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.

REPLY 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

Pursuant to FED. R. APP. P. 26.1 and 11th Cir. Rule 26.1, I certify that the Certificate of Interested Persons and Corporate Disclosure Statement contained in the Opening Brief of Defendant-Appellant is, to the best of my knowledge, complete.

Dated: December 8, 2021

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INTRODUCTION

The question whether companies should be allowed to condition service on the production of proof of COVID-19 vaccine documentation is one that implicates important questions at the heart of a State's traditional sovereign authority. There is nothing in the federal Constitution that demands that States decide this question in favor of allowing mandates. Indeed, Norwegian cites *zero* precedent holding that a business has a First Amendment right to condition service on the compulsion of private medical information from unwilling customers. And it cites *zero* precedent holding that a state law failed *Pike* balancing under the dormant Commerce Clause where the law was both wholly devoid of protectionism and wholly aimed at advancing legitimate government interests. Norwegian's brief essentially confirms that the District Court ruling below lacks substantial legal foundation. To rule for Norwegian, therefore, this Court would have to break new ground.

This Court should decline Norwegian's invitation to innovate. A company's business decision cannot override Florida's sovereign judgment regarding how best to balance its citizens' personal liberty, privacy, and health interests in the context of a pandemic. For the reasons stated in Florida's opening brief, and for the additional reasons explained below, this Court should vacate the preliminary injunction.

ARGUMENT

I. Norwegian Is Unlikely To Succeed on the Merits of Its First Amendment Claim.

A. Section 381.00316 Is a Valid Economic Regulation.

Norwegian's First Amendment argument largely begs the question of whether Florida's law regulates conduct or speech. Because this Court should determine that § 381.00316 is a valid economic regulation that does not implicate the First Amendment, the crux of Norwegian's First Amendment claim crumbles.

This Court should review § 381.00316 "under the standard appropriate for the review of economic regulation," not "under a heightened standard appropriate for the review of First Amendment issues." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997). The law prohibits businesses in Florida from "requir[ing] patrons or customers to provide any documentation certifying COVID-19 vaccination or postinfection recovery to gain access to, entry upon, or service from the business operations in this state." FLA. STAT. § 381.00316. The statute affects what businesses cannot *do*—condition service on vaccination documentation—"not what they may or may not *say*." *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 60 (2006). Any burden on speech is merely an incidental effect of the conduct prohibited by the law. 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.

Norwegian responds that § 381.00316 regulates speech because it "is triggered by a specific mode (documentary) of conveying specific information (vaccination against COVID-19) between a specific speaker and audience (customer to business)." Br. for Pls.-Appellees at 18 (Nov. 17, 2021) ("Resp."). Norwegian's contentions, however, are belied by binding Circuit precedent that establishes that a law like § 381.00316 does not implicate the First Amendment. In *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc), this Court held that a Florida law prohibiting doctors from discriminating against patients for owning firearms did not implicate the First Amendment. This law bore the key features Norwegian says are suspect: it prohibited discrimination based on specific information (firearms ownership) conveyed between a specific speaker and audience (doctors and patients). Indeed, the law went so far as to give patients a right to "decline to answer or provide any information regarding ownership of a firearm." *Id.* at 1314. Far from questioning the legitimacy of this restriction, this Court distinguished it from other parts of the law that actually restricted speech. *See id.* at 1314–15. If the anti-discrimination provision in *Wollschlaeger* did not implicate the First Amendment, the same conclusion must apply here.

Norwegian's attempt to apply *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), and *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116 (3d Cir. 2020), also fails. In *Expressions Hair Design*,

the law at issue restricted only how a business could communicate prices, not the prices themselves. 137 S. Ct. at 1151. A business could engage in the same commercial conduct—for example, charging $1.00 for a pack of gum bought with cash and $1.25 for the same pack of gum bought with a credit card—but that business was restricted in how it could *speak about* that conduct. Describing the $1.00 price as a "cash discount" was lawful, but describing the $1.25 price as a "credit card surcharge" was unlawful. Here, there is *nothing* that Norwegian can do or say to require COVID-19 vaccination documentation as a condition of service. It is the *conduct* of conditioning service upon COVID-19 vaccination documentation that § 381.00316 regulates, not *speech*.

As for *Greater Philadelphia*, Norwegian contends that Florida's § 381.00316 corresponds to the provision of the law at issue there that the Third Circuit held implicates the First Amendment. Resp. at 22. But that provision explicitly banned employers from even *inquiring* about wage history. *Greater Phila.*, 949 F.3d at 136. The court otherwise held that the portions of the law barring businesses from relying on wage history information in setting wages did not implicate the First Amendment, *id.* at 134–36, which is akin to Florida's law that prohibits Norwegian from relying on the presence or absence of COVID-19 vaccination documentation in providing services.

Norwegian argues that Florida's law is a content-based speech regulation that

triggers strict scrutiny under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). Resp. at 23–25. But Norwegian, again, simply assumes that the statute regulates speech, ignoring that Florida has not prohibited anyone from *saying* anything. Norwegian remains free to request COVID-19 vaccine documentation from its customers, its customers may *voluntarily* provide it, and both parties are free to discuss vaccination. Norwegian simply cannot *condition service* on the customer's providing COVID-19 vaccination documentation—conduct, not speech. Accordingly, Norwegian's claim that Florida's law would pave the way to banning certain books in the marketplace, *id.* at 17, rings hollow. A ruling upholding § 381.00316's regulation of conduct would provide zero support for any future law that barred the voluntary exchange of information between willing speakers.

Norwegian argues alternatively that if § 381.00316 regulates only conduct, "the relevant conduct is expressive so as to warrant First Amendment scrutiny." *Id.* at 27. Specifically, Norwegian maintains that conditioning service on its customers showing COVID-19 vaccination documentation conveys the message that "[e]veryone aboard our cruises is committing to stay safe by following best medical practices in the form of vaccination and proof of same." *Id.* But First Amendment protections extend "only to conduct that is *inherently* expressive," *FAIR*, 547 U.S. at 66 (emphasis added), like publicly burning a draft card, *see United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). Requiring COVID-19 vaccination

documentation as a condition of service is not inherently expressive. In *FAIR*, the Supreme Court held that the conduct regulated by the Solomon Amendment—a law school's denial of campus access to military recruiters equal to that of other employers—was not inherently expressive because "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *FAIR*, 547 U.S. at 66. "The expressive component of [the school's] actions is not created by the conduct itself but by the speech that accompanies it." *Id.* So too here. A reasonable observer who sees a prospective Norwegian customer choose another cruise line will have no basis at all for knowing why the customer made that decision. Norwegian's conduct is not expressive at all, let alone inherently expressive.

The cases Norwegian cites offer no support for its claim that its conduct is expressive. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), involved custom-designed wedding cakes, an artistic endeavor that "inherently communicates that a wedding has occurred, a marriage has begun, and the couple should be celebrated," *id.* at 1743 (cleaned up). *Texas v. Johnson*, 491 U.S. 397 (1989), involved the burning of an American flag as part of a "political demonstration that coincided with the convening of the Republican Party and its

renomination of Ronald Reagan for President," the expressive nature of which the Supreme Court held was "overwhelmingly apparent," *id.* at 406. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018), involved a non-profit organization's sharing of food with passersby at a table in a public park ("where the homeless tend to congregate"), including setting up the organization's banner and passing out literature during the event, *id.* at 1238. This Court held that the conduct was inherently expressive based on the context in which it took place, placing emphasis on the fact that the conduct occurred in a park near government buildings, that sharing food has been a means of conveying a message for "millennia," and that the group set up its banners and distributed literature at the events. *Id.* at 1242–43. In contrast to the inherently expressive activity at issue in these cases, requiring customers to show COVID-19 vaccine documentation as a condition of service is simply not inherently expressive; indeed, a business presumably could decide to mandate vaccination *without* attempting to send a political message.

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 concludes that § 381.00316 regulates speech, Norwegian is unlikely to succeed on the merits of its First Amendment claim because § 381.00316 satisfies the test applied to commercial speech regulations.

First, Norwegian is wrong that its "speech" is not "core" commercial speech. Resp. at 25–26. Norwegian's "speech" 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 vaccine documentation is *necessary* for customers to gain access to its services. A potential customer cannot successfully purchase a ticket and sail aboard a Norwegian ship unless that customer has provided the necessary vaccine documentation. Even assuming that Norwegian's purpose "is to exchange medical information carrying life-or-death implications," Resp. at 25, Norwegian is nonetheless requiring the documentation to consummate an economic transaction.

Moreover, even if Norwegian's speech were not "core" commercial speech, speech may nevertheless be commercial where the speech "reference[s] . . . a specific product" or the speaker "has an economic motivation" for distributing the material. *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983). Norwegian's "speech" here is plainly made with reference to a specific product—a cruise trip—and Norwegian has an economic motivation for the speech. *See id.*; *see also Greater Phila.*, 949 F.3d at 137. Norwegian itself alleges that requiring COVID-19

vaccination documentation is in its business interests and would affect its "bottom-line." App.30, 33–35.

Second, under *Central Hudson*, 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 Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). In enacting § 381.00316, the Legislature sought to advance two clearly substantial state interests: preventing discrimination for failure to provide documentation evidencing COVID-19 vaccination and promoting individual privacy by forbidding businesses from compelling disclosure of COVID-19 vaccine documentation as a condition of service. These interests promote both individual liberty and economic health and vitality. In its opening brief, Florida explained how legislators repeatedly referenced these interests while the bill was being considered. Opening Br. of Def.-Appellant at 29–30 (Oct. 4, 2021) ("Br."). And the law directly advances these interests. The Legislature made the commonsense, predictive judgment that without a prohibition enacted into law preventing businesses from conditioning service on providing COVID-19 vaccine documentation, some businesses would discriminate among potential customers on that basis, and that prohibiting that practice would promote individual interests in the privacy of sensitive COVID-19 medical information.

Norwegian charges in opposition that the "only interest" that Florida's law "truly serves . . . is shielding *lies* by those who *claim* to be vaccinated, contrary to what documentation reveals." Resp. at 30. Norwegian is simply incorrect: the Legislature was reasonably (and correctly) concerned that, if left unchecked, businesses (like Norwegian) would refuse service to individuals who could not or would not provide COVID-19 vaccine documentation. For example, Representative 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." *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. Although Norwegian asserts that the law "does not prevent discrimination against the 'vaccination hesitant,'" Resp. at 32, it ignores the logical conclusion that by discriminating against those who do not, or cannot, provide COVID-19 vaccine documentation, businesses will *necessarily* be discriminating against the vaccine hesitant. What is more, as Norwegian's own examples of other vaccine mandates being accompanied with a documentation requirement show, *see id.* at 37–38, it is reasonable to expect that without being able to demand documentation, companies will simply forego vaccine mandates, not that they will move to oral attestation requirements that "liars" could evade. Indeed, Norwegian does not cite a single example of a vaccine mandate that is *not* accompanied by a requirement to provide

documentary proof of vaccination. Florida's law therefore is not about protecting alleged "liars"; it is about protecting *everyone*.

Norwegian nevertheless insists that § 381.00316 has no antidiscrimination rationale because it permits businesses to treat unvaccinated customers differently than vaccinated customers. *Id.* at 33–34. As an initial matter, Florida has not conceded that any and all policies of treating unvaccinated customers as "second-class citizens" are lawful. Furthermore, Florida's law prohibits a specific type of discrimination—denying service to those who decline to provide a vaccination document. Florida's interest in prohibiting this *particular* type of discrimination is not undermined by Florida's decision not to attempt to prohibit *other* types of discrimination over international waters.[1] Indeed, we doubt Norwegian would prefer a law that not only required it to accept passengers who decline to produce vaccination documentation, but also prohibited it from taking protective measures like requiring masking and social distancing for unvaccinated customers.

Norwegian further argues that, rather than seeking to vindicate legitimate interests, the Legislature's true interest in enacting and enforcing § 381.00316 was to "scor[e] political points," *id.* at 4, and that the law represents Florida "tak[ing]

[1] Contrary to Norwegian's flagrant misrepresentation, Florida has not been "glad" to give a "blessing" to cruise lines that differentiate their treatment of cruise passengers based on vaccination status during any portion of the cruise over international waters. Resp. at 23, 46.

sides in a political debate over proper vaccination protocols," *id.* at 27, Florida being purportedly concerned with the "political valence of the *message* sent by requiring vaccine documentation," *id.* at 28. This contention misses the mark. Again, Florida's law reflects a sovereign policy judgment that businesses should not be able to condition service upon documentation of a customer's COVID-19 vaccination status. As Florida has repeatedly explained, during debate on the bill, legislators time and time again justified the prohibition based on protecting individual liberties, protecting privacy, and preventing discrimination. And Florida has decidedly *not* adopted an anti-vaccine stance. During debate on the bill, legislators referred to their own experiences in getting vaccinated, expressed the view that the vaccines work, and urged Floridians to get vaccinated. *See, e.g.*, *House Session*, at 2:28:37–2:28:50, FLA. HOUSE OF REP. (Apr. 28, 2021), https://bit.ly/3nvf3E7 (statement of Rep. Leek) ("Don't get me wrong. For all of you in this room, for all of you who are listening out there: get vaccinated. Please! Get vaccinated."); *id.* at 2:25:00–2:25:10 (statement of Rep. Beltran); *Senate Session*, at 6:23:48–6:23:57, FLA. SENATE (Apr. 29, 2021), https://bit.ly/3ljlCqW (statement of Sen. Burgess) ("If you choose to get a vaccine . . . I believe [it] will be helpful."). As Norwegian itself points out, the former State Surgeon General called the vaccine "a ray of hope" and "our path out of the pandemic." App.443. Contrary to Norwegian's apparent belief, it is possible to be pro-vaccine and anti-mandate.

In any event, however, Norwegian glosses over several critical principles in arguing that Florida's law does not advance its interests. For instance, *Central Hudson* intermediate scrutiny does not require direct empirical evidence that a legislative policy choice will succeed in its goals. It allows legislatures to 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). "[C]ourts must accord substantial deference to the predictive judgments of [legislatures]." *Id.* Furthermore, 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). 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). Accordingly, the fact that the Legislature did not marshal evidence regarding "any actual problem with unvaccinated customers being denied adequate options anywhere in the marketplace," Resp. at 32, does not doom Florida's law.

Try as it might, Norwegian cannot wave away the fact that the Supreme Court "ha[s] 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." *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 628–29 (1995) (cleaned up); *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 restricted type of athletic recruiting could lead to certain negative outcomes). 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. Instead, "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. Moreover, a legislature may address one aspect of an issue at a time. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

Norwegian says that the Legislature failed to satisfy these standards. At the time the Legislature enacted § 381.00316, it was concerned with a particular type of discrimination—conditioning service on an individual's COVID-19 vaccine documentation—and a particular type of privacy—COVID-19 vaccine documentation. Even without pointing to specific examples of this conduct occurring in Florida, the Legislature made the predictive judgment that, left unchecked, businesses would rely on COVID-19 vaccine documentation to deny service to potential customers. Norwegian itself is an example that bears out the

prediction—it has a policy of requiring 100% customer vaccination on its ships and of verifying that status through COVID-19 vaccine documentation—and other businesses have attempted to follow in its footsteps. *See* Order Denying Temporary Inj., *Bead Abode, Inc. v. State Surgeon Gen.*, No. 2021-CA-1588 (Fla. Cir. Ct. Oct. 14, 2021) (determining that § 381.00316 regulates conduct, not speech). And should the Legislature determine that conditioning service on an oral attestation of COVID-19 vaccine status is an issue that it wishes to address, it may do so in future legislation.[2] *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52–53 (1986).

Third, Section 381.00316 is not more extensive than is necessary to serve Florida's asserted interests. To satisfy this factor, Florida must demonstrate only "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). Like the District Court, Norwegian faults Florida for allegedly failing to consider "obvious, alternative policies that could advance the stated objectives without

[2] Indeed, the Florida Legislature has continued to consider and enact laws regarding COVID-19 vaccine mandates as the facts on the ground have developed. For example, on November 15, 2021, the Florida Legislature convened for a special session to enact four laws reacting to recent federal vaccine mandates applicable to employers throughout the country. *See* FLA. LAWS chs. 2021-272, 2021-273, 2021-274, 2021-275.

restricting speech." Resp. at 35. But Florida cannot address its asserted interests any more precisely than it did in § 381.00316 by prohibiting the very conduct underlying those interests. Under Norwegian's conception of this factor, Florida would have to regulate wide swaths of conduct instead of surgically targeting the issue that was before it to somehow "better" tailor the law.

Perhaps concerned that its arguments under *Central Hudson* will fail to persuade, Norwegian argues alternatively that the *Central Hudson* test is no longer good law after *Reed*. *See id.* at 26. *Reed*, however, did not sub silentio overrule the commercial speech doctrine. Several circuit courts have held that, notwithstanding *Reed*, the *Central Hudson* standard still applies to the regulation of commercial speech. *See, e.g.*, *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961 (10th Cir. 2020); *Greater Phila.*, 949 F.3d at 138; *Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019); *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192 (9th Cir. 2016). And these circuits are correct: *Reed* did not address a commercial speech regulation, and therefore had no occasion to overturn *Central Hudson*. The same is true for *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020). Norwegian cites the Sixth Circuit's decision in *International Outdoor, Inc. v. City of Troy*, 974 F.3d 690 (6th Cir. 2020), but that case involved a sign code that regulated both commercial and non-commercial speech. Unless and until the Supreme Court overrules *Central Hudson*, this Court should follow the lead

of those circuit courts that have continued to apply the *Central Hudson* test to commercial speech regulations. *See, e.g.*, *State Oil v. Khan*, 522 U.S. 3, 20 (1997).

Norwegian argues alternatively that if Florida's law does regulate commercial speech, then "the viewpoint discrimination [the law] interjects would still warrant strict scrutiny." Resp. at 26. Norwegian maintains that the law supposedly "takes sides in a national debate over COVID-19 vaccination, thereby telegraphing viewpoint discrimination." *Id.* Florida's law certainly reflects a policy judgment, but it does not prohibit any viewpoint in that national debate. The statute merely prohibits a business from conditioning service on a customer's providing COVID-19 vaccine documentation. Norwegian remains free to express its viewpoint on COVID-19 vaccination—or even whether COVID-19 vaccine documentation should be a requirement of service—under Florida's law.

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

But even if this Court concludes 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. As Florida explained in its opening brief, Florida's interests 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. Br. at 37. The statute is also narrowly tailored to serve those interests in a nearly one-to-one correlation. *Id.* at 37–38. Consequently, § 381.00316 satisfies strict scrutiny.

II. Norwegian Is Unlikely To Succeed on the Merits of Its Claim that § 381.00316 Violates the Dormant Commerce Clause.

Under the *Pike* balancing test, a state law's burden on interstate commerce must *clearly exceed* the local benefits in order to violate the dormant Commerce Clause. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This balancing test favors the State. Section 381.00316 has no protectionist motivation or effect, and it advances the important local interests of preventing discrimination against Floridians on the basis of COVID-19 vaccine documentation and protecting personal medical privacy. And the statute's local benefits are not clearly exceeded by the incidental burden the statute causes—if any—on interstate and international commerce.

In resisting this conclusion, Norwegian first broadly argues that the District Court's determination that § 381.00316 likely violates the dormant Commerce Clause "cannot be reversed absent clear factual error." Resp. at 38. But the ultimate determination that Florida's law violates the dormant Commerce Clause is a question of *law*, not *fact*. *See, e.g.*, *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003) ("The District Court held that Amendment E violates the dormant Commerce Clause. We review this conclusion of law de novo."); *Family*

Winemakers of Cal. v. Jenkins, 592 F.3d 1, 4, 5 (1st Cir. 2010) (reviewing de novo whether a statute "unconstitutionally discriminates against interstate commerce" in violation of the dormant Commerce Clause because the issue is "one[ ] of law"); *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 939 (11th Cir. 2013) ("[This Court] review[s] *de novo* the constitutionality of a challenged statute."). Consequently, this Court reviews the District Court's determination on Norwegian's dormant Commerce Clause claim de novo.

Even if clear error review applied, this Court must reach the "definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (cleaned up). The District Court clearly erred by misperceiving the nature of Florida's legitimate local interests, an error that infected the entirety of the District Court's *Pike* analysis. *See* App.533–35. The District Court determined that § 381.00316 was not "materially effective" at furthering Florida's interests because the statute does not "prohibit businesses from imposing a vaccination requirement," from "verifying vaccination status . . . orally," from "subjecting unvaccinated customers . . . to restrictions . . . that do not apply to vaccinated patrons," or from requiring customers to disclose COVID-19 test results or other non-COVID-19 vaccination records. *Id.* at 523–24. But § 381.00316 *is* materially effective at advancing Florida's interests in preventing discrimination on the basis of not providing documentation evidencing COVID-19 vaccination and

promoting individual privacy in the form of forbidding businesses from compelling disclosure of COVID-19 vaccination documents. The District Court thus based its *Pike* analysis on a misapprehension of a critical component: Florida's legitimate local interests. And the District Court further erred by determining that Florida could further its interests through alternative legislative schemes that in fact would entirely undermine them. *See id.* at 543–44. As explained below, the Florida legislature determined that it could not achieve its legitimate local interests by exempting the cruise industry from § 381.00316.

Norwegian also broadly argues that because Florida did not put on witnesses or submit affidavits below, Florida's positions are entirely devoid of evidence and Norwegian's evidence is unrefuted. *See, e.g.*, Resp. at 42. To the contrary, Appellant has cited statements and materials from § 381.00316's legislative history, Norwegian's own Healthy Sail Panel, industry groups like the Cruise Lines International Association ("CLIA"), the CDC's guidance documents, and the Legislature's predictive judgments about what public policy is in the best interest of the State.

Norwegian next minimizes the legitimacy of Florida's interests served by the statute, disputes that the law advances those interests at all, and laments the purportedly life-threatening injuries and monetary damages that will result if Florida's law remains in effect. However, review of Florida's law is deferential for

several reasons, including that Florida has broad power to regulate commerce in matters traditionally of local concern, like the promotion of public health and safety. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981); Br. at 40. And Florida deserves an extra measure of deference because "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) (cleaned up).

Norwegian complains that if § 381.00316 is allowed to stand, then "the only way [it] could require vaccine documentation is by eschewing operations in Florida," which would allegedly cause "far-reaching, adverse ripple effects [that] would deprive Florida . . . of 'an essential part of [its] economy.'" Resp. at 8. But if Norwegian's prognostications actually occur, Florida itself will be internalizing the cost of its own law. If voters disagree with the Legislature's decision to enact § 381.00316, then they can voice their disapproval at the ballot box during the next election. Courts will "generally defer[ ] to health and safety regulations," like Florida's law, "because their burden usually falls on local economic interests . . . , thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *C & A Carbone*, 511 U.S. at 404 (O'Connor, J., concurring in the judgment).

Despite this great weight of authority holding that the Florida Legislature's determination is entitled to high deference, Norwegian nevertheless points to a statement of a plurality of the Supreme Court that courts must be more exacting in their scrutiny of state laws that indirectly burden foreign commerce. *See S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (plurality op.). Be that as it may, the cases upon which Norwegian relies involved inapposite circumstances. For example, in *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 302 (1994), the California law in question regulated how the state determined the state corporate franchise tax, including for foreign corporations operating in California. In *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 453–54 (1979), the Supreme Court determined that California's ad valorem property tax as applied to cargo containers of Japanese shipping companies violated the dormant Commerce Clause. And in *South-Central Timber Development, Inc. v. Wunnicke*, the Supreme Court held that Alaska's law mandating that timber taken from state lands be processed within the state prior to export violated the dormant Commerce Clause—where over 90% of Alaskan timber is exported to Japan. 467 U.S. at 85–86 & n.4. Norwegian provides no reason to extend these precedents involving international taxation and raw materials to its luxury cruises. What is more, regardless of the *degree* of deference that applies, the parties agree that ultimately the deferential *Pike*

balancing test is the analysis that should be used to resolve the dormant Commerce Clause question.

Still on the question of the local benefits of § 381.00316, Norwegian disputes that it has conceded that "it cannot effectively deny service to unvaccinated customers without" documentation, Resp. at 46 n.11, resisting Florida's assertion that the law prevents businesses from discriminating among customers. But Norwegian itself repeatedly describes documentation as necessary to verifying vaccination status, rendering its protestations hollow. Indeed, Norwegian flatly states elsewhere in its brief that "[i]f [it] cannot require vaccine documentation, then it cannot verify whether its passengers have in fact been vaccinated." Resp. at 8; *see also id.* at 4 (asserting that "vaccine documentation is [Norwegian's] touchstone for ensuring that all of its passengers are in fact vaccinated"); *id.* at 8 ("[N]othing short of vaccine documentation enables proper verification of vaccination status.").

On the same factor, as in the First Amendment context, Norwegian retreats to the same reasoning as the District Court that § 381.00316 "serves no discernible purpose given obvious alternatives Florida had available." *Id.* at 47. But like the District Court, Norwegian impermissibly second-guesses the wisdom of the Legislature's choices and faults it for addressing one aspect of a problem at a time, both of which the Supreme Court has repeatedly admonished against. *See, e.g.*, *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 670 (1981);

Williams-Yulee, 575 U.S. at 449. Although Norwegian asserts that Florida could have exempted cruise lines from the law, the Legislature explicitly considered the cruise industry during debate but did not adopt an exemption, providing strong evidence that the Legislature determined that it could not achieve its objective with a cruise exemption. *See* Br. at 50.

In an attempt to buttress the District Court's discussion of the alleged burdens that Norwegian will bear to operate from Florida ports if Norwegian could not require COVID-19 vaccination documentation from its customers, Norwegian points to two specific destinations—the U.S. Virgin Islands and The Bahamas—as ports that purportedly require all passengers to be fully vaccinated before either allowing the cruise ship itself to dock or passengers to disembark the ship. Resp. at 43–44. Norwegian argues that testing in lieu of proven vaccination "is not even a theoretical option" for these destinations. *Id.* at 43.

First, it is unclear whether the U.S. Virgin Islands requires all cruise passengers ages 12 and older to be fully vaccinated in order for the cruise ship to be allowed entry to a port. Although a U.S. Virgin Islands government news release stated on August 22, 2021, that there was such a requirement, *see Governor Bryan Receives Response from CDC About Cruise Ship Guidelines*, U.S.V.I. (Aug. 22, 2021), https://bit.ly/3xACj6M, the publicly available travel guidelines for domestic travelers do not mention the same requirement, *see U.S. Virgin Islands Travel*

Screening Portal, U.S.V.I., https://bit.ly/3oYjTcn (last visited Dec. 8, 2021); *U.S. Virgin Islands COVID-19 Update: Information for Marine Vessels and Passengers*, U.S.V.I. (Dec. 3, 2021), https://bit.ly/3DTEfKc. Consequently, the details and provenance of the requirement are not clear.

Second, even if Norwegian is correct about the U.S. Virgin Islands' and The Bahamas' requirements, given the importance of the legitimate local interests that § 381.00316 advances, the law's incidental burden of limiting Norwegian's ability to travel directly from Florida to these destinations does not provide a basis to find that these burdens *clearly exceed* Florida's sovereign judgment that businesses are not allowed to condition service on a customer's provision of COVID-19 vaccination documentation. Again, courts are not empowered to second-guess the wisdom of state policies, and there is no basis for a court to require Florida to cede to the temporary policy judgments of other states or foreign governments on this issue. When these other jurisdictions eventually drop their COVID-19 vaccination requirements, § 381.00316 will place zero burden on Norwegian's ability to travel to them. The constitutionality of Florida's law should not depend on the come-and-go policies adopted by select foreign authorities.

Furthermore, any incidental burden on interstate or international commerce will be felt by Florida, which has implicitly chosen to internalize those costs by enacting § 381.00316 and potentially losing Norwegian's cruise business traveling

from Florida to these destinations. And regardless of the end result of this case, Norwegian will still have to comply with the shifting and disparate requirements of these various destination ports, requirements which are more onerous than Florida's simple prohibition on customer vaccine documentation.

Finally, Norwegian still fails to cite any case sustaining a challenge to a law on dormant Commerce Clause grounds where the law had no protectionist motivation nor failed to promote other legitimate government interests. *See, e.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2457 (2019) (law was a "protectionist restriction"); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579–80 (1986) (law was an example of economic protectionism); *Walgreen Co. v. Rullan*, 405 F.3d 50, 56 (1st Cir. 2005) (law was "protectionist both *de jure* and *de facto*"); *Pioneer Mil. Lending, Inc. v. Manning*, 2 F.3d 280, 283–85 (8th Cir. 1993) (concluding that the only interest promoted to even a "slight" degree was protecting "Missouri companies" from out-of-state competition).

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

Norwegian's failure to show a likelihood of success on the merits of its First Amendment and dormant Commerce Clause claims is alone fatal to Norwegian's request for a preliminary injunction. *See Bloedorn v. Grube*, 631 F.3d 1218, 1242

(11th Cir. 2011). Its contentions on the other preliminary injunction factors fare no better.

In arguing that irreparable harm will result from Florida's law, Norwegian contends that the law will jeopardize the health and safety of its passengers and the locales to which Norwegian will sail by preventing Norwegian from confirming that 100% of its passengers are vaccinated through COVID-19 vaccination documentation. *See* Resp. at 50–52. Norwegian maintains that it "cannot sail safely under Florida's ban." *Id.* at 8. This is flatly contradicted by the recommendations of Norwegian's Healthy Sail Panel, the CLIA's letter to the CDC, and the CDC's approval of a simulated voyage option in lieu of verifying certain vaccination thresholds among a cruise's passengers. *See* Br. at 52–54.

Norwegian discounts its own Healthy Sail Panel's recommendations as outdated and the CLIA's submissions to the CDC as pre-dating "the availability of vaccines." Resp. at 51. But the CLIA's letter was submitted on May 11, 2021, when vaccines were readily available to every adult in both Florida and the United States. And even after this letter was sent, Norwegian attested to the CDC that it had a plan to limit sailings to 95% verified vaccinated passengers and that it would *not* require vaccine documentation from Florida customers. App.347; *see also id.* at 346–51.

Norwegian further disputes Florida's characterization of any injuries Norwegian will suffer as "self-inflicted." Norwegian contends that its injuries are

not self-inflicted because they are caused by its decision not to comply with Florida's allegedly unlawful statute. Resp. at 52–53. But what is self-inflicted is Norwegian's continuing practice of promising its customers 100% vaccinated cruises despite knowing that its promise is not possible under Florida law and its decision to wait months before filing a lawsuit to seek to have the law enjoined.[3]

CONCLUSION

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

Dated: December 8, 2021

Respectfully submitted,

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[3] Norwegian represents that it filed this lawsuit the day after it "finally understood from the State there would be no reasonable carve-out for Norwegian" in the law, and therefore, that it cannot be faulted for delaying for months in bringing this suit. *See* Resp. at 54; *see also* Br. at 51–52. The law, however, is clear, and it was unreasonable for Norwegian to think a carve-out would be possible after the Legislature rejected one.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B)(ii) because this brief contains 6,470 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: December 8, 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 December 8, 2021. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: December 8, 2021

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