No. 21A-___

In the
Supreme Court of the United States

STATE OF FLORIDA,

Applicant,

v.

XAVIER BECERRA, ET AL.,

Respondents.

EMERGENCY APPLICATION TO VACATE THE ELEVENTH CIRCUIT'S STAY OF THE PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Directed to the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

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PARTIES TO THE PROCEEDINGS

Applicant the State of Florida was the Plaintiff-Appellee below. Respondents were the Defendants-Appellants below. They are Xavier Becerra, Secretary of Health and Human Services, in his official capacity; the Department of Health and Human Services; Rochelle P. Walensky, Director of the Centers for Disease Control and Prevention, in her official capacity; Centers for Disease Control and Prevention; and the United States of America.

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To the Honorable Clarence Thomas, Associate Justice of the United States and Circuit Justice for the Eleventh Circuit:

Under Supreme Court Rule 22 and the All Writs Act, 28 U.S.C. § 1651, applicant the State of Florida respectfully asks for an emergency order vacating the stay pending appeal issued July 17, 2021 by a split panel of the United States Court of Appeals for the Eleventh Circuit. *See* App. 1.[1]

INTRODUCTION

The Centers for Disease Control and Prevention has, for the better part of 16 months, shut down the entire Nation's cruise industry. From March to October 2020, the CDC categorically banned cruising. In October 2020, the agency supplanted its ban with a "Conditional Sailing Order," which sets up a gauntlet of preconditions that cruise lines must run before they may sail again. The Conditional Sailing Order purported to reserve to the CDC the power to issue "technical instructions"—which the CDC has wielded by posting an ever-changing array of requirements on its website, some of which purport to modify even central provisions of that Order, all without notice and comment.

Together with those "technical instructions," the Conditional Sailing Order requires cruise lines to, among many other things, establish COVID-19 testing laboratories, run self-funded experiments called "test voyages," and comply with social-distancing requirements throughout ships, including in outdoor areas like swimming pools and while waiting in line for the bathroom. Cruise lines must also

[1] En banc review of a stay order is unavailable in the Eleventh Circuit. 11th Cir. R. 35-4(a).

establish shoreside housing for quarantining passengers, subject to minutely detailed requirements. All responsible ship operators must individually certify, on penalty of perjury, compliance with those mandates.

The CDC permitted no cruise ships to sail from the Order's issuance in October 2020 until June 2021. The agency has since decided that a fraction of ships may sail, though only under restrictive conditions. Other ships may become eligible to sail under technical instructions posted online during this litigation that allow ships to bypass the "test-sailing" requirement if they refuse service to unvaccinated passengers, including children.[2] Most ships remain unapproved even for restricted sailing.[3]

The CDC's Order is manifestly beyond its authority, as the district court correctly concluded in preliminarily enjoining it. The statute grants the CDC limited powers to enact traditional quarantine measures. *See* 42 U.S.C. § 264(a). It does not permit the agency to remake the entire cruise-ship industry. The statute does not remotely contain the "clear and specific congressional authorization" that would be needed to support such extraordinary, industry-wide measures. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2320, 2321 (2021) (Kavanaugh, J.). The Order has already cost the State tens of millions of dollars in tax and port

[2] The Conditional Sailing Order was issued before COVID-19 vaccines were widely available and does not discuss vaccination of crew or passengers.

[3] According to the CDC as of the time it filed its stay motion, only 12 ships across the country (and only 5 in Florida) have been approved to sail, Dkt. 96-1, at ¶¶ 19, 21, while 65 ships are subject to the Order, *id.* at ¶ 7.

revenue and unemployment payments to separated cruise-industry employees. It will continue to do so until all ships are able to sail free from the CDC's mandates. That is most unlikely to happen soon, especially given the many families who will be unable to sail until their young children are eligible for and administered COVID-19 vaccines.

In *Alabama Ass'n of Realtors*, four Justices of this Court voted to vacate a stay pending appeal of an order vacating the CDC's nationwide eviction moratorium, which was issued under the same statutory authority that purportedly undergirds the Conditional Sailing Order. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16,731 (Mar. 31, 2021) (citing 42 U.S.C. § 264). A fifth Justice agreed that the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2321 (Kavanaugh, J.). But Justice Kavanaugh voted against vacatur because the agency "plan[ned] to end the moratorium in only a few weeks." *Id.* Here, there is no indication that the Conditional Sailing Order will expire anytime soon—by its terms, the Order presumptively lasts until November 2021, unless the CDC renews it. If the stay is not vacated now, Florida is all but guaranteed to lose yet another summer cruise season while the CDC pursues its appeal.

The Court should vacate the Eleventh Circuit's stay pending appeal of the district court's preliminary injunction.

JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

STATEMENT

In March 2020, the CDC ordered the cruise industry to shut down in light of the COVID-19 pandemic. No Sail Order and Suspension of Further Embarkation, 85 Fed. Reg. 16,628 (Mar. 24, 2020). As grounds for that order, the CDC relied on 42 U.S.C. § 264, which authorizes the agency to establish "regulations" that may be enforced through measures like "inspection, fumigation, [and] sanitation," 42 U.S.C. § 264(a). *See* 85 Fed. Reg. 16,628. The CDC extended that ban three more times.[4] The CDC did not conduct notice and comment before (or after) issuing those orders.

After more than seven months, in October 2020, the CDC determined that the "benefits of" opening "outweigh the costs of not allowing cruise ships to sail," and, claiming to reopen the cruise industry, entered the "Conditional Sailing Order." *See* Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew, 85 Fed. Reg. 70,153, 70,157 (Nov. 4, 2020). The Order, which by its terms contemplates lasting until at least November 2021, purports to provide a four-part framework to return to sailing: (1) creation of onboard laboratories, (2) test voyages, (3) a certification process, and (4) a restricted return to sailing. *Id.* Compliance with each of the four phases is complex. Phase one, for example, requires "following the most current CDC recommendations and guidance"

[4] *See* No Sail Order and Suspension of Further Embarkation; Notice of Modification and Extension and Other Measures Related to Operations, 85 Fed. Reg. 21,004 (Apr. 15, 2020); No Sail Order and Suspension of Further Embarkation; Second Modification and Extension of No Sail Order and Other Measures Related to Operations, 85 Fed. Reg. 44,085 (July 21, 2020); No Sail Order and Suspension of Further Embarkation; Third Modification and Extension of No Sail Order and Other Measures Related to Operations, 85 Fed. Reg. 62,732 (Oct. 5, 2020).

for dealing with any infected crew members and self-reporting and correcting even a single deviation from those recommendations and guidance. *Id.* at 70,158. It also requires cruise ships to enter into agreements with ports, local health authorities, and a shoreside facility that can provide housing for purposes of quarantine. *Id.* at 70,159. Similarly, the phase-two test voyages require every cruise ship to pay the costs of operating—including food, fuel, and wages—to transport volunteer passengers until it demonstrates to the CDC's satisfaction that cruising is safe. *Id.* (requiring each ship to conduct "a simulated voyage or series of simulated voyages demonstrating the cruise ship operator's ability to mitigate the risks of COVID-19 onboard its cruise ship").

The Order noted that the CDC intended to implement the Order through "technical instructions" that would be posted on its website. *Id.* at 70,153. The Order obliges cruise-ship operators to comply not only with the Order but also with the "technical instructions," which are subject to change at any time and carry criminal penalties for their violation. *See id.* at 70,158.[5] The Order continued to dispense with notice-and-comment procedures. *See* 5 U.S.C. § 553.

Almost six months after the issuance of the Conditional Sailing Order, the industry was still stuck in phase one of the four-phase process. The CDC took the position that cruise ships could not even begin phase-two test voyages without the

[5] The Order states it is enforceable under 18 U.S.C. § 3559 and 42 C.F.R. §§ 70.18, 71.2, which authorize criminal penalties. 85 Fed. Reg. at 70,158. And the Order requires cruise ship operators to swear compliance under 18 U.S.C. § 1001—which carries the possibility of a 5-year prison sentence—with "all of the CDC's requirements." 85 Fed. Reg. at 70,160.

promised "technical instructions," but the CDC still had not issued them. *See* Dkt. 1-8, at 7 (Defendant CDC Director Walensky testifying before Congress in March that she was unable to give a timeline for phase two).[6] Meanwhile, cruises based in Europe and Asia were back in full swing, with "[n]early 400,000 passengers" having sailed with "a far lower incident rate than on land." Dkt. 25-9, at 3.

Finally, in April 2021, the CDC issued some—but not all—of the promised "instructions," which consisted of more than 20 single-spaced pages of bureaucratic minutiae. *See* Dkt. 25-13; Dkt 25-14. The instructions, for example, directed the industry to include around 50 distinct components in agreements with each "U.S. port and local health authority,"[7] Dkt. 25-13; detail the precise testing equipment each cruise ship must obtain and the testing procedures they must follow, Dkt. 25-14, at 4–5; require operators to provide housing facilities and transportation to quarantined passengers after they leave the ship with detailed requirements for what those housing facilities must provide, including "separate ventilation systems for all travelers who are not part of the same household," Dkt. 25-13, at 7; and require the cruise industry to ensure that "close contacts" of those who test positive for COVID-19 quarantine for 14 days, even those that test negative, Dkt. 25-14, at 5.

[6] All docket citations are to ECF page numbers except citations to briefs, which use internal page numbers.

[7] Although these instructions sometimes use the word "must" and sometimes use the phrase "should ensure," the State's understanding is that the CDC has treated these as requirements.

The cruise industry immediately condemned the April instructions as "unduly burdensome, largely unworkable, and . . . reflect[ing] a zero-risk objective rather than the mitigation approach" taken with the rest of society. Dkt. 25-9, at 2. Some cruise lines began moving sailings overseas, stating that they were "fed up with waiting for the CDC to allow [them] to cruise." Dkt. 25-29, at 4.

Concerned about the tens of millions of dollars it had already suffered as a result of the CDC's actions, and with the glacial pace of the CDC's implementation of its own Order, Florida in April 2021, in advance of the summer 2021 cruise season, sued and sought preliminary injunctive relief to begin to mitigate its continuing harms from lost taxes, lost revenue to its ports, and the unemployment of former cruise-industry employees. *See* Dkt. 1; Dkt. 9; Dkt. 25.

Hours before filing its brief in response to Florida's motion for a preliminary injunction on May 5, the CDC updated its website with another round of "technical instructions." Pointing to those instructions, the agency declared in its brief that, at long last, "cruise ship operators now have all the necessary instructions" to begin sailing under the CDC's restricted conditions. Dkt. 31, at 11. Like the April instructions, the industry condemned the May instructions as unworkable. *See* Dkt. 56, at 4 (cruise line CEO explaining that the May 5 instructions provided "anything but a clear path to restarting" (quoting Nadine El-Bawab, *Norwegian Cruise Line CEO says U.S. ships are unlikely to sail this summer, calls CDC guidance 'unfair*,' CNBC (May 6, 2021), https://www.cnbc.com/2021/05/06/norwegian-cruise-ceo-says-us-ships-are-unlikely-to-sail-this-summer.html)).

The May 5 instructions, for example, require cruise ships to implement specific ventilation standards aboard the ships themselves, Dkt. 31-4, at 22–23; impose pervasive testing and reporting requirements, *id.* at 16–18; apply social distancing requirements throughout the ship, including in outdoor areas like pools and spas and while waiting for the bathroom, *id.* at 19–21; and prevent passengers from removing their masks except to eat and drink for brief periods and while swimming, *id.* at 19–20.

Without claiming to amend the Order—which was issued before vaccines were available—the May "technical instructions" allow cruise ships to avoid the test-sail requirement and many of the Order's other requirements by agreeing to vaccinate 95% of their crew and sail with 95% vaccinated passengers. Dkt. 31-4, at 13.[8] Many cruises are family-oriented, and children under 12 are ineligible for vaccines. *See* Dkt. 56, at 4–5 ("[C]hildren under 12 are a big part of the cruise experience." (quoting Ben Popken, *Carnival Cruise Line in 'active discussions' with CDC to return to sailing in July*, NBC News (May 17, 2021), https://www.nbcnews.com/business/travel/carnival-cruise-line-active-discussions-cdcreturn-sailing-july-n1267707)).

If a cruise ship completes test sailing to the CDC's satisfaction, or agrees to certify that 95% of its crew and passengers are vaccinated, it may apply for a certificate to sail under the conditions imposed by the Order and the website-issued

[8] The CDC initially required 98% vaccination for crew, but later dropped that requirement to 95%. *Compare* Dkt. 31-4, at 13 (98%), *with* https://www.cdc.gov/quarantine/cruise/ti-simulated-voyages-cso.html (95%).

instructions, although the nature and scope of those requirements is a moving target given that the instructions on the CDC's website often change.

On June 18, the district court granted Florida's motion for preliminary injunction. App. 5–128. It held that the Conditional Sailing Order (1) exceeded the CDC's authority, *id.* at 30–69; (2) was subject to notice and comment, *id.* at 93–97, 104–115; (3) was arbitrary and capricious because it imposed vague, constantly shifting requirements, *id.* at 100; (4) was arbitrary and capricious because it did not, as required by the CDC's regulations, consider "measures undertaken or planned by the local health authorities of any state," *id.* at 101–04; and (5) would violate the non-delegation doctrine, if it were a valid interpretation of the statute, *id.* at 72–93.

The court, however, stayed its order for 30 days, until July 18, and invited the CDC to propose an alternative injunction that would keep in place measures supported by scientific data and consistent with the CDC's authority. *Id.* at 127. The CDC declined to do so. Instead, 12 days before the stay was to expire, it appealed and asked the district court to stay its ruling pending appeal. The district court rejected that request, *id.* at 2–4, and the CDC sought the same relief from the Eleventh Circuit on a time-sensitive basis. Shortly before midnight on July 18, a divided panel granted the CDC's motion for a stay pending appeal, noting that opinions would follow. *See id.* at 1.

As of the CDC's stay motion, however, only five ships designated for cruising out of Florida, Dkt. 96-1, at ¶¶ 19, 21—out of at least 65 ships subject to the Order, *id.* at ¶ 7—have been approved to sail under the CDC's restrictions.

REASONS FOR GRANTING THE APPLICATION

Vacatur is warranted if (1) there is a likelihood that the case "could and . . . would be reviewed by [this Court] upon final disposition in the court of appeals," (2) "the rights of the parties . . . may be seriously and irreparably injured by the stay," and (3) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

To obtain the "extraordinary remedy" of a stay, *Garcia-Mir v. Meese*, 781 F.2d 1450, 1455 (11th Cir. 1986), and "intru[de] into the ordinary processes of administration and judicial review," *Nken v. Holder*, 556 U.S. 418, 427 (2009), the CDC was required to demonstrate to the Eleventh Circuit that it satisfied all four stay factors: (1) "a strong showing that [it] is likely to succeed on the merits," (2) "irreparabl[e] injur[y] absent a stay," (3) that a stay will not "substantially injure the other parties interested in the proceeding," and (4) that the public interest favors a stay. *Id.* at 434.

The CDC failed to demonstrate that any, let alone all, of those factors have been satisfied here. Vacatur of the stay is warranted because, consistent with the votes of four Justices to vacate a similar stay in *Alabama Ass'n of Realtors*, 141 S. Ct. at 2320, the Court is likely to grant review to settle the scope of the CDC's authority to regulate entire national industries under the guise of exercising its traditional quarantine authority, and because the stay of the district court's preliminary injunction threatens irreparable harm to Florida through severely restricting the operation of the cruise industry during the summer 2021 cruise season.

I. THE STAY ORDER IS DEMONSTRABLY WRONG.

A. The Conditional Sailing Order exceeds the CDC's authority.

The CDC lacks authority to issue the Conditional Sailing Order.

The CDC's Order invokes 42 U.S.C. § 264(a), which authorizes the CDC to "make and enforce such regulations" as it deems "necessary to prevent the introduction, transmission, or spread of communicable diseases." *Id.* The next sentence of the statute clarifies that it authorizes measures including "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures" the CDC thinks are "necessary." *Id.* What "other measures" this provision authorizes, under elementary principles of statutory construction, is informed and limited by the examples of what the CDC may do that are expressly enumerated in the statute. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (applying *ejusdem generis* canon); *see also Yates v. United States*, 574 U.S. 528, 543 (2015) (applying *noscitur a sociis* canon). The district court correctly concluded—following the lead of several other courts—that the CDC's authority here is limited to those "other measures" that "resemble or remain akin to" the traditional quarantine measures that the statute mentions. App. 51; *accord Tiger Lily, LLC v. HUD*, 992 F.3d 518, 522–24 (6th Cir. 2021); *Ala. Ass'n of Realtors v. HHS*, --- F. Supp. ---, 2021 WL 1779282, at *5 (D.D.C. May 5, 2021); *Skyworks, Ltd. v. CDC*, --- F. Supp. 3d ---, 2021 WL 911720, at *9–10 (N.D. Ohio Mar. 10, 2021); *but see Ala. Ass'n of Realtors v. HHS*, No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021).

The district court was quite right that the Conditional Sailing Order is far afield of traditional quarantine regulation. As the district court observed, the measures enumerated in the statute encompass "discrete action[s], such as inspection and sanitation at a port of entry, as well as detention for the duration of a disease's incubation period," which are "distinctly limited in time, scope, and subject matter." App 41. The statute thus codifies the federal government's historically "limited regulatory power typical of preventing diseases caused by a discrete item or a person at a major port of entry." *Id.* at 41–42. Yet the Conditional Sailing Order regulates on an industry-wide, systemic basis, in a manner wholly untethered to any indication that a particular cruise ship may pose a risk of infection. The requirements of the Conditional Sailing Order include, for example, self-funded experimental voyages, six feet of social distancing in all public areas aboard a cruise ship (including outdoor areas like swimming pools), specific ventilation requirements, procurement of expensive testing equipment, complex agreements with ports and local health authorities, procurement of housing for quarantined passengers, and mask mandates. *See* Dkt. 25-13; Dkt. 25-14; Dkt. 31-4. "[N]ever has CDC implemented measures as extensive, disabling, and exclusive as those under review in this action," App. 42, which, together with the "technical instructions," regulate cruise ships in "excruciating" detail, *id.* at 65.

The statute does not give the CDC authority to refashion an entire industry's business model simply because, in the CDC's "judgment," doing so is "necessary" to prevent disease. That breathtaking assertion of authority is precisely the kind that

would require "clear and specific congressional authorization." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2321 (Kavanaugh, J.); *see also, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). It also would render surplusage, not only the second sentence of Section 264(a) (which refers to narrower, specified powers), but also the many other statutes that grant the agency specific authority. *E.g.*, 42 U.S.C. § 264(b); *id.* § 265; *id.* § 266; *see Corley v. United States*, 556 U.S. 303, 314 (2009) (explaining that statutes should be construed to avoid surplusage).

The CDC's reliance on its regulations—which of course cannot exceed its organic statutory authority in any event—only confirms just how far afield the Conditional Sailing Order is from traditional, case-specific quarantine measures. In its stay papers in the court of appeals, the CDC relied principally on 42 C.F.R. § 71.31(b), and the concept of "controlled free pratique." Mot. for Stay Pending Appeal at 16–18, *State of Fla. v. Becerra*, No. 21-12243 (11th Cir. July 7, 2021). But that practice involves the inspection and detention of specific ships that present an individualized risk of disease on "arrival at a U.S. port." 42 C.F.R. § 71.31(a). It derives from a practice of detaining ships pending a health inspection on entry into U.S. ports. Part 71—Foreign Quarantine, 21 Fed. Reg. 9,855, 9,871, 9,873 (Dec. 12, 1956). After passing inspection, a ship was given "pratique" and no longer detained. *Id.* As an alternative to detention, the CDC may instead issue a controlled free pratique to that arriving ship stipulating ahead of time what measures that ship must meet to avoid detention. 42 C.F.R. § 71.31(b). But the only conditions the CDC may impose on an arriving ship are the "measures outlined in" Part 71, *id.*, which

include the same types of traditional quarantine measures that Section 264(a) itself authorizes, like disinfecting cargo, *id.* § 71.42. *See* App. 64.[9] That regulation is certainly not license for the CDC to micromanage the operations of the entire cruise-ship industry.

The CDC has also relied on 42 C.F.R. §§ 70.2 and 71.32(b), which add little to the conversation. They largely parrot the language of Section 264(a) itself, except that Section 70.2 adds a *restriction* on the CDC's exercise of Section 264(a) power. Before taking action, Section 70.2 requires the CDC to "determine[] that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession." 42 C.F.R. § 70.2. The Conditional Sailing Order came woefully short of making that finding, resting on the generic assertion that "[c]ruise ships by their very nature travel interstate and internationally." 85 Fed. Reg. at 70,157. But virtually everyone and everything travels interstate and internationally. The CDC's approach makes the finding required by Section 70.2 meaningless.

Finally, the CDC incorrectly argued below that Congress somehow "ratified" the Conditional Sailing Order in the Alaska Tourism Restoration Act (ATRA). *See* Pub. L. No. 117-14 (May 24, 2021). The Passenger Vessel Services Act of 1886

[9] Other such measures include "non-invasive procedures . . . to detect the potential presence of communicable diseases," 42 C.F.R. § 71.20(a); "requir[ing] individuals to provide contact information," *id.* § 71.20(b); determining whether to inspect a ship, *id.* § 71.31(a); quarantining arriving individuals, *id.* §§ 71.32–33; and requiring medical examinations of arriving individuals, *id.* § 71.36.

requires cruises to Alaska to stop in Canada, Pub. L. No. 49-421; *see also* 46 U.S.C. § 55103, but Canada currently refuses to admit them. ATRA provides a temporary exemption to this requirement. As a condition for that exemption, ATRA requires Alaskan cruise ships to obtain a COVID-19 Conditional Sailing Certificate. *See* § 2(a)(1). That narrow exemption hardly reflects approval of the CDC's Conditional Sailing Order more broadly, and certainly falls far short of satisfying the CDC's heavy burden of demonstrating congressional ratification of its actions. *See Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001); *Ala. Ass'n of Realtors*, --- F. Supp. 3d ---, 2021 WL 1779282, at *9; *Tiger Lily*, 992 F.3d at 524. Moreover, ATRA is effective into 2022, § 2(g), while the Conditional Sailing Order contemplates that it will last until November 2021, 85 Fed. Reg. at 70,163. Congress thus recognized that the availability of such a certificate is independent of the Conditional Sailing Order being in place more broadly.

B. The Conditional Sailing Order unlawfully dispensed with notice and comment.

Even if the Order were authorized by Section 264, it would be unlawful because the CDC did not engage in notice and comment rulemaking. Under the Administrative Procedure Act, substantive rules must go through notice and comment.[10] *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). New legal

[10] The Conditional Sailing Order claimed good cause for dispensing with notice and comment. 85 Fed. Reg. at 70,158. But as the district court noted, "the no-longer-new COVID-19 pandemic is insufficient for 'good cause' in October 2020, two-hundred-and-thirty-two days after cruising ceased." App. 109.

requirements backed by criminal penalties, *see supra* n.5, are quintessentially substantive.

The CDC argues, however, that the Order's obviously substantive requirements need not go through notice and comment because it labeled them "an 'order' rather than a 'rule.'" Mot. 22. But the CDC cannot "avoid notice and comment simply by mislabeling [its] substantive pronouncements," *Azar*, 139 S. Ct. at 1812, and the Conditional Sailing Order is an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

Adding insult to injury, the Order contemplates that its requirements may be modified not only by "additional orders" but also by "additional technical instructions as needed." 85 Fed. Reg. at 70,158. The term "technical instructions," however, has turned out to be something of an Orwellian euphemism, as the CDC has treated this provision in the Order as a license not only to clarify the order, but also to rewrite and even substantively amend the Order's terms and conditions through an ever-shifting array of website updates. That has resulted in "vague and indefinite rules subject to change" at any time. App. 100. As the district court correctly recognized, each iteration of technical instructions is itself subject to notice and comment. *Id.* at 112.

II. THE CASE LIKELY WOULD BE REVIEWED BY THIS COURT UPON FINAL DISPOSITION BY THE ELEVENTH CIRCUIT.

Because the Court may vacate a stay under the All Writs Act only "in aid of" its jurisdiction, 28 U.S.C. § 1651(a), Florida must show a likelihood that the case

"could and . . . would be reviewed [by the Supreme Court] upon final disposition in the court of appeals." *Coleman*, 424 U.S. at 1304. The Court has at times required applicants to show that such review would be "very likely," *id.*, and other times required only "a reasonable probability," *Maggio v. Williams*, 464 U.S. 46, 48 (1983). Florida satisfies either standard.

This case presents an important question regarding the scope of the CDC's authority to impose broad, industry-wide measures under its quarantine authorities. In *Alabama Ass'n of Realtors*, the CDC asserted a similarly expansive reading of its organic statute, claiming that it permits the CDC to impose a nationwide moratorium on evictions. In that case, the district court entered summary judgment against the CDC but stayed its ruling pending appeal. Four Justices of this Court voted to vacate that stay. A fifth Justice agreed that the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium." 141 S. Ct. at 2321 (Kavanaugh, J.). But Justice Kavanaugh voted against vacating the stay because the agency "plan[ned] to end the moratorium in only a few weeks." *Id.* Given the similarities between that case and this one, Florida believes that four Justices are likely to view this case as worthy of this Court's review. And here, there is no indication that the CDC will lift the requirements of the Order before at least November 2021.

Moreover, this case implicates a disagreement among the circuits regarding the proper scope of the CDC's authority under Section 264. On the one hand, the Sixth Circuit has concluded that the CDC's authority to impose "other measures," under

Section 264(a) is limited to traditional quarantine regulation, and thus does not permit the CDC to prohibit evictions on a nationwide basis simply because the CDC believes doing so will help prevent disease. *See Tiger Lily, LLC*, 992 F.3d at 522–24; *cf. Brown v. HHS*, --- F.4th ---, 2021 WL 2944379, at *2 (11th Cir. July 14, 2021) (holding, in another CDC eviction-moratorium case, that the challengers had not shown irreparable injury, but expressing doubts about the CDC's statutory authority under Section 264(a) to halt evictions nationwide). The D.C. Circuit, on the other hand, has agreed with the CDC that it may impose a nationwide eviction moratorium simply because it is a measure that the CDC has "determined to be necessary to protect the public health." *Ala. Ass'n of Realtors*, 2021 WL 2221646, at *2. While this case involves attempted CDC regulation of the entire cruise-ship industry, rather than nationwide regulation of the landlord-tenant relationship, the principle at stake in both cases is the same: whether the CDC has authority under Section 264 to remake an entire industry because it thinks that doing so is needed to prevent the spread of disease. Florida believes that the Court is likely to grant review to address that important question.

III. FLORIDA IS IRREPARABLY HARMED BY THE STAY ORDER.

The Eleventh Circuit's stay order will cause Florida to suffer a range of irreparable harms. As the district court correctly concluded, *see* App. 115–21, those include (1) payment of unemployment expenses, *see Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989); *Air Alliance Hous. v. EPA*, 906 F.3d 1049, 1059–60 (D.C. Cir. 2018); (2) direct tax losses, *see Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110–11 (1979); and (3) the lost

revenue of ports, which are creatures of Florida statute, *see* Title 22, Chapters 308–315, Florida Statutes.

Florida provided substantial evidence to substantiate these harms.[11] The district court correctly concluded, moreover, that Florida's "inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Const., Inc. v. Sec'y, Dept. of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013); *see* App. 116–17.[12]

The CDC argued below that Florida is somehow not harmed by its Order, positing that it is "implausible" that more cruises with more passengers will sail without the Conditional Sailing Order. Mot. 14. But the cruise industry, including the Cruise Line International Association—which the agency says is "the leading industry trade group," *id.* at 7—for months has been "ask[ing]" the CDC to "restart cruising" and "lift" the Conditional Sailing Order. Dkt. 25-10, at 5; *see also* Dkt. 25-9, at 2 (reiterating call to lift Order in April); Dkt. 25-28, at 2–3 (similar). With the

[11] *See* Dkt. 25-19, ¶ 3 (unemployment); Dkt. 25-25, ¶¶ 3–5 (taxes); Dkt. 25-26, ¶¶ 3–8 (ports); Dkt. 25-20, at 44 (showing Port Everglades generated $33 million in state taxes and $29.4 million in local taxes in 2019 from cruise-passenger activity); Dkt. 25-22, at 10 (JAXPORT $1.6 million in state and $1.5 million in local taxes in 2019); Dkt. 25-24, at 27 (Port Canaveral $74.2 million in state and local taxes in 2018); Dkt. 25-21, at 29 (PortMiami $182 million in state and local taxes in 2016); Dkt. 25-23, at 36 (Port Tampa Bay $9.6 million in state and local taxes in 2015).

[12] *See also Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (same); *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388 (3d Cir. 2012) (same); *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 599–600 (6th Cir. 2014) (same); *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (same); *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) (same).

Order and its unlawful requirements enjoined, it is "likely" and "predictable" that cruise lines will "react," *see Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019), by setting sail sooner and with more passengers than if this Court allows the Conditional Sailing Order to continue.[13] Even now—almost eight months since the Order—the CDC admits that some ships still have not emerged from the Order's phase-one requirement to "procure" COVID-19 testing units. Mot. 17.

The CDC has also argued that Florida incorrectly "assumes that prospective cruise ship passengers are indifferent to whether COVID-19 health and safety protocols are in effect" and that "cruise ship operators are going to want to reassure their customers that [cruise ships are] a safe place to be." *Id.* at 14 (quotations omitted). But cruise ships do not need the CDC for motivation to provide a safe space for passengers. They have sufficient business interest to do so. By the same token, passengers do not need the CDC to tell them when a cruise ship is safe to board. Over 400,000 passengers have sailed abroad on cruise ships since July 2020 with lower rates of COVID-19 than on land. *See* Dkt. 25-9, at 3; Dkt. 25-10, at 6. Many Americans traveled overseas to do so. *See* Dkt. 25-9, at 3; Dkt. 25-10, at 8.

[13] One company, Norwegian Cruise Line, filed an amicus brief in the Eleventh Circuit in support of the CDC's request for a stay pending appeal. No other cruise company joined that filing. Since that filing, Carnival—the largest cruise company—has reaffirmed that the Conditional Sailing Order is "unworkable" and not "sustainable" and that it should "be lifted." *See* https://www.flgov.com/wp-content/uploads/2021/07/FILE_5264.pdf.

IV. THE EQUITIES FAVOR FLORIDA.

The Conditional Sailing Order continues to harm an industry on which 159,000 Floridians rely for work and is devastating countless other businesses and industries that also rely on cruising. *See* Dkt. 25-1, at 14, 45–47; Dkt. 25-2, at 6–7; Dkt. 25-27, at 3. As the CDC has recognized, losing work "adversely affects" health, "is a major source of psychological stress," and "is associated with greater incidence of suicide." Dkt. 56, at 20 (quoting Dr. Rene Pana-Cryan et al., *Economic Security During the COVID-19 Pandemic: A Healthy Work Design and Well-being Perspective*, CDC NIOSH Science Blog (June 22, 2020), https://blogs.cdc.gov/niosh-science-blog/2020/06/22/economic-security-covid-19/).

Florida acknowledges that cruising will never be a zero-risk activity, as does the CDC. Dkt. 31-3, at 2. But the pandemic began 16 months ago. Society is reopening. Industries have learned to mitigate COVID-19 by voluntarily altering their business practices, and cruise lines should be given that same opportunity. Vaccines are available to adults who want them. Restaurants and sporting events are packed. "We're back traveling again. We're back seeing one another again. Businesses are opening and hiring again."[14] And yet the CDC continues to stand by the arbitrary and unlawful requirements of the Conditional Sailing Order and accompanying technical instructions.

[14] The White House, *Remarks by President Biden Celebrating Independence Day and Independence from COVID-19* (July 4, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/05/remarks-by-president-biden-celebrating-independence-day-and-independence-from-covid-19/.

The CDC also below pointed to the fact that the Florida legislature has enacted a law prohibiting Florida businesses from requiring vaccine passports. *See* § 381.00316, Fla. Stat. But that restriction—which unlike the CDC's action is supported by the police power of a sovereign state to regulate the health and welfare of its own citizens—does not preclude cruise lines from taking other strong measures to prevent the spread of COVID-19, or eliminate the significant harms the CDC's micromanaging of an industry critical to Florida's economy has imposed on Florida. In any event, "[c]hildren under 12 are a big part of the cruise experience" but are ineligible for vaccination. *See* Dkt. 56, at 4–5 (quoting Popken, *supra* 8).

CONCLUSION

For the reasons set forth above, this Court should vacate the stay entered by the Eleventh Circuit.

Respectfully submitted,

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