No. 21-12243

In the United States Court of Appeals for the Eleventh Circuit

STATE OF FLORIDA,

Plaintiff-Appellee,

v.

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellants.

RESPONSE TO APPELLANTS' MOTION FOR STAY PENDING APPEAL AND ADMINISTRATIVE STAY

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO. 8:21-CV-00839-SDM-AAS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee certifies that the following is a complete list of interested persons:

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3. American Society of Travel Advisors
4. Becerra, Xavier
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35. U.S. Centers for Disease Control and Prevention

36. U.S. Department of Health and Human Services

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38. Wenger, Edward

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40. Young, Marc

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Despite the significant progress the United States has made in combatting the spread of COVID-19, the CDC continues to stand by its March 2020 decision to single out and shut down the multi-billion-dollar cruise industry, halting an important sector of Florida's economy and threatening more than 159,000 Florida jobs. After the CDC, at long last, in April 2021 issued guidance for the ships to sail again, Florida sued to give the industry a chance of operating during the summer 2021 cruise season. The district court entered a 124-page order granting Florida a preliminary injunction, rejecting the CDC's "breathtaking, unprecedented, and acutely and singularly authoritarian" assertion of regulatory power. Dkt. 91, at 73. That order is fortified by the Supreme Court's recent decision in a related case signaling that the Court likely disagrees with the CDC's broad reading of its authority.

The CDC now seeks a stay pending appeal of the district court's ruling, remarkably without setting forth the demanding standard established by the Supreme Court for obtaining that extraordinary remedy. The CDC also designates its motion as "time sensitive" and asks the Court to issue an administrative stay pending its consideration of the motion—though the CDC did not bring this motion until almost three weeks after the district court itself stayed its injunction for 30 days as part of its ruling.

There is no basis for granting any kind of a stay pending appeal,[1] which would require the applicant to make: (1) "a strong showing that he is likely to succeed on the merits"; demonstrate (2) "irreparabl[e] injur[y] absent a stay"; show (3) that a stay will not "substantially injure the other parties interested in the proceeding"; and establish (4) that the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 427, 434 (2009).

The district court's decision is correct. The relevant statute authorizes the CDC to establish "regulations" that may be enforced through measures similar to traditional quarantine measures like "inspection, fumigation, [and] sanitation." 42 U.S.C. § 264(a). As the district court held, it does not authorize the CDC to shut down the entire cruise industry—an extraordinary assertion of power that would require "clear and specific congressional authorization." *Ala. Ass'n of Realtors v. HHS*, No. 20A169, 594 U.S. ---, 2021 WL 2667610 (June 29, 2021) (Kavanaugh, J., concurring in stay denial). And the equities overwhelmingly favor allowing the cruise industry to enjoy its first summer season in two years while this Court sorts out the CDC's contentions on appeal—putting the cruise industry on the same footing as the many other sectors of the economy that are returning to normal this summer. The motion should be denied.

[1] An administrative stay should be denied for the additional reason that the district court's stay does not expire until July 18, 2021. Dkt. 91, at 123.

STATEMENT

In March 2020, the CDC issued a "No Sail Order" which ordered cruise lines to stop sailing given the COVID-19 pandemic. Dkt. 1-4. The agency renewed the Order in April, July, and September. Dkt. 1-5; Dkt. 1-6; Dkt. 1-7. In October, the CDC admitted that the "benefits of" opening "outweigh the costs of not allowing cruise ships to sail," Dkt. 1-3, at 16, and issued its "Conditional Sailing Order." To sail again, a cruise ship is required to complete four phases to the CDC's satisfaction: (1) creation of onboard laboratories (2) self-funded test voyages (3) "a certification process," and (4) a restricted return to sailing. *Id.*[2] These requirements apply until November 2021. *Id.* at 41.

After almost six months, the industry was still stuck in *phase one* of the four-phase process. Dkt. 25, at 17. Meanwhile, cruises based in Europe and Asia were back in full swing, with "[n]early 400,000 passengers" having sailed with "a far lower incident rate than on land." Dkt. 25-9, at 3. Six months after issuing the Conditional Sailing Order, in April 2021, the CDC finally issued some—but not all—of its guidance for returning to sailing. The cruise industry condemned that guidance as "unduly burdensome," "largely unworkable," and "reflect[ing] a zero-

[2] The CDC's motion makes much of vaccine requirements. But the Conditional Sailing Order says nothing about vaccine requirements. The CDC offered 95% vaccinated cruises as an optional alternative to the four-phase process—via guidance—after Florida filed suit. Dkt. 31-4, at 12–13; Dkt. 31, at 11 (admitting released guidance on May 5).

risk objective rather than the mitigation approach" taken with the rest of society. Dkt. 91, at 8. Florida promptly sued and sought preliminary injunctive relief to mitigate the millions of dollars of losses it was suffering from lost taxes, lost revenue to its ports (which are political subdivisions of the State), and unemployment expenditures paid to former cruise-industry employees. Dkts. 1, 24. Hours before its response brief was due in the district court, the CDC issued another round of guidance, arguing in its responsive brief that "cruise ship operators now have all the necessary instructions . . . [to] begin restricted passenger voyages." Dkt. 31, at 11.[3]

On June 18, the district court granted Florida's motion for preliminary injunction. Dkt. 91. It held that the Conditional Sailing Order (1) exceeded the CDC's statutory authority, *id.* at 26–65; (2) was a rule subject to notice and comment, *id.* at 89–93, 100–111; (3) was arbitrary and capricious because it imposed vague, evolving requirements on the industry, *id.* at 96; and (4) was arbitrary and capricious because it violated its own regulations by "neither evaluat[ing] nor even mention[ing] measures undertaken or planned by the local health authorities of any state," *id.* at 97–100. Finally, as a fifth ground for its holding, the district court reasoned that the CDC's broad interpretation of Section 264—which the court

[3] Those "instructions," it turns out, are ever-changing website updates that, if violated, carry criminal penalties. Dkt. 1-3, at 20 (citing 18 U.S.C. § 3559 and 42 C.F.R. §§ 70.18, 71.2).

rejected—would violate the non-delegation doctrine. *Id.* at 68–89.

The court, however, stayed its order for 30 days, until July 18, and invited the CDC to propose an alternative injunction that would keep in place measures supported by scientific data and consistent with the CDC's authority. *Id.* at 123. The CDC declined to do so. Instead, it appealed almost three weeks after the district court's ruling (four days after its deadline to propose a narrower injunction), and brought this "time-sensitive" motion seeking a stay pending appeal (and seeking an administrative stay pending this Court's consideration of the motion).

ARGUMENT

A stay pending appeal is an "extraordinary remedy," *Belcher v. Birmingham Tr. Nat. Bank*, 395 F.2d 685, 685 (5th Cir. 1968), which "intru[des] into the ordinary processes of administration and judicial review" and thus "is not a matter of right." *Nken*, 556 U.S. at 427, 433–34. The applicant bears the burden on all four factors: (1) "a strong showing that he is likely to succeed on the merits"; (2) "irreparabl[e] injur[y] absent a stay"; (3) that a stay will not "substantially injure the other parties interested in the proceeding"; and (4) that the public interest favors a stay. *Id.* at 434.

I. THE CDC UNREASONABLY DELAYED SEEKING A STAY.

This Court should "apply a strong presumption against the grant of a stay" given the CDC's unexplained delay. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (quotation omitted). Applicants' "delay[ing] in filing their petition and seeking a stay vitiates much of the force" of their request, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers), and "may be grounds for denial," *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.,* 503 U.S. 653, 654 (1992) (per curiam).

Here, the district court stayed its order for 30 days to give the CDC the chance to propose a narrower injunction. The CDC offered no proposal, but instead delayed almost three weeks in seeking this extraordinary relief. The Court should deny the motion for that reason alone.

II. THE CDC IS NOT LIKELY TO SUCCEED ON THE MERITS.

A. The Order exceeds the CDC's statutory authority.

The district court correctly rejected the CDC's contentions that the Conditional Sailing Order is authorized by Section 264(a) and its implementing regulations.

1. Florida's reading of Section 264 is correct.

The first sentence of Section 264(a) authorizes the CDC to "make and enforce such regulations" as "necessary to prevent the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). The second sentence provides

examples of the measures that the statute authorizes, clarifying that the statute authorizes measures like "inspection, fumigation, [and] disinfection." *Id.*[4] The district court agreed with Florida that the second sentence of the statute reflects that the CDC's authority is limited to "measures" that "resemble or remain akin to" the ones expressly listed in the statute, Dkt. 91, at 47, following the lead of the Sixth Circuit and multiple federal district courts, *see Tiger Lily, LLC v. HUD*, 992 F.3d 518, 522–24 (6th Cir. 2021); *Ala. Ass'n of Realtors v. HHS*, --- F.3d ---, 2021 WL 1779282, at *5 (D.D.C. May 5, 2021); *Skyworks, Ltd. v. CDC*, --- F. Supp. 3d ---, 2021 WL 911720, at *9–10 (N.D. Ohio Mar. 10, 2021). This reading is reinforced by at least five additional considerations.

First, the unheralded power claimed by the CDC would require clear authorization from Congress, and the agency has identified none. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).[5] The CDC acknowledges that if the Conditional Sailing Order is a rule—which it is—it is a major rule under the

[4] As courts have recognized, applying the *ejusdem generis* and *noscitur a sociis* canons, the residual phrase "other measures" in § 264(a)'s second sentence is "controlled and defined by reference to the enumerated categories before it." *Tiger Lily*, 992 F.3d at 522–23; Dkt. 91, at 47. So "other measures" "must resemble or remain akin to" measures like "inspection, fumigation, disinfection, [and] sanitation" that Congress listed in Sections 264(a)'s second sentence. Dkt. 91, at 47.

[5] *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

Congressional Review Act, Dkt. 1-3, at 18, because it is likely to affect the economy by more than 100 million dollars, 5 U.S.C. § 804(2).

Second, reading the statute otherwise (to give the agency power to do anything it deems "necessary" for disease prevention) renders the second sentence (which refers to narrower, specified powers) superfluous. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (explaining statutes should be construed to avoid surplusage). The many other statutes that grant the agency specific powers would likewise be surplusage. *See, e.g.*, 42 U.S.C. § 264(b); *id.* § 265; *id.* § 266.

Third, such a reading would raise serious federalism and non-delegation concerns and should therefore be rejected in favor of the district court's reading. *See Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality op.). The only limits on its authority that the CDC identified below are the CDC's determination that something is "necessary" and the prospect of APA review. Dkt. 47, at 83:9–85:5; 86:15–87:15.

Fourth, the government's traditional authority to combat disease historically included measures like "inspection, sanitation, and isolation" that were "distinctly limited in time, scope, and subject matter." *See* Dkt. 91, at 26–38. The district court's reading of the statute aligns with that tradition. *Id.*

Finally, the Supreme Court recently signaled support for the district court's reading. In *Alabama Ass'n of Realtors*, 594 U.S. ---, 2021 WL 2667610 (June 29,

2021), four justices voted to vacate a stay premised on the same interpretation of Section 264(a) that the CDC asserts here. A fifth justice, Justice Kavanaugh, "agree[d]" that "the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium." *Id.* at *1. Justice Kavanaugh found it unnecessary to vacate the stay because the measure was set to expire "in only a few weeks." *Id.* Here, timing cuts the other way. The CDC's order will not expire until at least November 2021 and a stay would cause the industry (and accordingly, the State) to lose another entire summer of revenue.

2. The CDC exceeded its statutory authority.

The Conditional Sailing Order exceeds the CDC's statutory authority. Granting the CDC the power to inspect, disinfect, and fumigate is miles away from effectively shutting down a billion-dollar industry. The original No Sail Order expressly prohibited cruises from sailing.

Nor is the agency allowed to impose conditions so onerous that, like the Conditional Sailing Order, they operate as a prohibition in practice. The Order regulates every aspect of cruise-ship life in "excruciating" detail, Dkt. 91, at 61, including in many ways that set the business up for certain failure. For example, the Order requires ships to engage in week-long, "self-funded, expensive simulated voyages," *id.* at 61, to test out the CDC's "technical instructions," Dkt. 31-4. The only way to avoid that requirement is to refuse service to unvaccinated customers,

meaning that a family with children under the age of 12 cannot sail. Ships must also enforce "at least 6 feet" of distancing between passengers even in outdoor areas, including pools and spas. Dkt. 31-4, at 13, 20–21.

B. The Order exceeds the CDC's regulatory authority.

In its motion the CDC abandons most of the regulatory-power arguments it made below, relying almost exclusively on the notion that the Conditional Sailing Order is a "controlled free pratique" under 42 C.F.R. § 71.31(b). Mot. at 16–18. But the CDC's free pratique power authorizes it only to condition the admission of specific ships that may "arriv[e] at a U.S. port" on completion of "measures outlined in this part"—meaning Part 71. *See* § 71.31(a), (b). It does not authorize the CDC categorically to shut down an entire shipping industry. As the district court explained, Part 71 authorizes only the types of measures that Section 264(a) itself authorizes, like disinfecting cargo, § 71.42, or "disinfestation" of vermin, § 71.41. *See* Dkt. 91, at 60.

C. The Order is arbitrary and capricious.

The district court also correctly held that the CDC's order is arbitrary and capricious.

1. The Order violates the CDC's own regulations.

When an agency violates its own regulations, its actions are arbitrary and capricious. *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986). The CDC did

so here. Under 42 C.F.R. § 70.2, before trying actions like the ones here, the CDC must first determine that the measures taken by States and their "political subdivisions" (like ports) are insufficient. 42 C.F.R. § 70.2. The Conditional Sailing Order made only a blanket determination that every State and political subdivision lacked sufficient measures to prevent the spread of COVID-19. Dkt. 1-3, at 19; *see also* Dkt. 31-2, at 20 (in which Port Everglades, one of Florida's ports, informed the CDC of its measures).

According to the Order, that was because "[c]ruise ships by their very nature travel interstate and internationally." Dkt. 1-3, at 19. But virtually everyone and everything travels interstate and internationally. Such a reading would make the finding required by § 70.2 meaningless.

2. The Order imposes vague, shifting guidance carrying criminal penalties.

The CDC explicitly reserves the right to "enforce any of the provisions of the framework through additional orders . . . and [to] issue additional technical instruction as needed." Dkt. 1-3, at 21; *see also id.* at 23, 25, 35. As the district court ruled, by "[i]mposing on the cruise industry exhaustive, indeterminate, inconsistent, and unclear requirements (each of which threatens substantial penalty), the conditional sailing order likely is by definition capricious." Dkt. 91, at 96.

D. The Order unlawfully dispensed with notice and comment.

The district court also correctly concluded that the order unlawfully dispensed with notice and comment procedures. *First*, the Supreme Court has long held that substantive rules need to go through notice and comment. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). The government does not dispute that the CDC's action is substantive, but instead argues that the Order is "an 'order' rather than a 'rule.'" Mot. at 22.[6] But an APA rule is any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). The CDC cannot "avoid notice and comment simply by mislabeling [its] substantive pronouncements." *Azar*, 139 S. Ct. at 1812. The Order "creates new law, rights, or duties," *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009), and so is subject to notice and comment, *see* Dkt. 91, at 89–93, 100–111.

Second, the agency notes that its July 2020 call for information "served the same purpose as notice-and-comment rulemaking" and that "Florida has never explained" how another round of comment "would have affected the Conditional

[6] The CDC abandoned this argument in its stay papers below, Dkt. 96, at 16–17, and it is therefore waived. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (discussing waiver). This waiver dooms the requested relief. Without this argument, the CDC has no basis to contend that it has a substantial likelihood of success on its argument that the Court's notice and comment holding was error.

Sailing Order." Mot. at 22. The agency does not explain the legal relevance of this fact, and agencies are not free to rewrite the notice and comment procedures provided for by Congress in the APA in favor of their own. *See Safari Club Int'l v. Zinke*, 878 F.3d 316, 335 (D.C. Cir. 2017) ("[R]eject[ing] the notion that complainants must indicate additional considerations they would have raised in a comment procedure, had they been given the opportunity." (quotation omitted)). To hold otherwise would "virtually repeal section 553's [notice and comment] requirements." *Id*.

E. Congress did not ratify the Order.

The motion errs in suggesting that Congress ratified the Conditional Sailing Order through the Alaska Tourism Restoration Act (ATRA). *See* Pub. L. No. 117-14, 117th Cong. (May 24, 2021). The CDC faces "a difficult task" in showing ratification, *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001); *see also Ala. Ass'n of Realtors v. HHS*, --- F. Supp. 3d ---, 2021 WL 1779282, at *9, because when Congress wants to ratify agency conduct it does so clearly, *see Tiger Lily*, 992 F.3d at 524.[7] The CDC cannot show that Congress "expressly ratif[ied]" its actions "in clear and unequivocal language." *EEOC v. CBS*, 743 F.2d 969, 974 (2d Cir. 1984).

[7] *See also Thomas v. Network Sols.*, 176 F.3d 500, 505–07 (D.C. Cir. 1999) (express words of ratification); *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1250 (10th Cir. 2004) (same).

ATRA says nothing about the Conditional Sailing Order. Instead, as a condition for a Jones Act exception in the Pacific Northwest, ATRA requires Alaskan ships to obtain a COVID-19 Conditional Sailing Certificate. *See* § 2(a)(1). But the fact that Congress recognized that the CDC had acted does not speak to whether Congress approved of the exercise of the agency's authority in the first instance.[8] Notably, ATRA is effective into 2022, § 2(g), while the Conditional Sailing Order expires in November 2021, Dkt. 1-3, at 41. Congress thus recognized that the availability of such a certificate did not turn on the Conditional Sailing Order being in place.

III. FLORIDA HAS STANDING TO CHALLENGE THE ORDER, AND A STAY HERE WILL INJURE FLORIDA, ITS BUSINESSES, AND ITS CITIZENS.

A. The Conditional Sailing Order harms Florida.

This Court 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); *see also* Dkt. 47, at 74:14–20 (conceding that the Conditional Sailing Order harms Florida's economy). And as the

[8] Further, there is congressional disagreement over the CDC's actions here, CRUISE Act (S.B. 1105), and ATRA did not seek to resolve that disagreement. 167 Cong. Rec. S2512 (daily ed. May 13, 2021), available at https://www.congress.gov/117/crec/2021/05/13/167/83/CREC-2021-05-13-pt1-PgS2510.pdf (in which one of ATRA's sponsors acknowledged the "big, philosophical differences on some things that relate tangentially" to ATRA and emphasized that "right now this issue is very narrow . . . [i]t is not going to impact any other State").

district court found, Dkt. 91, at 13–22, Florida also has standing from three independent financial injuries it has suffered as a result of the Conditional Sailing Order: (1) unemployment expenses, *see Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989);[9] (2) direct tax losses, *see Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110–11 (1979); and (3) ports' accumulating lost revenue, *see Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1290–91 (11th Cir. 2017).

Contrary to the CDC's argument, no "assumption[s]" were necessary to reach that conclusion. Mot. at 14. Beyond declarations, Florida provided substantial evidence—unchallenged by the CDC—to support these harms.[10] And the CDC does not argue that the district court's factual finding that Florida is harmed by the Conditional Sailing Order is clear error. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). The district court correctly concluded, moreover, that Florida's "inability to recover monetary damages because of

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

[10] *See* Dkt. 25-19, ¶ 3 (unemployment); Dkt. 25-25, ¶¶ 3–5 (taxes); Dkt. 25-26, ¶¶ 3–8 (ports); Dkt. 25-20, at 44 (showing Port Everglades generated $33 million in state taxes and $29.4 million in local taxes in 2019 from cruise-passenger activity); Dkt. 25-22, at 10 (JAXPORT $1.6 million in state and $1.5 million in local taxes in 2019); Dkt. 25-24, at 27 (Port Canaveral $74.2 million in state and local taxes in 2018); Dkt. 25-21, at 29 (PortMiami $182 million in state and local taxes in 2016); Dkt. 25-23, at 36 (Port Tampa Bay $9.6 million in state and local taxes in 2015).

sovereign immunity renders the harm suffered irreparable." *Odebrecht Const., Inc. v. Sec'y, Dept. of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013); *see* Dkt. 91, at 113.

B. Florida's harm is traceable to the Order and redressable by an order enjoining it.

The CDC argues that it is "implausible" that more cruises with more passengers will sail without the Conditional Sailing Order. Mot. at 14. But the cruise industry, including the Cruise Line International Association—which the agency says is "the leading industry trade group," *id.* at 7—for months has been "ask[ing]" the CDC to "restart cruising" and "lift" the Conditional Sailing Order. Dkt. 25-10, at 5:7–20; *see also* Dkt. 25-9, at 2 (reiterating call to lift Order in April); Dkt. 25-28, at 2–3. Indeed, the CDC conceded below that "[c]ruise lines have advocated for a *faster re-opening*, or *lifting of the CSO*." Dkt. 31, at 11 (emphases added). Even now—almost 8 months since the Order—the CDC admits that some ships still have not emerged from the Order's phase-one requirement to "procure" COVID-19 testing units. Mot. at 17.

The CDC also argues that Florida's standing "assumes that prospective cruise ship passengers are indifferent to whether COVID-19 health and safety protocols are in effect" and that "cruise ship operators are going to want to reassure their customers that [cruise ships are] a safe place to be." *Id.* at 14. Florida agrees that cruise ships do not need the CDC for motivation to provide a safe space for passengers. They have sufficient business interest to do so. By the same token,

passengers do not need the CDC to tell them when a cruise ship is safe to board. Over 400,000 passengers have sailed abroad on cruise ships since July 2020 with lower rates of COVID-19 than on land. *See* Dkt. 25-9; Dkt. 25-10, at 6:14–18. Many Americans traveled overseas to do so. *See* Dkt. 25-9, at 3; Dkt. 25-10, at 8:13–18.

Finally, as the district court recognized, "if the industry [and passengers] will not sail" without the Conditional Sailing Order, "removing [it] is harmless," Dkt. 91, at 21. CDC cannot have it both ways. With the Order and its illegal requirements enjoined, it is beyond "likely" and "predictable" that cruise lines will "react," *see Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019), by setting sail sooner and with more passengers than if this Court allows the illegal Conditional Sailing Order to continue.

C. Granting a stay would be contrary to the public interest.

Florida's financial injuries aside, the Order has shut down an industry on which 159,000 Floridians rely for work and is devastating countless other businesses and industries that also rely on cruising. Dkt. 25-1, at 14, 45–47; Dkt. 25-2, at 6–7; Dkt. 25-27, at 3. As the CDC has recognized, losing work "adversely affects" health, "is a major source of psychological stress," and "is associated with greater incidence of suicide." Dkt. 56, at 20.

The CDC purports to justify these harms by saying the cruise industry wants the Order, pointing to letters from CLIA and entities associated with Florida's ports.

Mot. at 7, 21–22. But the CDC mistakes concessions the industry made (unsuccessfully) in the hopes the CDC would lift its Order as being endorsements of the Order.

The CDC also argues that failing to stay the preliminary injunction order is not "safe[]" and will spread COVID-19. *Id.* at 23–24. The Ninth Circuit recently rejected a similar argument by the federal government in *Flores v. Barr*, 977 F.3d 742, 748 (9th Cir. 2020). And for good reason. The pandemic began 16 months ago. Society is almost fully reopen. Even if at some point there were justification for the CDC's Order, there is no longer any good reason to maintain it. The United States now ranks first in the world in COVID-19 resilience, which measures reopening progress, COVID-19 status, and quality of life.[11] Vaccines are available to anyone who wants them. Restaurants and sporting events are packed, as they should be. "We're back traveling again. We're back seeing one another again. Businesses are opening and hiring again."[12] And yet the CDC still insists on preventing the cruise

[11] Hong, Change, & Yarley, *The Best And Worst Places to Be as The World Finally Reopens*, Bloomberg (Jun. 28, 2021), https://www.bloomberg.com/graphics/covid-resilience-ranking/?.

[12] The White House, *Remarks by President Biden Celebrating Independence Day and Independence from COVID-19* (July 4, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/05/remarks-by-president-biden-celebrating-independence-day-and-independence-from-covid-19/.

industry from sailing without the illegal, arbitrary requirements of the Conditional Sailing Order.

IV. THE CDC HAS NOT SHOWN THAT IT WILL BE IRREPARABLY HARMED WITHOUT A STAY.

The stay must be rejected for the further independent reason that, although the CDC has the burden to show that it will be irreparably harmed absent a stay, *Nken*, 556 U.S. at 434, it has not shown that it will be. Rather, the likely result of granting a stay would be further, continued irreparable harm to an important sector of the economy. At the same time, the cruise industry has every incentive, even without CDC intervention, to take strong measures to prevent the spread of COVID-19 on its voyages.

CONCLUSION

For the reasons set forth above, this Court should deny the CDC's motion for a stay pending appeal.

Respectfully submitted,

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July 12, 2021

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1. This response complies with the type-volume limits of Fed. R. App. P. 27(d)(2)(A) because the response contains 4,573 words.

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I certify that on July 12, 2021, I electronically filed this brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF.

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