No. 21-12729

# In the United States Court of Appeals for the Eleventh Circuit

NORWEGIAN CRUISE LINE HOLDINGS LTD., ET AL.,

*Plaintiffs–Appellees*,

v.

STATE SURGEON GENERAL,

*Defendant–Appellant*.

## OPENING BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
NO. 1:21-cv-22492-KMW

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

Defendant-Appellant certifies that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

1. Arrasas Ltd., an Isle of Man company, *Parent of NCL International, Ltd.*
2. Bergstrom, William V., *Attorney for Defendant/Appellant*
3. Burck, William A., *Attorney for Plaintiffs/Appellees*
4. Classic Cruises, LLC, *Parent of Seven Seas Cruises S. DE R.L. LLC*
5. Classic Cruises II, *Parent of Seven Seas Cruises S. DE R.L. LLC*
6. Cooper & Kirk, PLLC, *Attorneys for Defendant/Appellant*
7. Cooper, Charles J., *Attorney for Defendant/Appellant*
8. Cooper, Jonathan G., *Attorney for Plaintiffs/Appellees*
9. Del Rio, Frank J., *Declarant*
10. Ladapo, M.D., Ph. D., Joseph A., in his official capacity as State Surgeon General and Head of the Florida Department of Health, *Defendant/Appellant*
11. Laitamaki, Dr. Jukka, *Declarant*
12. Lander, Mark S., *Declarant*
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14. NCL (Bahamas) Ltd., *Plaintiff/Appellee*

15. NCL Corporation Ltd., a Bermuda company, *Parent of Arrasas Ltd.*

16. NCL International, Ltd., a Bermuda company, *Parent of NCL (Bahamas) Ltd.*

17. Norwegian Cruise Line Holdings Ltd. (traded on the New York Stock Exchange under ticker symbol NCLH), *Plaintiff/Appellee*

18. O'Sullivan, John F., *Attorney for Plaintiffs/Appellees*

19. Oceania Cruises S. De R.L., *Plaintiff/Appellee*

20. Ostroff, Dr. Stephen, *Declarant*

21. Patterson, Peter A., *Attorney for Defendant/Appellant*

22. Prestige Cruise Holdings S. de R.L., a Panama limited liability company, *Parent of Oceania Cruises S. De R.L.*

23. Prestige Cruises International S. de R.L., a Panama limited liability company, *Parent of Oceania Cruises S. De R.L.*

24. Quinn Emanuel Urquhart & Sullivan, LLP, *Attorneys for Plaintiffs/Appellees*

25. Seven Seas Cruises S. DE R.L. LLC, *Plaintiff/Appellee*

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30. Williams, Judge Kathleen M., *District Court Judge*

Apart from the entities listed above, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: October 4, 2021

Respectfully submitted,

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## STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns important questions of constitutional law: whether FLA. STAT. § 381.00316, which codifies the State of Florida's sovereign judgment that businesses are not allowed to condition service on a customer's provision of COVID-19 vaccination documentation, likely violates the First Amendment and the dormant Commerce Clause. This Court's answer to these questions will be instrumental in determining whether the State of Florida will continue to suffer the irreparable harm of having one of its statutes enjoined. Appellants believe oral argument would assist the Court in deciding the consequential issues presented by this appeal.

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## INTRODUCTION

In an unprecedented ruling, the District Court in this case held that a multi-billion-dollar company likely has a constitutional right to refuse service to prospective customers who fail to disclose private medical documentation. The Constitution gives companies no such right, and the District Court's decision must be reversed.

Exercising the State of Florida's authority through its traditional police power of safeguarding public health and safety and the economic well-being of its citizens, the Governor and Legislature of Florida have determined that businesses in the State should be prohibited from denying service to customers who decline to provide documentation certifying COVID-19 vaccination—so-called "vaccine passports"—or post-COVID-19 infection recovery. In issuing an executive order that preceded legislation codifying this policy, the Governor explained that he was opposed to creating "two classes of citizens based on vaccination" status and personal health decisions, but that he continued to support businesses' ability to "institut[e] COVID-19 screening protocols in accordance with state and federal law to protect public health." App.206–07. And in passing FLA. STAT. § 381.00316—the law at issue in this case—legislators repeatedly justified the prohibition based on protecting individual liberties, protecting privacy, and preventing discrimination.

Months after § 381.00316 was enacted on May 3, 2021, Plaintiffs Norwegian Cruise Line Holdings Ltd.; NCL (Bahamas) Ltd., d/b/a Norwegian Cruise Line; Seven Seas Cruises S. De R.L., d/b/a Regent Seven Seas Cruises; and Oceania Cruises S. De R.L., d/b/a Oceania Cruises (together, "Norwegian") challenged the statute and moved for a preliminary injunction so that it may exclude passengers from its cruises who fail to provide documentary proof of COVID-19 vaccination. The District Court preliminarily enjoined the law as likely violating the First Amendment and the dormant Commerce Clause. The District Court erred in making these determinations.

Section 381.00316 does not violate the First Amendment because it affects what businesses cannot *do*—condition service on customers providing documentation certifying COVID-19 vaccination—"not what they may or may not *say*," *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 60 (2006), and thus does not implicate the First Amendment. Indeed, *FAIR* and *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc), compel this result.

Nor does Section 381.00316 violate the dormant Commerce Clause. Under the *Pike* balancing test—the analysis that all parties agree applies to the statute—Florida's law is constitutional because any indirect effects it has on interstate commerce do not clearly exceed the local benefits of the law. Section 381.00316 advances the important local interests of preventing discrimination for failure to

provide documentation evidencing COVID-19 vaccination and promoting privacy by forbidding businesses to compel disclosure of COVID-19 vaccine documents. Florida's law reflects the State's sovereign judgment that businesses should not be allowed to condition service on a customer's disclosure of COVID-19 vaccination documentation. By contrast, Norwegian merely argues that it may be more expensive or time-consuming to comply with foreign ports' docking requirements vis-à-vis COVID-19. But these purported burdens do not *clearly exceed* Florida's sovereign public policy choice designed to strike the appropriate balance of individual liberty, personal privacy, and public health. There is no sound basis for a court to make the judgment that the policy choices of other jurisdictions, including how they balance these interests, should prevail over Florida's.

Indeed, Florida's law is consistent with Centers for Disease Control and Prevention ("CDC") guidelines, which do not require cruise lines to ensure their passengers are vaccinated. Although the CDC relaxes restrictions on cruise lines that attain 95% customer vaccination, the CDC has expressly disclaimed any intent to preempt § 381.00316. What is more, the CDC granted Norwegian authority to sail under relaxed restrictions after Norwegian represented that it *would not* require vaccination documentation in Florida. The CDC's guidelines currently are enjoined in Florida, but even if operative, they would not preclude Norwegian from sailing consistent with Florida law.

Norwegian's profitability does not override Florida's sovereign decision to protect its citizens' personal liberties, privacy, and health through § 381.00316. Accordingly, this Court should vacate the preliminary injunction.

## JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The District Court entered the preliminary injunction that is the subject of this appeal on August 8, 2021. Defendant filed a timely notice of appeal on August 10, 2021. This Court has jurisdiction over the interlocutory order granting a preliminary injunction under 28 U.S.C. § 1292(a)(1).

## STATEMENT OF ISSUES

1. Whether Norwegian has established a likelihood of success on the merits of its claim that § 381.00316 violates the First Amendment.

2. Whether Norwegian has established a likelihood of success on the merits of its claim that § 381.00316 violates the dormant Commerce Clause.

3. Whether the District Court abused its discretion in determining that irreparable injury, the balance of hardships, and the public interest weighed in favor of issuing a preliminary injunction against enforcement of § 381.00316.

## STATEMENT OF THE CASE

### I. Florida Passes FLA. STAT. § 381.00316.

On April 2, 2021, Governor Ron DeSantis issued an executive order prohibiting businesses in Florida from "requiring patrons or customers to provide any documentation certifying COVID-19 vaccination or post-transmission recovery to gain access to, entry upon, or service from the business." App.206. In the Order, Governor DeSantis explained that "COVID-19 vaccination records are private health information which should not be shared by mandate," that "requiring so-called COVID-19 vaccine passports for taking part in everyday life . . . would create two classes of citizens based on vaccination," and that the Order was "necessary to protect the fundamental rights and privacies of Floridians and the free flow of commerce within the state." App.205–06. The Florida Legislature then passed a bill stating, as relevant here, that "[a] business entity, as defined in s. 768.38 to include any business operating in this state, may not require patrons or customers to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service from the business operations in this state." FLA. STAT. § 381.00316.

Section 381.00316 reflects a sovereign policy judgment that businesses should not be able to condition service upon documentation of a customer's COVID-19 vaccination status. Norwegian's lawsuit represents a novel effort to discriminate

among customers based on otherwise private health information. Indeed, during debate on the bill, legislators repeatedly justified the prohibition based on protecting individual liberties, protecting privacy, and preventing discrimination. In the House, Representative Mike Beltran explained that the law would prohibit businesses from discriminating "based upon arbitrary classifications."[1] Representative Tom Leek argued that the law would prevent businesses from "unfairly and disparately discriminat[ing] against our minority populations," who are "the largest segment of [Florida] that is vaccination hesitant."[2] Rep. Leek further stated that the law would strike the appropriate balance "between protecting people and protecting people's civil liberties."[3]

In the Senate, Senator Danny Burgess explained that the bill would prevent a situation where a Floridian would "have to provide a piece of documentation to show that you got a vaccine in order to go to the grocery store."[4] He further described how the bill represented a "public policy call" by the Legislature that "if you operate a business . . . in Florida you cannot require [a person] to have a vaccine to gain

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[1] *House Session*, at 2:26:25–2:27:00, FLA. HOUSE OF REP. (Apr. 28, 2021), https://bit.ly/3nvf3E7.

[2] *Id.* at 2:28:55–2:29:06, 2:29:22–2:29:37.

[3] *Id.* at 2:30:18–2:30:31.

[4] *Senate Session*, at 6:18:57–6:19:17, FLA. SENATE (Apr. 29, 2021), https://bit.ly/3ljlCqW.

entry."[5] During debate in the Senate, Senators Tina Polsky and Annette Taddeo specifically mentioned the cruise industry.[6] The Legislature was thus cognizant of the bill's potential effects on the cruise industry as they considered the bill and voted to pass it. The Governor signed the bill into law on May 3, 2021, and it took effect on July 1, 2021.

## II. The CDC's Regulation of the Cruise Industry.

While the State of Florida has sought to ensure the right of its citizens to participate in the economy, the CDC has engaged in heavy-handed regulation of the cruise industry. On March 14, 2020, the CDC issued a "No Sail Order"[7] that essentially shut down the industry. On October 30, 2020, the CDC issued the Conditional Sailing Order ("CSO"), which specified a framework for reopening.[8] Among other things, the CSO requires cruise ships to complete simulated voyages designed to test a cruise ship operator's ability to mitigate COVID-19 before resuming sailing. CSO, 85 Fed. Reg. at 70,157.

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[5] *Id.* at 6:30:43–6:30:58.

[6] *Id.* at 6:30:37–6:32:33, 6:35:30–6:39:41.

[7] No Sail Order and Other Measures Related to Operations, 85 Fed. Reg. 16,628 (Mar. 14, 2020).

[8] Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew, 85 Fed. Reg. 70,153 (Oct. 30, 2020).

On April 28, 2021, the CDC issued a "Dear Colleague Letter" that, among other things, allowed a cruise ship to avoid the requirement of a simulated voyage if a cruise ship operator's crew is 98% fully vaccinated and the cruise line "submit[s] to CDC 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."[9] On May 14, 2021, the CDC issued Technical Instructions that further refined the option in lieu of a simulated voyage by lowering the percentage requirement for crew to be fully vaccinated to 95%.[10] Finally, on May 26, 2021, the CDC issued the Operations Manual, which added discretionary options for ships with vaccinated passengers, such as allowing fully vaccinated passengers not to wear masks during outdoor activities.[11]

At no point has the CDC ever required cruise ship operators to mandate that their customers to be vaccinated before sailing, much less obtain documentation of

[9] *Dear Cruise Industry Colleagues Letter* at 4, CDC (Apr. 28, 2021). App.59.

[10] *Technical Instructions for Simulated Voyages by Cruise Ship Operators Under CDC's Framework for Conditional Sailing Order*, CDC (May 14, 2021). App.69.

[11] *COVID-19 Operations Manual for Simulated and Restricted Voyages Under the Framework for Conditional Sailing Order*, CDC (May 26, 2021). App.70–84.

vaccination from customers. Accordingly, the CDC has disclaimed any intent to preempt § 381.00316.[12]

### III. Florida Sues the CDC.

In response to the CSO and its burdens on the cruise industry, Florida sued the CDC on April 8, 2021, in the U.S. District Court for the Middle District of Florida. *See Florida v. Becerra*, No. 8:21-cv-839, 2021 WL 2514138 (M.D. Fla. June 18, 2021). Florida argued that the CDC exceeded its statutory and regulatory authority, acted arbitrarily and capriciously, denied the required opportunity for notice and comment without good cause, and exercised an unconstitutional delegation of legislative authority. *Id.* at *1. Florida moved for a preliminary injunction, which the court granted, concluding that Florida was likely to prevail on the merits of its claims. *Id.* at *51. A divided panel of this Court initially stayed the injunction pending appeal on July 17, 2021,[13] but on July 23, 2021, the panel *sua sponte* vacated its July 17 Order and denied the CDC's motion for a stay pending

[12] App.319 ("I can tell you from CDC's perspective that at this time, CDC does not believe it has taken action to preempt the Florida law in question."); App. 320 ("We have not claimed to preempt the state law."); App.321 ("The CDC has offered [the vaccination option] as an option for cruise ships and has not purported to preempt state law on the question.").

[13] Order, *Florida v. Sec'y Dep't of Health & Human Servs.*, No. 21-12243 (11th Cir. July 17, 2021).

appeal.[14] Consequently, the CDC currently is enjoined "from enforcing against a cruise ship arriving in, within, or departing from a port in Florida the conditional sailing order and the later measures (technical guidelines, manuals, and the like)." *Florida*, 2021 WL 2514138, at *51.

## IV. Norwegian's Interactions with the CDC and Florida.

Meanwhile, on May 28, 2021—over three weeks after § 381.00316 was signed into law—Norwegian and Miami-Dade County executed a Memorandum of Agreement ("MOA") pursuant to the CSO. Miami-Dade County sent the MOA to Appellant for Appellant's execution. App.211–69. Rather than executing the MOA, however, Appellant sent Norwegian a letter on June 1, 2021, stating that the CSO likely is unlawful, but explaining that regardless, "the letter satisfies the requirement that your company receive approval from the Department." App.270–71.

Norwegian subsequently entered a modified MOA with Miami-Dade County not including the State Department of Health, which it submitted to the CDC when applying for a Conditional Sailing Certificate under the CSO. App.275. Dated June 2, 2021, the MOA states that "nothing in this MOA or any approved exhibits or annexes hereto shall be construed to require persons to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry

[14] Order, *Florida v. Sec'y Dep't of Health & Human Servs.*, No. 21-12243 (11th Cir. July 23, 2021).

upon, or service from any [Norwegian] vessel or business operation in this state," App.380, and required Norwegian to "comply with all applicable laws," including those "pertaining to SARS-CoV-2/COVID-19," App.384. Norwegian's vaccination strategy was in an exhibit, and it stated that Norwegian "shall require . . . embarking passengers . . . to be fully vaccinated prior to participating in simulated or restricted voyages *except where prohibited by applicable law*." App.408 (emphasis added). On June 10, 2021, Norwegian referenced this strategy when attesting to the CDC that it had a plan to limit sailings to 95% verified vaccinated passengers. *See* App.50–52, App.275.

Thus, Norwegian's submission to the CDC indicated that it *would not* require vaccine documentation from Florida customers. Norwegian nevertheless advertised fully vaccinated cruises and set its own preferred sailing date of August 15, 2021. Other cruise lines, such as Disney Cruise Lines, Royal Caribbean, and Carnival have opted to perform simulated sailings, App.276–78, App.294–306, and, at the time the District Court was considering the motion for a preliminary injunction, appeared poised to sail from Florida in compliance with CDC guidelines without mandating documentation of vaccination for all passengers, *see id.*

## V. Procedural History.

Norwegian filed suit on July 13, 2021, alleging that § 381.00316—as applied to Norwegian—is preempted by federal law and violates the First Amendment, the

dormant Commerce Clause, and substantive due process. App.10. Norwegian moved for a preliminary injunction on preemption, First Amendment, and dormant Commerce Clause grounds.

The District Court held a hearing on the motion on August 6, 2021, and two days later, on August 8, 2021, preliminarily enjoined Appellant from enforcing § 381.00316 against Norwegian pending resolution of the merits of the case. *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, No. 21-cv-22492, 2021 WL 3471585 (S.D. Fla. Aug. 8, 2021).

The District Court concluded that Norwegian had shown a substantial likelihood of success on the merits of its First Amendment and dormant Commerce Clause claims. *Id.* at *8–23. In analyzing the First Amendment claim, the District Court determined that § 381.00316 is a content-based restriction on speech. *Id.* at *8–12. Accepting for the sake of argument that § 381.00316 is a regulation of commercial speech subject to intermediate scrutiny, the Court held that the law could not satisfy that standard. *Id.* at *13–17. Turning to the dormant Commerce Clause claim, the District Court applied the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test and concluded that § 381.00316 is an unconstitutional burden on

interstate commerce because the burdens it places on interstate commerce outweighs its local benefits. *Norwegian*, 2021 WL 3471585, at *17–23.[15]

Appellant timely filed a notice of appeal on August 10, 2021. App.550–51.

## STANDARD OF REVIEW

"In this Circuit, a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (internal quotation marks omitted). Those prerequisites are that "(1) [the movant] has a substantial likelihood of success on the merits; (2) it will suffer an irreparable injury unless the injunction is granted; (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and (4) the injunction would not be adverse to the public interest." *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1270–71 (11th Cir. 2020). This Court "review[s] the grant of a preliminary injunction for abuse of discretion," and "any underlying

[15] Norwegian also argued in the District Court that § 381.00316 is preempted by the CDC's CSO, Technical Instructions, and Operations Manual. Doc. No. 3 at 9–12. The District Court did not decide whether Norwegian had demonstrated a likelihood of success on the merits of its preemption claim because the Court's ruling on the First Amendment and dormant Commerce Clause claims meant that "the Court need not address the Preemption claim at this stage." *Norwegian*, 2021 WL 3471585, at *23. Because preemption was not a basis for the District Court's ruling, Appellant does not address it in this brief, while reserving the right to raise his arguments against the claim, *see* Doc. No. 32 at 7–15, in the event Norwegian raises it as an alternative basis for affirmance.

legal conclusions *de novo*." *Id*. at 1270. "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, . . . or makes findings of fact that are clearly erroneous." *Id*. (quotation marks omitted).

## SUMMARY OF ARGUMENT

The District Court erred in determining that Norwegian is likely to succeed on the merits of its First Amendment and dormant Commerce Clause challenges to § 381.00316 and therefore abused its discretion in granting Norwegian's motion for a preliminary injunction.

I. Norwegian is unlikely to succeed on the merits of its claim that § 381.00316 violates the First Amendment. Section 381.00316 is not subject to First Amendment scrutiny because it is an economic regulation that targets what businesses may *do*, not what they may *say*, and is thus subject only to rational basis review. The law prohibits businesses from *conditioning service* on customers providing documentation certifying COVID-19 vaccination, an antidiscrimination provision akin to those this Court sanctioned in *Wollschlaeger* as not subject to First Amendment restrictions. But even if this Court determines that § 381.00316 does fall within the First Amendment's purview, the statute is at most subject to intermediate scrutiny as a regulation of a business's commercial speech, and it satisfies that standard.

II. Norwegian also is unlikely to succeed on the merits of its claim that § 381.00316 violates the dormant Commerce Clause. The parties agree that this Court's resolution of this point turns on an application of the *Pike* test, which requires the Court to determine whether Florida's interest furthered by the law is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. The statute satisfies this standard. Section 381.00316 protects Floridians' individual liberties, protects their privacy in personal health information, prevents discrimination by disallowing businesses from conditioning service on the provision of documentation evidencing COVID-19 vaccination, and promotes an open and vibrant economy. Against this sovereign public policy choice designed to strike the appropriate balance between individual liberty, public safety, and economic health, Norwegian argues that it may be more expensive or time-consuming to comply with foreign ports' docking requirements vis-à-vis COVID-19. But in this area of the State's traditional police power to legislate for the health, safety, and welfare of its citizens, the requirements of foreign ports should not dictate the limits of local public policy in Florida. Florida's law lacks the pernicious protectionist effects that the Supreme Court has found time and again to violate the dormant Commerce Clause and, thus, is constitutional.

III. The other injunctive factors—irreparable injury, balance of the equities, and the public interest—also do not justify enjoining § 381.00316, and the District

Court abused its discretion by concluding otherwise. Norwegian cannot establish that its First Amendment rights are being infringed, and any monetary damages, harm to business, or loss of goodwill are attributable to Norwegian's voluntary business decisions. Norwegian's claim of irreparable harm also is belied by its delay in bringing this suit. The balance of the equities and the public interest weigh heavily in Florida's favor. The State of Florida has enacted into law a public policy that businesses cannot condition service on a customer furnishing documentation evidencing COVID-19 vaccination. Affirming the District Court's injunction would infringe on this sovereign determination, whereas leaving the law in place would still allow Norwegian to sail safely and consistent with governing laws.

## ARGUMENT

### I. Norwegian Is Unlikely to Succeed on the Merits of Its Claim that § 381.00316 Violates the First Amendment.

#### A. Section 381.00316 Is a Valid Economic Regulation that Satisfies Rational Basis Review.

While drawing the line between speech and conduct may at times be difficult, the Supreme Court's precedents "have long drawn it, and the line is long familiar to the bar." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (internal quotation marks and citations omitted). "[R]estrictions on protected expression are distinct from restrictions on economic activity." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). For this reason, "the First Amendment does not

prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* As this Court has explained, "laws that target real-world commercial activity need not fear First Amendment scrutiny. Such run-of-the-mill economic regulations will continue to be assessed under rational-basis review." *Dana's R.R. Supply v. Att'y Gen. of Fla.*, 807 F.3d 1235, 1251 (11th Cir. 2015).

Where a law regulates conduct, not speech, it is "subject only to rational-basis review as a mine-run economic regulation." *Id.* at 1241. Legislatures are given wide latitude to "balance the advantages and disadvantages" when choosing whether and how to regulate commercial behavior. *Id.* at 1242. Indeed, the Supreme Court has applied a lenient standard to ordinary commercial or regulatory legislation, recognizing the need to defer significantly to legislative judgment. *See, e.g.*, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 475–76 (1997). In such cases, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). Courts applying rational-basis review have no license to second-guess "the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or

printed." *FAIR*, 547 U.S. at 62 (internal quotation marks omitted); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011). A legislature, for example, can prohibit racial discrimination in hiring without violating the First Amendment, even though such a prohibition would require an employer to take down a sign reading "White Applicants Only." *FAIR*, 547 U.S. at 63.

Section 381.00316 is a mine-run economic regulation that this Court should review "under the standard appropriate for the review of economic regulation," not "under a heightened standard appropriate for the review of First Amendment issues." *Glickman*, 521 U.S. at 469. Section 381.00316 prohibits businesses in Florida from "requir[ing] patrons or customers to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service from the business operations in this state." The statute affects what businesses cannot *do*—condition service on vaccination documentation—"not what they may or may not *say*." *FAIR*, 547 U.S. at 60. Any burden on speech that the statute engenders is merely an incidental effect of the conduct prohibited by the law. Further evidencing that the statute regulates conduct, not speech, the law neither forbids nor requires Norwegian or its customers to say anything, to engage in any form of speech, or to endorse any particular point of view, whether ideological or related to the sale of a product. *Cf. Glickman*, 521 U.S. at 469–70.

The law simply prohibits businesses from *conditioning service* on customers providing documentation certifying COVID-19 vaccination. Norwegian may still *request* that documentation from its customers, its customers may *voluntarily* provide it, and both parties are free to discuss the topic. What Norwegian may not do is deny service to customers who fail to provide that documentation. Neither does Florida's law prevent the free flow of information or prevent Norwegian and its customers from communicating. Again, Norwegian can *discuss* COVID-19 vaccination status with its customers to whatever extent it wishes and *request* documentation of vaccination status. Norwegian simply cannot *deny service* to customers if they do not provide that documentation.

Indeed, Circuit precedent establishes that § 381.00316 does not implicate the First Amendment. In *Wollschlaeger*, this Court held that a Florida law prohibiting doctors from discriminating against patients for owning firearms did not implicate the First Amendment because it could be construed "to apply to non-expressive conduct such as failing to return messages, charging more for the same services, declining reasonable appointment times, not providing test results on a timely basis, or delaying treatment because a patient . . . owns firearms." 848 F.3d at 1317. Here, no construal is required: § 381.00316 by its plain terms applies only to the non-expressive conduct of denying service to customers who do not produce documentary proof of vaccination. It therefore follows that § 381.00316 does not

implicate the First Amendment.

*Wollschlaeger*, to be sure, declared unconstitutional other provisions of the Florida law that did restrict speech, but even that part of the opinion supports the State because the Court repeatedly relied on the fact that another provision of the law gave patients a right to "decline to answer or provide any information regarding ownership of a firearm." *Id*. at 1314; *see also id.* at 1315. This essentially is the same right § 381.0036 gives to Florida consumers with respect to vaccine documentation, and there is no indication in *Wollschlaeger* that extension of this right presents a First Amendment issue.

Persuasive authority from the Third Circuit similarly supports a finding that § 381.0036 does not implicate the First Amendment. In *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 134 (3d Cir. 2020), the Third Circuit held that a provision barring businesses from relying on wage history information in setting wages did not implicate the First Amendment. The law at issue in *Greater Philadelphia* is akin to the law at issue here, which prohibits Norwegian from relying on the presence or absence of COVID-19 vaccination documentation in providing services. By contrast, the *Greater Philadelphia* court held that a provision that prohibited employers simply from inquiring about wage history did implicate the First Amendment. Here, unlike in *Greater Philadelphia*, Norwegian is free to inquire about customer vaccination documentation. All

Norwegian cannot do is use a customer's refusal to provide that documentation as a basis to deny service.

The Supreme Court's decision in *Rumsfeld v. FAIR* also mandates a ruling in Defendant's favor. In *FAIR*, the Supreme Court held that the Solomon Amendment, which required law schools to provide military recruiters access to campus and to students that was at least equal in quality and scope to the access that the school provided to any other employer, regulated conduct, not speech. 547 U.S. at 60. The Supreme Court concluded that the law affected what the schools had to *do*, not what they could or could not *say*. The Court further explained that the speech that the law schools complained was burdened by the law—expressing their disapproval of the military—was "plainly incidental to the Solomon Amendment's regulation of conduct," and "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62. *FAIR* mandates the conclusion that § 381.00316 is a regulation of conduct, not speech. Like the law in *FAIR*, § 381.00316 prohibits entities (here, cruise lines; in *FAIR*, law schools) from restricting access to services (here, cruises; in *FAIR*, recruiting events) to a certain class of persons (here, customers who do not present COVID-19 vaccination documentation; in *FAIR*, military recruiters). If the Solomon Amendment did not restrict speech, it follows that § 381.00316 does not

either.

As an economic regulation, therefore, § 381.00316 is subject to rational basis review. Under that standard, "a law must be rationally related to a legitimate government interest." *Jones v. Governor of Fla.*, 950 F.3d 795, 809 (11th Cir. 2020). This review is "highly deferential" and examines "whether there is *any* rational basis for the law, even if the government's proffered explanation is irrational, and even if it fails to offer any explanation at all." *Id.* Indeed, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns, Inc.*, 508 U.S. at 315.

Section 381.00316 satisfies rational-basis review. Preventing discrimination for failure to provide documentation evidencing COVID-19 vaccination and promoting privacy in the form of forbidding businesses to compel disclosure of COVID-19 vaccine documents are undoubtedly important state interests. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (noting cases upholding federal and state antidiscrimination laws against First Amendment challenges); *Wollschlaeger*, 848 F.3d at 1314 (recognizing that the "protection of individual privacy" and

"ensuring access to health care without discrimination" are substantial government interests). And the statute is rationally related to those interests: it prevents businesses from discriminating against prospective customers for failing to provide COVID-19 vaccination documentation, and it promotes individual privacy by forbidding businesses from conditioning service on the provision of that documentation. In other words, it ensures that Florida consumers can access the consumer marketplace without being compelled to produce private medical documentation.

The District Court, however, disagreed, holding that § 381.00316 was a content-based speech restriction subject to the First Amendment. *Norwegian*, 2021 WL 3471585, at *8–12. The Court determined that the statute was a restriction on speech and "not merely an economic regulation" because the statute "singles out documentary proof of COVID-19 vaccination" but "does not prohibit businesses from predicating services based on the exchange of other medical documents or oral verification of vaccination." *Id.* at *10–11. Section 381.00316 is therefore, in the District Court's view, not merely an incidental burden on speech "because it is specifically directed at certain content." *Id.* at *11 (internal quotation marks omitted).

The District Court erred in this analysis. Section 381.00316 is an economic regulation of conduct that has merely an incidental effect on speech akin to laws that

courts have repeatedly held not to implicate the First Amendment. The District Court's reasoning—that the statute regulates speech because it "singles out documentary proof of COVID-19 vaccination"—begs the question whether the statute regulates *speech*. And it does not. Indeed, the District Court's reasoning is impossible to square with *Wollschlaeger*, as the anti-discrimination provision that this Court held did not implicate the First Amendment restricted discrimination only on the basis of a certain subject—firearm ownership. The District Court's error was in focusing on the *protected activity* (here, refusal to provide vaccine documentation; in *Wollschlaeger*, ownership of firearms) rather than the *restricted conduct* (here, refusal to serve customers; in *Wollschlaeger*, discriminating against firearm-owning patients).

The cases the District Court relied on do not support its conclusion that § 381.00316 restricts speech because the laws at issue in those cases were critically different. For example, in *Dana's Railroad Supply*, this Court determined that a Florida statute prohibiting merchants from imposing surcharges on credit-card purchases implicated the First Amendment because it did not affect what businesses could charge but only how they communicated those charges. 807 F.3d at 1243–46. Here, that is not the case: there is nothing businesses in Florida can say to allow them to condition services on provision of COVID-19 vaccination documentation. *Dana's Railroad Supply* therefore *favors* Appellant, because the Court made clear that if the

law actually did regulate pricing (as Florida's law actually does regulate business behavior) it would be "a regulation of economic conduct" instead of "a restriction on speech" and therefore would not implicate the First Amendment. *See id.* at 1243.[16]

In *Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020), this Court concluded that local ordinances prohibiting therapists from engaging in certain purely speech-based therapies were content-based restrictions on speech. The Court reached this conclusion because whether a therapy was prohibited under the ordinances "depends only on the content of the words used in that therapy." *Id.* at 863. But the conduct that § 381.00316 prohibits, unlike the ordinances in *Otto*, is not dependent solely on the content of the words a business uses and the statute does not directly regulate speech. Instead, Florida's law is a regulation of "non-expressive conduct"—conditioning service on a customer providing COVID-19 vaccination documentation—that does not "implicate the First Amendment at all," *id.* at 861, and that at most incidentally affects speech, *id.* at 865.

And in *Sorrell*, the Supreme Court determined that a Vermont law restricting

[16] *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), favors Appellant for the same reason. In *Expressions*, the Supreme Court held that a similar New York statute implicated the First Amendment because it "regulat[ed] the communication of prices rather than prices themselves." *Id.* at 1151. But, again, the Court explained that if the law actually did regulate pricing, it would "simply regulate the amount that a store could collect" and therefore would not implicate the First Amendment. *Id.* at 1150–51.

the disclosure of individual physician prescribing practices by pharmacies and the use of that information for marketing by pharmaceutical manufacturers implicated the First Amendment. *See* 564 U.S. at 567. Here, by contrast, § 381.00316 does not restrict the communication of any information by a willing speaker, and Florida's law does nothing to restrict willing customers from disclosing their medical records to cruise lines or cruise lines from using that information. For Vermont's law to be equivalent to Florida's law it would have had to have protected doctors from being compelled to provide private patient information to pharmaceutical companies as a condition of prescribing the companies' medications. There is no indication in *Sorrell* that such a law would have implicated the First Amendment.

Accordingly, Florida's law is an economic regulation that does not implicate the First Amendment and that is subject to rational-basis review. Because it satisfies that review, the law is constitutional.

### B. If Section 381.00316 Implicates the First Amendment, It Is a Regulation of Commercial Speech that Satisfies *Central Hudson* Intermediate Scrutiny.

If this Court were to find that § 381.00316 regulates speech, it should still find that Plaintiffs are unlikely to succeed because § 381.00316 passes the test applied to commercial speech regulations. Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). The "core notion"

of commercial speech is "speech which does no more than propose a commercial transaction." *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (internal quotation marks omitted). But even beyond this core notion, speech may be commercial where (1) the speech is "conceded to be advertisements," (2) the speech contains a "reference to a specific product," or (3) the speaker "has an economic motivation" for distributing the material. *Id.* at 66–67. No one factor is dispositive. *See id.* at 67.

Under the *Central Hudson* test for determining whether a particular regulation on commercial speech is constitutionally permissible, the court first asks "as a threshold matter whether the commercial speech concerns unlawful activity or is misleading." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). If it does, "then the speech is not protected by the First Amendment." *Id.* If it does not, then the court examines (1) "whether the asserted governmental interest is substantial," (2) "whether the regulation directly advances the governmental interest asserted," and (3) "whether it is not more extensive than is necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 566. As elaborated below, under this test, the "fit" between the restriction and the government's interest need not be the least restrictive means. Instead it need only be a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001). The government, as the party seeking to uphold the restriction

on commercial speech, has the burden of satisfying each of these inquiries in the affirmative. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

**1. If it regulates speech, § 381.00316 regulates commercial speech.**

Norwegian seeks to require all passengers to provide documentation proving COVID-19 vaccination status as a condition of its providing service to them. *Norwegian*, 2021 WL 3471585, at *6. To the extent this is "speech," it is core commercial speech because it is made pursuant to and in furtherance of a commercial transaction, namely, customers purchasing and using a cruise ticket to sail aboard Norwegian's ships. It is speech "necessary to the consummation of a commercial transaction." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013). By Norwegian's own design, providing COVID-19 vaccination documentation is necessary for customers to gain access to its services. Norwegian customers cannot successfully purchase a ticket and set sail aboard a Norwegian ship unless they have provided the necessary vaccination documentation. Although Norwegian alleges to have motivations other than economic for requiring the documentation, *see Norwegian*, 2021 WL 3471585, at *6, that does not change the fact that Norwegian is requiring the documentation to consummate an economic transaction.

But even if Norwegian's "speech" falls outside of this core notion, it is nevertheless commercial speech because it is made with "reference to a specific product"—a cruise trip—and Norwegian "has an economic motivation" for the

speech. *Bolger*, 463 U.S. at 66–67; *see also Greater Phila.*, 949 F.3d at 137 (holding that ordinance prohibiting employers from inquiring about wage history was regulation of commercial speech because of the economic motive involved in that speech). Norwegian itself alleges that requiring COVID-19 vaccination documentation would be in its business interests and would affect its "bottom-line." App.30, 33–35. Norwegian plainly—and concededly—has an economic motive for its actions at issue here.

Accordingly, if this Court determines that § 381.00316 implicates the First Amendment, it should analyze the law's regulation of Norwegian's speech as a regulation of commercial speech under *Central Hudson*.

**2. Florida's interests are substantial.**

As explained above, in passing § 381.00316, the Legislature sought to advance two state interests: preventing discrimination for failure to provide documentation evidencing COVID-19 vaccination and promoting privacy in the form of forbidding businesses to compel disclosure of COVID-19 vaccine documents. These interests promote both individual liberty and economic health and vitality. While the bill was being considered, Rep. Beltran explained that the COVID-19 vaccination documentation provision would prevent businesses from "unfairly and disparately discrminat[ing] against our minority populations," who are

"the largest segment of [Florida] that is vaccination hesitant."[17] Sen. Burgess explained that the bill would prevent a situation where a Floridian would "have to provide a piece of documentation to show that you got a vaccine in order to go to the grocery store," and referenced laws protecting the privacy of an individual's medical information.[18] As this Court held in *Wollschlaeger*, interests in preventing discrimination and protecting individual medical privacy are substantial state interests. *See* 848 F.3d at 1314.

**3. Section 381.00316 directly advances Florida's asserted interests.**

Section 381.00316 directly advances Florida's interests in (1) preventing discrimination on the basis of failing to provide documentation evidencing COVID-19 vaccination; and (2) promoting individual privacy in the form of forbidding businesses to compel disclosure of COVID-19 vaccination documents. The District Court erred by applying a much higher standard than precedent requires for this *Central Hudson* factor and concluding that § 381.00316 does not directly advance these interests.

*Central Hudson* intermediate scrutiny does not require direct empirical evidence that a legislative policy choice will succeed. It allows legislatures to

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[17] *House Session*, at 2:28:55–2:29:06, 2:29:22–2:29:37, FLA. HOUSE OF REP. (Apr. 28, 2021), https://bit.ly/3nvf3E7.

[18] *Senate Session*, at 6:18:57–6:19:17, 6:32:34–6:34:17, FLA. SENATE (Apr. 29, 2021), https://bit.ly/3ljlCqW.

forecast and make plausible predictive judgments when definitive empirical evidence is not available. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994). Indeed, "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Id.* And "courts must accord substantial deference to the predictive judgments of [legislatures]." *Id.*

This substantial deference is even more heightened when a legislature is acting in "areas fraught with medical and scientific uncertainties," like the COVID-19 pandemic. *Marshall v. United States*, 414 U.S. 417, 427 (1974); *see also Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring). Consequently, "legislative options must be especially broad" in this situation and "courts should be cautious not to rewrite legislation, even assuming . . . that judges with more direct exposure to the problem might make wiser choices." *Id.* State legislatures must be accorded "wide discretion . . . in determining what is and what is not necessary" to protect the public welfare. *See, e.g.*, *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232–33 (1945); *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22–23 (1977).

The *Central Hudson* standard is flexible in the amount and type of evidence required to uphold commercial speech restrictions. *See Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 628–29 (1995). The Supreme Court "has permitted litigants to justify

speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense." *Id.* (internal quotation marks omitted); *see also Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 300 (2007) (explaining that the Court "need[ed] no empirical data to credit TSSAA's commonsense conclusion" that the type of athletic recruiting restricted could lead to certain negative outcomes); *Nixon v. Shrink Mo. Gov. PAC*, 528 U.S. 377, 390–91 (2000) (concluding that the state satisfied its evidentiary obligations even though the state lacked empirical evidence that the law would advance the state's interests); *W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 303–04 (4th Cir. 2009). In other words, "[t]he Supreme Court has not demanded that the enacting authority achieve legislative certainty or produce empirical proof that the adopted legislation would achieve the stated interest even when applying strict scrutiny." *Greater Phila.*, 949 F.3d at 122. Rather, "substantial evidence of *the possibility* that the speech restriction *could* favorably impact a concern that the state actor had a fundamental interest in addressing is sufficient." *Id.* at 145.

Florida has made this requisite showing. The Legislature made the commonsense, predictive judgment that without a prohibition enacted into law preventing businesses from conditioning service on providing COVID-19

vaccination documentation, some businesses would discriminate among potential customers on that basis, and that prohibiting that practice would promote individual privacy of sensitive COVID-19 medical information. Norwegian's actions in this very case demonstrate the wisdom of the Legislature's predictions. Norwegian brought this case for the express purpose of being able to condition service upon customers providing documentation of COVID-19 vaccination.

The District Court first erred by determining that § 381.00316 was not "materially effective" at furthering Florida's substantial state interests. *Norwegian*, 2021 WL 3471585, at *14. The Court concluded that § 381.00316 does not "prohibit businesses from imposing a vaccination requirement," from "verifying vaccination status . . . orally," or from "subjecting unvaccinated customers . . . to restrictions, requirements, and expenses that do not apply to vaccinated patrons." *Id.* at *14–15. Furthermore, in the Court's view, the statute does "not effectively protect the medical privacy of residents" because it is allegedly "underinclusive": the statute does not govern employers, nor does it prohibit businesses from requiring the disclosure of COVID-19 test results or other non-COVID-19 vaccination records. But § 381.00316 *is* materially effective at advancing Florida's interests in preventing discrimination on the basis of failing to provide documentation evidencing COVID-19 vaccination and promoting individual privacy in the form of forbidding businesses from compelling disclosure of COVID-19 vaccination documents. In

fact, the relationship is nearly tautological. The statute advances Florida's interest in preventing businesses from discriminating among potential customers on the basis of those customers' failing to provide documentation evidencing COVID-19 vaccination by prohibiting businesses from conditioning service on the provision of that documentation. The statute advances Florida's interest in promoting individual privacy in the form of forbidding businesses to compel disclosure of COVID-19 vaccination documentation by prohibiting businesses from compelling disclosure of COVID-19 vaccination documentation as a condition of service.

The District Court next erred by faulting the Legislature for not addressing certain other issues through § 381.00316. For example, the District Court took the view that the statute was not effective at advancing Florida's asserted interests because it did not address, among other issues, the employer/employee relationship, vaccinations for other diseases, and oral verification of COVID-19 vaccination status. *Id.* at *14–16. It is a well-settled rule, however, that legislatures "must be allowed leeway to approach a perceived problem incrementally." *Beach Commc'ns, Inc.*, 508 U.S. at 316. A legislature is permitted to "deal with one part of a problem without addressing all of it." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975). "A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015); *accord McDonald v. Bd. of Election Comm'rs of*

*Chi.*, 394 U.S. 802, 809 (1969). The First Amendment "imposes no freestanding underinclusiveness limitation." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (internal quotation marks omitted). States adopt laws to address the problems that confront them, and the First Amendment does not require States to regulate for problems that do not exist. *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion). The Supreme Court has accordingly "upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Williams-Yulee*, 575 U.S. at 449.

Just so here. Florida should not be faulted for having a laser-focus on a narrow problem—that of businesses conditioning service on the provision of documentation evidencing COVID-19 vaccination—and addressing solely that issue to the exclusion of others. Florida is entitled to address the issue that it perceives as most pressing, and it has done so in § 381.00316. The narrow tailoring of the law should count in Florida's favor, not against it. The District Court erred by concluding otherwise.

**4. Section 381.00316 is not more extensive than is necessary to serve Florida's asserted interests.**

The District Court concluded that Appellant had failed to demonstrate that § 381.00316 is not more extensive than is necessary to serve Florida's asserted interests because Florida "could have directly regulated discriminatory business practices, as opposed to the exchange of COVID-19 vaccination documentation," or

"could have prevented or placed limitations on businesses photocopying, keeping, or storing a copy of documentation" to address medical privacy concerns. *Norwegian*, 2021 WL 3471585, at *16. But this factor does not require Florida to employ "the least restrictive means conceivable," but rather, Florida must only demonstrate "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999). The Supreme Court eschews a least restrictive means test out of concern that such a level of scrutiny would interfere with legislative policy choices. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 479–80 (1989) (explaining that under *Central Hudson*, "we leave it to governmental decisionmakers to judge what manner of regulation may best be employed"). Here, as previously explained, § 381.00316 is perfectly tailored to achieve the State's interests, whereas the District Court's suggested alternatives would not have achieved those interests.

The District Court, however, concluded that the law failed to satisfy this factor because there was no evidence in the record that "Florida considered obvious, alternative policies" that could advance Florida's objectives "without restricting speech." *Norwegian*, 2021 WL 3471585, at *16. But, again, Florida was narrowly focused on *conditioning service on the provision of COVID-19 vaccination documentation* in this statute, *not* generalized discrimination or generalized medical

privacy concerns. Florida cannot address its asserted interests any more precisely than it did in this statute by prohibiting the very conduct underlying those interests. Under the District Court's conception of this factor, Florida would have to regulate wide swaths of conduct (*e.g.*, "discriminatory business practices" and "photocopying, keeping, or storing a copy of documentation") instead of surgically targeting the issue that was before it: businesses conditioning service on customers' disclosure of COVID-19 vaccination documentation.

### C. Even if § 381.00316 Is Subject to Strict Scrutiny, It Satisfies that Test.

Should the Court conclude that § 381.00316 is neither an economic regulation nor a regulation of commercial speech and therefore subject to strict scrutiny, the statute nevertheless passes that test. A law subject to First Amendment strict scrutiny is constitutional if the government proves that it is narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Florida's interests in preventing discrimination on the basis of failing to provide documentation evidencing COVID-19 vaccination and promoting individual privacy in the form of forbidding businesses to compel disclosure of COVID-19 vaccination documents are compelling and an exercise of the State's traditional police power of safeguarding public health, safety, and the economic well-being of its citizens. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Furthermore, the statute is

narrowly tailored to serve those interests in a nearly one-to-one correlation. Florida's statute restricts, as relevant here, one specific act, namely, a business conditioning service on the provision of COVID-19 vaccination documentation. Florida, as a sovereign State, must be allowed to make the public policy choice that businesses cannot essentially shut out Floridians from participating in the marketplace due to the failure to provide COVID-19 vaccination documentation.

## II. Norwegian Is Unlikely to Succeed on the Merits of Its Claim that § 381.00316 Violates the Dormant Commerce Clause.[19]

The Commerce Clause states that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Although the clause addresses only the powers of Congress, the Supreme Court has held that it has a "dormant" aspect as well, namely, one that serves as "a substantive restriction on permissible state regulation of interstate commerce." *Dennis v. Higgins*, 498 U.S. 439, 447 (1991). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988). This dormant aspect also prohibits states from "ventur[ing] excessively into the

[19] Several Justices have questioned dormant Commerce Clause doctrine, *see, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring), and we reserve the right to challenge the doctrine in the Supreme Court.

regulation of . . . [interstate] commerce . . . [and] trespass[ing] upon national interests." *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981) (internal quotation marks omitted).

Courts apply a two-tiered analysis to determine whether a statute violates the dormant Commerce Clause. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986). If a law "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [courts] have generally struck down the statute without further inquiry." *Id.* at 579. Where, however, a statute "advances a legitimate local interest and has only indirect effects on interstate commerce, [this Court] appl[ies] the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and invalidates the law only if the burden on interstate commerce clearly exceeds the local benefits." *Fla. Transp. Servs., Inc. v. Miami-Dade County*, 703 F.3d 1230, 1244 (11th Cir. 2012) (internal quotation marks omitted). One factor that courts will consider is whether the local interests "could be promoted as well with a lesser impact on interstate activities." *Id.*at 1255. But "increased costs are insufficient alone to constitute an unreasonable burden on interstate commerce in violation of the dormant Commerce Clause." *Id.* at 1258. The "ultimate object" is to "determine whether the regulation involves economic protectionism." *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281, 1289 (S.D. Fla. 2007).

A court's review in this area is deferential for several reasons. First, "a State's power to regulate commerce is never greater than in matters traditionally of local concern," such as the promotion of public health or safety. *Kassel*, 450 U.S. at 670. Deference is particularly strong in the context of "state legislation in the field of safety." *Pike*, 397 U.S. at 143. Indeed, the cases "where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce" are "few in number." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). Second, "the existence of substantial in-state interests harmed by a regulation is a powerful safeguard against legislative discrimination." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 404 (1994) (O'Connor, J., concurring in the judgment) (internal quotation marks omitted). "The Court generally defers to health and safety regulations because their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *Id.* (internal quotation marks omitted). Finally, "the state has exceptional scope for the exercise of its regulatory power" with respect to "local regulations of rivers, harbors, piers, and docks," which "have been sustained even though they materially interfere with interstate commerce." *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 783 (1945).

The District Court determined that, because "Section 381.00316 does not

directly regulate, or affirmatively discriminate against interstate commerce," and because "the Statute is applicable to both out-of-state and in-state business entities that operate in the State of Florida," "the first tier of analysis does not apply." *Norwegian*, 2021 WL 3471585, at *17. Neither Norwegian nor Appellant argued for a different conclusion below, *see id.* at *17 n.40, and Appellant does not contest the District Court's conclusion on this point here. Accordingly, this Court may proceed directly to the second tier of the analysis: considering whether the burdens on interstate commerce engendered by Florida's law *clearly exceed* the law's local benefits. This balancing test favors the State.

First, as previously explained in the First Amendment context, § 381.00316 advances important local interests: preventing discrimination for failure to provide documentation evidencing COVID-19 vaccination and promoting privacy in the form of forbidding businesses from compelling disclosure of COVID-19 vaccine documents.

The District Court faulted Appellant for purportedly "fail[ing] to articulate *why*" these interests "are legitimate local purposes." *Norwegian*, 2021 WL 3471585, at *19. But Appellant *has* articulated why the State interests § 381.00316 advances are substantial and legitimate. Florida exercised its sovereign authority through its traditional police power of safeguarding the public health, safety, and economic well-being of its citizens, and determined that the public policy of the State should

be that businesses operating in the State should be prohibited from denying service to customers who decline to provide documentation certifying COVID-19 vaccination. In considering the bill, legislators repeatedly justified this public policy based on protecting individual liberties, protecting privacy, and preventing discrimination. Courts have no basis to second-guess this judgment. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 670 (1981).

It was reasonable for the Legislature to focus on documentation evidencing COVID-19 vaccination in tailoring the law, and the wisdom of that determination has borne out: Norwegian brought this very case so that it could deny service to customers who decline to provide documentation certifying COVID-19 vaccination. As Norwegian itself conceded, it cannot effectively deny service to unvaccinated customers without being able to require those customers to provide COVID-19 vaccination documents. *See Norwegian*, 2021 WL 3471585, at *22. Indeed, in other contexts where vaccines are mandated as a condition of "service"—such as to attend public K-12 schools—vaccination status is proven through documentation.[20] Furthermore, Norwegian has failed to produce any evidence of any business conditioning service on proving COVID-19 vaccination in any other manner—such as an oral attestation—in light of § 381.00316. Should Florida businesses begin

[20] *See* FLA. DEP'T OF HEALTH, IMMUNIZATION GUIDELINES 3 (Mar. 2013), https://bit.ly/2Y8Rozr.

requiring oral attestations as a condition of service, the Legislature could act to address that new conduct. *See Williams-Yulee*, 575 U.S. at 449. Or it could determine that an oral attestation system is not as intrusive or burdensome as a documentary requirement. But in all events the Legislature did not act unconstitutionally by addressing the most immediately pressing issue—the risk that businesses would implement a "vaccine passport" requirement.

The District Court's reliance on cases for the proposition that Florida needs to submit evidence to justify its law is misplaced. For example, in *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008), this Court upheld the district court's determination that a local ordinance did not serve the legitimate local purpose of preserving a small-town community because that locality did not have a small-town character at all. But here, Norwegian's very behavior in bringing this case vindicates Florida's predictive judgment that its law would serve legitimate local purposes. Furthermore, the discussion in *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002), of evidentiary support is inapposite. In *Bainbridge*, this Court considered to what extent the Twenty-First Amendment immunized a state's alcohol-related law that was discriminatory against interstate commerce *on its face* from the dormant Commerce Clause. In that context, the *Bainbridge* Court held that the state had not presented sufficient evidence "supporting a genuine need for its *discriminatory* laws." *Id.* at 1114 (emphasis added). Here, where the District Court had already

determined that Florida's law was not discriminatory on its face, this discussion from *Bainbridge* has no application.

The District Court also once again faults the Florida Legislature in creating § 381.00316 for not effectively addressing Florida's substantial interests, for not regulating more broadly, and for not addressing other potential issues, such as the employer-employee relationship, COVID-19 test results, and "other medical documentation—including documentary proof-of-vaccination requirements for schoolchildren." *Norwegian*, 2021 WL 3471585, at *19. Appellant has already explained the flaws inherent in this line of reasoning in the First Amendment context. *See supra* sections I.B.3, I.B.4. Florida's law *does* advance Florida's substantial, legitimate local interests. And Florida is constitutionally permitted to address the issues that it deems to be the most pressing and to focus on one aspect of a problem at a time, to the exclusion of other potential issues. *Williams-Yulee*, 575 U.S. at 449; *McDonald*, 394 U.S. at 809. Consequently, that § 381.00316 does not, for example, regulate the disclosure of COVID-19 test results does not render it unconstitutional as violating the dormant Commerce Clause.

Second, the local benefits of § 381.00316 clearly exceed the incidental burden on interstate or international commerce. Section 381.00316 reflects Florida's sovereign judgment that the public policy of the State should be that businesses are not allowed to condition service on a customer's provision of COVID-19

vaccination documentation. Through the statute, Florida is protecting its vulnerable minority populations, preventing the balkanization of the marketplace, and protecting individual medical privacy by preventing businesses from mandating disclosure of COVID-19 vaccination documentation as a condition of service. This Court is "not empowered to second-guess the wisdom of [these] state policies." *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 670 (1981); *see also Beach Commc'ns*, 508 U.S. at 313 (in the Fourteenth Amendment context, explaining that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices"); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ."). Where a legislature "undertakes to act in areas fraught with medical and scientific uncertainties," its latitude "must be especially broad," *Marshall*, 414 U.S. at 427, and where the legislature does not exceed those broad limits, it "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). In the face of these substantial local benefits, and given the deference this Court must show the

Florida Legislature, any incidental burdens on commerce engendered by the law pale in comparison.

The District Court disagreed, determining that Florida's law excessively burdened commerce. The District Court found it significant, in weighing the burdens of Florida's law on commerce against the local benefits of the law, that Norwegian would allegedly have to "go through tortured, costly, time-consuming, damaging contortions in order to go to or from Florida relative to other ports" if Norwegian could not require COVID-19 vaccination documentation from its customers. *Norwegian*, 2021 WL 3471585, at *21. But the record before the District Court demonstrated that Norwegian planned to sail only to foreign ports that required *either* proof of COVID-19 vaccination *or* a negative COVID-19 test prior to disembarkation at that port, App.30, and that Norwegian planned to require tests from all passengers whether they had presented COVID-19 vaccination documentation or not.[21] App.32–33. That Norwegian's ships might dock at multiple foreign ports in quick succession, *see Norwegian*, 2021 WL 3471585, at *19, would add no burden, given Norwegian's existing plan to test its passengers for COVID-

[21] The only port that the District Court identified as potentially requiring all passengers ages 12 and older to be fully vaccinated in order for the ship carrying them to be allowed to dock was St. Thomas in the U.S. Virgin Islands. *Norwegian*, 2021 WL 3471585, at *21. Norwegian submitted no evidence itself that the U.S. Virgin Islands required all passengers aboard a cruise ship to be vaccinated in order for that ship to dock. Furthermore, the District Court described this St. Thomas requirement as merely a "plan," so it is unclear whether it was even implemented.

19. Furthermore, the District Court's finding that "Section 381.00316 will prevent [Norwegian] . . . from possessing verified information necessary to effectively and efficiently process landing and disembarkation at various, preferred domestic and international ports" is simply incorrect. *Id.* at *22. Norwegian will still be able to voluntarily request that documentation from its passengers, and there is every reason to believe that the vast majority of Norwegian's passengers will voluntarily provide it. *See* App.453 (explaining that "99 percent of the people on board" the first U.S. cruise on Celebrity, which left from Fort Lauderdale, "were fully vaccinated"); *id.* ("Royal Caribbean has said its surveys show 90 percent of customers who were booking were already vaccinated or planned to be in time for their cruise."); App.309 (industry representatives telling the CDC that "we believe that the vast majority of our guest bookings will be fully vaccinated before sailing"). Consequently, the notion that Norwegian will have to suffer additional time and expense to comply both with Florida's law and the requirements of foreign ports above and beyond what it already plans to do is illusory.

In any event, given the importance of the legitimate local interests § 381.00316 advances, even if the incidental burdens on interstate commerce the statute creates were greater than they currently are, there still would be no basis to find that those burdens *clearly exceed* Florida's sovereign judgment on this issue. Indeed, there would be no basis for the Court to require Florida to cede to the policy

judgments of other states or foreign governments on this issue.

Moreover, the critical element of economic protectionism is entirely absent from Florida's law. In all of the cases that were cited by Norwegian below, or that were cited by the District Court, the law successfully challenged on dormant Commerce Clause grounds either appeared to be protectionist or wholly failed to promote any legitimate government interests. For example, in *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 446–47 (1978), the law at issue imposing a limit on the vehicle lengths permissible in Wisconsin was "enacted at the instance of, and primarily benefit[s], important Wisconsin industries" and could not "be said to make more than the most speculative contribution to highway safety." *See also Pike*, 397 U.S. at 145 (identifying the State's interest as having "cantaloupes identified as originating in Arizona"); *C & A Carbone*, 511 U.S. at 386 (concluding that the law "deprive[s] competitors, including out-of-state firms, of access to a local market"); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573 (4th Cir. 2005) (determining that law imposed "heavy burdens predominantly on out-of-state interests"); *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 216 (3d Cir. 2002) (explaining that the law's burden "appears to fall only on out-of-state dealers"); *Island Silver & Spice*, 475 F. Supp. 2d at 1291–92 (concluding that law "appears tailored to serve local business interests by preventing competition from national chains"). And in *Bibb*, the Supreme Court

determined that a law mandating curved mud flaps be used in state violated the dormant Commerce Clause because "it was conclusively shown that the contour mud flap possesses no advantages over the conventional or straight mud flap." 359 U.S. at 525 (internal quotation marks omitted); *see also S. Pac. Co.*, 325 U.S. at 775 (determining that law regulating train lengths actually "made train operation more dangerous"); *Fla. Transp. Servs.*, 703 F.3d at 1261 (determining that stevedore "permitting practices did not further, but if anything rather disserved, the County's purported purposes and benefits"). These cases do not control where, as here, there is no hint of protectionism in Florida's law—indeed, Plaintiffs, who are allegedly harmed by § 381.00316, are Florida businesses—and where the law advances legitimate local interests that the Florida Legislature has determined to be the public policy of the State. In the absence of either protectionism or lack of a rational basis, there simply is no basis to find that the incidental burdens Florida's law purportedly creates on interstate commerce *clearly exceed* the local benefits, *cf. Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (explaining that when "the interests on both sides are incommensurate," the *Pike* balancing test is "more like judging whether a particular line is longer than a particular rock is heavy"), and a finding to the contrary would require the Court to make an "essentially legislative judgment[ ]" it is "ill suited" to make, *id.* (internal quotation marks omitted).

The District Court lastly faulted Appellant for failing to articulate why a less restrictive alternative to § 381.00316 would not have addressed Florida's legitimate concerns. *Norwegian*, 2021 WL 3471585, at *22. To start, as previously explained, § 381.00316 addresses Florida's interests in a nearly one-to-one manner; no other alternative law would address those interests as well. And although the cruise industry was brought up during debate on the bill, the fact that the bill passed without any carveouts provides strong evidence that the Legislature determined that its purposes could not be met if the cruise industry were exempted. There is no other less restrictive alternative to § 381.00316 that would have addressed Florida's substantial, legitimate interests. Indeed, the alternatives suggested by the District Court did not involve less restrictive means of seeking to advance the interests Florida seeks to advance through § 381.00316, but rather abandoning those interests altogether with respect to the cruise industry.

## III. Norwegian Lacks All Other Prerequisites for a Preliminary Injunction.

Norwegian's failure to show a likelihood of success on the merits of its claims that § 381.00316 violates the First Amendment and the dormant Commerce Clause is fatal to Norwegian's request for a preliminary injunction. *See Bloedorn v. Grube*, 631 F.3d 1218, 1242 (11th Cir. 2011). Nevertheless, Norwegian fails to satisfy the remaining prerequisites to obtain a preliminary injunction as well.

First, Norwegian will not suffer irreparable injury if Appellant is allowed to enforce § 381.00316 against it. "A showing of irreparable injury is the sine qua non of injunctive relief," *Siegel*, 234 F.3d at 1176 (internal quotation marks omitted), but Plaintiffs have failed to make that showing. Because Norwegian does not demonstrate a likelihood of success on the merits of its claim that § 381.00316 violates its First Amendment rights, no finding of irreparable injury may follow on this basis.

Neither may Norwegian rely on alleged economic harms, damage to reputation, or loss of customer goodwill to establish irreparable harm. Any such injuries would be caused by Norwegian's own actions, and self-inflicted injuries cannot constitute irreparable harm. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020); *Di Biase v. SPX Corp.*, 872 F.3d 224, 235 (4th Cir. 2017); *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *Salt Lake Trib. Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003). As a recounting of the timeline shows, Norwegian had known for months about Florida's law, but significantly delayed in seeking injunctive relief and set itself up for a conflict with Florida's law, choosing to "stake[ ] its reputation and its relationships with customers on setting sail August 15 with everyone's vaccine documentation in hand." Doc. No. 3 at 18. On April 2, 2021, Governor DeSantis issued Executive Order 21-81, which applied to "businesses in Florida," including cruises. App.298.

On April 28, in its Dear Colleague Letter, the CDC first announced the vaccination option for a cruise ship to avoid the requirement of a simulated voyage. App.55–59. On May 3, Governor DeSantis signed § 381.00316 into law. Yet on May 7, Norwegian "said it intends to require 100 percent of passengers and crew to be fully vaccinated to sail." App.288. And while on June 2, Norwegian executed an MOA with Miami-Dade County stating that it would follow Florida law and not require vaccine documentation from customers, App.374–433, on June 7, Norwegian announced the August 15 voyage of the *Norwegian Gem* and committed to it being a fully vaccinated cruise, App.291. Norwegian then waited over an additional month before bringing this lawsuit on July 13. Consequently, Norwegian had ample time to seek injunctive relief but chose to delay, filing this suit months after the law took effect. "A delay in seeking a preliminary injunction of even only a few months . . . militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Although not inevitably fatal, a delay in seeking preliminary injunctive relief "necessarily undermines a finding of irreparable harm" because "the very idea" of the relief "is premised on the need for speedy and urgent action to protect a plaintiff's rights before a case can be resolved on its merits." *Id.*

Finally, by sailing in compliance with Florida's law, Norwegian will not suffer irreparable harm in the form of undue risks to human health and safety. The

CDC has presented cruise lines with two equivalent options to sail in a way the CDC deems to be safe for passengers—performing a simulated voyage to demonstrate safety protocols or verifying 95% vaccination rates aboard the ship—so Norwegian cannot complain that one of the two CDC-approved choices would lead to irreparable harm. At the time this case was in the District Court, numerous major cruise lines had implemented measures short of demanding vaccine documentation, App.294–306, App.322–34, to safely comply both with the CDC's CSO and Florida's law. And the submissions of the Healthy Sail Panel and the Cruise Lines International Association ("CLIA") refute the notion that COVID-19 vaccine documentation is required for safe cruises, as does the CLIA's insistence that cruises have been operating in Europe and Asia since summer 2020—well before vaccines were available—with "a far lower incident rate than on land." App.434–36. The Healthy Sail Panel, a group of experts co-convened by Norwegian "to define a set of protocols and procedures that would protect guests, crew, and the communities cruise ships visit from [COVID-19] and reduce the risk of transmission below the level people would experience in other normal activities," App.138, concluded that by following protocols such as rigorous testing, physical distancing and masking, and supervising off-board excursions, the cruise industry could reopen "in the safest ways possible" and "protect passengers and crew against the risk of transmission," App.198–99, even in the absence of an available vaccine. In fact, the Panel's

"paramount goal and guiding principle" was to define a set of "protocols and procedures" that would "reduce the risk of transmission below the level people would experience *in other normal activities*," so presumably cruise passengers would be *safer* on a cruise ship implementing the Healthy Sail Panel's plan than in their everyday lives *even without being vaccinated*. App.138. Similarly, on May 11, 2021, the CLIA—of which Norwegian is a member, App.352–65, and its CEO is on the Global Executive Committee, App.366–68—recommended a framework to the CDC that it stated would allow the operation of cruises in a manner that would "significantly reduce risk to a level that would compare favorably to other venues" while merely encouraging customer vaccination, App.347; *see also* App.346–51.

Second, the remaining factors—the balance of the equities and the public interest—favor Florida. These factors "merge when . . . the government is the opposing party." *Gonzalez*, 978 F.3d at 1271 (internal quotation marks and alteration omitted). As just explained, while Norwegian will not suffer irreparable injury in the absence of a preliminary injunction, the District Court's preliminary injunction subjects Florida to ongoing irreparable injury. Whenever "a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018). Florida, in its sovereign capacity and exercising its traditional police powers to legislate to

protect the health, safety, and economic well-being of its citizens, *see Medtronic*, 518 U.S. at 475; *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607, has determined that the public interest lies in prohibiting businesses from conditioning service on customers' providing COVID-19 vaccination documentation.

This determination involved the balancing of important interests such as public health, safety, economic well-being, and privacy. Indeed, during debate on the bill, Florida legislators repeatedly described it as a "public policy call"[22] that struck the appropriate balance between individual liberty and safety.[23] Norwegian has no basis to second-guess the Florida Legislature's judgment, and this Court lacks the power to "second-guess the wisdom of state policies." *W. & S. Life Ins. Co.*, 451 U.S. at 670; *see also Beach Commc'ns*, 508 U.S. at 313; *City of New Orleans*, 427 U.S. at 303; *Marshall*, 414 U.S. at 427; *S. Bay United Pentecostal Church*, 140 S. Ct. at 1614 (Roberts, C.J., concurring in denial of application for injunctive relief). Furthermore, the public also suffers an irreparable injury in the absence of § 381.00316's protections against businesses conditioning service on the provision of COVID-19 vaccination documentation.

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[22] *Senate Session*, at 6:21:49–6:22:07, 6:30:43–6:30:58, FLA. SENATE (Apr. 29, 2021), https://bit.ly/3ljlCqW (statements of Sen. Burgess).

[23] *House Session*, at 2:30:18–2:30:31, FLA. HOUSE OF REP. (Apr. 28, 2021), https://bit.ly/3nvf3E7 (statement of Rep. Leek).

Whatever burdens Norwegian might bear should this Court allow Appellant to enforce § 381.00316 against it are far exceeded by the public benefits of preventing discrimination for failure to provide documentation evidencing COVID-19 vaccination and promoting privacy in the form of forbidding businesses to compel disclosure of COVID-19 vaccine documents. Consequently, the balance of the equities and the public interest weigh decidedly in Appellant's favor.

## CONCLUSION

This Court should vacate the District Court's preliminary injunction.

Dated: October 4, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B)(i) because this brief contains 12,947 words, excluding parts of the brief exempted by FED. R. APP. P. 32(f) and 11th Cir. R. 32-4.

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: October 4, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on October 4, 2021. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: October 4, 2021

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