

Case No. 21-12729

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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NORWEGIAN CRUISE LINE HOLDINGS LTD., ET AL.,  
*Plaintiffs-Appellees,*

v.

STATE SURGEON GENERAL,  
*Defendant-Appellant.*

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On Appeal From The United States District Court For The  
Southern District Of Florida (Hon. Kathleen Williams)  
Case No. 1:21-cv-22492-KMW

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**APPELLEES' RESPONSE TO  
APPELLANT'S CIVIL APPEAL STATEMENT**

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Norwegian Cruise Line Holdings Ltd., NCL (Bahamas) Ltd., Seven Seas Cruises S. de R.L., and Oceania Cruises S. de R.L. (“**NCLH**”) respectfully responds to the Civil Appeal Statement (“**Statement**”) filed by the State Surgeon General (“**Surgeon General**”) in order to address discrete aspects and balance this Court’s understanding of basic premises.

In Section 1 of his Statement, the Surgeon General asserts that this appeal involves the following issue of first impression: “whether a business has a constitutional right to compel documentation of medical information as a condition for service.” Statement at 2. NCLH must respectfully correct that framing, which suggests the court below announced some freestanding “constitutional right.” In actuality, the court below ruled simply that a state statute, as applied to NCLH, violates the First Amendment by proscribing businesses from requiring from customers one particular means of conveying truthful information (documentary proof of vaccination) on a concededly legitimate subject of inquiry (a passenger’s vaccination status), and further violates the Dormant Commerce Clause by uniquely and excessively burdening interstate and international commerce without furthering any creditable state interest. Neither of those holdings fairly poses the issue that the Surgeon General has framed as an issue of first impression.

NCLH also respectfully disagrees with the Surgeon General’s assertion in Section 2 of his Statement that determination of this appeal will turn on the

interpretation of *Wollschlaeger v. Governor*, 848 F.3d 1293 (11th Cir. 2017) (en banc). Statement at 2. To be sure, *Wollschlaeger* is among the decisions that support NCLH’s First Amendment claim, but NCLH’s First Amendment claim does not “turn” on the interpretation of that one case, and NCLH’s other claims are even further removed from *Wollschlaeger*.

Section 4 of the Surgeon General’s Statement indicates that the appeal involves a conflict of law with *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116 (3d Cir. 2020), because that decision “held that a provision barring businesses from relying on wage history information . . . did not implicate the First Amendment.” Statement at 2. But no such conflict with *Greater Philadelphia* currently exists. Because Florida’s statute at issue here does not prohibit NCLH from relying on vaccine information, nothing here corresponds with the portion of the local law in *Greater Philadelphia* that the Third Circuit found did not implicate the First Amendment. Rather, Florida’s statute corresponds with the portion of the local law—prohibiting employers from asking a job applicant in writing or otherwise about the applicant’s wage history, requiring disclosure of wage history, or conditioning employment or consideration for an interview or employment on disclosure of wage history—that the Third Circuit held “clearly regulates speech.” *Greater Philadelphia*, 949 F.3d at 136. It is only the Surgeon General’s argument, according to which the First Amendment is *not* implicated by

Fla. Stat. § 381.00316—prohibiting NCLH from requiring vaccine documentation from passengers—that threatens to clash with the Third Circuit’s holding in *Greater Philadelphia* and could create a circuit split.

Finally, Section 5 in the Surgeon General’s Statement asserts that this appeal raises the issue of “whether and to what extent the First Amendment applies to the conduct regulated by the state of Florida under the state law challenged in this case.” Statement at 2. NCLH respectfully disagrees that the challenged law regulates “conduct” as opposed to speech. Moreover, because NCLH’s challenge is limited to the application of Florida’s law specifically to NCLH, this appeal does not involve general speech or conduct “regulated by the state of Florida under the state law challenged in this case.” *Id.*

DATED: August 26, 2021

Respectfully submitted,

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By /s/ Derek L. Shaffer

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## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and 32(g)(1), I certify that the foregoing response is proportionately spaced using 14-point Times New Roman font and contains 589 words, excluding the parts exempted from length limits by Rule 32(f).

*/s/ Derek L. Shaffer*

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Derek L. Shaffer

**CERTIFICATE OF SERVICE**

I hereby certify that, on August 26, 2021, I electronically filed the foregoing response with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

*/s/ Derek L. Shaffer*

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Derek L. Shaffer