August 6, 2021

IN THE SUPREME COURT OF THE UNITED STATES

No. 2021-2022

William DeNolf, Petitioner

v.

The United States of America, Respondent

On Writ of Certiorari to the Court of Appeals for the Fourteenth Circuit.

ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

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 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?

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

No. 01-76320

WILLIAM DENOLF, Plaintiff-Appellant

v.

THE UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the United States District Court for the Central District of Olympus

Before CHARLES GRAHAM, III, KELSEY HALL, and AMBER JOHN Circuit Judges.

OPINION

CHARLES GRAHAM, III, Circuit Judge:

I

Order

In this appeal, the United States of America must defend against charges that it has exceeded its power to regulate interstate commerce and that it has violated Appellant's rights to liberty and privacy protected by the Due Process Clause of the Fifth Amendment. Our jurisdiction rests on 28 U.S.C. § 1291. We review all questions of law *de novo.* Appellant sought a preliminary injunction enjoining the United States from enforcing the Polio Vaccination Act (PVA) against him or imposing the fine thereunder. The United States moved to dismiss Appellant's suit. After a hearing, United States Federal District Court Judge D.R. Fair denied Appellant's request and dismissed the case. Appellant appealed. All parties have stipulated to the following facts. There are no questions of material facts nor are there any procedural questions implicated by this case. We now examine the issues in turn. For the reasons below, we affirm the judgment of the District Court.

II

Overview of the Facts

A

In 2021, while in the midst of recovering from the COVID-19 global pandemic that killed millions of people worldwide and afflicted over 31.6 million people in the United States, President

Joseph Biden commissioned a bipartisan, Blue-Ribbon Panel to study and make suggestions for the development of "a comprehensive national plan that would enable the country to better identify and prepare for potential future pandemics." This Panel included thirteen members: seven experts in the field of infectious diseases and six politicians (three Democrats and three Republicans). The panel was co-chaired by two of the nation's most renowned public health experts, Drs. Bobbi Bronner and Chester Comerford. The Panel issued a report, the Bronner-Comerford Report, which the President submitted to Congress. Congress adopted many of the recommendations included in the Report. Among these recommendations was the creation of a Pandemic Preparedness Czar and an authorization that the President, with the consent of Congress, could order compulsory vaccinations if the President determined that the risk of a pandemic exists and that the loss of life and the damage to the economy is significant. The Department of Health and Human Services (DHHS) was instructed to stockpile vaccines for highly infectious diseases that do not mutate, such as polio and measles.

By June of 2021, the United States economy was a few months into a recovery that came on the heels of the COVID-19 Recession. In 2020, the national unemployment rate reached 10% for the first time since October 2009. In 2020 alone, COVID-19 infected more than 9% of the United States (31.6 million), killing 570,500, or about .172% of its population. Worldwide, there were an estimated 100 million cases and 2.5 million deaths. Many of the survivors continue to suffer from a combination of long-term side effects, including fatigue, cough, muscle pain, headaches, loss of smell or taste, organ damage, blood clots, and mental illness. The net impact of COVID-19 on the economy and on the health of Americans was catastrophic, and the costs associated with the health care of those afflicted with these long-term effects is significant.

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. These countries also had sports teams that compete in the United States.

The last reported case of polio transmission in the United States occurred in 1979.[1] The Centers for Disease Control and Prevention (CDC) reports that "the United States has been polio-free since 1979."[2] Polio, which has a $R0$[3] of 5 to 7, is one of the most infectious diseases in existence.[4] (See Appendix I). Preventive measures, such as vaccines and quarantines, can effectively reduce the number of persons who are susceptible to exposure.

The Centers for Disease Control and Prevention (CDC) reports that 72% who contract the poliovirus are asymptomatic, which means they will show no signs of contracting or carrying polio. 25% will have flu-like symptoms for a few days. 3% will develop symptoms that include paresthesia, paralysis, or meningitis. Polio is highly contagious. The CDC reports that "[an]

[1] In 1993, several travelers entered the United States with polio, but there was no transmission of the disease.

[2] Global Immunization, *Polio Elimination in the United States*, Center for Disease Control and Prevention.

[3] R0 pronounced R naught, refers to the reproduction number of an infectious disease. The higher the number, the more intense the outbreak. A disease's R0 is situation-dependent. Factors that must be weighed include how infectious a disease is and how susceptible the host population is (this is affected by factors such as population density, diet, climate, socio-economics, and the population's exposure to diseases that may compromise immune systems).

[4] This means that every person with polio will potentially expose at least five to seven susceptible persons. This range will rise and fall depending on the susceptibility of the population.

infected person may spread the virus to others immediately before and up to 2 weeks after symptoms appear." What is more, because the majority are asymptomatic, at least 72% of those infected may be interacting with others without knowing they are contagious.

There are two forms of polio: paralytic polio and non-paralytic polio. Both can be fatal. Fatality is most often associated with loss of the ability to use the muscles that are required to eat, drink, or breathe. Others die from contracting meningitis.

The majority of persons (66%) afflicted with paralytic polio are left with some permanent weakness in their arms and/or legs. 34% do not suffer permanent affects. Less extreme outcomes associated with paralytic polio include: the loss of muscle reflex, severe muscle spasms and pains, and loose, floppy or deformed limbs. Permanent damage to the brain and/or spinal cord occurs in about 1% of all cases. A more common outcome than death is suffering permanent weakness in the arms and/or legs. The mortality rate for paralytic polio is 5% to 10%.

Persons who suffer from non-paralytic polio frequently suffer flu-like symptoms that may last up to five days. The most extreme cases develop meningitis which can be fatal. The mortality rate for non-paralytic polio is about 2%.

Of adults who contracted polio as children, an estimated 25% to 40% will eventually suffer from post-polio syndrome (PPS). PPS is rarely fatal. However, its effects can be very serious. The CDC states that persons afflicted with PPS suffer from muscle pain and weakness and in some cases paralysis. PPS sufferers can suffer difficulty breathing, eating and drinking, and sleeping. Many will require assistance with daily functions as there is a reduced ability to live independent lives. PPS often results in pneumonia. The onset of PPS typically occurs 15 to 40 years after one's initial bout with polio.

On June 28, 2021, the President's Czar for Pandemic Preparedness, Dr. Geronimo Gusmano, informed President Biden that there was a great likelihood that persons with polio had or would soon travel to the United States. He also informed the President that because the polio virus does not mutate, DHHS had a sufficient stockpile of the polio vaccine on-hand to fully vaccinate the unvaccinated population.[5] That population is estimated to be about 32.8 million or 10% of the total population of the United States. The vaccine is good for a lifetime.

Polio vaccination of the entire civilian population has historically not been required by federal or state law in the United States. However, the overwhelming majority of the states require the vaccine in order to attend public school, and 90% of children aged 19-35 months have already received the polio vaccine.[6] That said, there are certain clusters in the United States with adults and children who are not vaccinated. These tend to occur in large cities or in rural areas. Many children in these clusters attend private or home schools. Polio is most commonly transmitted

[5] Recommendations on use of vaccine in the civilian population are made by the Advisory Committee on Immunization Practices (ACIP). The polio vaccine that ACIP recommends and, since 2000, the only polio vaccine administered in the United States is the Inactivated Poliovirus Vaccine (IPV). Two doses provide 90% immunity. Three doses provide about 99% immunity. ACIP recommends that for best protection one should receive four doses of IPV. Thus, to be fully vaccinated is to have received four vaccinations.

[6] National Center for Health Statistics, Centers for Disease Control and Prevention.

through food or water, the shared use of utensils, or through droplets of aerosols from the throat. A high percentage of these clusters are in close proximity to areas with rivers, lakes and ponds, and many of these population clusters have their own communal swimming pools. Unvaccinated adults are free to travel and work in the United States. Studies have found that a high percentage of unvaccinated adults are employed in the farming and food preparation industries.

Polio outbreaks can be devastating. The CDC website reports:

> In the late 1940s, polio outbreaks in the U.S. increased in frequency and size, disabling an average of more than 35,000 people each year. Parents were frightened to let their children go outside, especially in the summer when the virus seemed to peak. Travel and commerce between affected cities were sometimes restricted. Public health officials imposed quarantines (used to separate and restrict the movement of well people who may have been exposed to a contagious disease to see if they become ill) on homes and towns where polio cases were diagnosed.

On July 2, 2021, Jacqueline Renee, an advocate for vaccinations and the publisher of a pro-vaccine blog/website known as *Action Jackson*, and Dr. Samantha Beauchamp, a leading scholar in the field of infectious disease, testified before Congress about the effects of one particularly devastating polio outbreak that occurred in New York City in 1916. Officials estimated that the outbreak resulted in 27,000 cases and 6,000 deaths. A sizeable number of the survivors spent significant time in iron-lungs and a great many were weakened, if not paralyzed, for life.

On July 6, 2021, Congress enacted the Polio Vaccination Act (PVA). (Appendix II). The PVA authorized the President to order the vaccination of all persons in the United States. On July 7, 2021, President Biden announced that the risk of a polio pandemic and an economic emergency existed. He issued Executive Order 15,000, a polio vaccination order (Order) (Appendix III). Prior to this Order there was no federal requirement that civilians be vaccinated for polio. Such requirements, if they existed, had previously been left to the states and the District of Columbia. Under President Biden's Order, all persons identified in Section 4(a) of the PVA must be "fully vaccinated" or be subject to a $500 fine under Section 4 (e). All costs of implementing the mandatory vaccinations are to be incurred by the United States Government. The President's Order requires each individual to receive four vaccinations. The PVA exempts "persons whose health would be put at risk if vaccinated for polio." It also includes a religious exemption.[7] All persons receiving vaccinations will be provided with a card that will be stamped by authorized medical personnel as proof of vaccination.

B

William DeNolf is self-employed and works out of his home. He lives alone and has no children. DeNolf has never been vaccinated for polio. This is largely because he attended private school (K-12) in a state that did not require that students enrolled in private schools be vaccinated.

DeNolf is not a shut-in and he does not deny that he engages in intrastate, and to a lesser degree interstate, commerce as a consumer (e.g., he orders goods/food to his home and has people

[7] All but five states have such an exemption. The five, California, New York, Mississippi, West Virginia, and Maine, represent 19.62% of the population of the United States as of 2021.

come to his home to mow his lawn, fix appliances, and tend to his sprinkler system). Since COVID, he has arranged for all groceries and restaurant meals as well as his clothing and gift purchases to be delivered. A pescatarian, DeNolf grows or catches much of his own food. He uses the same fishing rod and reel his father gave him when he was 16, and he fishes with bait he harvests from the fish he catches or worms he unearths. DeNolf fishes almost exclusively from the shore of a river that runs through land he owns. He has the line delivered to him through Amazon. The tackle he inherited from his father, who owned a fishing and tackle store. He also swims in the river.

DeNolf does freelance statistical analysis for fantasy baseball publications. He does not travel out of state for his job, and he uses a computer that he built himself. If he has to watch any baseball games, he streams them on his computer. DeNolf uses Zoom for work meetings. He does pay for internet and cable from a national provider, and he pays his taxes and bills electronically. He uses a local credit union with a drive through and the drive through at his local post office.

Deeply concerned about the environment, DeNolf uses organic cleaning supplies that he makes himself. He tries to buy local products to reduce his carbon footprint. Moreover, DeNolf owns an electric car and charges it at his home. Although his car was built in Olympus where DeNolf lives, several of its component parts were manufactured outside his home state and shipped there. DeNolf does his own repairs with parts from either a local junk yard or a local auto parts store owned by an old friend, Andrea Sommerville. The District Court found that Sommerville dropped off parts to DeNolf on his front steps. None of the parts were terribly expensive (e.g., a new side mirror), and DeNolf acquired them from Sommerville as part of a friendly arrangement under which DeNolf gave Sommerville fantasy baseball tips and advice in exchange for the parts he needed. DeNolf's car does not use oil or gas. The electricity for his car, as well as his home, is generated and provided entirely by an in-state utility.

DeNolf 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. He does not claim to have any medical or religious reason for refusing the vaccine. DeNolf argues that Congress exceeded its authority under the Commerce Clause and that mandatory vaccination violates his rights under the Fifth Amendment's Due Process Clause.

The District Court found for the United States and DeNolf appealed in a timely fashion.

III

A

The Commerce Clause of the United States Constitution (the "Commerce Clause") gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Here, we consider whether Congress exceeded this authority when it enacted the PVA, authorizing the President to order compulsory polio vaccinations.[8] Determining

[8] Appellant argues that Congress lacked the authority to enact the PVA. Appellant does not assert that the President's vaccination Order was inconsistent with the PVA. Nor does he challenge the notion that Congress has a general power to delegate authorities to the President. The United States does not argue the President has authority to issue the vaccination Order outside the authority Congress delegated in the PVA. Accordingly, those issues are not preserved for appeal and are not before us.

whether Congress has exceeded its power to regulate interstate commerce is hardly a new endeavor. Indeed, reporters are full of case law addressing challenges to congressional efforts to regulate interstate and intrastate commerce. Most Commerce Clause opinions address whether a specific activity or class of activities is sufficiently commercial or sufficiently connected to interstate commerce to fall within the jurisdiction of Congress. Never before has Congress sought to use its power to regulate commerce to require people to be vaccinated. The case before us is one of first impression, and it is impossible to overestimate the magnitude and importance of correctly deciding this issue. What we decide here will affect generations in untold ways.

1

The Supreme Court has consistently held that the congressional power to regulate interstate commerce is broad. A review of Court doctrine reveals that the dividing line between acceptable and impermissible uses of the commerce power is drawn at the point where the activity being regulated affects interstate commerce. *Perez v. United States*, 402 U.S. 146, 150 (1971). Congress has concluded that the number of persons not vaccinated for polio is of such profound national and economic importance that it warrants the legislation before us. Our task is not to pass judgment on the wisdom of the law. Rather, it is to examine the law's constitutionality in accordance with the Constitution and Court precedent. The standard for such an inquiry is to ask whether the Congress acted to achieve a legitimate objective, and whether it did so in a rational manner. *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 258 (1964). Applying this analysis to the law, we conclude that the law fits within the constitutional parameters of the commerce power. In *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the Court went so far as to hold that "even if [the individual's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Supreme Court "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 18 (2005); *see also Perez*, 402 U.S. at 150; *Wickard*, 317 U.S. at 128–29 (1942).

2

Our task is to determine if and when activities that indirectly affect interstate commerce have a sufficient effect to permit federal regulation. As this nation's recent experience with COVID-19 demonstrated, it is hard to argue that 30 million unvaccinated persons living in the United States would not be a threat to the economy and the physical and mental health of its people. Congress has the authority to forbid what is harmful to the nation's economy and overall health. *See, e.g.*, *Heart of Atlanta*, 379 U.S. at 258 (ruling that Congress can forbid racial discrimination in places of public accommodation because that practice threatened interstate commerce); *Wickard*, 317 U.S. at 111 (sustaining placing a limit on wheat grown on a farm for home consumption on the grounds that the over-harvesting would wreak a price support scheme and thus threaten interstate commerce); *Perez*, 402 U.S. at 146 (finding that Congress can forbid loan-sharking because it threatens interstate commerce); and *Raich*, 545 U.S. 1, 28 (affirming a congressional ban on the legal possession of marijuana for medicinal purposes because legalizing marijuana would undermine "the orderly enforcement" of a regulatory scheme). Consequently, the actions of the government in this case are more than appropriate.

B

Critics of decisions such as *Wickard* have warned that the assumption of an expansive view of congressional power to regulate commerce would forever alter the balance of federalism and destroy property rights. Such fears have been unfounded. A decision in favor of the government will not erode the balance of power in our federal system. In fact, it will do the opposite. It will ensure that Congress can regulate issues that are of profound economic importance to the nation. The political branches of the government have found that a compulsory vaccine for polio is warranted and that it has the authority under the Commerce Clause to authorize and order such vaccinations. They have the authority to make such judgments, and it is not for us to set aside such political determinations unless they are "irrational." *Heart of Atlanta*, 379 U.S. at 274.

The Court has held that:

> The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnaped. Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce.

Perez, 401 U.S. at 150 (citations omitted).

Proponents of a broad federal commerce power suffered setbacks in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). These opinions have tended to define the classes that can be regulated more narrowly than in the past. *Lopez* and *Morrison* struck down federal laws when the government was unable to show a direct and substantial effect on interstate commerce. The Court found that these cases involved criminal statutes that had nothing to do with commerce or any sort of economic enterprise, however broadly those terms were defined. More importantly for the immediate case, *Lopez* held that Congress cannot regulate as commerce non-economic activity that is not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561. The Court engaged in a similar analysis of the Affordable Health Care Act (AHCA) in *National Federation of Independent Business*, 567 U.S. at 548–58.

The immediate case is distinguishable because the policy in question is different. A national pandemic demands a national solution. The failure to act will both directly and indirectly effect interstate commerce. As such, the threat of a pandemic both requires and validates congressional regulation. Contrast the results in *Lopez*, *Morrison*, and *National Federation of Independent Business* with *Raich*. In *Raich*, the Court upheld federal regulations of marijuana and overturned state laws in the process, in part because these laws were part of a larger regulatory scheme. This was true even though there was no legal commercial market for the marijuana and even though the drug was never bought, sold, or moved across state lines. In essence, the Supreme Court held that Congress' authority to regulate interstate commerce was so broad as to include authority to prohibit entirely intrastate commerce in a particular market. Because the law in that case was a statute that directly regulated economic activity it fell on the permissible side of the

line. Today, we have a similar set of facts. The dissent contends that Congress has not regulated any commercial activity since decisions about whether or not to get vaccinated do not involve any commercial activity. This argument ignores the reality that the government confronts. As the COVID-19 pandemic showed, sick people get other people sick, and the economy suffers in turn. To argue otherwise is to deny science and history. The law in question is a rational response to a legitimate concern on the part of Congress that is within its purview to regulate. To have to revisit all the debates about masks and vaccines that marked 2020 and part of 2021 brings to mind the words of the poet laureate Bob Dylan:

> And here I sit so patiently
> Waiting to find out what price
> You have to pay to get out of
> Going through all of these things twice

IV

Appellant claims the President's Order under the PVA violates the Fifth Amendment's Due Process Clause by infringing on his fundamental right to "make life-shaping medical decisions and to preserve the integrity of his body." *Supra*, at 5. This argument is foreclosed by the Supreme Court's holding in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Even if it were not foreclosed by *Jacobson*, Appellant's claim fails.

A

In *Jacobson*, the Supreme Court held that Massachusetts' compulsory vaccination law did not violate the Fourteenth Amendment.[9] In so doing, the Court observed that

> [I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29. The Court opined that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty], whether in respect of his person or his property, regardless of the injury that may be done to others." *Id*. at 26.

The central thrust of *Jacobson* is that, though a mandatory vaccination program may interfere with an individual's will, individual liberty must sometimes be subordinated to protect the health and safety of all of society. The public's ability to guard itself against imminent danger does not always depend on an individual's willingness to participate. As the *Jacobson* Court noted, the liberty secured by the Due Process Clause secures a person's right to live and work where he chooses, and yet an individual may still be compelled against his will to "take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." *Id.* at 29.

[9] While the national government's power to address this issue is relevant to the first question presented, for purposes of our analysis of the Appellant's asserted *liberty* interest, we find it immaterial whether the government seeking to ensure public safety and allegedly infringing on individual liberty is the national or state government.

Appellant is being commanded to undergo a far less significant infringement on his liberty than being sent to war. If individuals can be commanded to die on behalf of their nation, then surely they can be commanded to accept a vaccine in protection of the nation's public health.

In attempting to explain away *Jacobson*, the dissent suggests that *Jacobson* has been somehow implicitly overruled in the intervening years since its announcement. To be sure, the modern understanding of substantive due process and the individual liberties it protects arose after *Jacobson* was decided. But *Jacobson* has never been overruled. As such, despite Appellant's suggestion that we break with *Jacobson*, we are powerless to do so. *Jacobson* is binding precedent. Moreover, the Supreme Court's identification of individual liberties since *Jacobson* has done nothing to erode its force. The right to liberty and privacy underlying the cases the dissent cites do not conflict with *Jacobson*, which is focused on the necessary imposition on some modicum of individual liberty when necessitated by a serious public health concern. Under our system of precedent and stare decisis, it is the Court's decision—not ours—whether to overrule *Jacobson.*

B

Even if *Jacobson* did not foreclose Appellant's substantive due process and privacy claims, such claims would fail. The Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit certain government infringements on liberty.[10] Certain fundamental rights may be protected even if not explicitly identified in the Constitution. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint."). However, the Supreme Court has cautioned against the expansion of the substantive due process doctrine expansion. *Id.* at 720. In *Glucksberg*, the Court established the two elements of the substantive due process analysis:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

Id. at 720-21 (citations omitted). Bearing that test in mind, we consider Appellant's substantive due process claim. We believe it helpful to begin this consideration with the second element mentioned in *Glucksberg*—the description of the asserted fundamental right—before determining whether the right is deeply rooted in this nation's history and traditions and implicit in the concept of ordered liberty.

[10] We recognize that most precedent regarding fundamental liberties has been in the context of the *Fourteenth* Amendment's Due Process Clause. However, Fourteenth Amendment jurisprudence applies to Fifth Amendment Due Process claims without distinction. Neither party asserts that the due process issue in this case should be analyzed differently under the Fifth Amendment than it has been interpreted under the Fourteenth Amendment. *See, e.g.*, *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007).

Glucksberg instructs courts to adopt a narrow articulation of the interest at stake. *Id.* at 722 ("[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases."). It bears repeating that substantive due process requires a "careful description of the asserted fundamental liberty interest." *Id.* at 721 (quotation and citations omitted). Even in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), which is often cited for a more expansive conception of fundamental rights, the Court recognized a narrowly articulated fundamental right of adults to engage in consensual sexual activity, including homosexual sodomy, in the home without government intrusion. Here, Appellant asserts that he has a fundamental right to "make life-shaping medical decisions and to preserve the integrity of his body." As in *Glucksberg*, Appellant's articulation of the affected right is too broad. The right at issue here is the right to refuse vaccination when doing so risks one's own life and the lives of the general public.

The Due Process Clauses protect only those fundamental rights and liberties that are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks omitted). The right to risk one's own life and the lives of others is certainly not deeply rooted in this nation's history and traditions, nor is it implicit in the concept of *ordered* liberty. Even if we were to accept Appellant's articulation of the right at issue, his claim would fail under this prong of the *Glucksberg* analysis. Stated simply, a careful review of our nation's history demonstrates that there is *not* a right to refuse vaccinations at the risk of one's life and the lives of the public that rises to the level of being "deeply rooted in this Nation's history and tradition." As *Jacobson* makes clear, in the context of preventing communicable and dangerous disease, our history and tradition *allow* compulsory vaccination. While the right to refuse unwanted medical treatment generally might have some historical basis in our tradition, the right to refuse vaccination that ensures the safety of others does not.

The dissent mistakenly believes that *Obergefell v. Hodges*, 576 U.S. 644 (2015), fundamentally altered federal courts' substantive due process analysis. To be sure, *Obergefell*'s grandiloquent pronouncements regarding fundamental rights suggested broad scope. *See, e.g., id.* at 671–72 (rights can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era"); *id.* at 663 (constitutionally protected liberties "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."). But *Obergefell* essentially applied a previously identified and uncontroversial fundamental right–the right to marry–to a new context; it did not identify a new fundamental right. Moreover, *Obergefell* occurred in a context, in which, unlike in the immediate case, an equal protection challenge was entwined with the due process claim. This context was central to the outcome. *Id.* at 672. ("The Due Process Clause and the Equal Protection Clause [interrelate] in a profound way . . . . This interrelation of the two principles furthers our understanding of what freedom is and must become."). Additionally, in *Obergefell*, Petitioners did not ask the state to leave them alone, as Appellant is here, but rather asked the state to sanction their relationships—they sought a positive rather than a negative right.

The approach taken in *Glucksberg* to determine whether there was a fundamental right to physician-assisted suicide is the correct method here to determine whether there is a fundamental right to refuse to participate in a life-saving vaccination program. Under *Glucksberg*, Appellant has failed to establish a fundamental right that has been infringed by the PVA and the President's subsequent vaccination Order.

C

In the context of due process, when a law does not infringe on a "fundamental" right, rational basis review applies.[11] Thus, we ask only whether the law rationally relates to a legitimate government interest. *Glucksberg*, 521 U.S. at 728. The government interest here—preventing community spread of a devastating disease—is unquestionably legitimate. Moreover, imposing mandatory vaccination against the disease is unquestionably a rational way to accomplish the government's goal. In fact, even if Appellant could establish a fundamental right that was being infringed by the Order , which he cannot, the Order would clearly meet both prongs of strict scrutiny. Public safety in the form of eradicating a devastating illness is not only a legitimate government interest, it is a compelling interest; and requiring vaccination is narrowly tailored to accomplish that interest because it is the only way to accomplish that interest.

The President's vaccination Order does not violate a right to liberty or privacy guaranteed by the Fifth Amendment of the United States Constitution.

The order of the district court is AFFIRMED.

AMBER JOHN, Circuit Judge, dissenting:

I

The majority is correct that the congressional commerce power has been interpreted quite broadly over the years. However, this power has never been properly extended to what is neither interstate nor commerce. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (upholding a congressional mandate to purchase health insurance as within Congress's taxing power, but rejecting the argument that the mandate was within Congress' Commerce Clause authority because inactivity did not substantially affect interstate commerce); *Jones v. United States*, 529 US 848, 851 (2000) (finding that the efforts of the United States to punish arson of a private residence exceeded "the authority vested in Congress under the Commerce Clause"); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (ruling that Congress cannot punish domestic violence under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that Congress cannot ban firearms at public schools under the Commerce Clause).

The opinion this court tenders today—that an individual's decision to refuse vaccination either substantially affects interstate commerce or constitutes interstate commerce—is dangerous, deeply flawed, and inconsistent with the original and most recent understandings of the Commerce Clause. The power to regulate interstate commerce may be plenary. *See Gonzales v. Raich*, 545 U.S. 1, 28 (2005). But the power to decide what constitutes interstate commerce is not plenary. *See id.* at 35-36; *see also Lopez*, 514 U.S. at 564–67; *Morrison*, 529 at U.S. 617–18. Simply put, the decision not to be vaccinated, selfish or misguided as it may be, is a private and personal one beyond the reach of the state. If the act of doing nothing can be regulated under a clause intended to regulate commercial activity, then we have reached a point where regulation of commerce is truly a power without end, and distinctions between interstate and intrastate lose their meaning.

[11] Were we to find the Order infringed on a fundamental right, we would assess whether the Order passes strict scrutiny. *See, e.g., Glucksberg*, 521 U.S. at 766–67.

It is well settled that Congress may regulate three categories of activity pursuant to the commerce power. These categories were first summarized in *Perez v. United States*, 402 U.S. 146, 150 (1971), and have been repeatedly reaffirmed, *see Lopez* and *Morrison*. This standard holds that Congress may regulate (1) the "use and channels of interstate or foreign commerce," (2) the "protection of the instrumentalities of interstate commerce," or (3) activities that substantially affect, or substantially relate to, interstate commerce. *Perez*, 402 U.S. at 150. The requirement that one be vaccinated is neither a channel nor instrumentality of interstate commerce. Thus, if the PVA and the President's vaccination Order are to survive, vaccination must be justified as an activity substantially affecting commerce.

Before determining what substantial affects may exist, the key question to be answered is what activity is being regulated. This is where the logic of the majority falls apart. It is beyond dispute that the health care industry and the pharmaceutical industry engages in business that substantially affects interstate commerce. Congress can regulate the manufacture, sale, distribution, storage, delivery, and administration of vaccines. However, the law in question does not regulate anything in either industry. To the contrary, the PVA and the President's mandatory vaccination Order do not regulate or prohibit any economic activity. Nor do they regulate any economic activity associated with producing or administering vaccines. The only thing regulated is inactivity–namely *not* getting vaccinated. There simply is no way that the Framers, men who believed in the sanctity of individualism, private property, and limited government, would have intended for Congress to regulate inactivity of this nature under the guise of regulating commercial activity. To paraphrase an old expression, the Framers did not hide elephants in mouseholes.

To illustrate the proper limits on the power to regulate commerce, it is instructive to compare rulings which have upheld laws under the Commerce Clause with laws that have been struck down. Perhaps the two broadest interpretations of the commerce power came in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Raich*. In *Wickard*, Filburn, a commercial farmer in Ohio, had grown wheat beyond his allotment in violation of the Agricultural Adjustment Act. The Act was designed to create a stable price for wheat by regulating its supply and demand. Filburn argued that since the wheat was for his own personal consumption, it would never be bought, sold, or leave his farm, and could therefore not be considered interstate commerce. The Court disagreed, holding that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125. The Court held such because the class of activities being regulated, wheat production, taken in the aggregate, would have substantial effects, stating that because an individual's "own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127–28.

In *Raich*, the Court upheld the Controlled Substances Act against a challenge by two individuals who had grown marijuana for medical purposes. That this crop was never to be bought or sold was of no moment. The Court reached this conclusion because the class of activities being regulated (marijuana production), taken in the aggregate, could have had a substantial effect on the supply that would reach the illicit markets and thus could frustrate federal law enforcement efforts. *Raich* recognized many similarities with *Wickard*: like Filburn, the respondents in *Raich* were growing a product for home consumption where there was an established (albeit illegal) interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of

wheat] moving in interstate and foreign commerce in order to avoid surpluses," and consequently control the market price, *Wickard,* 317 at 115, the Controlled Substances Act was designed to control the supply and demand in both lawful and unlawful drug markets. In *Wickard,* the Court concluded that Congress had a rational basis for believing that, when viewed in the aggregate, excluding home consumed wheat from the federal regulatory scheme would have a substantial influence on price and market conditions. Similarly, *Raich* held that Congress had a rational basis for reaching that same conclusion as to home-grown marijuana.

While each case allows for a very expansive federal power, the instant case is distinguishable. Filburn and Raich were both willing and knowing members of the class being regulated. Each made a conscious choice to participate in their respective activities. Unlike Filburn and Raich's situations, the PVA and the President's mandatory vaccination Order do not affect any commercial activity by DeNolf. Instead, DeNolf has consciously chosen to refrain from engaging in the regulated activity. Forcing DeNolf to get vaccinated would only be analogous to *Wickard* and *Raich* if the government had punished Filburn for refusing to grow wheat or Raich for not cultivating marijuana. Either scenario would seem improbable on its face, much as is the current controversy. By finding that the authority to regulate interstate commerce includes the power to regulate not only voluntary activity that is commercial or even commercially related, but also inactivity that is intentionally designed to avoid entry into any market, the majority removes any obstacles to Congress's commerce power. If today's decision stands, Congress can mandate anything under the guise of regulating interstate commerce. As the Court held in *Lopez*:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

514 U.S. at 567–68 (citations omitted).

Contrasting *Wickard* and *Raich* with *Lopez*, *Morrison*, and *National Federation of Independent Business* is instructive. *Lopez* upheld a challenge to the Gun-Free School Zone Act. This was followed by *Morrison*, which upheld a challenge to the Violence Against Women Act. *National Federation of Independent Business* held that the individual mandate found in the Affordable Care Act was not supportable under the Commerce Clause. In each of these cases, the Court held that the law regulated activities that were beyond the reach of Congress. The Court ruled as much regardless of the effect these activities had on interstate commerce. To support the PVA, the federal government needs to establish that there is a nexus between the activity regulated and interstate commerce. *See Lopez,* 514 U.S. at 562. Such a nexus is not established—in small part because there is no commercial activity, *de minimus* or otherwise, implicated. However noble the purpose, the Appellee has failed to meet the burden set for it in *Lopez* and its progeny. Because the PVA does not reach any economic activity, this court cannot uphold this exercise of congressional power without admitting that the Commerce Clause has no limits.

II

A

The President's vaccination Order is a naked assault on the liberty and privacy protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. "The Due Process Clause guarantees more than fair process, and the `liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Due Process Clauses protect against two forms of government action. First, "substantive due process" prevents the government from engaging in conduct that "shocks the conscience" or interferes with "fundamental rights." Second, when government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner, a requirement has traditionally been referred to as "procedural due process."

"Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992). Indeed, the Supreme Court has a long history of recognizing unenumerated fundamental rights as protected by substantive due process.[12] As *Casey* reminds us:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

Id. at 849.

How courts determine whether rights are fundamental and deserve special protection has evolved. The various opinions announced in *Griswold* exemplified a variety of approaches; *Casey* confirmed a somewhat different method in the context of abortion rights; *Glucksberg* adopted yet another mechanism for determining whether a right is fundamental in the context of an asserted right to physician-assisted suicide; and, recently, in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court reverted to an older approach for assessing whether the Due Process Clause protected a right to marry that included same-sex couples. The Court has described the rights involved in keeping the government from infringing on bodily integrity and similar personal decisions regarding what one does with one's body as implicating a right to privacy, a right to liberty, a right to dignity, and a right to autonomy. No matter how described, the Due Process Clause of the Fifth Amendment guarantees a right to be free from governmental intrusion of the sort the PVA imposes.

[12] *See, e.g.*, *Casey*, 505 U.S. 833 (to have an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (to use contraception and to marital privacy); *Rochin v. California*, 342 U.S. 165 (1952) (to bodily integrity).

The majority relies heavily on the approach the Court employed in *Glucksberg* to determine whether a fundamental right was infringed. But the narrow *Glucksberg* approach did not survive *Obergefell*, and thus *Obergefell*, not *Glucksberg*, is the appropriate lens through which to evaluate Appellant's claim. *See Obergefell*, 576 U.S. at 702 (Roberts, C.J., dissenting) ("It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process.").

In *Obergefell*, the Court employed a far broader method of determining whether government action infringed on a fundamental right than the approach employed in *Glucksberg*. Indeed, the Court rejected any mechanical or formulaic approach. Instead, the Court returned to a prior conception of courts exercising "reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Id.* at 664 (majority opinion). Ultimately, the *Obergefell* Court's analysis unlocked both prongs of the *Glucksberg* test.

While the majority here adopts the *Glucksberg* approach of "carefully describing" the right, *Obergefell* noted that in some instances, the right should be described in a more "comprehensive sense." *Id.* at 671. *Obergefell* specifically rejected articulating rights only at their most specific level of abstraction. Appellant's claim of a right to make life-altering medical decisions and protect the integrity of his body is within the broader boundaries that *Obergefell* established.

Moreover, *Obergefell* recognized a broader understanding of how to determine whether an asserted right is fundamental. While accepting that tradition and history are "guides," the Court recognized they are not dispositive, noting that "rights come not from ancient sources alone," but also rise "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." *Id*. at 671–72; *see also Lawrence v. Texas*, 539 U.S. 558, 579 (2003) ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."). Indeed, the right to shield one's body from state interference and control has arrived from just such a better-informed understanding of liberty, as *Casey*, *Griswold*, and *Rochin* recognized. As articulated in *Casey* and reiterated in *Lawrence*:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Lawrence, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). The right to live in accordance with one's chosen understanding of physical and mental well-being, and in so doing refuse unwanted medical treatment, falls within "the right to define one's own concept of existence." *Id.*

In *Obergefell*, the Court examined the *principles* underlying why a previously identified right (marriage) was fundamental and applied those principles to the newly asserted right (the right to same-sex marriage). 576 U.S. at 665–70. Here, the principles underlying the Court's previous identification of fundamental rights similarly point toward a fundamental right to liberty and privacy that includes the right to determine what happens to one's body. Privacy, and the liberty

to do with and to one's body as one chooses, underlay the fundamental rights identified in much of the substantive due process jurisprudence. *See, e.g.*, *Casey*, 505 U.S. at 915 (right to bodily integrity and freedom to decide matters of the highest privacy and most personal nature) (Stevens, J., concurring in part and dissenting in part); *Griswold*, 381 U.S. at 481–86 (right to use contraception in context of marital relationship and marital privacy); *Rochin*, 342 U.S. at 166–74 (right to not have one's stomach forcibly pumped for purposes of retrieving evidence therefrom). The principles underlying these cases align with Appellant's claim to a right to bodily integrity in the context of refusing a vaccine he does not want, in much the same way that, in *Obergefell*, the principles underlying why the right to marriage was fundamental demonstrated that the right should include same-sex couples. Moreover, Appellant's right is analogous to other fundamental rights that "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 576 U.S. at 663.

Even if we were to apply the *Glucksberg* test as the majority purports to do, the right to refuse unwanted medical treatment is *consistent* with this nation's history and tradition. Indeed, our history and tradition is that forced medical treatment constitutes *battery*. *Glucksberg*, 521 U.S. at 725; *see also Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990). What is more, in *Cruzan* the Court noted that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Cruzan*, 497 U.S. at 278. *Cruzan* included *Jacobson* among those cases. *Id.*

The Supreme Court's substantive due process jurisprudence, especially interpreted through the lens of *Obergefell*, clearly establishes a fundamental right to control what one puts into one's own body, to refuse medical treatment, and to make decisions consistent with one's understanding of existence. Under the *Obergefell* analysis, we must determine if the government has a "sufficient justification" for infringing on the individual interest. 576 U.S. at 671. In light of the comparatively lower risk of pandemic posed by the presence of polio in a nation that is already largely vaccinated against the disease and has been "polio-free since 1979," *supra*, at 3, the government has failed to demonstrate a sufficient justification for imposing a nationwide vaccination mandate.

If we were to apply the *Glucksberg*-era "strict scrutiny" standard to this infringement of a fundamental right, the PVA is still unconstitutional. While public safety may rise to the level of a compelling interest in some circumstances, in the current situation it is not clear that public safety is at risk. Even if we were to accept that public safety is a compelling government interest in this instance, a nationwide vaccine requirement—imposed despite the reality that the government has declared the United States to be "polio-free," imposed without regard to local conditions, and imposed without regard to individual circumstances—cannot be considered "narrowly tailored."

B

The majority relies primarily on *Jacobson* as a bar to Appellant's due process claim. This reliance is misplaced. While the Supreme Court has not expressly overruled *Jacobson*, its substantive due process jurisprudence in the nearly 120 years since *Jacobson* has greatly lessened its force. To illustrate the archaic nature of *Jacobson*, we need only remember that in the same era as *Jacobson*, the Court determined that involuntary sterilization of intellectually disabled individuals was consistent with the Fourteenth Amendment. *Buck v. Bell*, 274 U.S. 200 (1927). Indeed, *Buck*, in allowing government participation in involuntary eugenics, explicitly relied on

Jacobson. The perils of applying *Jacobson* too broadly was demonstrated by Justice Holmes' conclusion that forced sterilization of the "feeble minded" was constitutional because "society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v Massachusetts* [citation omitted]. Three generations of imbeciles are enough." *Id.* at 207. In *Buck,* the state imposed upon individual liberty by physically invading the body, supposedly for the good of society. We have since come to understand the immorality and injustice of that sentiment. What is more, *Jacobson* pre-dates the development of strict scrutiny. Were *Jacobson* to be applied today, it would face strict scrutiny."

The post-*Jacobson* Supreme Court has repeatedly found that the right to control one's own body is protected by the Due Process Clause. *See Cruzan*, 497 U.S. at 278–79. As the Court noted in *Glucksberg*, it has assumed, without deciding, that competent adults have a constitutionally protected right to refuse medical treatment, including life-sustaining medical treatment. *Glucksberg*, 521 U.S. at 724–25 ("[T]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." (quoting *Cruzan*, 497 U.S. at 278)). The *Jacobson* Court applied rational basis review to the vaccination law in question because the Court's individual liberty jurisprudence had yet to take hold at the time *Jacobson* was decided. *Jacobson* is an anachronism; the ensuing century of recognition of individual liberties–especially the recognition in *Griswold* of a general right "'to be left alone'"–has eroded *Jacobson*'s foundation as an absolute justification for involuntary, government-mandated immunization programs. *Griswold,* 381 U.S. at 494.

Jacobson would be decided differently if it arose before the Court today. And even if *Jacobson* still applies, it does not lead to the result claimed by the majority. As the *Jacobson* majority itself recognized, the government's police powers must be based on the "necessity of the case." *Jacobson,* 197 U.S. at 28. Nor can such power be exercised in an "arbitrary, unreasonable manner" or extend "beyond what was reasonably required for the safety of the public." *Id.,* at 28. In the present case, the government has imposed a new nationwide mandatory vaccine where no need exists. The President's Order is not based on reason, but rather flies in the face of it. The national mandate is imposed despite the government's own declaration that "the United States has been polio-free since 1979." *Supra,* at 3. Additionally, it is imposed nationwide, irrespective of local conditions. And it is imposed in apparent disregard of the facts that over 90% of children aged 19-35 months already receive the polio vaccine, that the nation's vaccination program has been going on for decades, and that the vast majority of states already require polio vaccinations for students to be admitted to public schools. *Id.* The government acts not based on "necessity," but goes far beyond that which is required. This is not the same situation that the United States recently faced when attempting to vaccinate sufficient persons against COVID-19 to achieve "herd immunity" and slow the spread of the disease. In 2020, *zero percent* of the population had been immunized against that disease, thus exposing the population to mass contagion and death. Here, a large percentage of the population has already been immunized.

DeNolf and thousands—perhaps millions—of Americans like him pose little threat to others. Imposing a mandatory vaccine on a competent adult who wishes to refuse it violates the concept of individual liberty in a way that is both simple and profound.

C

The majority accuses me of ignoring binding precedent, but it is the majority that does so in this case. As a lower court, we of course may not overturn Supreme Court precedent; that responsibility is left to the Court itself. Moreover, neither *Jacobson* nor *Glucksberg* has been explicitly overruled. But the majority's rigid adherence to cases that have been eroded, if not implicitly overruled, by subsequent precedent ignores the more recent binding precedent. *Jacobson* and *Glucksberg* do not have the force the majority suggests.

Because the Government has failed to sufficiently justify the intrusion on Appellant's liberty, privacy, dignity, and autonomy, the PVA and the President's vaccination Order violate the Fifth Amendment of the United States Constitution.

I respectfully dissent.

Appendix I

Infectious Diseases and Reproduction Numbers (R0)

Disease	***Reproduction number R0***
Ebola, 2014	1.51 to 2.53
H1N1 Influenza, 2009	1.46 to 1.48
Seasonal Influenza	0.9 to 2.1
Measles	12 to 18
MERS	around 1
Polio	5 to 7
SARS	<1 to 2.75
Smallpox	5 to 7
SARS-CoV-2 (causes COVID-19)	1.5 to 3.5

Source: University of Michigan School of Public Health

Appendix II

Polio Vaccination Act (PVA) of 2021

(1) PURPOSE: An Act to protect the people of the United States and its economy from the effects of a polio outbreak.

(2) Definitions

(a) As used in this chapter—

(i) For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(ii) For purposes of this section, to "affect" commerce refers to anyone who engages in activities not limited to those that influence commerce as defined in this section.

(iii) To "move" in interstate commerce refers to anyone or anything that travels across state borders.

(iv) R0 refers to the reproduction number of an infectious disease. The higher the number the more intense the infectious disease outbreak.

(v) Fully vaccinated means to receive the number of doses recommended by the Advisory Committee on Immunization Practices (ACIP).

(vi) A pandemic refers to when the infectious disease in question has an R0 of greater than 3 to 5, and reliable government estimates predict that without a compulsory vaccination there would be at least 25,000 deaths nationwide annually.

(vii) An economic emergency refers to when reliable government estimates predict that without a compulsory vaccination, the Gross Domestic Product (GDP) would drop by at least 1% or the unemployment rate would be expected to rise by more than 10%.

(3) FINDINGS – Congress makes the following findings:

(a) IN GENERAL – The power vested in the Congress to regulate interstate commerce is plenary. This power includes the power to take action to protect the channels and instrumentalities of interstate commerce as well as activities substantially affecting commerce. This extends to matters including but not limited to the manufacture, sale, and shipping of goods and services.

(b) EFFECTS OF HIGHLY INFECTIOUS DISEASES – A pandemic can do serious, if not irreparable damage to the nation's economy, including interstate commerce, and to the mental and physical health of the people of the United States.

(c) INFECTIOUS RATE OF POLIO – Polio is among the most infectious diseases known to mankind. It has a R0 of 5 to 7.

(d) EFFECTIVENESS OF VACCINATION FOR POLIO – The vaccine for polio is safe and one of the most effective of all vaccines.

(e) EFFECTS ON THE NATIONAL ECONOMY AND INTERSTATE COMMERCE – The decision to be vaccinated for a highly infectious disease substantially affects interstate commerce.

(4) ACTION

(a) If the President shall determine that the risk of a pandemic exists and that the loss of life and the damage to the economy is significant, the President is authorized 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.

(b) Persons whose health would be put at risk if vaccinated for polio shall be exempt from any order pursuant to this Act to undergo mandatory vaccination. Persons who can prove that they have already been fully vaccinated against polio shall be exempt.

(c) Persons who have religious objections to vaccinations shall be exempt from any order pursuant to this Act to undergo mandatory vaccination.

(d) Newborn infants whose parents object to the procedure on grounds that the procedure conflicts with the religious tenets and practices of the parents shall be exempt from any order pursuant to this Act. To make an objection under this subsection, the parents must sign a statement attesting that the procedure conflicts with the religious tenets and practices of the parents.

(e) Any individual who fails to be fully vaccinated against polio in accordance with an order by the President pursuant to this Act shall be fined $500 except those identified in Subsections 4 (b), (c), or (d).

(f) The United States shall provide proof of vaccination to persons when they are vaccinated.

(g) The United States shall pay all costs associated with procurement, distribution, and administration of any vaccines required by any order pursuant to this Act. Funds shall be appropriated by separate legislation.

(5) This law shall go into effect on July 6, 2021.

Appendix III

Executive Order 15,000, "Polio Vaccination," 85 Fed. Reg. (July 7, 2021)

In accordance with the Polio Vaccination Act of 2021, Section (4)(a), I, JOSEPH R. BIDEN, JR., President of the United States of America, determine that the risk of a polio pandemic exists and that the risks of loss of life and damage to the economy are significant.

By the authority vested in me by Section (4)(a) of the Polio Vaccination Act, I hereby order:

Section 1. All 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, as defined by Section 2(v) of the Polio Vaccination Act. Persons identified in Sections (4)(b), 4(c), or 4(d) of the Polio Vaccination Act are exempt from this order

Section 2. In accordance with Section 4(e) of the Polio Vaccination Act, any individual who fails to be fully vaccinated in accordance with Section 1 of this order shall be fined $500.

Section 3. In accordance with Section 4(f) of the Polio Vaccination Act, the United States shall provide proof of vaccination to persons when they are vaccinated.

Section 4. In accordance with Section 4(g) of the Polio Vaccination Act, the United States shall pay all costs associated with procurement, distribution, and administration of any vaccines required by this order.

This order shall be implemented consistent with applicable law.

Issue 1 Cases:

Wickard v. Filburn, 317 U.S. 111 (1942) Wickard v. Filburn :: 317 U.S. 111 (1942) :: Justia US Supreme Court Center

Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964) Heart of Atlanta Motel, Inc. v. United States :: 379 U.S. 241 (1964) :: Justia US Supreme Court Center

Perez v. United States, 402 U.S. 146 (1971) Perez v. United States :: 402 U.S. 146 (1971) :: Justia US Supreme Court Center

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Jacobson v Massachusetts, 197 U.S. 11 (1905) Jacobson v. Massachusetts :: 197 U.S. 11 (1905) :: Justia US Supreme Court Center

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