

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.

On Appeal from the United States District Court
for the Middle District of Florida (Hon. Steven D. Merryday)

**REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL
AND ADMINISTRATIVE STAY**

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for defendants-appellants certify that the following have an interest in the outcome of this appeal:

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INTRODUCTION

Florida's opposition brief confirms that there is no basis to lift the COVID-19 health and safety protocols that were developed by the Centers for Disease Control & Prevention (CDC) in collaboration with the cruise ship industry. The State's brief is more telling for what it omits than for what it says.

Echoing the district court, Florida casts the CDC protocols as a “breathtaking, unprecedented, and acutely and singularly authoritarian” assertion of regulatory power.” Opp. 1. However, Florida ignores what the protocols actually require: conventional communicable-disease control measures for cruise ships engaged in international travel, which fall easily within the CDC's longstanding statutory and regulatory authority.

Florida likewise ignores the fact that its own law prohibiting cruise ship operators from requiring documentation of a passenger's vaccinated status impedes cruise ships' planned operations from Florida ports. And Florida disregards the threat to public health that would arise if cruise ship operators were at liberty to ignore the CDC guidance or to act without oversight from public-health authorities.

ARGUMENT

A. Florida's Opposition Rests On A Mischaracterization Of The Requirements Of The Conditional Sailing Order And Technical Guidance

The premise of Florida's opposition brief is that the CDC protocols "operate as a prohibition in practice" of passenger cruises. Opp. 9. But as our motion explained, 12 cruise operators have been granted COVID-19 Conditional Sailing Certificates—meaning that these protocols have already been implemented—and passenger voyages have already resumed. *See* Add. 148-149 ¶ 21 (listing cruises with departure dates in June, July, and August).

The CDC protocols track in significant respects the cruise industry's own proposals, which were explicitly designed to "facilitate cruise resumption in the U.S. by Summer 2021." Add. 165. In asserting that the CDC protocols are too onerous, Florida relies on an outdated industry press release from early April, *see* Opp. 16, and disregards what has happened since. The CDC protocols now in place reflect the industry's input at twice-weekly meetings to discuss the impact of vaccines and other scientific developments. *See* Dkt. No. 31-3, Page ID 1667. The current protocols reflect the industry's general vaccination strategies for passengers and crew, *see* Add. 165, and the industry's specific proposals for the different protocols

that should apply to “Vaccinated Cruising”—which the industry defined as requiring 95% of crew and 95% of passengers to be fully vaccinated, Add. 161—and “Cruising Open To All”—which the industry defined as requiring 95% of crew to be fully vaccinated and encouraging all passengers to be fully vaccinated, *id.*

Consistent with the cruise industry’s view that “vaccines are a gamechanger,” Add. 159, the CDC does not require vaccinated passengers to undergo routine testing for COVID-19.¹ Masks and physical distancing are also discretionary in areas designated by cruise ship operators as only accessible to fully vaccinated passengers and crew (such as casinos, bars, spas, entertainment venues, and self-serve buffets), or on cruises where 95% of crew and 95% of passengers are fully vaccinated.² Quarantine and testing are not routinely required for vaccinated passengers who come in close contact with a traveler who tests positive for COVID-19.³ And, consistent with the cruise industry’s proposal, a test voyage (aka simulated voyage) is

¹ <https://www.cdc.gov/quarantine/cruise/covid19-operations-manual-cso.html#>.

² *Id.*

³ <https://www.cdc.gov/quarantine/cruise/management/technical-instructions-for-cruise-ships.html>.

not required for a cruise that meets the industry’s definition of “Vaccinated Cruising.” Add. 163, line 20; Add. 144-145 ¶ 10.

Florida’s brief barely acknowledges the crucial role that vaccines play in facilitating passenger cruises. In a footnote, Florida states that “the Conditional Sailing Order says nothing about vaccine requirements.” Opp. 3 n.2. But the Conditional Sailing Order was issued in October 2020, which was before the first vaccine had even received emergency-use authorization from the Food and Drug Administration. For obvious reasons, the CDC’s technical guidance has evolved over time to take into account scientific developments, including the availability of vaccines. Although Florida derides these “ever-changing website updates,” Opp. 4 n.3, the industry’s May 11 proposal called for these protocols to be reevaluated no less than every 60 days to reflect the evolving “knowledge base of COVID-19 and the impact of vaccinations and treatments.” Add. 161.

In the same footnote, Florida intimates that this lawsuit—rather than the CDC’s collaboration with the cruise industry in light of evolving public-health conditions—prompted the CDC to eliminate the test-voyage requirement for highly vaccinated cruises. *See* Opp. 4 n.3. In reality, Florida’s law prohibiting cruise operators from requiring documentation that

passengers are vaccinated has undermined the cruise industry's ability to take advantage of the flexibility that the CDC provides for vaccinated passengers and highly vaccinated cruises. Indeed, a major cruise line filed suit this morning to challenge that Florida law, alleging that the State's "anomalous, misguided intrusion threatens to spoil" the cruise line's "careful planning and force it to cancel or hobble upcoming cruises, thereby imperiling and impairing passengers' experiences and inflicting irreparable harm of vast dimensions."⁴ Florida's role in impeding cruise operations undermines both its standing to bring this action and its assertion that a preliminary injunction is an appropriate exercise of equity to protect it from irreparable harm. The preliminary injunction should be stayed (and ultimately vacated) for those reasons alone.

B. The CDC's Protocols Are Squarely Within CDC's Statutory and Regulatory Authority

As our stay motion explained, the protocols at issue here are conventional communicable-disease control measures that fall well within the CDC's longstanding statutory and regulatory authority. All of the cruise ships at issue here are foreign-flagged vessels, and Florida concedes that the

⁴ *Norwegian Cruise Line Holdings Ltd. v. Rivkees*, No. 1:21-cv-22492, Dkt. No. 1 ¶ 3 (S.D. Fla.) (filed July 13, 2021).

CDC may establish conditions under which such vessels are allowed to arrive at U.S. ports. *See* Opp. 10 (citing 42 C.F.R. § 71.31(b)).

Rhetoric aside, Florida's opposition never explains which of the CDC protocols it regards as exceeding the CDC's statutory authority. The only requirement that its opposition brief discusses is the requirement to conduct a simulated test cruise (which, as explained above, is waived for highly vaccinated cruises). Florida describes these test voyages as "week-long, self-funded, expensive simulated voyages" to "test out the CDC's 'technical instructions.'" Opp. 9 (citing Dkt. No. 31-4) (some quotation marks omitted).

What the cited technical instructions actually said is that "[s]imulated voyages must be between 2-7 days in length with a[t] least one overnight stay," in order "to test the efficacy of the cruise ship operator's ability to mitigate the risk of COVID-19 onboard the cruise ship." Dkt. No. 31-4, Page ID 1677. For example, "[t]he cruise ship operator must meet standards during the simulated voyage for hand hygiene, use of face masks, and social distancing for passengers and crew, as well as ship sanitation, as required by CDC technical instructions or orders." *Id.* The cruise ship operator also must test "embarkation and disembarkation procedures," "[t]ransfer of symptomatic passengers or crew . . . from cabins to isolation rooms," and

“[o]nboard and shoreside isolation and quarantine,” *id.*, and must have a “protocol for managing persons with COVID-19 and close contacts at all foreign ports of call,” *id.* at Page ID 1678. Numerous cruise ship operators have already conducted such simulated voyages or are set to do so in the coming weeks. Add. 147-148 ¶ 18.

These run-of-the-mill protocols are manifestly appropriate to prevent and contain COVID-19 outbreaks onboard cruise ships. As Florida acknowledges, the CDC can require measures “similar to traditional quarantine measures” including “inspection, fumigation, [and] sanitation.” Opp. 2 (quoting 42 U.S.C. § 264(a)). That is what the CDC’s technical guidance does: it instructs cruise operators to inspect (test) passengers and crew for infection; to quarantine exposed persons who are potentially contagious and isolate persons found to be infected; to arrange for the safe disembarkation of such persons; and to take related sanitary measures such as mask wearing and physical distancing to prevent the spread of the virus.

Florida does not seriously argue otherwise. Instead, Florida declares that “the cruise industry has every incentive, even without CDC intervention, to take strong measures to prevent the spread of COVID-19 on its voyages.” Opp. 18. But even assuming that full compliance with

voluntary procedures were likely, cruise industry operators are not public-health experts, and CDC oversight and supervision have been crucial in identifying industry mistakes and working with cruise ship operators to make passenger voyages safe.⁵

It is thus unsurprising that Congress specifically approved the CDC's authority to issue Conditional Sailing Certificates. As our stay motion explained, Congress granted special privileges to a covered cruise ship that "has been issued, operates in accordance with, and retains a COVID-19 Conditional Sailing Certificate of the [CDC]." Alaska Tourism Restoration Act, Pub. L. No. 117-14, § 2(a), (b), 135 Stat. 273 (2021). A "Conditional Sailing Certificate" is the document that the CDC issues to a ship that has completed the steps required under the Conditional Sailing Order and

⁵ *See, e.g.*, Add. 150-152 ¶¶ 24-27 (explaining that CDC personnel on a simulated voyage identified (among other problems) staff training deficiencies in operating laboratory testing equipment, lapses in identifying unvaccinated passengers required to wear masks and physically distance, and passengers with positive test results who were not physically distanced from other passengers cleared for embarkation); Add. 153 ¶ 25 (noting reports of cruise ship operators mislabeling positive COVID-19 test results as negative, improperly engaging in repeat testing of crew to negate the reporting of a positive test result, erroneously interpreting test results, accidentally releasing crew early from quarantine due to an error in transcribing names, and failing to prevent obvious breaches of quarantine by crew).

technical guidance. *See Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew*, 85 Fed. Reg. 70,153, 70,158-59 (Nov. 4, 2020). Thus, contrary to Florida’s assertion, Opp. 14, the validity of the Conditional Sailing Order is a necessary premise of the May 2021 legislation. That statute would be a nullity—and Alaskan cruises would be unable to sail—if the CDC lacked authority to issue Conditional Sailing Certificates to cruise ships.⁶

C. There Was No Unreasonably Delay In Seeking A Stay

Florida’s assertion that the government unreasonably delayed in seeking a stay is baseless. The district court’s June 18 order directed the CDC to determine by July 2 whether a narrower injunction would be adequate to protect the public health. Add. 138. The next business day (July 6), the government moved for a stay pending appeal. Dkt. No. 96. The district court did not suggest that there was any unreasonable delay in the filing of that stay motion. On the contrary, the district court ruled promptly on that stay motion in order to allow this Court to act “before the preliminary injunction becomes effective on July 18, 2021.” Add. 166.

⁶ Congress’s approval of the Conditional Sailing Order makes Florida’s arbitrary and capricious claim and its procedural challenge to the Order legally irrelevant, and the claims also fail for reasons set out in our motion.

CONCLUSION

This Court should stay the district court's preliminary injunction pending appeal and issue an administrative stay pending the Court's consideration of this motion.

Respectfully submitted,

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⁷ The Acting Assistant Attorney General is recused.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 1,833 words. The motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared using Microsoft Word 2016 in proportionally spaced 14-point Century Expd BT typeface.

/s/ Alisa B. Klein

ALISA B. KLEIN

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2021, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein

ALISA B. KLEIN