

United States Court of Appeals
for the
Eleventh Circuit

NORWEGIAN CRUISE LINE HOLDINGS LTD, a Bermuda Company, NCL
(BAHAMAS), LTD., a Bermuda Company agent of Norwegian Cruise Line,
SEVEN SEAS CRUISES S. DE R.L. LLC, d.b.a. Regent Seven Seas Cruises,
OCEANIA CRUISES S. DE R.L., d.b.a Oceania Cruises,

Plaintiffs-Appellees,

– v. –

STATE SURGEON GENERAL, Florida Department of Health,
in his official capacity,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
HONORABLE KATHLEEN M. WILLIAMS, U.S. DISTRICT JUDGE

BRIEF FOR PLAINTIFFS-APPELLEES

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Norwegian Cruise Line Holdings Ltd., et al. v. State Surgeon General
No. 21-12729

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

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, undersigned counsel hereby certifies that Defendant-Appellant's certificate of interested persons is correct and complete.

Norwegian Cruise Line Holdings Ltd., a Bermuda company; NCL (Bahamas) Ltd., d/b/a Norwegian Cruise Line ("NCLB"), a Bermuda company; Oceania Cruises S. De R.L., d/b/a Oceania Cruises ("Oceania"), a Panama limited liability company; and Seven Seas Cruises S. De R.L., d/b/a Regent Seven Seas Cruises ("Regent Seven Seas"), a Panama limited liability company, file the following corporate disclosure statement:

1. Norwegian Cruise Line Holdings Ltd. is publicly traded on the New York Stock Exchange under ticker symbol "NCLH." There are no parent corporations or publicly-held corporations that hold ten percent or more of Norwegian Cruise Line Holdings Ltd.'s stock.
2. NCLB is a wholly-owned subsidiary of NCL International, Ltd., a Bermuda company, which in turn is a wholly-owned subsidiary of Arrasas Limited, an Isle of Man company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd. ("NCLC"), a Bermuda company, which in turn is a wholly-owned subsidiary of Norwegian Cruise Line Holdings Ltd.

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3. Oceania is a subsidiary of Prestige Cruise Holdings S. de R.L. (99.99%) (“Prestige Cruises Holdings”), and Prestige Cruises International S. de R.L. (0.01%) (“Prestige Cruises International”), each a Panama limited liability company. Prestige Cruise Holdings is a subsidiary of Prestige Cruises International (99.99%) and NCLC (0.01%). Prestige Cruises International is a subsidiary of NCLC (99.99%) and Norwegian Cruise Line Holdings Ltd. (0.01%). NCLC is a wholly-owned subsidiary of Norwegian Cruise Line Holdings Ltd.

4. Regent Seven Seas is a subsidiary of Classic Cruises, LLC, a Delaware limited liability company (“Classic Cruises”) and Classic Cruises II, LLC, a Delaware limited liability company (“Classic Cruises II”), each of which hold a 50% interest in Regent Seven Seas. Classic Cruises and Classic Cruises II are in turn wholly-owned subsidiaries of Prestige Cruise Holdings. Prestige Cruise Holdings is a subsidiary of Prestige Cruises International (99.99%) and NCLC (0.01%). Prestige Cruises International is a subsidiary of NCLC (99.99%) and Norwegian Cruise Line Holdings Ltd. (0.01%). NCLC is a wholly-owned subsidiary of Norwegian Cruise Line Holdings Ltd.

STATEMENT REGARDING ORAL ARGUMENT

Norwegian Cruise Line Holdings Ltd., NCL (Bahamas) Ltd., Seven Seas Cruises S. de R.L., and Oceania Cruises S. de R.L. (“**NCLH**”) agree with Appellant that oral argument would materially assist the Court. This case presents the important question whether a district court abused its discretion by granting targeted preliminary relief protecting the rights of a cruise line that sails in international waters—and all of its many passengers, employees, and other stakeholders—against an aberrant state statute that is likely unconstitutional insofar as it prohibits collection of truthful vaccine documentation amidst a global pandemic, when that documentation demonstrably stands to preserve public health and save lives.

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INTRODUCTION

On August 8, 2021, the district court preliminarily enjoined—solely as applied to NCLH—the Florida Surgeon General from enforcing Florida’s prohibition against businesses requiring vaccine documentation from customers (the “Ban”). In a 59-page opinion, Judge Williams explained why this as-applied injunction follows from rich, uncontested evidence and testimony by NCLH. The court also plumbed precedents illuminating why the First Amendment and the Dormant Commerce Clause are offended by Florida’s anomalous intrusion upon the free, honest exchange of life-saving vaccine information between cruise lines and passengers.

The district court’s restrained, careful exercise of discretion should be irreproachable against the backdrop of this one-sided record combined with settled law. In arguing otherwise, Florida comes perilously close to urging judicial abdication of the scrutiny courts have long applied in constitutionally sensitive realms, in favor of abject deference to a State’s *ipse dixit*. So long as settled precedents and principles win the day, however, Florida must lose this appeal.

Even as COVID-19 rates soared in Florida, deadly variants spread, and the crisis worsened, Florida began implementing in July 2021 a statute that specially prohibits businesses from requiring documentary proof of COVID-19 vaccinations to corroborate customers’ claimed vaccination status. Specifically, the statute

prohibits any business in Florida from “requir[ing] patrons or customers to provide any documentation certifying COVID-19 vaccination.” Fla. Stat. § 381.00316(1). Notably, this Ban does *nothing* to restrict businesses from *inquiring* into customers’ vaccination status and *demanding* responses, nor does it restrict businesses from *publicizing* customers’ vaccination status, nor does it prevent businesses from *differentiating* between customers based on their vaccination status. All the statute outlaws is insistence upon documentation that would confirm the *truthfulness* of a respondent’s claimed vaccination status. App.514, App.516, App.516–17 n.33; Br. at 8–9, 19.

Although this peculiar Ban defies cogent justification, it poses glaring problems for businesses that want simply to confirm claimed vaccination status. And these problems are especially acute for NCLH—a cruise line whose passengers are in close quarters and counting on NCLH to provide a safe, enjoyable, carefree experience while cruising from port to port. Only with this preliminary injunction could NCLH resume sailing as it had planned and committed to do.

The district court meticulously explained why the Ban runs afoul of the First Amendment and the Dormant Commerce Clause, such that NCLH’s likelihood of success is overwhelming. Contrary to Florida’s arguments, the Ban is not fairly characterized as regulating mere conduct because, as Florida concedes, the Ban does not categorically restrict the exchange of vaccine documentation, nor does it even

prevent differing treatment of passengers based on vaccination status. Instead, the Ban outlaws one particular way of communicating truthful information pursuant to a concededly legitimate inquiry into vaccination status, thereby necessarily implicating the First Amendment. App.512, App.516–17. Once subjected to any form of heightened scrutiny, the Ban is too incoherent and ill-tailored to survive. App.519–28.

Nor does the Ban withstand balancing under the Dormant Commerce Clause, as mandated by *Pike v. Bruce Church, Inc.* Unrefuted evidence proved that the Ban “will directly affect [Norwegian’s] abilities to operate the *Norwegian Gem* and other vessels” through interstate and international waters, including by subjecting passengers “to an array of diverse quarantining and testing requirements” and “imped[ing] the ability of Plaintiffs to manage the business of vessels at foreign and interstate ports.” App.535, App.542. The upshot would be “incalculable and unpredictable delays in travel.” App.542. On the flip side, Florida “fail[ed] to articulate” how the Ban “actually advance[s]” its objectives “in any meaningful way” or “how they weigh against any burdens that the Statute imposes on interstate commerce.” App.533–34. Florida cannot upend this analysis short of jettisoning Dormant Commerce Clause jurisprudence or abdicating any semblance of judicial scrutiny and balancing.

Nor does Florida have any answer on the remaining factors. The evidence was one-sided in establishing public imperatives for the instant relief. NCLH submitted sworn, detailed declarations from (1) its CEO (Frank Del Rio), (2) a recognized public-health expert (Dr. Stephen Ostroff), and (3) a professor of business development and branding (Dr. Jukka Laitamaki) proving that vaccine documentation is NCLH's touchstone for ensuring that all of its passengers are in fact vaccinated. In turn, 100% vaccination is essential to enable NCLH to resume sailing safely, across interstate and international waters, true to the settled expectations and interests of its many passengers, employees, stakeholders, hosts, and regulators. On the other side of the caption, Florida's then-Surgeon General Scott Rivkees (since replaced)¹ offered no substantive refutation. While "focused on protecting, promoting and improving the health of everyone who calls Florida home," SA.46, Dr. Rivkees embraced NCLH's core premises by publicly advocating vaccination as, *e.g.*, "our ray of hope," and "our path forward out of the pandemic." App.442. Not a scintilla of evidence or testimony was offered by Dr. Rivkees or anyone else to suggest that interim enforcement of the Ban against NCLH would benefit anyone (except, perhaps, by scoring political points).

¹ *Governor Ron DeSantis Announces Dr. Joseph A. Ladapo as Florida Surgeon General*, Fla. Gov. (Sept. 21, 2021), <https://perma.cc/A638-T4PD>.

In sum, NCLH below established independent paths to likelihood of success and made overwhelming, uncontested showings of irreparable harm and equitable entitlement. Assuming (contrary to Florida’s ostensible premise) that a preliminary injunction can ever be granted against a State, as reams of precedent confirm it can, this is a paradigmatic case for one. Issuing as-applied relief was the opposite of an abuse of discretion.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by preliminarily enjoining § 381.00316 as applied to NCLH.

STATEMENT OF THE CASE

A. Background

When the COVID-19 pandemic swept the planet in 2020, the experiences of other cruise lines demonstrated the dangers. 85 Fed. Reg. 16628-03, 16629–30 (Mar. 24, 2020). In response to outbreaks, NCLH and other cruise industry leaders suspended passenger operations in March 2020. *Id.* at 16631; App.29¶7.

CDC quickly issued a “No Sail Order and Suspension of Further Embarkation” (“No Sail Order”), forbidding cruising unless permitted by CDC. 85 Fed. Reg. at 16631. Next came a “Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew” (“Conditional Sailing Order” or “CSO”), which specified a framework for re-opening, potentially culminating in a “Conditional Sailing Certificate” authorizing “restricted passenger

voyages” subject to onerous strictures. 85 Fed. Reg. 70153-01, 70158–59 (Nov. 4, 2020); *see Florida v. Becerra*, 2021 WL 2514138, at *2–3 (M.D. Fla. June 18, 2021).

Nevertheless, cruises remained in limbo. Rounds of regulatory guidance outlined only a hazy path forward, spawning a lawsuit by Florida in the Middle District of Florida challenging CDC’s guidance and authority. *Becerra*, 2021 WL 2514138, at *1. After Florida obtained preliminary relief, *id.* at *51, CDC appealed to this Court and obtained an initial stay that the panel later vacated. *See Florida v. Sec’y Dep’t of Health & Human Servs.*, No. 21-12243 (11th Cir. July 23, 2021). CDC is now “transition[ing] to a voluntary program” that continues to encourage verification of passengers’ vaccination. Oct. 25, 2021 Temporary Extension and Modification of Framework for Conditional Sailing Order (CSO) at 1, *available at* <https://www.cdc.gov/quarantine/cruise/pdf/CDC-CSO-Extension-10-25-21-p.pdf>.

Meanwhile, Florida has gone the opposite way. In April 2021, shortly before suing CDC, Florida’s Governor issued an Executive Order prohibiting businesses in Florida from conditioning customers’ service or access upon “any documentation certifying COVID-19 vaccination.” App.206. Florida’s legislature then passed a bill that the Governor signed on May 3, 2021, flatly prohibiting all businesses in Florida starting July 1 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 [Florida].” Fla. Stat.

§ 381.00316(1) (hereinafter the “Ban”). Violators face fines of up to “\$5,000 per violation.” *Id.* No findings accompanied the Ban, nor did anything other than isolated statements by a few individual legislators purport to justify it.

NCLH sails internationally but is headquartered in Miami, where its 28-ship fleet is based. App.28–29 ¶¶ 2, 4, 7–8. NCLH recently developed a terminal at PortMiami, “one of the cruise industry’s largest and most essential international ports.” App.28 ¶ 4. Many of NCLH’s attendant destinations require proof of vaccination before passengers can enter without onerous strings. App.30 ¶¶ 16–18.

From the pandemic’s onset, NCLH has done everything within its power to protect its passengers and crew. App.29 ¶ 6. Consistent with world-class and regulatory guidance, NCLH concluded it could best protect everyone by requiring total vaccination. App.29–31 ¶¶ 13, 20; App.86. Accordingly, NCLH’s cruises require documentary proof that 100% of passengers and crew have been vaccinated against COVID-19. App.29–30 ¶ 13. Requiring vaccination documentation is all the more essential given the vaccination protocols required by foreign ports NCLH visits. App.30 ¶¶ 16–18. To name a few, Belize, Bahamas, British Virgin Islands, and Honduras all require proof of vaccination before passengers can enter without testing. App.30 ¶ 18. Indeed, some ports now require proof of vaccination, period. *See infra* at 43.

NCLH cannot sail safely under Florida’s Ban. If NCLH cannot require vaccine documentation, then it cannot verify whether its passengers have in fact been vaccinated. App.104 ¶¶ 18–20. Exposure risks will invariably increase as a result. App.541–42 (quoting App.104). Indeed, there is no dispute that vaccination and proof of same offer the best path forward. Available vaccines all boast “strong protection against severe illness against all known variants” of COVID-19. App.495. Although “[t]esting is an important adjunct measure,” it “cannot serve as a substitute for vaccination.” App.539 (quoting App.103 ¶ 15). And nothing short of vaccine documentation enables proper verification of vaccination status. App.541–42 (quoting App.104 ¶ 20).

Inability to verify vaccination status would also undercut NCLH’s ability to attract and comfort passengers. Customer demand has returned but cruise lines still face critical challenges in rebuilding confidence, particularly among an older passenger base. App.30 ¶ 14; App.88–91 ¶¶ 8–17. Customer surveys indicate that most passengers want to sail with others who have been completely vaccinated and can prove it. App.30 ¶ 14; App.89 ¶¶ 9–10.

If Florida’s Ban stands, then the only way NCLH could require vaccine documentation is by eschewing operations in Florida. From there, far-reaching, adverse ripple effects would deprive Florida, as the State has warned, of “an essential part of [its] economy.” Fla.’s Am. Mot. for Prelim. Inj., Dkt. 25, *Florida v. Becerra*,

No. 8:21-cv-839-SDM-AAS, at 2 (M.D. Fla. Apr. 8, 2021) (“Fla. PI Br.”); *id.* at 2–3; *id.* Ex. 26 at 2–3; *see also* *Becerra*, 2021 WL 2514138, at *48 (noting cruise industry’s “ubiquitous footprint” and “enormous financial effect” in Florida). NCLH alone employs well over 100 people who work a turn-around day at its PortMiami terminal. App.35 ¶ 35. Its subsidiaries have 15 ships embarking from Florida during fall and winter seasons with appropriate safeguards, App.33–34 ¶ 31, all of which face risk of cancellation, disruption, and outbreak if subject to the Ban.

Worst of all are the threats the Ban poses to human health and life. NCLH’s expert Dr. Stephen Ostroff, former FDA Chief Scientist, attested that “Florida is right now confronting a COVID-19 crisis.” App.490 ¶ 5. Heading into the preliminary-injunction hearing, Dr. Ostroff reported that “[t]he pandemic situation in the U.S. ha[d] changed dramatically in recent weeks, especially in Florida, which ha[d] become a hotspot for COVID-19.” App.489 ¶ 5. Fueling this surge was “the Delta Variant, a highly-transmissible variant that is 50 percent more contagious than the initial strain.” App.495. “Since the end of June [2021], the number of new COVID-19 cases ha[d] increased dramatically in Florida,” accounting for “20 percent of all new cases in the United States” and throwing off a bevy of red flags for public health. App.496 (citing App.489 ¶ 5).

Although Florida claims that the Ban prevents discrimination against the unvaccinated and protects medical privacy, *see* App.520 (citing SA.35), its approval

of other cruise lines' practices demonstrates otherwise. Below, Florida commended the approaches of "other major cruise lines," SA.38, SA.24, even though they have been "discriminating" (to use Florida's terminology) against unvaccinated passengers in ways and degrees never contemplated by NCLH. Florida endorses cruise lines' "two class system" whereby passengers who are unvaccinated or withhold their status are conspicuously "segregated" and disfavored as "second-class citizens" who pay *more* for *less* services. App.450–487, App.524, App.526.

B. Proceedings Below

NCLH sued and sought a preliminary injunction on July 13, 2021, less than two weeks after the Ban took effect. Dkt. 1, 3. Defendant then unsuccessfully sought transfer to the Middle District of Florida, Dkt. 28, before opposing the preliminary injunction through the hearing held on August 6, Dkts. 32 & 50.

On August 8, 2021, Judge Williams granted a preliminary injunction as applied to NCLH, Dkt. 43, and denied transfer, Dkt. 44. The court found that NCLH is likely to succeed under the First Amendment and Dormant Commerce Clause, App.506–44, that NCLH faces irreparable harm, App.545–48, and that the equities and the public interest favor an injunction, App.548–49.

STANDARD OF REVIEW

A "preliminary injunction is reviewed under the deferential abuse of discretion standard" and should be affirmed unless "the state has made a strong

showing that the district court abused its discretion.” *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1176–77 (11th Cir. 2020) (citing *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018)). “[C]onclusions of law are reviewed de novo,” while “findings of fact underlying the grant of an injunction are reviewed for clear error.” *Am.’s Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014).

Deference is further heightened where constitutional rights are at stake: This Court “should uphold the injunction and remand for trial on the merits” if “the underlying constitutional question is close.” *Ashcroft v. ACLU*, 542 U.S. 656, 664–65 (2004). Provided that “the district court’s analysis of the preliminary injunction factors reflects a reasonable conclusion about a close question of constitutional law,” “novel and difficult constitutional questions [should be] settled at a later stage.” *Gordon v. Holder*, 721 F.3d 638, 644–45 (D.C. Cir. 2013); *see also Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 817 (9th Cir. 2013).

Because the trial court is better positioned “than this Court to evaluate th[e] evidence,” this Court “will not disturb its factual findings unless they are clearly erroneous.” *Cumulus Media, Inc. v. Clear Channel Commc’ns, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002). “Clear error is a highly deferential standard of review,” *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005), and “does not entitle a reviewing court to reverse the finding of the trier of fact simply

because it is convinced that it would have decided the case differently,” *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

SUMMARY OF ARGUMENT

Only by granting preliminary relief could the district court prevent looming constitutional violations as well as harms to human health and life that could never be repaired. Given that key findings are grounded in extensive record evidence and none is clearly erroneous, affirmance follows naturally.

I. The district court correctly identified two separate bases for NCLH’s likely success: (A) the First Amendment and (B) the Dormant Commerce Clause.

A. Florida does little to contest that the Ban fails First Amendment scrutiny. Instead, Florida leans heavily on the premise that the Ban does not implicate the First Amendment, because it supposedly regulates pure conduct. But that position defies lines of precedent that teach why government necessarily implicates the First Amendment when it disfavors a particular way of formulating or conveying legitimate information. Given that this Ban is tripped by only one mode of conveying vaccine information (documentary) for only one subject (COVID-19) between one speaker and audience (customer to business), even as businesses otherwise can lawfully inquire into vaccination status and differentiate based on same, Florida cannot dodge First Amendment scrutiny. Regardless what precise standard of scrutiny applies, *any* form of heightened scrutiny is fatal to the

Ban. The district court observed why Florida’s claimed interests in combating discrimination and protecting privacy are neither genuine, nor supported by evidence, nor served by the Ban, which in any event lacks requisite tailoring. Far from dislodging that reasoning, Florida surrenders to it by retreating to the “near[] tautolog[y]” that the Ban is self-justifying in pursuing its own statutorily-circumscribed ends. Br. at 34. That is no answer to heightened scrutiny, however, and no path to likely success for Florida.

B. NCLH’s path to success under the Dormant Commerce Clause is, if anything, even more straightforward. Florida agrees the court was correct to balance the burdens the Ban imposes on interstate and international commerce against its local benefits under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). On both sides of the scale, the district court’s fact-finding is irreproachable: Overwhelming evidence confirms that the Ban imposes inordinate burdens, particularly on cruise lines as they endeavor to travel interstate and internationally swiftly and smoothly, while facing time-consuming, onerous, varying protocols absent proof of vaccination. Nor does anything appreciable counterbalance those burdens: Florida’s putative interests are negligible, at best, and thoroughly debunked. Unlike traditional laws that protect public health and safety, this law gratuitously imperils those familiar interests. On this record, NCLH’s likelihood of prevailing under the Dormant Commerce Clause should be incontestable.

II. Nor is the court’s finding of irreparable harm susceptible to challenge. Any First Amendment injury is irreparable, by definition. The court also found from uncontested evidence that NCLH faces loss of reputation and goodwill, as well as non-compensable monetary damages, all of which separately constitute irreparable harm. Last, increased risks of COVID-19 exposure pose the very worst irreparable harm—including potential loss of human life and a renewed shutdown of the cruise industry. Although Florida now calls NCLH’s injuries “self-inflicted,” that self-serving gloss is devoid of substance: NCLH is simply coping with a global pandemic while resisting Florida’s dangerous intrusions. Moreover, as Florida well knows and did not deny below, NCLH promptly sought relief as soon as extensive settlement efforts failed.

III. Finally, the court rightly determined that the equities and public interest necessarily support an injunction because the Ban is likely unconstitutional. Even setting aside the merits, the evidence and findings are one-sided in establishing that the public health and the interests of countless stakeholders are profoundly served by an injunction. In contrast, Florida’s rote invocation of sovereign interests is generic and hollow: Not only has Florida not sought any stay, but it has itself opted to *expand* the as-applied relief at issue to *other* cruise lines, thereby dispelling any notion that its Ban is sacrosanct.

ARGUMENT

The district court by no means abused its discretion by preliminarily enjoining Florida’s Ban as applied to NCLH. Such relief is warranted where “(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). The court well analyzed and applied each factor, and Florida identifies no legal error or clearly-erroneous fact-finding.

I. NCLH Is Likely To Succeed On The Merits.

There are two separate paths to NCLH’s likely success.

A. Florida’s Ban Likely Violates The First Amendment.

“In the fields of medicine and public health . . . information can save lives.” *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1313 (11th Cir. 2017) (en banc) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)). Florida’s Ban restricts the free flow of vital, potentially life-saving information by targeting only one type of *written* information exchange—“documentation certifying COVID-19 vaccination,” Fla. Stat. § 381.00316(1)—about subject matter that is uniquely charged and controversial. Because it “singles out specific subject matter[s] for differential treatment,” *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015), the Ban represents a content-based speech restriction that is “presumptively invalid,” *R.A.V.*

v. City of St. Paul, 505 U.S. 377, 382 (1992). Alternatively, even if the Ban were treated (generously) as a content-neutral regulation of expressive conduct or commercial speech, it does not come close to satisfying intermediate scrutiny. *Any* form of First Amendment scrutiny is fatal to the Ban.

Recognizing as much, Florida mostly tries to dodge First Amendment scrutiny by casting the Ban as nothing more than a run-of-the-mill economic regulation. Br. at 16–26. But the district court was right not to let Florida “evade First Amendment review.” App.515. Florida’s Ban “regulates speech because it restricts the free flow of information by rendering the *exchange* permissible in some circumstances but impermissible in others.” App.512 (emphasis added); *see also Sorrell*, 564 U.S. at 570. In *Sorrell*, the Supreme Court analyzed a law prohibiting exchange of medical information based on its economic use and explained that the “dissemination of information [is] speech within the meaning of the First Amendment” rather than conduct. 564 U.S. at 570. Similarly, this Court in *Wollschlaeger* warned—in invalidating restrictions on communication and expression in connection with medical services—that “the enterprise of labeling certain verbal or written communications ‘speech’ and others ‘conduct’ is unprincipled and susceptible to manipulation.” 848 F.3d at 1308 (quoting *King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014)).

Were Florida successful in characterizing the Ban as regulating merely the conduct of “conditioning service” on vaccine documentation, Br. at 19, it would tear a hole through established protections. As NCLH noted below, without refutation, Florida’s position affords government “carte blanche to tell private entities what information they may agree to exchange as part of their terms of demonstrations, associations and transactions,” including potentially by banning requirements for documentary proof of party membership, employment references, academic transcripts, and quality certifications. SA.51. “Indeed, Defendant would afford the government open season to ban sale of *books* with disfavored content—by couching such a ban as regulating simply ‘conditioning’ payment upon exchange of the offending documentation.” SA.51. Yet Florida has ignored these worrisome implications here, just as it did below.

1. The Ban Regulates Speech Rather Than Conduct.

According to Florida’s primary argument, the Ban is not subject to First Amendment scrutiny because it “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.” Br. at 18. But “a law may constitute a speech-based restriction by burdening or limiting speech . . . even if it does not outright ban a form of speech.” App.511–12. (citing *Reed*, 576 U.S. at 169); *Sorrell*, 564 U.S. at 564;

Wollschlaeger, 848 F.3d at 1308; *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020).

Florida nevertheless asserts that “[a]ny burden on speech that the statute engenders is merely an incidental effect of the conduct prohibited by the law.” Br. at 18; *see also id.* at 17–18 (citing *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 62 (2006); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011)). But this Ban restricts speech in ways that run-of-the-mill conduct regulations do not. The Ban is triggered by a specific mode (documentary) of conveying specific information (vaccination against COVID-19) between a specific speaker and audience (customer to business). Only if a business first engages in this communicative exchange can its ensuing conduct (restricting access) violate the Ban. Unlike in cases like *FAIR*, where speech was incidental to the regulated conduct, 547 U.S. at 66, the protected speech at issue here is the express touchstone of the Ban’s prohibition on certain conduct, not ancillary to it. *See* App.512–13. Put differently, this statute is *not* generally prohibiting the conduct associated with relying upon vaccination status; rather, it is crafted to go after one and only one communicative exchange, which the Ban regulates not incidentally but *designedly*.

To quote *Wollschlaeger*, invalidating provisions regulating what health-care providers could communicate about firearm ownership, “[s]aying that restrictions

on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation.” 848 F.3d at 1308. This statute, by its terms, is telling NCLH what communications it can and cannot require passengers to convey before they board, with only “documentation certifying COVID-19 vaccination” taboo. Fla. Stat. § 381.00316(1). Regulation of that written exchange is *sui generis* and anything but “incidental.”

Sorrell, too, is instructive. That law “appeared to proscribe conduct (*i.e.*, the sale, license, and use of prescriber-identifying information),” App.514 (citing *Sorrell*, 564 U.S. at 557, 580), but the Supreme Court held it “imposes more than an incidental burden on protected expression” by “impos[ing] a burden based on the content of speech and the identity of the speaker,” *Sorrell*, 564 U.S. at 567. *See id.* (“Vermont’s law . . . is directed at certain content and is aimed at particular speakers.”). No less is Florida’s Ban “directed at certain content” and “aimed at particular speakers”—namely, COVID-19 vaccination documentation as collected from customers by businesses.

Consider also *Reed v. Town of Gilbert*, 576 U.S. 155, where the Supreme Court invalidated a sign code that restricted sign placement based on what information each sign conveyed. Under Florida’s theory, that code should have been immune from First Amendment review because it affected only the “placement” of signs—never mind the content-based triggers that determined those placement

limitations. Indeed, Florida submits that a statute that does not “directly regulate speech” “does not ‘implicate the First Amendment at all.’” Br. at 25 (quoting *Otto*, 981 F.3d at 861). This errant analysis would allow virtually *any* speech restriction to be recast as mere conduct regulation, provided the restriction targets disfavored speech by limiting related conduct.

Florida is correct that a legislature could “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.’” Br. at 18 (citing *FAIR*, 547 U.S. at 63). But the circumstance here fundamentally differs. Whereas a ban on racial discrimination targets conduct while incidentally burdening communication, the opposite is true for Florida’s Ban, which directly targets specified communication *without* regulating the broader stripe of *conduct*. Again, the Ban does *not* prevent businesses from inquiring into vaccination status, from demanding responses, from penalizing persons determined to be unvaccinated, from publicizing vaccination status, or from demanding vaccine documentation from employees. The Ban is *indifferent* to all of that overarching conduct, *unless* the offending conveyance of the offending documentation from the offending speaker happens.

Because the Ban (unlike anti-discrimination legislation) is so gerrymandered, it necessarily implicates the First Amendment. App.516–17. This case thus reprises

the same First Amendment problem the Supreme Court and this Court called out in *Expressions Hair Design v. Schneiderman* and in *Dana's R.R. Supply v. Florida Attorney General*, both of which applied First Amendment scrutiny to laws that prohibited businesses specifically from communicating “surcharges” for customers’ use of credit cards versus cash, while permitting precisely the same pricing differential when couched in terms of cash “discounts.” See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150–51 (2017) (differentiating law under challenge from “mine-run price regulation” whose “effect on speech would be only incidental to its primary effect on conduct,” because the law “tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer,” but “does regulate . . . how sellers may communicate their prices”); 807 F.3d 1235, 1245 (11th Cir. 2015). Likewise, this Ban does *not* prevent “businesses from requiring patrons to verify their vaccination status” but *instead* forbids “businesses from requiring customers to verify their vaccination status with ‘documentation certifying COVID-19 vaccination’” while permitting them to “require customers to provide *oral verification*.” App.516.

For the same reasons, *Wollschlaeger* and *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116 (3d Cir. 2020), in no way support

this Ban. Br. at 19–20 (citing 848 F.3d at 1317 and 949 F.3d at 134).² Whereas the relevant provisions *actually banned* discrimination (based on wage history and gun ownership, respectively), Florida’s Ban does *not* prevent discrimination against the unvaccinated. As Florida concedes, *id.* at 19; App.516–17 n.33, the Ban permits businesses to demand *oral* affirmation of vaccination status and then deny service accordingly. By disfavoring one and only one way of pursuing concededly legitimate inquiries, the Ban falls beyond anything that *Wollschlaeger* or *Greater Philadelphia* could be read to condone.

Further still, the statutory provision in *Wollschlaeger* “did not ‘on its face, implicate the spoken or written word’” whereas the Ban does “expressly regulate[] a form of speech.” App.515 n.32 (quoting 848 F.3d 1317).³ Indeed, Florida’s statute corresponds with the portion of the local law that the Third Circuit held “clearly regulates speech” in *Greater Philadelphia*. 949 F.3d at 136. There, First Amendment scrutiny attached to provisions prohibiting employers from “requir[ing]

² A state court recently followed Florida’s lead in rejecting a First Amendment challenge on the theory that the Ban “regulates conduct—not speech.” *Bead Abode, Inc. v. State Surgeon Gen.*, No. 2021-CA-1588, slip op. at 4 (Fla. Cir. Ct. Oct. 14, 2021). But that court’s reasoning evinces the same flaws Florida’s does, including by ignoring how the Ban isolates upon one communicative exchange without faulting broader conduct.

³ This Court upheld the anti-discrimination provision at issue in *Wollschlaeger* only “by construing it to apply to non-expressive conduct.” 848 F.3d at 1317. Here, however, there is no way to leave expression untouched while forbidding telltale documentation of vaccination status.

disclosure of wage history, or condition[ing] employment . . . on disclosure of wage history.” *Id.* The same holds for Florida’s Ban, which is directed at proscribing what disclosure businesses can require from customers.

Lest there be any doubt, the record spotlights how far removed this Ban is from anti-discrimination laws. Florida has been *glad* to see other cruise lines segregating, penalizing, and branding unvaccinated passengers—provided only that the offending subject matter has not been conveyed in the offending form from passenger to business. App.504–05, App.523–24 (“[O]ther cruise lines operating in Florida have required unvaccinated passengers” to “sit in the back of the theater.”) (citing App.458–65); *see also supra* at 10. It could not be clearer, therefore, that the Ban cares exclusively about one and only one communicative exchange—of documentation, about COVID-19 vaccination, from customer to business.

2. Florida’s Ban Fails The Strict Scrutiny Applicable To Content-Based Restrictions On Speech.

Conventional First Amendment scrutiny is fatal to the Ban. A state “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Reed*, 576 U.S. at 163 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). “Content-based laws . . . are presumptively unconstitutional” *id.* (citing *R.A.V.*, 505 U.S. at 395; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)). And a speech regulation is content-

based if it “singles out specific subject matter for differential treatment.” *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020) (citation omitted).

Florida’s Ban is content-based in “distin[guishing] based on the message of speech.” App.507 (citing *Reed*, 576 U.S. at 163). The Ban “prohibits businesses from requiring their patrons to present ‘documentation certifying COVID-19 vaccination or post-infection recovery’ for access or services,” without impeding them from “demanding documentation of a negative COVID-19 test or any other type of medical or informational documentation.” App.507.

Indeed, the Ban “expressly permit[s]” businesses to require kindred documentation, “including COVID-19 test results, other vaccine documentation, and other types of medical information.” App.508. What is more, “Florida state law and regulations promulgated by the Florida Department of Health” *require* children to receive “numerous vaccines for polio, rubella, chickenpox, and other diseases caused by viruses,” and to provide documentation “before they may enroll in and attend public school in Florida.” App.508 n.30 (citing Fla. Stat. §§ 1003.22(1), (3); Fla. Admin. Code Ann. r. 64D-3.046). This disparate treatment of *COVID-19* vaccine documentation was acknowledged (but never explained) by legislators pre-passage. App.521 n.35. “Accordingly, the statute is a content-based restriction because it singles out documentation regarding a particular subject matter . . . and

subjects it to restrictions . . . that do not apply to documents regarding other topics.” App.508.

Such content-based regulation triggers strict scrutiny. Florida nonetheless maintains that the Ban regulates, at most, commercial speech because vaccine documentation is exchanged “pursuant to and in furtherance of a commercial transaction,” and “is made with ‘reference to a specific product’—a cruise trip—and Norwegian ‘has an economic motivation’ for the speech.” Br. at 28 ((quoting *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983))). But the “core notion” of commercial speech is confined “to speech that *proposes* a commercial transaction,” *i.e.*, advertising, and it is flatly untrue that all speech attending a transaction receives lesser constitutional protections. *Tobinick v. Novella*, 848 F.3d 935, 950 (11th Cir. 2017) (quoting *Bolger*, 463 U.S. at 66 (emphasis added)). “That the Times [i]s paid for publishing [an] advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1973); *see also Tobinick*, 848 F.3d at 951–52; *Otto*, 981 F. 3d at 865.

What matters is the “primary purpose of the communication” being regulated, *Valle Del Sol*, 709 F.3d at 819, and that purpose here is to exchange medical information carrying life-or-death implications. The mere fact that speech “has an economic motivation” does not lessen its protection. “[W]hile the ‘burdened speech’

may result from ‘an economic motive, so too does a great deal of vital expression.’” App.515 (quoting *Sorrell*, 564 U.S. at 567).

Even if the Ban were confined to purely commercial concerns, however, the viewpoint discrimination it interjects would still warrant strict scrutiny. Commercial speech does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). If, for example, a law prohibited businesses from referencing “Black Lives Matter” in communicating with customers, that law would not receive intermediate scrutiny as a commercial-speech regulation. The same holds for this Ban, which takes sides in a national debate over COVID-19 vaccination, thereby telegraphing viewpoint discrimination and triggering strict scrutiny. *See Sorrell*, 564 U.S. at 565.

Short of that, strict scrutiny would apply simply because the Ban is content-based. Heeding *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335, and *Reed v. Town of Gilbert*, 576 U.S. 155, sister circuits strictly scrutinize content-based regulations, regardless whether the regulated speech is “professional” or “commercial.” *Otto*, 981 F.3d at 861; *see also Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (“*NIFLA*”); *Int’l Outdoor v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020).

Strict scrutiny dooms the Ban, per the above-cited cases. Indeed, because the Ban cannot withstand *intermediate* scrutiny, *see infra* at 30–37, it *a fortiori* cannot withstand strict scrutiny.

3. Alternatively, Florida’s Ban Fails The Intermediate Scrutiny Applicable To Regulation Of Expressive Conduct.

Even if Florida’s Ban could be thought to regulate only conduct, as Florida contends, the relevant conduct is expressive so as to warrant First Amendment scrutiny. “[A] wide array of conduct . . . can qualify as expressive,” provided the conduct was “‘intended to be communicative’ and, ‘in context, would reasonably be understood by the viewer to be communicative.’” *Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm’n*, 138 S. Ct. 1719, 1741–42 (2018) (Thomas, J., concurring in part and concurring in the judgment) (citation omitted); *see Texas v. Johnson*, 491 U.S. 397, 406 (1989); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018).

Here, NCLH is not only protecting its employees and clientele, but also conveying a *public message*: Everyone aboard our cruises is committing to stay safe by following best medical practices in the form of vaccination and proof of same. By targeting COVID-19 vaccination documentation, Florida has targeted that message for disfavored treatment and taken sides in a political debate over proper vaccination protocols, thereby violating the First Amendment.

Lest there be any doubt, the Ban and Florida’s defense of it reflect a concern *not* about NCLH’s conduct but about the *expressive connotations* uniquely associated with collecting vaccine documentation in the context of COVID-19. Again, Florida is *indifferent* to the collection of vaccination information, which cruise lines can demand orally from passengers; differentiation based on vaccination status, which cruise lines have engaged in without constraint; and disclosure of passengers’ vaccination status, which cruise lines can publicize to their hearts’ content. So what is specially concerning about simply collecting documentation confirming the *truth* of passengers’ claimed vaccination status? The answer is plain: Florida’s government condemns businesses promoting “so-called ‘vaccine passports.’” Br. at 1.

Florida repeatedly says so in its brief, Br. at 1, 5, 43, betraying its concern about the political valence of the *message* sent by requiring vaccine documentation. Representative Grieco called this out in opposing the bill, saying that “even though [‘vaccine passport’ is] not mentioned in the bill [t]hat is a trigger word, that is a trigger term, that has been pulled. It’s political, it’s meant to inflame the emotions of certain people.” *House Session*, at 2:17:26–2:17:40, FLA. HOUSE OF REP. (Apr. 28, 2021), <https://bit.ly/3nfv3E7>; *see also id.* at 2:26:07–2:26:16 (statement of Rep. Beltran). Florida is within its rights to eschew *governmental imposition* of “vaccine passports,” as it did in passing the same bill containing the Ban. But Florida offends

the First Amendment by preventing a *private business* and its *willing passengers* from exchanging concededly legitimate vaccine information, pursuant to a concededly legitimate inquiry about vaccination status, simply because Florida fears that particular mode of communication may connote broader support for “vaccine passports.” Because Florida is shutting down expressive conduct as politically anathema and because its interest in doing so is anything but “unrelated to the suppression of free expression,” the First Amendment is violated even assuming *arguendo* that exchanging vaccine documentation does not involve pure speech. *See Fort Lauderdale*, 901 F.3d at 1241–42; *see also infra* at 30–37 (detailing why the Ban fails any form of intermediate scrutiny).

4. Florida’s Ban Also Fails Intermediate Scrutiny If Analyzed As Regulating Commercial Speech.

The same conclusion follows if the Ban is treated as regulating commercial speech and subject to intermediate scrutiny under *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 561–66 (1980). *See FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298–99 (11th Cir. 2017). “To demonstrate . . . a ‘substantial government interest,’ the burden is on the governmental entity to show that these interests are based on a problem that actually exists.” App.520; *see, e.g., United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 475 (1995); *Edenfeld v. Fane*, 507 U.S. 761, 770–71 (1993).

Treating the Ban as regulating commercial speech cannot save it, for government has no justification to interrupt “the free flow of commercial information.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). “Over the last 40 years, the Supreme Court has extended an ever-increasing level of First Amendment protection to commercial speech. Indeed, it is difficult to find a Supreme Court decision upholding governmental suppression of truthful commercial speech in the last 25 years.” Martin H. Redish, *Commercial Speech and the Values of Free Expression*, Cato Inst., at 2 (2017). As noted, the only interest this Ban truly serves (if it can be called an “interest”) is shielding *lies* by those who *claim* to be vaccinated, contrary to what documentation reveals. That is diametrically opposed to the government’s interests in ensuring *truthful* exchanges and no colorable basis for regulating commercial speech. Florida has never argued otherwise.

5. Florida’s Justifications Below Do Not Come Close To Withstanding Any Form Of Intermediate Scrutiny.

Turning to Florida’s purported lines of defense, the Ban neither “serve[s] a substantial interest,” nor is “narrowly drawn.” *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quotations omitted). Specifically, Florida “assert[ed] two interests that Section 381.00316 purportedly addresses: ‘protecting the medical privacy of its citizens’ and ‘avoiding discrimination through balkanization of the marketplace.’” App.520 (quoting SA.35). As Judge Williams found and Florida does not deny,

however, the “Defendant presented no evidence to demonstrate that his asserted interests are in response to real problems that Florida residents are actually facing.” App.520. There was “no evidentiary support” demonstrating “that residents have experienced intrusions on their medical privacy or discrimination because some businesses, including cruise lines, have required COVID-19 vaccination documentation.” App.520–21. “In light of the absence of any appropriate data, reports, or even anecdotal evidence,” Florida failed to show that its “articulated interests are based on ‘a problem that exists in fact,’ *FF Cosms. FL, Inc.*, 866 F.3d at 1298, as opposed to ‘mere speculation or conjecture[,]’ *Edenfield*, 507 U.S. at 770.” App.520–21.⁴ Beyond those failures of proof, “Defendant cites to no relevant

⁴ Florida elides its evidentiary void by arguing intermediate scrutiny can be satisfied by “reference to studies and anecdotes” as well as “history, consensus, and simple common sense.” Br. at 32 (citing and quoting cases). But “[t]he quantum of empirical evidence needed . . . will vary up or down with the novelty and plausibility of the justification raised,” and “mere conjecture” has not been accepted “as adequate.” *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 391–92 (2000). Tellingly, Florida’s cited cases credited extensive record evidence, time-proven regulations, or common sense. See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 626 (1995) (“106-page summary” of a “2-year study” containing “data—both statistical and anecdotal—support[ed] the Bar’s contentions”); *Shrink Missouri Gov’t PAC*, 528 U.S. at 393 (“[E]vidence [was] introduced . . . by petitioners or cited by the lower courts.”); *Greater Phila.*, 949 F.3d at 145 (crediting “substantial evidence in the form of testimony and meta-analysis of relevant research”); *WV Ass’n of Club Owners & Fraternal Servs. Inc. v. Musgrave*, 553 F.3d 292, 294 (4th Cir. 2009) (crediting State’s “longstanding and substantial interest in regulating the implementation and promotion of its own lottery”); *Tenn. Sec. Sch. Ath. Ass’n v. Brentwood Academy*, 551 U.S. 291, 300 (2007). This anomalous Ban, in contrast, has neither historical pedigree nor “studies and anecdotes” from anywhere

authority” showing that “his articulated objectives constitute substantial state interests” in the midst of “a global pandemic”; if anything, “courts have suggested that the unvaccinated population is not a protected class that enjoys a fundamental Constitutional right to remain unvaccinated.” App.521–22.

Most fundamentally, Florida’s justifications lack support in the legislative record. Under heightened scrutiny, a state’s “justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533, 535–36 (1996); *see also Wollschlaeger*, 848 F.3d at 1314. Yet nothing in the legislative record, or even, for that matter, the trial record, points to any actual problem with unvaccinated customers being denied adequate options anywhere in the marketplace, much less aboard luxury cruise lines.

Florida cites Representative Beltran’s passing concern for discrimination against “minority populations” that are “the largest segment of [Florida] that is vaccination hesitant,” Br. at 6, but, as the district court found (and Florida does not dispute), the Ban does not prevent discrimination against the “vaccination hesitant,” *see* App.523. Nor did the legislature find any such discrimination to be actually occurring, against anyone, anywhere, let alone against the “minority population” in Florida. Florida also cites Senator Burgess’ concern that a Floridian would “have to

supporting it, *Fla. Bar*, 515 U.S. at 628, and is at war with ““simple common sense,”” *id.* (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

provide a piece of documentation to show that you got a vaccine in order to go to the grocery store,” Br. at 6, 30, but there is no actual evidence of unvaccinated individuals ever being denied access to grocery stores or anything like—or any indication why week-long luxury cruises deserved to be painted with the same brush as basic necessities.

And Florida betrays desperation by citing NCLH’s instant challenge as though *that* justifies the Ban. Br. at 33, 43. This challenge itself is not evidence of any kind, and it certainly is not evidence that the legislature identified a problem in need of fixing. This challenge results from problems the Ban *creates* by placing NCLH and all of its passengers at the mercy of those who might lie about vaccination status; that cannot be conflated with any preexisting problem the Ban was crafted to *solve*.

Even if Florida’s stated objectives were nonetheless credited, Florida “failed to show that Section 381.00316 advances these objectives in a material way.” App.522. Florida “provide[d] no evidence to show that the Statute is materially effective at either protecting the medical privacy of Florida residents or preventing discrimination against unvaccinated individuals,” and “the record is devoid of any reports, data, affidavits, or any other appropriate evidence on this issue.” App.523.

If anything, the record “appears to support the opposite conclusion.” App.523. The Ban permits businesses to “‘discriminate’ against unvaccinated individuals by adopting a vaccination requirement, [including] by requiring oral

verification of vaccination status before entry or by deterring unvaccinated patrons from entering by putting up signs that read ‘vaccinated customers only’ and ‘unvaccinated patrons are not allowed.’” App.523. Nor does the Ban do anything to prevent differential treatment of unvaccinated employees. *See* App.525. Other cruise lines have been free to subject unvaccinated passengers “to restrictions, requirements, and expenses that do not apply to vaccinated patrons.” App.524. Because the Ban demonstrably “does not prohibit businesses from treating unvaccinated passengers differently by charging them more while offering them less,” no antidiscrimination rationale can pass muster. App.524.

Neither does Florida’s Ban “effectively protect the medical privacy of residents,” for it is “far too underinclusive.” App.526. The statute does not govern employers. App.526. It “does not safeguard against any hypothetical violation of medical privacy caused by exchanging other medical or health-related documentation” other than COVID-19 vaccination. App.526. It does not “prohibit businesses and employees from requiring individuals to provide their COVID-19 vaccination status orally.” App.526. “Finally, the Statute does not prohibit businesses from retaining, disclosing, or publishing a person’s COVID-19 vaccination status,” and “[c]ruise lines have [implemented] policies that easily disclose [passengers’] unvaccinated status.” App.526. When, as here, medical information can otherwise be disseminated and publicized without limitation,

“privacy” cannot justify shutting down one particular form of expression about that information. *Sorrell*, 564 U.S. at 573.

Finally, the district court found “no evidentiary support” for Florida’s assertion that the Ban “is appropriately tailored” so as to avoid gratuitous intrusions. App.528. There is “no evidence” that Florida “considered obvious, alternative policies that could advance the stated objectives without restricting speech.” App.528. “To prevent ‘discrimination,’ Florida could have directly regulated ‘discriminatory’ businesses practices, as opposed to the exchange of COVID-19 vaccination documentation.” App.528. “To address medical privacy concerns, the state could have prevented or placed limitations on businesses photocopying, keeping, or storing a copy of such documentation.” App.528. Because Florida did not provide “any reason why these or other possibilities would be insufficient—or that Florida even considered any alternative policies,” it “failed to show that the law is not more extensive than necessary.” App.528.

6. Florida’s Revised Justifications On Appeal Are Neither Available Nor Adequate To Satisfy Intermediate Scrutiny.

Without challenging the above-referenced findings, Florida attempts simply to re-frame its interests so that they are now self-justifying and impervious to judicial scrutiny. Thus, rather than claim an interest in prohibiting discrimination or protecting medical privacy as hitherto understood, Florida now reformulates both

putative interests solely within the confines of “documentation evidencing COVID-19 vaccination.” Br. at 29, 36–37.

Not only do these “interests” differ from those offered to the district court, SA.35, App.520–522, but they have become “nearly tautological,” as Florida confesses. Br. at 34. Whereas it is an axiom of rational-basis review (the lowest form of constitutional scrutiny) that ““reform may take one step at a time,”” *Jones v. Governor of Fla.*, 975 F.3d 1016, 1035 (11th Cir. 2020) (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)), judicial attention to under-inclusiveness is part and parcel of heightened scrutiny. *See, e.g., NIFLA*, 138 S. Ct. at 2375–76.

Notably, Florida could run much the same defense if its Ban protected only those passengers who have red hair or last names starting with “D”: As suspect as such fractional approaches would be, Florida could still argue they track, by definition, the extent of the anti-discrimination and privacy interests its legislature saw fit to vindicate. For that matter, in *any* past case where a statute was deemed over- or under-inclusive, the government might urge the opposite result simply by formulating its interest in terms of the statute’s express provisions; every statute necessarily achieves its self-defined ends. But that is no substitute for heightened constitutional scrutiny, which requires courts to analyze critically, for themselves, whether statutory means are appropriately tailored to achieve genuine, important government ends extending beyond the particular statute under challenge.

Tautology aside, Florida’s re-defined interests are too narrow to deserve credit. There is no discernible reason to protect the passenger who declines to disclose her vaccine documentation but *not* the passenger who declines to disclose her vaccination status when asked. *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (“Once properly narrowed, the City’s asserted interests are insufficient.”); *see also Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (“[V]accination requirements, like other public-health measures, have been common in this nation.”). Once Florida accepts, as it has, that inquiring into vaccination status and demanding answers is fair game, it lacks any legitimate basis to prohibit businesses from using documentation simply to confirm the *truthfulness* of the responses that come back, particularly in a setting where passengers and crew travel in close quarters and transmission risks are amplified.

Furthermore, Florida’s own laws give the lie to its claimed interests. Florida *mandates* discrimination against would-be schoolchildren who lack written documentation of *other* vaccinations. *See* Immunization Guidelines, Florida Dep’t of Health, at 3 (Mar. 2013), http://www.floridahealth.gov/programs-and-services/immunization/children-and-adolescents/_documents/school-guide.pdf. Florida cannot explain why discrimination for failure to provide documentation of *those* vaccinations is obligatory, but discrimination for failure to provide documentation of *COVID-19* vaccination is forbidden. App.521 n.35; *Senate*

Session, at 6:20:00–6:21:08, FLA. SEN. (Apr. 29, 2021), <https://bit.ly/3ljlCqW> (statements of Sens. Polski and Burgess). Nor is there any reason why “medical privacy” is specially implicated by “disclosure of *COVID-19* vaccine documents,” Br. at 29 (emphasis added), but not *other* vaccine documents, App.526. Such haphazard, insincere invocations of governmental interests are incapable of overriding First Amendment interests. *See Sorrell*, 564 U.S. at 574; *Wollschlaeger*, 848 F.3d at 1314.

B. Florida’s Ban Likely Violates The Dormant Commerce Clause.

The district court separately determined that the Ban likely violates the Dormant Commerce Clause. Because Florida agrees that the court applied the correct legal test, this determination cannot be reversed absent clear factual error, which Florida does not come close to showing.

Instead, Florida pins much of its hopes on challenging governing Dormant Commerce Clause jurisprudence in the Supreme Court, Br. at 38 n.19, 49, but that prospect cannot alter assessment of NCLH’s likely success at this stage. Notably, the Supreme Court recently affirmed that the Dormant Commerce Clause is “firmly established” with roots dating “back as far as *Gibbons v. Ogden*, 9 Wheat. 1, [6] (1824).” *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459–60 (2019).

As it governs today and has been understood for centuries, the Dormant Commerce Clause operates as a “negative command,” *Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005), “prohibit[ing] states from enacting statutes that impose ‘substantial burdens’” on interstate and foreign commerce, *Locke*, 634 F.3d at 1192 (citing *Dennis v. Higgins*, 498 U.S. 439, 447 (1991)). A two-part test determines whether a law unduly restricts interstate or foreign commerce, and failing either component renders a law unconstitutional. *Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1243–45 (11th Cir. 2012). First, a state law is *per se* invalid if it “discriminate[s] against an article of commerce by reason of its origin or destination out of State.” *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). Second, even if a law “regulates evenhandedly,” it is nevertheless unconstitutional if it imposes a burden that is “clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142. “In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

Despite arguing that “the critical element of economic protectionism is entirely absent from Florida’s law,” Br. at 48–49, Florida acknowledges the bottom line that *Pike*’s balancing test applies regardless. App.530 n.40; Br. at 39, 41. Nor does Florida deny that this balancing involves a “fact-sensitive inquiry,” App.532

(citing *Pike*, 397 U.S. at 142), to determine whether burdens clearly exceed putative local benefits. Br. at 39, 41.⁵

Certainly the Ban frustrates the free flow of commerce between States and Nations specifically as applied to cruise lines. Florida recognizes that “the cruise industry was brought up during debate on the bill,” only for the Ban to be “passed without any carveouts.” Br. at 50. Although Florida calls this “strong evidence that the Legislature determined that its purposes could not be met if the cruise industry were exempted,” *id.*, Florida cites not a *scintilla* of actual “evidence.” What is clear is that the legislature elected to extend the Ban specifically to cruise ships, knowing inordinate burdens would result. Courts should be no less cognizant of these burdens when analyzing this aspect of the Ban specifically as applied to NCLH and asking whether any putative benefits justify them under *Pike*. See also *Walgreen Co. v. Rullan*, 405 F.3d 50, 54–57 (1st Cir. 2005); *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 283 (8th Cir. 1993).

Under *Pike*’s “balancing approach,” “[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be

⁵ To the extent Florida suggests that *Pike* balancing is automatically satisfied by *non*-protectionist regulation, Br. at 15, 39, 48–49, it collapses two separate doctrinal threads and defies controlling caselaw. See, e.g., *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *Fla. Transp. Servs., Inc.*, 703 F.3d at 1245; *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846 (11th Cir. 2008).

tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” 397 U.S. at 142–45; *see also Fla. Transp. Servs., Inc.*, 703 F.3d at 1245.

Because foreign commerce is at stake, weightier justification is required from the State. Foreign commerce is “unique,” given the need for “a single government with unified and adequate national power” to regulate “international relations” and “foreign intercourse.” *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (quoting *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448 (1979)). Accordingly, “state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny.” *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984). Yet Florida nowhere grapples with this heightened scrutiny.

1. The Ban Imposes Heavy, Gratuitous Burdens On Interstate And International Commerce.

Nor does Florida come to grips with evidence and findings establishing the daunting burdens the Ban imposes on both foreign and interstate commerce specifically as applied to cruise ships. Ample evidence underlies the finding that the Ban “imposes substantial burdens on interstate commerce that will directly affect [NCLH’s] abilit[y] to operate the *Norwegian Gem* and other vessels.” App.535. As Judge Williams noted, it is “undisputed that nearly every country and port that Plaintiffs intend to set sail to during the remainder of the year have varying, often

complicated requirements” for entry, and “COVID-19 vaccination documents are the fulcrum of many of these requirements.” App.536. Foreign countries and U.S. territories that NCLH visits from Florida maintain “myriad, rapidly-changing requirements,” as canvassed below. App.539. When the record closed, the only alternatives to providing vaccination status entailed inordinate burdens: in addition to other requirements such as quarantine, certification, and daily health surveys, different jurisdictions would otherwise insist that multiple COVID-19 tests be taken at varying intervals. App.536–38.

Whereas these findings are grounded in hard evidence, Florida challenges them by positing “what ifs”? Br. at 46–47. According to Florida (which offered no one to counter NCLH’s CEO and experts), “given Norwegian’s existing plan to test its passengers for COVID-19,” it “would add no burden” for “Norwegian’s ships [to] dock at multiple foreign ports in quick succession.” *Id.* But that notion comes solely from Florida’s lawyers; no such testimony or proof was offered below. Moreover, the court explained why the record proves otherwise: considering that the “protocols vary so markedly” and entail “myriad, rapidly-changing” requirements, it would be “not only impractical, but also financially, legally, and logistically onerous for cruise lines like NCLH to comply” with the testing alternatives. App.539. Nor does testing alleviate *quarantining* of passengers who lack vaccination documentation. Quarantining “can be impractical as applied to the

cruise line industry, given that vessels typically dock, disembark at, and depart from a foreign or interstate port for another, all in one day.” App.540. That is why NCLH would have to undertake “tortured, costly, time-consuming, damaging contortions” to secure entry into these ports if it could not require documentation of vaccination. App.540.⁶

Indeed, testing is not even a theoretical option for some destinations. At the time of decision, the U.S. Virgin Islands was poised to require “that all passengers ages 12 and older . . . must be fully vaccinated in order for the cruise ship to be allowed entry” at its main port. App.538–39. The official U.S.V.I. website now states that this is a “binding protocol” and a “requirement” as of August 22, 2021. Similarly, The Bahamas now requires that, “all cruise ship passengers ages 12 and older must be fully vaccinated to enter a port in The Bahamas.”⁷ Therefore, Florida

⁶ Florida dismisses increased costs as immaterial. Br. at 39. But the burdens found below transcend cost, *see* App.536–40, and it makes no sense to disregard monetary implications when weighing impacts on *commerce*. In fact, the Supreme Court has specifically recognized that increased costs, when paired with health hazards, impose “substantial burden on commerce.” *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 673–75 (1981) (plurality opinion).

⁷ *Cruise Passengers*, Bahamas Ministry of Tourism <https://perma.cc/XF47-FFPH>. Florida calls implementation of U.S.V.I.’s protocol “unclear.” Br. at 46 n.21. But U.S.V.I.’s government has been quite clear in “establish[ing] binding protocols” as stated. *Governor Bryan Receives Response from CDC About Cruise Ship Guidelines: USVI Has Established Binding Agreements with Cruise Lines to Safeguard Health and Well-being of Virgin Islanders and Visitors*, U.S.V.I. (August 22, 2021), <https://perma.cc/XX9L-R54V>.

is whistling past today’s realities as well as well-substantiated findings when it posits that testing could substitute for vaccine documentation.

Last, it went unrefuted that “[t]esting is an important adjunct measure but cannot serve as a substitute for vaccination . . . [because] tests are susceptible to false positive and false negative results, even when repeated testing is done.” App.539 (quoting App.103 ¶ 15). Florida still has no response. Nor does Florida contend with perils faced by local populations should unvaccinated passengers carry COVID-19 abroad. *See* App.30–31 ¶ 19 (noting “many of these populations lack access to health care and other resources that we have in the United States”).

The district court therefore had every good reason to find the Ban will “lead to incalculable and unpredictable delays in travel” beyond Florida. App.542.

2. In Contrast, Any Putative State Interests Are Either Illusory Or, At Best, Negligible.

While the burdens the Ban imposes are punishing, *any* burden should be fatal because nothing appreciable weighs on the other side of the scale. *See, e.g., Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 (1978) (striking down highway trailer-length regulations where Wisconsin “virtually defaulted in its defense of the regulations”). Florida “fail[ed] to specifically articulate any local

These government records are subject to judicial notice. Fed. R. Evid. 201(b)(2); *Dimanche v. Brown*, 783 F.3d 1204, 1213 n.1 (11th Cir. 2015) (noticing public reports).

purpose that justifies the Statute’s alleged burdens on interstate commerce pursuant to *Pike*.” App.533. Florida nonetheless urges deference on the premise that the Ban is aimed at “the promotion of public health or safety,” Br. at 40. But Florida ignores overwhelming evidence proving that this state law—unlike virtually any hitherto known to the federal reports—is *antithetical* to public health and safety. *See supra* at 9.

Nor can Florida prevail by invoking its local regulatory power over “harbors, piers, and docks.” Br. at 40 (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 783 (1945)). Its Ban is not limited to its citizenry or its parochial concerns. PortMiami is “one of the cruise industry’s largest and most essential international ports,” App.28 ¶ 4—more akin to an international airport than a fishing dock—and Florida concedes that the Ban’s effects ripple far beyond its borders. Br. at 46–47.⁸

As for the only justifications Florida could purport to derive from the legislative record (affording it every benefit of the doubt),⁹ they reflect the same

⁸ Bereft of evidence, Florida impugns “the proposition that Florida needs to submit evidence to justify its law.” Br. at 43. But Florida’s quarrel extends beyond the court below. *Pike*, 397 U.S. at 142 (burdens are considered only “[i]f a legitimate local purpose is found”); *Kassel*, 450 U.S. at 670; *Raymond Motor Transp., Inc.*, 434 U.S. at 444 (State’s lack of evidence reflected “virtual[] default[] in its defense”); *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008) (“Any balancing approach, of which *Pike* is an example, requires evidence.”).

⁹ Although Florida now adds references to “protecting individual liberties,” Br. at 42, and “economic well-being, *id.* at 37, 41, it does not illuminate

defects identified *supra* at 30–37. “Defendant fail[ed] to articulate *why* [medical privacy and preventing ‘discrimination’ against the unvaccinated] are legitimate local purposes or *how* they weigh against any burdens that the Statute imposes on interstate commerce.” App.533. Not only was the record “devoid of any reports, data, affidavits, or any other appropriate evidence” supporting the medical privacy and discrimination rationales, but the facts “support the opposite conclusion: the Statute is not an effective measure for advancing either of these objectives.” App.523. Taking just two examples, the Ban leaves businesses free to request oral verification of their customers’ vaccination status and then publicize that information (hardly promoting medical privacy), App.526,¹⁰ and equally free to differentiate between vaccinated and unvaccinated passengers at the grave expense of the latter, precisely as other cruise lines have done with Florida’s blessing, App.523–35.¹¹

why those interests are supposedly implicated or how the Ban furthers them by shutting down voluntary, productive exchanges of information. No such vague, unexplained, ungrounded interests can sway the balance, especially after Florida failed to advance them below. App.534.

¹⁰ Florida argues that no actual “oral attestation” requirement was specifically evidenced, Br. at 42, without citing evidence that *any* vaccine requirement of *any* kind was actually identified by the legislature (as opposed to hypothesized). Nor does Florida explain why businesses’ demands for oral responses would any less engender its claimed concerns.

¹¹ Florida returns to its canard that the Ban has been “borne out” by NCLH’s challenge, Br. at 42, but no such “evidence” was before Florida’s

Indeed, Florida’s asserted interests are no more satisfying than Iowa’s were in *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. at 667, where Iowa blankly asserted that “65-foot doubles are more dangerous than 55-foot singles.” Mere “incantation of a [legitimate] purpose”—indeed, “a purpose to promote the public health or safety”—does “not insulate [the] state law from Commerce Clause attack.” *Id.* at 670. “Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid” *Id.* Here, “the Ban does not actually advance” Florida’s objectives “in any meaningful way.” App.534. Because Florida “failed to make even a colorable showing that its regulations contribute to [its purported goals],” the Ban is doomed under *Pike* so long as it imposes any burdens on commerce, *Raymond*, 434 U.S. at 448, not to mention such *severe* burdens on *foreign* commerce.

In any event, extension of the Ban to NCLH serves no discernible purpose given obvious alternatives Florida had available. While Florida “fail[ed] to address the issue” below, App.543, NCLH demonstrated that “reasonable and less

legislature and this lawsuit reflects *problems* resulting from the Ban, different from any *solutions*. Nor has NCLH “conceded” that “it cannot effectively deny service to unvaccinated customers without” documentation. Br. at 42. What NCLH cannot do is put everyone at the mercy of certain would-be passengers who might lie about vaccination status; the upshot of the Ban, therefore, might be denial of service to *all* passengers in Florida. App.541, App.546–47. And other cruise lines have in fact been denying services specifically to unvaccinated passengers, consistent with the Ban. App.504–05, App.524.

burdensome alternatives would have served [Florida's] purposes” *Fla. Transp. Servs., Inc.*, 703 F.3d at 1261. Specifically, “Florida could have adopted a narrow carveout that specifically exempts cruise line operators” or “interstate activities and services, such as international cruises and private bus excursions.” App.543. Florida in fact offered precisely such carve-outs to healthcare and service providers, and altogether omitted employees from coverage. § 381.00316. It has never identified any reason for denying like dispensation to cruise lines, even after opponents of the Ban expressed grave concerns about implications for the cruise industry, *Senate Session*, at 6:30:37–6:32:33, 6:35:30–6:39:40, FLA. SENATE (Apr. 29, 2021), <https://bit.ly/3ljlCqW> (statements of Sens. Polsky & Taddeo).

Instead, Florida here recycles its tautology by trumpeting the “nearly one-to-one” fit between the Ban’s terms and interests Florida now reformulates using those same terms. Br. at 50. But such tautology is no answer to the court’s reasoning and findings, and it no more satisfies the Dormant Commerce Clause than it does the First Amendment. *See supra* at 35–37. Even assuming the Ban was animated by concerns that Floridians might “have to provide a piece of documentation to show that you got a vaccine in order to go to *the grocery store*,” *Senate Session, supra*, at 6:18:57–6:19:17 (statement of Sen. Burgess), there is no reason why Florida needed to hobble interstate, international, *luxury cruise lines* to vindicate that concern.

II. NCLH Faces Irreparable Harm.

The district court correctly found that NCLH established irreparable harm on “several independent grounds,” App.545, none of which is questionable.

First Amendment. To the extent NCLH is likely to prevail on its First Amendment claim, “continued enforcement of Section 381.00316 against [it] constitutes an irreparable injury.” App.546. The “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” App.546 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see also *FF Cosms. FL, Inc.*, 866 F.3d at 1298. Without disputing this rule, Florida argues only that the court erred on the First Amendment merits. Br. at 51. But those merits arguments have been addressed, see *supra* Section I.A, and this dimension of irreparable harm is otherwise uncontested.

Reputation, trust, goodwill, and unrecoverable damages. The court further found that NCLH established “irreparable injury from the loss [of] reputation, trust, and goodwill,” based on premises that go unchallenged. App.546 (citing *Ferrellgas Partners, L.P. v. Barrow*, 143 F. App’x 189, 190 (11th Cir. 2005)). As the court noted, the “undisputed record” demonstrates that, absent documentary verification of vaccination status, NCLH would in fact suffer injury to its “reputation, trust and goodwill.” App.546–47 (citing, e.g., App.33–34 ¶¶ 28–32, App.90–91 ¶¶ 12–16).

Florida “present[ed] no evidence to refute NCLH’s assertion that absent an injunction, it would suffer significant reputational damage.” App.547. All Florida offers now is a passing suggestion that NCLH “*cho[se]*” to stake its reputation on requiring vaccine documentation. Br. at 51. But that suggestion defies uncontradicted proof that NCLH’s vaccination protocols are part and parcel of NCLH’s longstanding brand, reputation and customer base; because NCLH and its passengers prize safety, hygiene, and comfort, anything short of 100% vaccination and proof of same would be inherently compromising and damaging for NCLH. App.31–32 ¶¶ 20, 26, 27; App.89–91 ¶¶ 9–13, 16.

Beyond the above-noted harms, the court found NCLH “would suffer monetary losses,” which it “would not be able to recover from the state because of sovereign immunity,” “render[ing] the harm suffered irreparable.” App.547 (quoting *Odebrecht Const., Inc. v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013)). Even now, Florida “has not rebutted NCLH’s assertion that absent an injunction, it is likely to suffer significant financial losses,” affording yet another strand of irreparable harm. App.548.

Risk of COVID-19. Putting the general public—particularly NCLH’s passengers, employees, and populations who greet them—at gratuitous risk of exposure to COVID-19 poses the worst form of irreparable harm. Florida denies neither that vaccination best protects against COVID-19, nor that vaccine

documentation best confirms vaccination status. App.541 (citing App.30–32 ¶¶ 15, 25, 26; App.90 ¶ 13; App.104 ¶ 20). Any gap relative to the recommended protocols hazards serious illness and death. *See Gayle v. Meade*, 2020 WL 3041326, at *20 (S.D. Fla. June 6, 2020); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (“[T]he public has a strong interest in combating the spread of the COVID-19 Delta variant.”); *Klaassen*, 7 F.4th at 594 (denying preliminary injunction against Indiana University’s vaccine mandate), *application for injunctive relief denied, In re Ryan Klaassen, et al.*, No. 21A15 (Aug. 2, 2021). And any renewed outbreak could spell a return to the shutdown that, as Florida has elsewhere noted, “ravaged” the industry and inflicted “billions of dollars in losses,” never to be recouped. Fla. PI Br. at 7; App.89–91 ¶¶ 9, 16.

Whereas NCLH has on its side public-health experts like Dr. Ostroff and even Dr. Rivkees himself, as well as copious district-court findings, Florida has no one testifying the other way. All Florida can do is point to other, outdated protocols for minimizing COVID-19 short of vaccination, citing CDC’s simulated voyage option, the Healthy Sail Panel’s recommendations, and earlier industry submissions to CDC. Br. at 52–54. But the district court had ample reason to deem those proposals inadequate, given that they pre-date, *e.g.*, the availability of vaccines, the advent of the Delta variant, and Florida’s alarming spike in COVID-19 infections. App.104

¶¶ 18–20; App.488–90 ¶¶ 2–5. Regardless, the court’s findings control unless clearly erroneous, which Florida does not even contend they are.

No self-injury or delay. Unable to dent the findings below, Florida coats over them with self-serving gloss. By Florida’s account, the looming “economic harms, damage to reputation,” and “loss of customer goodwill” result from NCLH’s “own actions,” and, says Florida, “self-inflicted injuries cannot constitute irreparable harm.” Br. at 51 (citing cases). Relatedly, Florida claims that NCLH “significantly delayed” its lawsuit and “set itself up for a conflict with Florida’s law.” *Id.* at 51–52. Those criticisms defy irreversible findings and are meritless.

“Self-inflicted” harm arises where a party manufactures its claimed injury, such as “by choosing to make expenditures based on hypothetical future harm that is not certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (2013). Here, NCLH simply did what was necessary to cope with COVID-19—a pandemic that is in no way attributable to NCLH—while resuming business operations that everyone, including Florida, welcomes. Yet Florida obstructed NCLH’s path forward by prohibiting NCLH from doing something that is indispensable to NCLH’s safe resumption of operations. In other words, NCLH injury follows inexorably from Florida’s law.

Because NCLH’s harm derives from “a conflict with Florida’s law,” just as Florida says, Br. at 51, the harm is genuine, not self-inflicted, notwithstanding this

challenger's volition. This Court has held, for example, that an organization's expenses caused by state law "qualify as an injury, whether they are voluntarily incurred or not." *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008). And the Tenth Circuit has emphatically "reject[ed] the notion that the source of an injury is a litigant's decision not to comply with an allegedly unlawful state regime, rather than the regime itself. [Otherwise], a court could never enjoin enforcement of an unlawful statute if the plaintiffs could have complied with the statute but elected not to; this hypothetical scenario borders on the absurd." *Fish v. Kobach*, 840 F.3d 710, 753–54 (10th Cir. 2016) (citation omitted).

It is especially disingenuous and graceless for Florida to argue here that NCLH "significantly delayed." Br. at 51. When Florida claimed below (in moving to extend deadlines) that NCLH had "delay[ed]," SA.2, NCLH responded that it "should not be faulted for pursuing other avenues in good faith to achieve resolution before filing suit as a 'last resort,'" SA.9 (quoting App.9 ¶ 1). Without "get[ting] into specifics of the extensive settlement efforts," NCLH represented that "such efforts . . . continued in earnest through this past weekend and into Monday [the day before NCLH filed suit] with high-level state officials." SA.9. NCLH warned that, "if Defendant persists in suggesting otherwise, then NCLH w[ould] . . . correct the record." SA.9.

Florida then dropped any such suggestion; the word “delay” nowhere appeared in its opposition brief. *See* SA.13–40. Although Florida’s counsel at hearing briefly asserted that NCLH did not “com[e] to court immediately,” SA.120, NCLH’s counsel again refuted any such suggestion: “[T]he day before we filed the lawsuit was the day we finally understood from the State there would be no reasonable carve-out for Norwegian,” SA.142.

Notably, Florida itself waited “weeks,” if not “*months*,” before challenging CDC. SA.121 (emphasis added). Why? As Florida’s counsel explained, Florida was “waiting until the CDC gave [implementing] guidance to see what it looks like”; “[o]nce they gave the guidance” that left Florida “unsatisfied,” the State filed suit “within weeks.” SA.121. As NCLH’s counsel explained, without refutation, “Exactly the same is true with Norwegian.” SA.142. Florida’s claim of delay is thus belated, hollow, and irreconcilable with Florida’s own position elsewhere. *See Becerra*, 2021 WL 2514138, at *47.

III. The Equities And Public Interest Favor NCLH.

The court also found that the “equities and public interest weigh in favor of an injunction.” App.548; *see Gonzalez*, 978 F.3d at 1271. Once NCLH establishes likely success, “the balance of harm and the public interest weigh in [its] favor,” App.548, because “[t]he public has no interest in the enforcement of what is very likely an unconstitutional statute,” *Odebrecht*, 715 F.3d at 1290; *see also KH*

Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1272 (11th Cir. 2006). What is more, Plaintiffs have “show[n] that they are likely to suffer significant financial and reputational harms absent an injunction” and “demonstrated that public health will be jeopardized.” App.548; *see Ala. Ass’n of Realtors*, 141 S. Ct. at 2490.

By contrast, Florida “identifies no public benefit from the continued enforcement of the Statute against NCLH.” App.548–49. Florida now insists that it suffers an “ongoing irreparable injury” whenever it is “enjoined by a court from effectuating [a] statute[] enacted by representatives of its people,” invoking its “sovereign capacity” and “traditional police powers.” Br. at 54–55 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) and citing *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018)). But those boilerplate interests can be incanted by rote to defend *any* state statute, no matter how patently unconstitutional or noxious. They are no match for the compelling reasons—specific to this challenger, this statute, and this record—why the equities here favor an injunction. Extensive, unrefuted evidence proves that the interests of countless stakeholders, including passengers, employees, vendors, and populations abroad, all ride with NCLH here.

Indeed, Florida’s claimed interests ring false. Unlike in *King* and *Scott*, Florida here sought no stay. To the contrary, Florida itself opted to *expand* the as-

applied relief at issue to *other* cruise lines during the pendency of this appeal.¹² And Florida does not deny that “the public interest is served when constitutional rights are protected.” *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019).

Finally, this Ban stands apart from traditional laws that serve venerable purposes like protecting public health. As proved and found below, this Ban *assails* public health. To hold that the equities and public interest nonetheless weigh against an injunction would be tantamount to foreclosing preliminary injunctive relief against any sovereign. *But see Becerra*, 2021 WL 2514138, at *51 (enjoining CDC from restricting cruise ships in Florida).

CONCLUSION

This Court should affirm the preliminary injunction.

¹² See, e.g., Alison Durkee, *Cruise Lines, Starbucks, Harry Styles: Here's Who Florida Could Punish For Violating Its Vaccine Passport Ban*, Forbes (Oct. 11, 2021), <https://www.forbes.com/sites/alisdurkee/2021/10/11/cruise-lines-starbucks-harry-styles-heres-who-florida-reportedly-could-punish-for-violating-its-vaccine-passport-ban/> (“[T]he state has previously told Forbes it will not pursue charges against [other cruise lines requiring proof of vaccinations from passengers] until an appeals court rules on Norwegian Cruise Line’s lawsuit.”).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), 32(a)(7)(B), and 32(g)(1), I certify that the foregoing brief is proportionately spaced using 14-point Times New Roman font and contains 12,974 words, excluding the parts exempted from length limits by Rule 32(f) and 11th Cir. R. 32-4.

/s/ Derek L. Shaffer

Derek L. Shaffer

CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 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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