

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-12729

NORWEGIAN CRUISE LINE HOLDINGS LTD,
a Bermuda Company,
NCL (BAHAMAS), LTD.,
a Bermuda Company agent of Norwegian Cruise Line,
SEVEN SEAS CRUISES S. DE R.L. LLC,
d.b.a. Regent Seven Seas Cruises,
OCEANIA CRUISES S. DE R.L.,
d.b.a. Oceania Cruises,

Plaintiffs-Appellees,

versus

STATE SURGEON GENERAL,
Florida Department of Health, in his official capacity,

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Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cv-22492-KMW

Before WILLIAM PRYOR, Chief Judge, ROSENBAUM, and BRASHER,
Circuit Judges.

WILLIAM PRYOR, Chief Judge:

This appeal concerns whether a Florida statute that prohibits all businesses operating in the state from requiring customers to provide documentary proof that they are vaccinated against COVID-19 violates the Free Speech and Commerce Clauses of the Constitution. Norwegian Cruise Line Holdings Ltd., a corporation headquartered in Florida, operates cruise ships that travel around the world. Norwegian requires everyone on board its ships to be vaccinated against COVID-19. To enforce that policy, Norwegian requires its customers to provide proof of vaccination. Florida sought to protect its residents from that kind of discrimination by enacting a statute that prohibits businesses from “requir[ing] patrons or customers to provide any documentation certifying COVID-19 vaccination or postinfection recovery to gain access to, entry upon, or service from the business operations in [Florida].”

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FLA. STAT. ANN. § 381.00316(1). Norwegian sued Florida's Surgeon General and moved for a preliminary injunction. The district court entered a preliminary injunction on the grounds that the statute likely violates Norwegian's right to speak freely, *see* U.S. CONST. amends. I, XIV, and likely unduly burdens interstate commerce, *see* U.S. CONST. art. I, § 8, cl. 3.

We vacate the preliminary injunction. Florida's statute is a regulation of economic conduct that only incidentally burdens speech, which does not implicate the First Amendment. And its burdens on interstate commerce do not exceed the benefits of furthering Florida's substantial interests in protecting its residents from discrimination and invasions of privacy.

I. BACKGROUND

After March 2020, the COVID-19 pandemic took a substantial toll on the cruise industry. Although some cruise lines voluntarily suspended operations, not all did. *See* 85 FED. REG. 16628, 16631 (Mar. 24, 2020). As a result, the federal government published a No Sail Order and generally prohibited cruise-ship operations. *Id.* For more than a year, Norwegian's "entire 28-vessel fleet was docked and inactive" because of the pandemic. And the halt of operations in that time allegedly cost Norwegian more than \$6 billion.

Later that year, the Centers for Disease Control and Prevention published another order that "establishe[d] a framework for a phased approach to resuming cruise ship passenger operations in

U.S. waters.” 85 FED. REG. 70153, 70153 (Nov. 4, 2020). The conditional sailing order included the “[e]stablishment of laboratory testing of crew onboard cruise ships in U.S. waters”; “simulated voyages designed to test a cruise ship operators’ ability to mitigate COVID-19 onboard cruise ships”; “a certification process”; and “a return to passenger voyages in a manner that mitigates the risk of COVID-19 introduction, transmission, or spread among passengers and crew onboard ships and ashore to communities.” *Id.* And the order “contain[ed] requirements for . . . [s]horeside COVID-19 laboratory screening testing of all crew”; “onboard diagnostic testing capabilities for symptomatic travelers”; “shoreside COVID-19 laboratory screening testing of all newly embarking crew”; and “continued compliance with complete, accurate, and acknowledged, No Sail Order Response Plans.” *Id.*

In April 2021, the Centers sent a letter to “Cruise Industry Colleagues.” The letter included updates for fully vaccinated passengers and crew. “In lieu of conducting a simulated voyage” as announced in the phased approach, cruise ship operators could “submit to [the Centers] a clear and specific vaccination plan and timeline to limit cruise ship sailings to 95 percent of passengers who have been verified by the cruise ship operator as fully vaccinated prior to sailing.”

The State of Florida sued the Centers and moved for a preliminary injunction on the ground that the conditional sailing order and the later instructions were unlawful. *See Florida v. Becerra*, 544 F. Supp. 3d 1241, 1246–47 (M.D. Fla. 2021). The district court

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preliminarily enjoined the Centers “from enforcing against a cruise ship arriving in, within, or departing from a port in Florida the conditional sailing order and the later measures.” *Id.* at 1305. The Centers appealed to this Court and requested a stay of the injunction. After we first granted that request, we *sua sponte* vacated our initial order and denied the Centers’ request for a stay. *See Florida v. Sec’y, Dep’t of Health & Hum. Servs.*, No. 21-12243 (11th Cir. July 23, 2021). This year, the Centers moved to voluntarily dismiss the appeal and we granted that motion. So, the conditional sailing order and later instructions are now non-binding guidelines, but all cruise lines operating in Florida have voluntarily complied.

Norwegian planned to resume sailing from Florida for the first time “aboard the *Norwegian Gem*.” On July 9, 2021, the Centers approved Norwegian’s application for a conditional sailing certificate. Norwegian “attested to [the Centers] . . . that at least 95% of passengers and 95% of its crew on its upcoming cruise will be confirmed as fully vaccinated prior to sailing.” (Internal quotation marks omitted.) When Norwegian submitted its attestation, it “planned—and continues to plan—to ‘confirm[]’ passengers’ and the crews’ COVID-19 vaccination status through documentation, which [it] understand[s] to be the only reliable way of confirming vaccination status in this context.”

Florida acted to discourage and prohibit businesses from requiring vaccination documents as a condition of service. Governor Ron DeSantis issued an executive order declaring that “[b]usinesses in Florida are prohibited from requiring patrons or customers to

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