UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA,

Plaintiff,

v. Case No. 8:21-cv-839-SDM-AAS

BECERRA, *et al.*,

Defendants.

FLORIDA'S REPLY IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION[1]

I. FLORIDA DID NOT UNREASONABLY DELAY IN PURSUING PRELIMINARY INJUNCTIVE RELIEF.

Less than a month after unilaterally shutting down the nation's multi-billion-dollar cruise industry, the CDC promised cruising would resume if cruise operators completed a list of measures. Doc. 1-5 at 7. Several complied, Doc. 1-7 at 11, but the CDC broke its promise, *id.* at 17. The Conditional Sailing Order that Florida challenges made a second such promise. Doc 1-3 at 22. But by refusing to provide the necessary guidance and by making compliance otherwise impossible, the CDC again broke its promise, and seven months later the cruise industry remains locked down.

[1] Because the Court already held oral argument on Florida's motion, this Reply endeavors not to repeat points the parties have already covered in detail.

Defendants now argue that Florida delayed in seeking preliminary injunctive relief and that Florida's motion should be denied solely for that reason. Doc. 31 at 18. Defendants are wrong. Delay, alone, is not a basis for denying preliminary injunctive relief. Rather, the delay must be "unexplained." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016).[2] Florida's behavior is not only explainable, but reasonable.

First, Florida took the CDC at its word. Believing the federal government is neither inexplicable nor unreasonable. Surely Defendants agree—certainly they do not want to live in a world where parties cannot take seriously representations from the federal government but must file suit to test the government's veracity.

Second, once the available facts showed that the cruise industry would not reopen, Florida moved quickly. The CDC finally issued technical instructions on April 2, 2021. Doc. 25-13; Doc. 25-14. The industry widely condemned this guidance as unworkable, Doc. 25-9 at 2; Doc. 25-10 at 6; Doc. 25-28 at 3, and Florida sued six days later. Doc. 1. Florida then moved for preliminary injunctive relief 14 days after filing suit. Doc. 9.

In short, Florida behaved reasonably and sought to protect its rights the moment it became clear the CDC was not reopening cruise lines. The party

[2] *Accord Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 244–45 (D.D.C. 2014); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019).

guilty of unexplained delay is the CDC, and Florida should not be faulted for failing to predict that delay.

II. THE MAY 5 GUIDANCE DOES NOT MATERIALLY ALTER THE ANALYSIS.

After sitting by for months while Florida lost millions and its citizens suffered, the CDC finally issued what it claims is the necessary guidance to resume sailing. It conveniently issued this guidance on *the day its brief was due*. And it now says its "goal" is "the prospective resumption of passenger operations in the United States by mid-summer."[3] The relevant analysis remains unchanged: (1) the Conditional Sailing Order was invalid when entered; (2) the Court should rightly be skeptical of the CDC's "goal" for a "midsummer" reopening; and (3) an injunction would, at a minimum, allow more ships to sail more quickly, which is all Florida need show to establish redressability.

1. Courts evaluate agency action when the agency took the action. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *see also* Doc. 31 at 33, 41 n.27. That rule "instills confidence that the reasons given are not simply convenient litigating position[s]" and avoids "forcing both litigants and courts to chase a moving target." *Regents*, 140 S. Ct. at 1909. Thus, later developments, which do not purport to modify the Conditional Sailing Order,

[3] https://www.cdc.gov/media/releases/2021/s0505-conditional-sailing-order.html.

do not alter the fundamental question. And for the reasons discussed below, including that the Order functioned as a lockdown for months, the Order is ultra vires. This is made clearer by Defendants' concession at the hearing that *they knew* the Order would function as a lockdown for at least several months. Doc. 47 at 61:13–23; 65:18–67:16.

2. The CDC's conduct in this case does not inspire confidence. It has twice promised the industry it could reopen and has twice reneged. Only the threat of this Court's remedial power has appeared to spur the CDC to action, as shown by the supposed path to sailing that the CDC identified only hours before its brief was due. Denying Florida an injunction would only encourage the CDC to continue this behavior.

And Florida is not alone in its skepticism. Commenting one day after the May 5 website updates, one cruise industry CEO explained that he "seriously doubt[ed]" cruise ships would be sailing from the United States in July, and that August sailing was even "in jeopardy" because the CDC's May 5 actions provided "anything but a clear path to restarting."[4] And even when considering those actions, some cruise lines have been forced to cancel July cruises.[5] Others like Carnival are still negotiating with the CDC because "[c]hildren under 12

[4] https://www.cnbc.com/2021/05/06/norwegian-cruise-ceo-says-us-ships-are-unlikely-to-sail-this-summer.html.

[5] https://insidethemagic.net/2021/05/disney-cancels-more-cruises-ks1/.

are a big part of the cruise experience . . . in the summer" and "as it stands right now, [they] wouldn't be able to have kids under 12 on board"[6] if they skip the onerous—and potentially never-ending—Phase "2B" test voyages.

Florida's cruise industry and its supporting businesses need certainty so they can make ready to resume sailing, which is no small endeavor. Because the CDC keeps moving the goalposts, only this Court can provide that certainty.

3. Even if the CDC is correct that some cruise ships will be sailing by midsummer, Florida is still entitled to an injunction. An injunction need only mitigate Florida's harm. *Massachusetts v. EPA*, 549 U.S. 497, 524–525 (2007).

The industry for months has been "ask[ing]" the CDC to "restart cruising" and "lift" the Conditional Sailing Order. Doc. 25-10 at 5; *see also* Doc. 25-9 (reiterating call to lift Order in April). As the CDC admits, "[c]ruise lines have advocated for a *faster* re-opening, or lifting of the CSO." Doc. 31 at 11 (emphasis added). That is because the Order imposes many onerous requirements that are preventing the industry from returning to cruising on its preferred timeframe. With the Order and its illegal requirements enjoined, it is beyond "likely" and "predictable" that cruise lines will "react," *Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019), by setting sail sooner and more

[6] https://www.nbcnews.com/business/travel/carnival-cruise-line-active-discussions-cdc-return-sailing-july-n1267707.

completely than if the Court allows the illegal Conditional Sailing Order to continue.

For one, the CDC admits that after almost seven months, 20% of cruise lines remain stuck in *Phase 1*. Doc. 31-1 ¶ 49. That timeline does not bode well for the CDC's "goal" of a "midsummer" restart. Neither do the many other hoops through which the Order requires the cruise industry to jump, and that's putting aside the delays caused in the first instance by deciphering what exactly the many technical instructions require.

Even after making it out of Phase 1, cruise ships must negotiate agreements with ports and state and local health authorities under Phase "2A." The CDC's technical instructions require that these agreements consider over 50 components. Doc. 25-13.

But even if the cruise industry can negotiate these by "midsummer," it must conduct the Phase "2B" simulated voyages to the satisfaction of the CDC. Those are subject to exhausting requirements, Doc. 31-4, and the CDC reserves the right to make each ship "engage in additional simulated voyages." Doc. 1-3 at 27.

Of course, the CDC now says its technical instructions allow a way around the Phase "2B" test sailings if cruise lines vaccinate 98% of their employees and accept only 5% of unvaccinated customers. Doc. 31-4 at 13. But the CDC's attempt to impose vaccine requirements only underscores the

breadth of its overreach. Further, the CDC admits that "there is reason to doubt that many cruise ship operators will be able to fully vaccinate crew," Doc. 31-1 ¶ 61, and that some cruise lines are not interested in this option, *id.* ¶ 59. As Carnival's President recently told NBC News: "There's no mandate for any other business to have that requirement."[7]

Even if the cruise industry can overcome all these obstacles, Phase 3 requires applying for a Conditional Sailing Certificate. Ships cannot do that, though, until their operators swear under 18 U.S.C. § 1001—which authorizes five-year imprisonment—that they have complied with the Conditional Sailing Order, including the constantly updating and ever-shifting technical instructions. Doc. 1-3 at 21, 28, 29. The CDC—acting like each port's public-health harbormaster—then retains full discretion to grant or deny a sailing certificate based on "public health considerations," Doc. 1-3 at 36, and to "limit [the certificate's] terms or conditions." Doc. 1-3 at 30.

Finally, even if cruise ships reach Phase 4, they still may only conduct "restricted passenger voyages" under sailing certificates, Doc. 1-3 at 32–34—which are subject to now unknown CDC-imposed conditions.

The CDC's allowing the cruise industry to sail by "midsummer" under the Conditional Sailing Order is, at best, purely aspirational. Ships will be

[7] https://www.nbcnews.com/business/travel/carnival-cruise-line-active-discussions-cdc-return-sailing-july-n1267707.

sailing more quickly and in greater numbers with the Order enjoined than without.

III. FLORIDA IS LIKELY TO SUCCEED ON THE MERITS.

a. The CDC exceeded its statutory authority.

This Court should reject the CDC's attempt to ground its authority under the first sentence of Section 264(a). As multiple courts have recognized, the first sentence is narrowed and informed by the second sentence. *See, e.g.*, *Tiger Lily, LLC v. HUD*, 992 F.3d 518 (6th Cir. 2021); *Ala. Ass'n of Realtors v. HHS*, --- F.3d ---, 2021 WL 1779282 (D.D.C. May 5, 2021).

Moreover, Defendants' reading raises inescapable nondelegation problems that this Court should avoid. *See, e.g.*, *U.S. Telecom Indus. Union Dep't v. API*, 448 U.S. 607, 646 (1980) (plurality op.). Although Congress "may confer substantial discretion on executive agencies to implement and enforce the laws," Congress must still "suppl[y] an intelligible principle to guide the delegee's use of discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). And delegations of great economic significance require even clearer guidance. *See Whitman v. Am. Trucking*, 531 U.S. 457, 475 (2001).

Defendants identify no "intelligible principle." They say, instead, that the CDC's limitless § 264(a) authority would be subject to judicial review—specifically APA arbitrary and capricious review. Doc. 47 at 83:9–85:5; 86:15–87:15. Putting aside Defendants' attempts to avoid that review here, Doc. 31

at 13–22, this argument conflates an intelligible principle with the APA's distinct limits on agency action. Put differently, if APA review alone were enough to create an intelligible principle, there would be no need for a non-delegation doctrine—at least until Congress repeals the APA.

But even if this court adopts the minority reading, Defendants still lose because the first sentence authorizes only two things: the "mak[ing] and enforc[ing] [of] *regulations*." 42 U.S.C. § 264(a) (emphasis added). The Order purports to do neither. It is not an enforcement action; it imposes new requirements rather than enforcing existing ones. And Defendants' position is that the Order is not a regulation. Doc. 31 at 40. They, therefore, must travel under the second sentence.

The second sentence does not authorize the CDC's actions either. Granting the CDC the power to inspect, disinfect, and fumigate is nothing like shutting down the cruise industry, nor is it like, for example, requiring cruise ships to engage in week-long experimental voyages on their own dime to test out the CDC's arbitrary "technical instructions." Doc. 31-4. The contrast between the statute and the CDC's Order is even stronger for requiring cruise lines to vaccinate their employees and to refuse service to unvaccinated customers. Doc. 31-4 at 13. So, too, for forcing the cruise lines to execute contracts with local ports—not to mention conscripting Florida's health authorities to carry out the Conditional Sailing Order's illegal regime. Doc. 25-

13. The Conditional Sailing Order exceeds § 264(a) at every corner.

b. The CDC exceeded its regulatory authority.

The CDC's authority under 42 CFR §§ 71.31(b), 71.32(b), and 70.2 is even weaker than under § 264(a). Defendants stress that the Conditional Sailing Order is simply a "condition of obtaining controlled free pratique." Doc. 31 at 24. A controlled free pratique under § 71.31(b), though, has nothing to do with conditions on departing—only *arriving*. And CDC's insistence that the Conditional Sailing Order has nothing to do with "detention" is perplexing. Doc. 31 at 30. Controlled free pratique and detention are inseparable concepts.[8] CDC's insistence on this point underscores the problems with forcing the Conditional Sailing Order under a "controlled free pratique."

Moreover, any conditions on controlled free pratique for arriving ships are limited to "measures outlined" in Part 71. 42 CFR § 71.31(b). Those measures contemplate almost every scenario the CDC could encounter for inspecting and disinfecting arriving ships. But nowhere is there the authority to shut down the industry or require things like test sailings, employee vaccinations, or agreements with ports and state health authorities. That

[8] Under the original Part 71, all arriving ships were subject to detention. 21 Fed. Reg. 9805, 9871, 9873. After passing inspection, they were given "pratique" and no longer detained. *Id.* And once receiving pratique, if they agreed to visit only certain ports, they could bypass the mandatory detention. *Id.* Current Part 71 gives the CDC two options. It can detain *arriving* ships to prevent disease or it can issue a controlled free pratique stipulating what measures *arriving* ships must meet ahead of time to avoid that detention. 42 CFR § 71.31(b).

makes sense because § 264 also does not allow measures like that.

Section 70.2 fares even worse for Defendants' case. That regulation prevents the CDC from taking any action until CDC first determines that the measures taken by States, "including political subdivisions" like ports, are insufficient. The Conditional Sailing Order made a global, blanket determination that in October 2020 *every* State and *every* political subdivision within them lacked sufficient measures to prevent the spread of COVID-19. Doc. 1-3 at 19. According to the Order, that was because "[c]ruise ships by their very nature travel interstate and internationally." *Id.* The Order never addressed what measures any given State or political subdivision had undertaken to combat the virus and why those were insufficient as of October 2020. That Defendants had specific examples like Port Everglades's efforts in front of them when they made the decision only makes the Order's conclusory, global assertion even more deficient. *See* Doc. 31-2 at 20.

Defendants try to explain this away by saying that entities like Port Everglades and Florida Port's Council were asking the CDC "to impose protocols" back in September 2020. Doc. 47 at 92:15–24, 152:13–153:13. But when these commenters asked the CDC for guidelines, the CDC already had shut down the cruise industry for six months. The ports were desperate for sailing to begin again. So they asked the CDC to release guidelines "*to resume sailings* from U.S. ports," Doc. 31-2 at 20 (emphasis added), because the cruise

industry "remain[ed] the only industry that ha[d] not been permitted to operate under any guidelines," Doc. 31-2 at 13. Little did these commenters know that the CDC would issue "guidelines" not to "resume sailings" but to continue to lock down the industry.

c. The Order is arbitrary and capricious.

"[A] court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015). The Trefiletti Declaration, Doc. 31-1, thus is an "impermissible post hoc rationalization[]" to which this Court should give zero weight because the declaration's "reasons [are] nowhere to be found in the [Order]." *Regents*, 140 S. Ct. at 1908–09. Because Defendants have not produced an administrative record, the Court is limited to the inadequate reasons provided in the Order itself. Doc. 25 at 14–17.

Moreover, even if the Court considers the Trefiletti Declaration, it still fails to explain away things like the CDC's continuing the cruise-industry lockdown despite concluding that the benefits of opening weighed against continuing the lockdown, expressly basing the Order on no vaccines despite knowing they would be arriving within a few months of the Order, and expressly relying on stale data from March 2020. Doc. 25 at 14–17.

d. No good cause existed in October 2020.

The Conditional Sailing Order is a legislative rule because it creates new legal duties. *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009). Legislative rules generally have no legal force without going through notice and comment. *Chrysler Corp. v. Brown,* 441 U.S. 281, 313 (1979). Defendants argue that the CDC had good cause to forgo notice and comment. Doc. 31 at 40 (citing 5 U.S.C. § 553(b)(B)). It did not.

Defendants have not shown that notice and comment was "impractical," "unnecessary," or "contrary to the public interest." 5 U.S.C. § 553(b)(B). The Order relies on the "emergency" of COVID-19, Doc. 1-3 at 19, but it is hard to imagine what emergency the Conditional Sailing Order sought to avoid. The cruise industry was *already locked down*, and the Order purported to provide a path to reopening. If the CDC's conduct in this case shows one thing, it is that the CDC has never viewed reopening the cruise industry as urgent, much less an emergency.[9] Further, an emergency rule should "remedy" the emergency. *See Mack Trucks, Inc. v. EPA.*, 682 F.3d 87, 93 (D.C. Cir. 2012). Even assuming the CDC viewed ending the lockdown as the emergency, the Order did not remedy that emergency.

[9] To the extent Defendants offered additional rationales in their briefing or at the hearing, the Court need not consider them because "the grounds justifying the agency's use of the exception should be incorporated within the published rule." *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

In any event, Defendants have not met their "heavy" burden to establish good cause. *United States v. Cain*, 583 F.3d 408, 420–21 (6th Cir. 2009).[10] Courts apply a "meticulous and demanding" standard when agencies assert good cause. *N.J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980). The exception is "to be narrowly construed and only reluctantly countenanced." *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001). Courts also owe the agency's good-cause determination "no particular deference," *Mack Trucks*, 682 F.3d at 93, because "an agency has no interpretative authority over the APA," *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

And even if an emergency justifying good cause existed in October 2020, "[c]ommon sense suggests" that avoiding notice and comment should be "temporary." *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981). It has now been *14* months since the first No Sail Order shutting down the industry and almost seven months since the Conditional Sailing Order. That is "a substantial amount of time within which to prepare regulations, the promulgation of which [the CDC] knew was both necessary and forthcoming in the near future." *Id.* Throughout this case, the CDC has not represented that it will *ever* conduct notice and comment.

[10] *See also N. Am. Coal Corp. v. Dir., Off. of Workers' Comp. Programs*, 854 F.2d 386, 389 (10th Cir. 1988); *United States v. Gavrilovic*, 551 F.2d 1099, 1105–06 (8th Cir. 1977).

IV. THE ORDER IS IRREPARABLY HARMING FLORIDA.

The Eleventh Circuit has "readily conclude[d]" that Florida has standing when agency action "may" adversely impact Florida's economy. *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1130 (11th Cir. 2005). Defendants admit that the Conditional Sailing Order adversely impacts Florida's economy. Doc. 47 at 74:14–20. They therefore cannot get around *Alabama*.

In any event, all three of Florida's injuries are more specific than general harm to Florida's economy and establish standing: unemployment expenses, *Chiles v. Thornburgh,* 865 F.2d 1197, 1209 (11th Cir. 1989);[11] direct tax losses, *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110–11 (1979); and the ports' accumulating lost revenue, *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1290–91 (11th Cir. 2017). Further, while Florida believes its declarations are sufficient, it offered significant additional evidence of those injuries.[12]

The same injuries are also irreparably harming Florida. To begin, and contrary to Defendants' assertion, Doc. 31 at 19–20, the Eleventh Circuit does

[11] *See also Air All. Hous. v. EPA*, 906 F.3d 1049, 1059–60 (D.C. Cir. 2018).

[12] *See* Doc. 25-20 at 44 (showing Port Everglades generated $33 million in state taxes and $29.4 million in local taxes in 2019); Doc. 25-22 at 10 (showing JAXPORT generated $1.6 million in state taxes and $1.5 million in local taxes in 2019); Doc. 25-24 at 27 (showing Port Canaveral generated $74.2 million in state and local taxes in 2019); Doc. 25-21 at 26 (showing PortMiami generated $182 million in state and local taxes in 2017); Doc. 25-23 at 36 (showing Port Tampa Bay generated $9.6 million in state and local taxes in 2015).

not require an additional "substantiality" test for irreparable harm. Instead, "the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Const., Inc. v. Sec'y, Fla. Dept. of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013).[13] But even if substantiality were required, Florida satisfies it given its tens, if not hundreds, of millions of dollars in financial losses, which are growing by the day.

Defendants argue that Florida must show a likelihood of future harm, not merely past harm. Florida agrees. But Defendants conflate a doctrinal point with an evidentiary point. While, doctrinally, Florida cannot merely rely on past harm, it does not follow that evidence of past harm is irrelevant. Rather, evidence of the harm the CDC's actions *have caused* Florida is strong proof of the harm the CDC's actions *will continue to cause* Florida unless ordered to change course.

For example, before the CDC's lockdown, Florida was paying around $400,000 to $500,000 annually in unemployment benefits to separated cruise-industry employees, Doc. 25-19 ¶ 3. Since the lockdown, Florida has paid $20 million in unemployment benefits to separated cruise-industry employees—*40*

[13] *See also Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (same); *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388 (3d Cir. 2012) (same); *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 599–600 (6th Cir. 2014) (same); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (same); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) (same).

times the pre-lockdown annual amount. *Id.* Naturally, Florida will continue suffering those harms until the Order is lifted or enjoined. Since the future has not happened yet, it is difficult to imagine what clearer evidence Defendants are looking for.

The same is true of Florida's other injuries. Before the CDC locked down the cruise industry, the industry was generating hundreds of millions of dollars in state and local taxes, *supra* n.12; Doc. 25-25 ¶¶ 3–5, and Florida's ports were generating hundreds of millions of dollars in revenue, Doc. 25-26 ¶¶ 3–8. Florida will keep losing out on these taxes and revenues until the Court enjoins the Conditional Sailing Order.

V. THE EQUITIES FAVOR AN INJUNCTION.

All indications are that the cruise industry will go above and beyond to sail safely. It already is. Over 400,000 passengers have sailed on cruise ships since July 2020 with lower rates of COVID-19 than on land. *See* Doc. 25-9; Doc. 25-10. In Europe specifically, "CLIA ocean-going cruise line members have carried out 270 cruise itineraries on 21 cruise ships since the onset of the pandemic," carrying 154,000 passengers and reporting only 43 total cases of COVID-19. Doc. 25-29 at 13. And many of these voyages in Europe and elsewhere occurred before vaccines were widely available and the pandemic started to subside. Doc. 25-29 at 13; Doc. 31-1 ¶ 80.

Defendants point to a single "outbreak"—other than examples of a

handful of people getting COVID, which are not examples of outbreaks, but of good protocols *preventing outbreaks*—on an ocean-going cruise ship. Doc. 31-1 ¶ 80. But the CEO of that cruise line publicly apologized for failing to follow protocols.[14]

The Conditional Sailing Order also notes that its new requirements are "in addition to other requirements in regulations or actions taken by HHS/CDC to prevent the introduction, transmission, and spread of communicable diseases under 42 U.S.C. § 264 and 42 CFR part 70 and 42 CFR part 71." Doc. 1-3 at 20. Enjoining the Conditional Sailing Order would leave these pre-existing regulations and actions intact. And even with the Order enjoined, the CDC could publish non-binding guidance for the cruise industry, just like the CDC has done for many other industries like hotels, casinos, and sporting events. *E.g.*, Doc. 25-4 (hotels); Doc. 25-5 (casinos); Doc. 25-6 (sporting events).

But even those recommendations would be unnecessary because the cruise industry "ha[s] worked together to develop layers of protection" from COVID-19. Doc. 25-10 at 7. Industry members have formed the Healthy Sail Panel chaired by former FDA Commissioner Dr. Scott Gottlieb and former HHS Secretary Michael O. Leavitt. Doc. 1-3 at 13. After four months of collaboration between experts in public health, infectious disease, biosecurity,

[14] https://www.travelpulse.com/news/cruise/hurtigruten-ceo-apologizes-for-weakness-in-covid-19-protocols.html.

epidemiology, hospitality, and maritime operations, the Panel created a list of 74 recommendations on topics including, among other things, testing, denying boarding, personal protective equipment, physical distancing, sanitation and ventilation measures, contact tracing, isolation, and quarantine.[15]

The Cruise Line International Association also told the CDC in September 2020 that it was establishing mandatory COVID-19 protocols for all members that included things like testing, masks, physical distancing, ventilation, and improved medical and public health measures.[16] Its members have now begun sailing in other parts of the world "with strict protocols in place" that are "working as designed—to mitigate the risk of COVID 19."[17]

Cruise lines also have taken steps to "inform practical, adaptable and science-based solutions for mitigating and living with COVID-19" and "to review policy initiatives, technical innovations, or operational measures related to COVID-19." Doc. 1-3 at 14. All these efforts make sense because cruise lines "have a business reason" to get it right.[18]

So, too, do the ports. They thus are making every effort to provide the

[15] https://www.regulations.gov/comment/CDC-2020-0087-11038.

[16] https://www.regulations.gov/comment/CDC-2020-0087-9921.

[17] https://cruising.org/-/media/research-updates/research/2021-state-of-the-cruise-industry_optimized.ashx.

[18] https://video.foxbusiness.com/v/6248641046001#sp=show-clips.

maritime community with vaccines. The State of Florida has worked with Port Canaveral to establish an on-site COVID-19 vaccination center at the Port where anyone over the age of 16—including crew members of cargo and cruise vessels—can receive a vaccine (including the Johnson & Johnson single-shot dose).[19] Port Tampa Bay, PortMiami, and JAXPORT have similar programs.[20]

While Defendants focus on "outbreaks" the size of a single household, they ignore the 159,000 Floridians they put out of work, which the CDC recognizes "adversely affects" health, "is a major source of psychological stress," and "is associated with greater incidence of suicide."[21] That the federal government violated the law in separating these hard-working Floridians from their jobs adds insult to injury. It is always in the public interest to force the federal government to follow the law. *Cent. United Life, Inc. v. Burwell*, 128 F. Supp. 3d 321, 330 (D.D.C. 2015). This Court should do just that.

* * *

For all these reasons, the Court should grant Florida's motion.

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[19] https://www.portcanaveral.com/About/Recent-News/Port-Canaveral-and-State-of-Florida-Establish-an-O.

[20] https://www.porttb.com/posts?id=B767D1B7-2E36-429F-AADE-16E3A30D12C5; https://www.miamidade.gov/releases/2021-05-10-mayor-portmiami.asp; https://www.jaxport.com/jaxport-hosting-new-covid-19-vaccine-clinic-for-port-workers-and-the-public/.

[21] https://blogs.cdc.gov/niosh-science-blog/2020/06/22/economic-security-covid-19/.

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May 19, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 2021, a true and correct copy of the foregoing was filed with the Court's CM/ECF system, which provides notice to all parties.

/s/ *Jason H. Hilborn*
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