identification of fundamental rights must not be reduced to any specific formula. Rather than using a formula, the Court can use broad principles to identify fundamental rights. History and tradition may guide a fundamental rights inquiry but should not limit it. The Court can also expand the existing right to medical choice to include the right to refuse a vaccine.

In *Glucksberg*, the Court did not find that the right to suicide was deeply rooted or narrowly defined. However, the concept of fundamental rights in regards to medical choice has a long history. In *Planned Parenthood vs Casey*, and in *Griswold v. Connecticut*, the Court upheld the fundamental right to privacy and applied to medical choice. The Court ruled in *Griswold* that the amendments of the Bill of Rights contain "penumbras" that assure fundamental rights. *Griswold* was a monumental decision that laid the foundation for the right to medical choice.

The Court further elaborated on the right to medical choice in *Cruzan v. Director, Missouri Department of Public Health*. In *Cruzan*, the Court ruled that a competent person can refuse or remove lifesaving medical treatment, even if doing so will hasten the death or illness of the patient. *Cruza*n also outlined the doctrine of informed consent.

The government may cite the case of *Jacobson v. Massachusetts* to support its case. In *Jacobson,* the Court upheld Cambridge, Massachusetts's vaccine requirement for smallpox. However, *Jacobson* is distinguishable from the case at bar because it was decided before the Court asserted protections for individual liberty under substantive due process. Additionally, the facts have eroded since the time of ruling. *Planned Parenthood of Southeastern Pennsylvania vs. Casey* reviewed a few of the conditions in which a law should be overturned, and *Jacobson* meets two of them: the law has developed since the time of ruling, and the facts have changed. Therefore, Jacobson should be explicitly overturned by the Court today.

Based on common law and history, DeNolf has the fundamental right to medical choice under the Due Process Clause, and the government cannot touch the right to bodily integrity.

The Polio Vaccine Act fails strict scrutiny in that it fails to meet a compelling interest, and the means of the act are not narrowly tailored. The *Cruzan* decision said that it is permissible for the government to apply a clear and convincing evidence standard when there are competing state and individual interests. In light of DeNolf's fundamental right to medical choice, a heightened standard must be used.

The record states that 90% of the American population is vaccinated against polio. *The Record,* page 4. Also, it states that the United States has been free from polio since 1979. *The Record,* page 2. In light of these facts, the government fails to meet a compelling interest in enacting the Polio Vaccine Act. The government does not have enough of a compelling interest to force a procedure on DeNolf when it is his expressed choice to refuse it despite the consequences.

The means of the Polio Vaccine Act are not narrowly tailored because they do not appropriately address the threat the government is claiming. Page 2 of the record states that the

United States has been free from polio since 1979, and therefore the only threat of spreading the disease is through travelers entering the U.S. border. However, the means of the Polio Vaccine Act do not reflect this reality, as the mandate only applies to individuals currently residing in the United States. There are alternative methods the government could take to prevent polio transmission, such as travel restrictions.

The vaccine mandate is too broad of a method to prevent polio. There are more narrowly tailored ways to stop the spread of the virus that do not encroach upon the right to medical choice.

We ask this Court to reverse the ruling of the 14th Circuit and strike the Polio Vaccine Act as unconstitutional.

ARGUMENT

I. CONGRESS EXCEEDED ITS AUTHORITY UNDER THE COMMERCE CLAUSE WHEN IT ENACTED THE POLIO VACCINE ACT AUTHORIZING THE PRESIDENT TO MANDATE POLIO VACCINES FOR ALL PERSONS.

A. There is no activity present for Congress to regulate.

1. Congress seeks to regulate inactivity.

Article I, Section 8, Clause 3, the Commerce Clause, grants Congress the authority to regulate interstate commerce. Through the enactment of the Polio Vaccination Act (PVA), Congress seeks to expand its already broad power under the Commerce Clause to regulate inactivity, a power it has never been granted. The ruling of *National Federation of Independent Business v. Sebelius* 567 U.S. 519 (2012) held that the individual mandate requiring Americans to maintain minimum health insurance coverage was not a valid exercise of Congress' power under the Commerce Clause. In *Sebelius*, not purchasing health insurance was depicted as inactivity and similarly here, Mr. William DeNolf's refusal to be vaccinated cannot constitute any sort of activity as he has done nothing by refusing to participate in interstate commerce. Justice Roberts found that Congress can only regulate existing commercial activity but it cannot compel individuals to become active in commerce. Doing nothing could not be said to be an activity even if doing nothing affects the economy. Without question not shopping affects the market but Congress cannot compel an activity in the absence of one just to save the market as doing so would open a new realm of Congressional authority.

Justice Roberts interpretation of activity versus inactivity in *National Federation of Independent Business v. Sebelius* is binding precedent given that four Justices, Ginsburg,

Breyer, Kagan, and Sotomayor, agreed with the notion that the mandate was unconstitutional under the Commerce Clause as it sought to regulate inactivity written in their separate opinions. Turning this Court's attention to *Marks v. United States* 430 U.S. 188 (1977), as cited in *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992), when five members of the Court agree on a principle, even on the most-narrowest grounds, that principle is considered binding. Thus, as no evidence exists of any economic activity being regulated under the PVA, Congress has no authority under the Commerce Clause as it attempts to regulate inactivity, a power that was outright rejected in *Sebelius*.

2. Congress can only regulate activity that is interstate or substantially affect interstate commerce.

When there is activity to regulate, the activity must be clearly interstate or substantially affect interstate commerce. In *Perez v. United States* 402 U.S. 146 (1971) this Court outlined the three legitimate areas of congressional regulation under the Commerce Clause. These areas concern the use of channels of interstate commerce, the protection of the instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. Not getting vaccinated does not fall under any of the three categories that Congress may regulate. If Congress was regulating the shipment of vaccines, then it would properly be regulating a channel of interstate commerce. If Congress made vaccine requirements to travel, it would properly be regulating instrumentalities of interstate commerce. Because channels and instrumentalities are absent in the case at bar, if the Polio Vaccination Act is to survive, it must be justified as an activity substantially affecting interstate commerce – it does not.

Appendix II, Section 4(a) of the record states that the PVA applies to those persons whose "health may affect the channels of instrumentalities of interstate commerce as well as whose health may affect intrastate commerce in a manner that substantially affects interstate commerce," and therefore allows for Congressional legislation. *The Record*, at 22. While the act's language is written in such a way that gives the impression of regulating commercial activity, it is not nearly specific enough since the majority of individuals are engaged in commerce. Under the PVA, someone who is significantly secluded from commerce and extremely self-sufficient, like Mr. William DeNolf, is subject to this mandate due to the mere fact that he orders Amazon packages and uses Zoom for work meetings. *The Record*, at 7. Nonetheless, in *United States v. Lopez* 514 U.S. 549 (1995) and *Jones* v. *United States* 529 U.S. 848 (2000), the Court was careful to withhold from Congress the power to regulate anything which would theoretically impact interstate commerce as it would alter the bounds of federalism.

In *United States v. Lopez*, the Court analyzed that it is not sufficient for the regulate activity to simply affect commerce, but rather it must have a substantial effect on commerce from an activity for Congress to regulate. *The Record*, at 5 indicated that 90% of the population is vaccinated against polio therefore there cannot be a substantial economic effect to trigger Congressional legislation. Furthermore, Footnote 1 of the record explains that when polio was an actual threat and travelers came to the United States in 1993, there was no spread. *The Record*, at 4. The United States has been able to eradicate polio without a mandatory vaccination. Moreover, while the record expresses that Mr. William DeNolf is not a shut-in, nor does he deny that he engages in interstate as well as intrastate commerce to a limited extent, it is critical to note that while being

engaged in interstate commerce is necessary for Congress to regulate but it is not sufficient and falls short of constitutional muster. *The Record*, at 6. The Court in *Jones v. United States* rejected Congress' argument that a private residence used solely for living purposes is a residence used in commerce simply because it is involved in elements of interstate commerce, such as obtaining a mortgage and insurance, as accepting such broad interpretation, hardly any building would fall outside federal regulation. Similarly today, allowing the federal government to compel a citizen's vaccination simply because he has at some point engaged in commerce or because his failure to do so might at some point in the future possibly affect the interstate economy, Congress will be able to regulate anything under the sun.

Congressional authority under the Commerce Clause has historically been broad but it has never been extended to include something that is neither interstate nor commerce. This Court has upheld congressional acts regulating intrastate economic activities which substantially affect interstate commerce. In *Wickard v. Filburn* 317 U.S. 111 (1942), the Court found the Agricultural Adjustment Act properly regulated the activity of growing wheat for home consumption by those who were already growing wheat for the market and in whose abstention would, in the aggregate, affect the national wheat markets; in *Heart of Atlanta Motel, Inc. v. United States* 379 U.S. 241 (1964), Title II of the Civil Rights Act properly address the effects of racial discrimination on the national economy by requiring those active in the travel market running accommodations, like restaurants and motels, make those accommodations available to all as Congress found interstate travelers would avoid regions of the country where they would be harassed and humiliated; and most recently in *Gonzales v. Raich* 545 U.S. 1 (2005), the Controlled

Substance Act properly regulated the production, distribution, and consumption of commodities for which there is an established market by prohibiting the possession, or manufacturing of marijuana for personal medical use. Thus, it is evident that Congress can regulate economic activity that substantially affect commerce. However in *Wickard*, *Heart of Atlanta*, and *Gonzales*, Congress was regulating commodities and businesses who willingly engaged and participated in commerce. Further, in all three cases, the regulations in question were a part of a broader regulatory scheme and without the provision in question, the overall scheme would be weakened.

The insignificant population of unvaccinated individuals, or 10%, has existed for decades and pose no threat to the United States due to the fact that there is no outbreak as the most recent outbreak occurred in the 1940s. *The Record*, at 6. The federal government is merely regulating on the speculation that there may be an outbreak and fails to provide a rational basis for mandating polio vaccines.

B. The Polio Vaccination Act fails rational basis.

1. There is no rational basis to conclude that one's decision to be vaccinated substantially affects commerce.

Traditionally, this Court applied a variation of the rational basis standard when assessing Congress's authority under the Commerce Clause. In *Heart of Atlanta Motel v. United States*, the Court held two prongs that must be satisfied in order to support Congressional legislation under Article I, Section 8, Clause 3. In his majority opinion, Justice Clark concluded that "[t]he only questions are: (1) whether Congress had a rational basis for finding that [the regulated activity] affect[s] commerce, and (2) if it had

such a basis, whether the means it selected to eliminate the evil are reasonable and appropriate." 379 U.S. 258.

Turning to the first prong, Congress cannot claim to have a rational basis to support its assumption that requiring vaccines will help the economy. Unlike in *Gonzales v. Raich* where the Court found a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the Controlled Substance Act, here, Congress has no rational basis in part because polio is not a current outbreak, nor are there any individuals residing in the United States that have polio, but most importantly, while the interest of wanting to prevent disease is an important one, it is not one that the federal government is empowered to address in the manner it has chosen. Petitioner does not contend that the federal government can never act in a time of crisis, as it would be unreasonable to assume that Congress does not consider a disease to be a threat, it would be unreasonable to assume that Congress does not consider a disease to be a threat, but simply because they recognize a medical harm, does not empower them to legislate outside their constitutional bounds. This Court has long recognized and respected that Congress may only create law from their enumerated powers. If the federal government wishes to legislate in realms where states are sovereign, they must do so in pursuit of a commercial regulation. This is precisely why Title II of the Consumer Credit Protection Act in *Perez v. United States* was deemed permissible, by Sections 13981 of the Violence Against Women Act in *United States v. Morrison* 529 U.S. 598 (2000) was not.

Should this Court allow the federal government to invade a general police power that legally belongs to the states**,** it would set a precedent that would allow Congress to

dangerously expand its power under the Commerce Clause, removing all limits set forth in *United States v. Lopez* and *United States v. Morrison*. The Court in *Lopez* refused to further broaden Congress' Commerce Clause authority when it deemed the Gun Free School Zones Act of 1990 unconstitutional – possession alone was no an activity in any proper sense constitutional construction. There, the activity of purchasing the gun had already been completed by the time the regulation took effect on its possessor, and nothing about the manufacture, sale, or purchase of the gun was within the scope of the act. Similarly here, the economic activity has already taken place as the manufacture of the polio vaccine has been completed and the federal government is not partaking in the sale of the product. *The Record,* at 22. Additionally, to uphold the federal government's contentions here, the Court would have to pile "an inference upon inference" that first, polio will arrive to the United States, someone like Mr. DeNolf will get infected with polio, and that it will cause a substantial effect on this nation's economy. *Lopez,* at 567.

The Court in *United States v. Morrison* turned to *Lopez* and concluded that the regulated activity must be economic in nature. While violence against women is an activity, and an abhorrent one at that, it is not an economic activity – and it was violence that was the interest congress sought to regulate. Justice Rehnquist rejected the but-for causal chain as such reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on commerce, blurring the boundaries of federal and state authority. Thus, as Congress shamelessly hides behind the COVID-19 global pandemic to mandate vaccines for a hypothetical polio outbreak, no rational basis exists to trigger congressional legislation.

2. The Polio Vaccination Act does not have reasonably related means.

Even if this Court were to find Congress had a reasonable basis for concluding that inactivity was within the scope of Congress' authority to regulate the market, the means are not reasonably related to achieve its end. The means are to require every American who does not wish to become vaccinated, become vaccinated. However, given that 90% of the country is already protect against polio, this ensures no pandemic size outbreak is even possible that would affect the market the way COVID has. *The Record*, at 3. Furthermore, Appendix II, Section 4(b), 4(c), and 4(d) outlines three groups who are exempt from the PVA – those whose health would be put at risk if vaccinated for polio, persons who have religious objections to vaccinations, and newborn infants whose parents object to the procedure due to religious practices. *The Record*, at 22. Assuming that a conservative five percent fall within the exceptions, Congress is compelling a mandated vaccine to the remaining five percent. Turning to Appendix II, Section 4(e) of the record, the five percent of individuals not vaccinated for polio can simply pay the $500 fine and remain unvaccinated, unreasonably related to achieve its end. *The Record*, at 22.

Referencing the Court's decision where means have failed, *United States v. Morrison* noted that while the effects of the resulting trauma from violence may have an indirect economic effect, the means to address the interest were not reasonably related. There, Congress authorized Section 13981, the federal civil suits for compensation, yet the remedy did not reasonably address the problem of stopping violence against women since violence was motivated by gender and not monetary, economic, or market forces. Similarly in today's case, pandemics are not motivated by monetary forces. More importantly, the act does nothing to target the root of the problem considering that it does

nothing to stop the spread of the virus at the borders, where the problem is currently, a power Congress undoubtedly has within its enumerated powers.

The federal government can certainly be proactive in preventing another national pandemic, however it must do so within its prescribed constitutional bounds. In *South Dakota v. Dole* 483 U.S. 203 (1987), as cited in *National Federation of Independent Businesses v. Sebelius*, the federal government planned to withhold 5% of States Federal Highway funds from the states to encourage them to increase their drinking age to 21 – such regulation was permitted by the Court under Congress' Spending power. The federal government can similarly provide state incentives in the case at bar, however it would be done through a different power, not under the Commerce Clause.

Upholding the Polio Vaccination Act will set a precedent that would allow Congress to dangerously expand its authority and obtain a power it was never intended to have. If the act of doing nothing can be regulated under a clause specifically intended to regulate activity, then we have reached a point where regulation of commerce is truly a power without end. The Framers of the Constitution were careful in building a limited government, as well as valuing individualism – they would not have intended for Congress to regulate inactivity under the appearance of regulating commercial activity. *The Record*, at 14.

II. THE MANDATORY VACCINE ORDER VIOLATES PETITIONER'S FUNDAMENTAL RIGHT TO MEDICAL CHOICE PROTECTED BY THE FIFTH AMENDMENT.

The Due Process Clause of the United States Constitution prohibits the Federal

Government from depriving individuals of "life, liberty or property without due process of law." The Polio Vaccine Act violates the Due Process Clause of the Fifth Amendment by encroaching on petitioner's right to medical choice. "The Clause provides heightened protection against government interference with certain fundamental rights and liberty interests." *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1446-1447, 123 L.Ed.2d 1 (1993) as cited in *Washington v. Glucksberg.*

The Polio Vaccine Act fails to meet the strict scrutiny standard, which requires any encroachment on fundamental rights to possess a compelling state interest and narrowly tailored means. The government does not have a compelling interest nor narrowly tailored means for intruding on the fundamental right to medical choice.

A. The United States violated the fundamental right to medical choice and therefore strict scrutiny is the appropriate standard to review the case at bar.

When a case concerns sensitive areas of liberty, i.e., fundamental rights, the Court must apply the highest level of scrutiny. *Skinner v. State of Oklahoma,* 316 U.S. 535 (1942) as cited in *Griswold v. Connecticut* 381 U.S. 479 (1965). The court in *Griswold* determined that under strict scrutiny, it is the government's burden to prove that it as a compelling interest in order to override a fundamental right. Rights are not limited to what is specifically enumerated in the Constitution. For the state of Connecticut to implement a law that limits the martial right to privacy, it must show a "compelling subordinating state interest."

Traditionally, the Court has used a calculation illustrated in *Washington vs. Glucksberg*521 U.S. 702 (1997) to determine a fundamental right under substantive due process. A right must pass both prongs to be considered fundamental. First, whether the right or liberty is deeply rooted in this Nation's history and tradition. *Moore v. East Cleveland,*

431 U.S. 494, as cited in *Washington v. Glucksberg.* Second, the Court requires a "careful description" of the asserted fundamental liberty interest. *Reno v. Flores,* 507 U.S. 292, 302, 113 as cited in *Glucksberg.*

However, the Court departed from the traditional *Glucksberg* analysis in *Obergefell v. Hodges* 576 U.S. 644 (2015). The Court in *Obergefell* reasoned that the identification of fundamental rights must not be reduced to any specific formula. Rather than using specific requirements, the Court must instead use broad principles to identify fundamental rights. While history and tradition may guide a fundamental rights inquiry, it should not limit it. *Obergefell* did not create a new right for same sex couples to marry, but rather, expanded the existing right to marry to include same sex couples. The Court cited the cases of *Loving v. Virginia,* 388 U.S. 1, *Turner v. Safley,* 482 U.S. 78, and *Baker v. Nelson,* 409 U.S. 810 to support that the right to marry is protected by the Constitution.

The fundamental right for same sex couples to marry was not a new right in Obergefell, but rather an expansion of the existing right to marry. Since *Obergefell* is the most recent precedent that we have in regards to fundamental rights analysis, it should be used in the case at bar today. Similarly, today, the Court can expand the existing fundamental right to medical choice to include the more specific right to refuse vaccines. One of the cases that outlined the fundamental right is *Griswold*, in which he Court identified the fundamental right to privacy. And in *Cruzan v. Missouri Department of Public Health*, the Court asserted the liberty interest in refusing lifesaving medical treatment 497 U.S. 261 (1990).

Even if the Court were to apply the *Glucksberg* test to determine a fundamental right, the right to medical choice would still pass because the right is deeply rooted in our nation's history and tradition, and it is carefully described. The right to medical choice is deeply

rooted because it is present in cases such as *Griswold* and *Planned Parenthood of Southeastern Pennsylvania vs. Casey,* and the liberty interest in medical choice is outlined in *Cruzan.* The right to medical choice has been present since common law – forced medical treatment constitutes battery. *Glucksberg* 521 U.S. at 725. The right to medical choice is also carefully described: it allows patients to make their choices about the right course of action for themselves and themselves only. While the interest in medical choice must be balanced against relevant state interests, as described in *Cruzan,* medical choice is still a fundamental right.

Cruzan concerned whether the right to refuse or remove life-saving medical treatment was a fundamental right. The Court ruled that under Due Process, a competent individual has an interest in refusing or removing life-saving medical procedures, even if doing so will hasten the death or illness of the patient.

In *Cruzan,* the Court found that most state courts have a right to refuse treatment based off the common-law right to informed consent. Justice Cardozo of the Court of Appeals of New York, as cited in *Cruzan,* said "Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." 211 N.Y. 125, 125-130, 105 N.E. 92, 93 (1914), as cited in *Cruzan* 497 U.S. 269. In addition, the right to informed consent is also "firmly entrenched in American tort law." Keeton, Dobbs, Keeton, & Owen, supra, 32, pp. 189-192; F. Rozovsky, Consent to Treatment, A Practical Guide 1-98 (2d ed. 1990), as cited in *Cruzan* 497 U.S. 269. Informed consent includes the right to refuse treatment. Therefore, based on common law and history, DeNolf has the right to refuse the polio vaccine because he has the right to refuse treatment.

In *Griswold*, the Court ruled that a Connecticut statute that made use of contraceptives a criminal offense a criminal offense violated a couple's right to privacy. The Court ruled that the amendments of the Bill of Rights contain "penumbras" that assure fundamental rights beyond what is explicitly stated – this includes a penumbral right to privacy. *Griswold* laid the foundation for the right to make medical decisions without interference. Just as married couples have the right to consult a doctor and choose to use contraceptives, DeNolf has the right to make a choice about being vaccinated. Requiring petitioner to get vaccinated against polio intrudes on the right to medical choice.

Respondent may cite the case of *Jacobson v. Massachusetts* 197 U.S. 11 (1905) because the case concerned whether the right to refuse vaccines was a fundamental one. *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992) reviewed some conditions in which a law should be overturned, two of which are relevant in the case at bar: first, whether the law has developed since the time of ruling. "Whether related principles of law have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine." *Patterson v. McLean Credit Union* 491 U.S. 164 173-174 (1989) as cited in *Casey*. *Jacobson* meets this condition. It was decided before the court asserted protections for individual liberty under substantive due process. *Griswold* created penumbral rights when it identified the right to privacy, which is not explicitly mentioned in the Constitution, but rather exists in the "shadows" of several Constitutional amendments. Additionally, since *Jacobson* was decided, the right to refuse treatment has been affirmed by the Court. In light of these developments, the *Jacobson* decision is antiquated.

The second condition listed in *Casey* relevant to overturning *Jacobson* that the facts have eroded. "Whether facts have so changed, or come to be seen so differently, as to have

left the old rule no more than a remnant of an abandoned doctrine." *Patterson v. McLean Credit Union* 491 U.S. 164 412 (Brandeis, J., dissenting) as cited in *Casey*. *Jacobson* was decided more than a century ago. Technology has evolved since the *Jacobson* decision, and there are now alternative methods of preventing a polio outbreak that the Court should consider today. Some of these new methods of preventing polio include contact tracing and testing for polio. The *Casey* court recognized that technology is not an irrelevance; see *Casey* 505 U.S. 833, 320, 350. Additionally, it is important to note the difference in facts between *Jacobson* and the case at bar. In the context of *Jacobson,* petitioner Henning Jacobson lived in Cambridge, Massachusetts, a city that was dealing with a current smallpox outbreak 197 U.S. 11, 197 U.S. 12. The Board of Health in Cambridge ordered a mandatory vaccine order because of a current outbreak of smallpox, not a potential one. Page 2 of the record indicates that polio has not entered the United States; the United States has been free from polio since 1979. It is inappropriate for Congress to force people to receive a vaccine before there is a current outbreak.

The *Jacobson v. Massachusetts* decision is antiquated. The law and the facts have evolved once the decision was made. Therefore, *Jacobson* should be overturned by the Court. The Polio Vaccine Act is a drastic measure that occurred

B. The Polio Vaccine Act fails to meet a compelling interest, and the means of the act are not narrowly tailored.

The Polio Vaccine Act does not pass the strict scrutiny standard of review, which requires a compelling interest and narrowly tailored means. In *Griswold*, the Court asserted that under strict scrutiny, the government must meet a compelling state interest to enact a law that treads upon a fundamental right. "Where there is a significant encroachment upon

personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. City of Little Rock,* 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 as cited in *Griswold*.

According to page 6 of the record, the United States claims that it has a compelling interest in having every American vaccinated against polio to prevent an outbreak that would cause an economic downturn. But despite the respondent's claim, economic interests can never be found to override a fundamental right. Additionally, even if the Court were to consider the overall interest of preventing a polio outbreak to prevent loss of life, the Polio Vaccine Act still fails to meet a compelling interest because the United States already has a high percentage of the population vaccinated against polio, and there is little risk of an outbreak occurring.

The facts present in the record indicate that there is no substantial risk of a widespread polio outbreak in the United States. Page 2 of the record states, "The last reported case of polio transmission in the United States occurred in 1979. The Centers for Disease Control and Prevention (CDC) reports that "the United States has been polio-free since 1979." Polio simply cannot spread if it is not here. There is no risk of person to person transmission if there are no cases currently present in the United States.

Additionally, page 3 of the record states that "[the population unvaccinated against polio] is estimated to be about 32.8 million or 10% of the total population of the United States." In other words, 90% of the American population is already vaccinated against polio. So even if there were to be a polio outbreak, the majority of the population would be protected against it.

The government relies on fear of a repeat of the COVID-19 pandemic to support its right to implement the Polio Vaccine Act. However, there are stark differences between COVID-19 and polio. COVID-19 was a brand-new virus that was virtually unknown when it arrived in the United States. There were zero individuals vaccinated against COVID-19 when the pandemic began; unfortunately, this is what caused so many deaths to occur. There were also high unemployment rates because of shutdowns. However, the context of polio is starkly different from the context of COVID. Most Americans are already vaccinated against polio, and those who are not commonly reside in rural clusters, as page 4 of the record indicates. A polio pandemic in the United States is highly unlikely. The interest in preventing a polio pandemic is not compelling enough to warrant a substantial intrusion on DeNolf's fundamental right to medical choice, given that a widespread epidemic is unlikely to occur.

Mr. DeNolf is not at risk of contracting and spreading polio because of his isolated lifestyle. He works from home, and gets groceries and packages delivered to his home, according to page 4, putting him at low risk of contracting and spreading polio. Because of his isolation, DeNolf does not pose a risk to others in remaining unvaccinated.

The means of the Polio Vaccine Act are not narrowly tailored. To describe the strict scrutiny standard, the Court in *Glucksberg* cited *Reno v. Flores*: "The dual dimensions of the strength and the fitness of the government's interest are succinctly captured in the so-called "compelling interest test," under which regulations that substantially burden a constitutionally protected (or "fundamental") liberty may be sustained only if "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 E.Ed.2d 1 (1993), as cited in *Glucksberg*.

The Polio Vaccine Act punishes people who do not become fully vaccinated against polio (receive four separate shots) by fining them $500 (page 4 of the record). Fines are not narrowly tailored means because they do not directly address the government's concern of preventing a polio outbreak. An individual who wishes to remain unvaccinated can simply pay a one-time fine and remain unvaccinated – they will still be at risk of contracting and spreading the disease. This does not further the interest that the government is claiming to address. Additionally, page 4 of the record states that there are two exemptions to the vaccine mandate: those who have medical exemptions, and those who have religious exemptions. The 10% of unvaccinated individuals are likely to fall within these two categories. Therefore, even with the Polio Vaccine Act in place, the United States fails to meet a 100% vaccination rate.

In *Griswold*, the Court ruled that despite the state of Connecticut's interest in regulating a constitutionally protected right, specifically, the right to privacy, the government cannot prohibit its use. Similarly, a government interest in preventing a polio outbreak can only encourage Americans to get vaccinated, and cannot compel.

A state may not sweep overly broadly into areas of protected liberty. If the government is to regulate a close protected freedom, such as bodily autonomy or medical choice, it must be precise and narrowly tailored. The vaccine mandate as seen in the Polio Vaccine Act is too broad of a method to prevent a polio outbreak. There are other, more narrowly tailored ways in which to stop the spread of the virus, including masks, quarantines, and travel restrictions, that do not encroach upon the right to medical choice. Page 2 of the record indicates that quarantines are an effective preventative measure for preventing the spread of a disease. These methods do not have to apply to everyone; only

unvaccinated individuals, or those exposed to polio, would be forced to wear masks or quarantine. These alternative means would be more appropriate, rather than the government automatically using the most extreme option of forced vaccinations.

Page 2 of the record states, "On June 15, 2021, media outlets began to report that there were outbreaks of polio among humans in at least five countries. These outbreaks occurred in several major cities that had international airports and were hubs for cruise ships. Planes and ships from these cities regularly travel to the United States." Polio is only found in other countries as of right now. Therefore, polio is an external threat – the only risk of transmission of polio is if travelers from other countries spread it to people living in the United States. However, the means of the Polio Vaccine Act do not reflect this reality. The vaccine mandate is purely internal – it only applies to people currently residing in the United States. More appropriate means would perhaps be mandatory testing at the border, proof of polio vaccination when traveling to the United States, or proof of a negative polio test. These means would be more narrowly tailored to address a polio threat. According to page 2 of the record, the last time polio was on American shores was in 1993, when several travelers entered the United States with polio. However, even on this occasion, there was no transmission of the disease. This suggests that if the external threat of polio can be contained, there is no risk of a polio epidemic.

In summary, Mr. DeNolf has the fundamental right to medical choice. This right has been reinforced by decisions such as *Cruzan, Griswold, Casey,* etc. Based on the *Obergefell* analysis, the right to medical choice can be expanded to include the right to refuse vaccines. In order for the government to intrude on a fundamental right, it must have a compelling interest and narrowly tailored means. The government fails to meet a

compelling interest because the majority of the American population is already vaccinated against polio. The Polio Vaccine Act does not have narrowly tailored means because forcing Americans to get vaccinated against polio is the most extreme measure that can be taken. The government must instead consider alternative options that do not encroach upon the rights to bodily autonomy and medical choice. More appropriate options include travel restrictions, because the threat is purely external. The Polio Vaccine Act fails the strict scrutiny analysis and is therefore unconstitutional. Additionally, *Jacobson* must be overturned because it is an antiquated decision that took place before substantive due process.

CONCLUSION

The federal government enacted the Polio Vaccination Act built on an unconstitutional foundation. First, Congress exceeded its authority under Article I, Section 8, Clause 3 through the implementation of the PVA as it forces Americans to receive a vaccine, something that is neither an economy activity, nor a market. Second, the Polio Vaccination Act violates the Due Process Clause of the Fifth Amendment by encroaching on the fundamental right to medical choice and fails the strict scrutiny analysis. We therefore ask this Court to reverse the ruling of the Fourteenth Circuit and strike to Polio Vaccine Act as unconstitutional.

Respectfully Submitted,

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