

EXHIBIT D

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA,)	
)	Case No. 8:21-cv-00839-SDM-AAS
Plaintiff,)	
)	
vs.)	Tampa, Florida
)	Wednesday, May 12, 2021
)	9:03 a.m. - 3:11 p.m.
XAVIER BECERRA, Secretary)	
of Health and Human)	
Services, in his official)	
capacity; HEALTH AND HUMAN)	HEARING RE PLAINTIFF'S MOTION
SERVICES; ROCHELLE)	FOR PRELIMINARY INJUNCTION
WALENSKY, Director of the)	
Centers for Disease)	
Control and Prevention, in)	
her official capacity;)	
CENTERS FOR DISEASE)	
CONTROL AND PREVENTION;)	
THE UNITED STATES OF)	
AMERICA,)	
)	
Defendants.)	
_____)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

(Appearances continued on Page 2)

COURT REPORTER:

Shayna Montgomery, CSR, RMR, CRR
United States District Court
801 North Florida Avenue, Room 15A
Tampa, Florida 33602
(813) 301-5024 or shayna_montgomery@flmd.uscourts.gov

Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

1 APPEARANCES CONTINUED:

2 For the Plaintiff:

3 OFFICE OF THE FLORIDA ATTORNEY GENERAL
 4 BY: JAMES HAMILTON PERCIVAL, II, ESQ.
 -and-
 5 BY: ANITA J. PATEL, ESQ.
 -and-
 6 BY: JASON H. HILBORN, ESQ.
 -and-
 7 BY: JOHN GUARD, ESQ.
 8 PL-01, The Capitol
 Tallahassee, Florida 32399
 (850) 414-3300

9

10 For the Defendants:

11 DEPARTMENT OF JUSTICE - CIVIL
 12 BY: AMY POWELL, ESQ.
 13 150 Fayetteville Street, Suite 2100
 Raleigh, North Carolina 27601
 (919) 856-4013

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

--oOo--

THE COURT: We are together in case 21-civil-839,
State of Florida vs. Becerra and others.

Who speaks this morning for the State of Florida?

MR. HILBORN: I do, Your Honor. Jason Hilborn.

THE COURT: Mr. Hilborn?

MR. HILBORN: Yes, sir.

THE COURT: Good morning.

And who else is at counsel table, Mr. Hilborn, that
you would like to be recognized?

MR. HILBORN: My colleagues, Jimmy Percival,
John Guard and Anita Patel.

THE COURT: All right. Good morning to each of you.

And who speaks for Becerra and the defendants, for the
United States for short?

MS. POWELL: Amy Powell for the United States.

THE COURT: Good morning, Ms. Powell.

Now, we have spoken briefly a few moments ago in
chambers just to say hello. And as we were doing that, you
indicated that you had a stipulation with respect to certain
documentary exhibits for the hearing today. Will one -- would
one or the other of you like to offer that stipulation or
introduce evidence or otherwise implement that stipulation?

MR. PERCIVAL: I'll handle that, Your Honor.

1 Mr. Percival for Florida. So we have agreed that all of the
2 exhibits on our exhibit list can be considered by the Court
3 given the relaxed evidentiary standard at the preliminary
4 injunction stage. So I think I'll just go ahead and move our
5 exhibits and their exhibits into evidence, Your Honor.

6 THE COURT: The ones on the exhibit list?

7 MR. PERCIVAL: Yes, Your Honor.

8 THE COURT: That's on the docket?

9 MS. POWELL: That's correct, Your Honor.

10 MR. PERCIVAL: Yes. Yes, sir.

11 MS. POWELL: Without waiving any objections --
12 (Court reporter admonition.)

13 MR. PERCIVAL: I can represent that. So we have
14 agreed -- sorry, loud voice. I'll step back, Your Honor.

15 THE COURT: You just speak the same volume and at the
16 same -- we can adjust. All right.

17 MR. PERCIVAL: Yes, Your Honor.

18 THE COURT: Go ahead.

19 MR. PERCIVAL: We have agreed that each of us retains
20 the right to raise relevance arguments and weight arguments,
21 but other than that, that the Court can consider the exhibits
22 that we've offered.

23 THE COURT: Understood. All right. Then the exhibits
24 listed on the exhibit lists of plaintiff and the defendants are
25 received for the purposes of this hearing.

1 MR. PERCIVAL: Thank you, Your Honor.

2 THE COURT: All right.

3 (The exhibits on plaintiff's and defendants' exhibit
4 lists were admitted into evidence for this hearing.)

5 THE COURT: Then since the movant here is State of
6 Florida, I'll recognize Mr. Hilborn to advance his motion for
7 preliminary injunction. Good morning.

8 MR. HILBORN: Good morning, Your Honor. Thank you
9 again.

10 The CDC claims the power to unilaterally shut down the
11 multibillion dollar cruise industry for over a year, just like
12 they claim the power to prohibit evictions nationwide. Only
13 days ago, the District of DC joined a number of other courts,
14 including the Sixth Circuit, in holding that the CDC's power is
15 a narrow sliver of what it claims. We are here today asking
16 the Court to reach the same conclusion. Now, as the Court is
17 no doubt aware, the CDC finally updated their website with what
18 they claim are the necessary instructions to create a path to
19 sailing. They did so on the day that their brief was due,
20 which is, of course, no coincidence.

21 So I want to spend my time walking through all the
22 issues before the Court, but I generally want to make two main
23 points. First, I want to explain why the conditional sailing
24 order was invalid when, in turn, this is the issue before the
25 Court. Everything that the CDC has done since then is

1 completely derivative of that order, and the CDC appears to
2 agree that this is the central question. They also ask the
3 Court to evaluate the order as of the time that it was issued.

4 THE COURT: Was the original -- was the original no
5 sail order lawful? What was it, March of '20?

6 MR. HILBORN: It was March of 2020. And I don't think
7 it was, Your Honor, but we --

8 THE COURT: Just succinctly what would be your reason
9 for that?

10 MR. HILBORN: So similar to the conditional sailing
11 order, that original no sail order relies on the same statute
12 and the same regulations and, even in large part, the same
13 facts as the conditional sailing order. And so we think that
14 most of our analysis today would apply to that.

15 And so second today, I want to explain why, even if --

16 THE COURT: So then all of the orders were unlawful?
17 The original and the -- was it three extensions of the --

18 MR. HILBORN: Three extensions --

19 THE COURT: -- no sail order?

20 MR. HILBORN: Yes, there was an original no sail order
21 in March, and then three more extensions and then the
22 conditional sailing order in October.

23 THE COURT: And they've all been unlawful?

24 MR. HILBORN: I think so, yes, Your Honor.

25 THE COURT: For the same reasons?

1 MR. HILBORN: Yes. If anything --

2 THE COURT: Well, let me anticipate counsel's
3 argument. Then -- and she -- and the argument appears, why
4 then has the United States -- has the State of Florida waited
5 so long to assert whatever rights it might have to challenge
6 those orders?

7 MR. HILBORN: So today we're challenging the
8 conditional sailing order, and I don't think that we should be
9 faulted for taking the CDC at its word, that they were opening
10 up the cruise industry in October 2020. And so I don't think
11 that that is unreasonable delay at all, which is what they have
12 to show.

13 Now, second --

14 THE COURT: So you want the measurement of delay, if
15 any, to be from October until the present, until April 20 --
16 whatever it was when you -- when you filed.

17 MR. HILBORN: Yes, Your Honor, because that's the
18 order that we're challenging here today.

19 THE COURT: Then why did you wait the time from
20 October until April?

21 MR. HILBORN: Again, because the CDC said that they
22 were opening up the cruise industry in October. And so I think
23 if we had sued in --

24 THE COURT: Well, it was clear by November the 1st
25 maybe -- if they said they were going to open it in October, it

1 would have been clear on November 1st that they weren't
2 according to the State of Florida.

3 MR. HILBORN: So I think if we had sued in November,
4 the Federal Government would have said that we're simply
5 speculating that they're actually keeping the industry shut
6 down, whereas now we know that that's absolutely what, at
7 least, was the affect of the conditional sailing order in
8 October. And so again, I don't think we should be faulted for
9 waiting the time that we did because once we knew that it had
10 been shut down and was being shut down, we filed this lawsuit.

11 THE COURT: So there was some point between the day
12 the suit was filed and October 20th that you were sort of on
13 notice -- to borrow the phrase -- the State of Florida was sort
14 of on notice of what it -- what it characterizes as a
15 determination by the CDC not to permit sailing.

16 MR. HILBORN: Yes, at some point between the
17 conditional sailing order and the time we filed suit. And I
18 don't --

19 THE COURT: Was there some particular event that
20 occurred between October and April that fixed the position --
21 the understanding of the State of Florida that the CDC was not
22 going to, in its view, reopen the industry?

23 MR. HILBORN: So by March 2020, when the industry was
24 not actually opened yet, there's publicly available press
25 releases where we exhorted the CDC to open the industry or we

1 were going to sue. Then on April 2nd, the CDC released more
2 technical instructions to their website and we filed suit
3 within a week after that. I believe we sued on April 8th.

4 THE COURT: So when you saw the -- the -- if I
5 understand correctly, if I ask you the question directly what
6 was it that triggered the decision to sue now, it would have
7 been that those -- those additional technical -- what do they
8 call it -- technical guidance?

9 MR. HILBORN: The CDC calls them "technical
10 instructions," and I think that was certainly a factor. I
11 don't know if I can represent that that was the only factor.
12 Again, as time went on and the cruise industry was not opening
13 and as the summer season started approaching and as the cruise
14 ships started threatening to move abroad if the CDC didn't act,
15 that's when we brought our suit.

16 THE COURT: I suppose similar to that 30 days to
17 remove after it becomes clear on the record one should
18 reasonably determine from the record that the amount of
19 controversy is in excess of the jurisdictional limit.
20 Sometimes that can be a little hazy as to when exactly that is.

21 MR. HILBORN: Right. I don't have the exact moment in
22 time, Your Honor.

23 THE COURT: All right. Excuse me. Go ahead.

24 MR. HILBORN: So -- so firstly, I want to explain why
25 the order was invalid when it was entered. And then second, I

1 still want to explain why, even if this Court views the Dear
2 Colleague letter and the technical instructions as altering the
3 analysis, that we're still entitled to an injunction today. So
4 I plan to start with the statute and then move through the
5 regulations and discuss our other APA arguments, and then get
6 to irreparable harm and standing.

7 Now, before I get into the statute, I want to make
8 three threshold points. One, it's important to keep in mind
9 the conditional sailing order relies on the same statute, same
10 regulations and same facts the CDC used to shut down the cruise
11 industry and those four no sail orders that Your Honor
12 mentioned. Fundamentally, the power they claim here is all but
13 absolute.

14 Second, although the conditional sailing order on its
15 face, as we've already discussed, does not actually purport to
16 do the same thing as the no sail orders, the fact is it's had
17 the affect of continuing the shutdown of those orders what has
18 now been six months and will be at least another two more
19 months, according to the defendants' best estimates. That
20 means --

21 THE COURT: Or what?

22 MR. HILBORN: The CDC has said that they have now
23 provided a path to sailing, and so I think their best estimate
24 is that that would be by midsummer. So we have at least a
25 couple more months to go.

1 THE COURT: That's an estimate of how long it would
2 take to secure the port agreements and --

3 MR. HILBORN: To --

4 THE COURT: -- get the certificates applied for and
5 agreed to and to get to Phase 4?

6 MR. HILBORN: Correct. That's what they say, yes.

7 THE COURT: Do you disagree with that practical and
8 real availability of that schedule?

9 MR. HILBORN: So I think whether there's an actual
10 path to sailing within two months, that we should be granted
11 relief either way.

12 Now, as far as --

13 THE COURT: Well, if I may insist upon an answer to my
14 question.

15 MR. HILBORN: Sure.

16 THE COURT: Do you have a basis to think that that
17 schedule -- let's call it July 1 for shorthand. I'm not saying
18 it's July 1 --

19 MR. HILBORN: Sure. Sure.

20 THE COURT: -- but let's just call it that for
21 shorthand. That July 1 date is not either legally or
22 reasonably or practically available?

23 MR. HILBORN: I question whether it's available simply
24 because the order itself and the technical instructions on the
25 website, almost every other paragraph says that they're subject

1 to change at any time. And even in the declaration that
2 they've submitted, they say that they intend to amend the --

3 THE COURT: Now you're talking about the website of --
4 addition of May the 5th?

5 MR. HILBORN: The addition on May the 5th and even the
6 additions before that, Your Honor. And so I can't tell you as
7 a factual matter that they absolutely cannot comply with that
8 before July 1st, but I certainly question whether they can
9 because of its constantly changing nature.

10 And then third, I do want to --

11 THE COURT: There are a number -- I'm sorry, but there
12 are a number of instances in there -- in that technical
13 guidance that require application and approval --

14 MR. HILBORN: Correct.

15 THE COURT: -- and the availability of that. So it
16 would affect the schedule and that would be under the control
17 of the CDC?

18 MR. HILBORN: Right, that's correct. And my
19 understanding is that they essentially reserve all rights to
20 accept or reject any of the conditional sailing certificates,
21 and that's after the test sails and all of that.

22 THE COURT: So this isn't -- at least according to
23 your understanding, this is not a circumstance in which the
24 industry can't control the schedule by simply hurrying up and
25 accomplishing a list of specified things and heading out?

1 MR. HILBORN: That's correct, Your Honor. My
2 understanding is that -- and that's actually one of the
3 problems here -- is there isn't actually a clear set of
4 guidelines for them to follow where it says, If you do this you
5 will absolutely be able to sail. It's still -- you still have
6 to go through the CDC. They still reserve the right to approve
7 your certificate. And again, all of this is subject to change
8 for health reasons at any time.

9 THE COURT: Is there a temporal limit on the time --
10 there's no temporal limit on industry's requirement to satisfy
11 these technical instructions as I understand it.

12 MR. HILBORN: I think that's correct.

13 THE COURT: Is there any limitation on the time within
14 which the CDC must either approve or disapprove the things that
15 they must approve or disapprove?

16 MR. HILBORN: So in the conditional sailing order --
17 and I'm forgetting the exact amount of time. I think it's
18 either 30 or 60 days that they say it will take to go through
19 the certificate process. Now, in their -- it's either their
20 Dear Colleague letter or the technical instructions that they
21 added on May 5th -- I think it's a Dear Colleague letter --
22 they say that, Well, we'll actually just do that in five days.
23 And again, that's what they say. I don't know if -- how that's
24 actually playing out.

25 THE COURT: Is it playing out? Is someone doing it?

1 MR. HILBORN: So not to my knowledge. I know that the
2 CDC, in their declaration, they -- and even their brief -- they
3 say that only 80 percent of cruise ships have actually made it
4 through Phase 1. So again, that's Phase 1. That's not even --
5 you're not even at the Phase 2 test sailing or the -- they've
6 now broken up Phase 2 into at least two parts. Phase 2A are
7 these local agreements. Phase 2B are these test sailing. So
8 that's not even to that. And it's not even to applying for the
9 certificate, and then that's not even to actually sailing with
10 some restrictions they say.

11 So -- and we've touched on it -- and I just want to
12 explain how the order actually works in practice. So the order
13 is signed by the CDC director, and as we've just talked about,
14 it purports to provide a four-part framework to return to
15 sailing. And it states that as part of that framework, it's
16 going to be providing these instructions, right? And we now
17 know that those instructions are unsigned updates on the CDC's
18 website and, as I've said, they are subject to change at any
19 time. And they carry both civil and criminal penalties under
20 the order.

21 And I want to pause there because it's very important.
22 So the CDC has enacted an order without noticing comment that
23 says follow our substantial changing Internet guidance or go to
24 jail. That is not just unlawful and not just procedurally
25 flawed under the APA, it violates the most basic principals of

1 our constitutional republic.

2 Now let's jump into the statute, which is Section 264.

3 THE COURT: Under what circumstances would someone be
4 penalized?

5 MR. HILBORN: So the order lists a lot of statutes and
6 regulations under which it's enforceable. I think the easiest
7 to sort out are in Regulation 70 and 71, and if you excuse me,
8 Your Honor, I'm just going to grab a quick drink of water.

9 THE COURT: Sure.

10 MR. HILBORN: So if you look to -- I'm going to pull
11 it up right now -- 42CFR71.2 -- and we'll talk all about these
12 regulations more in depth later, but that regulation states
13 that "Persons in violation of this part are subject to a fine
14 of \$100,000 or one year in jail or both."

15 And the other --

16 THE COURT: They'd have to be a sailing violation of
17 the regulations?

18 MR. HILBORN: I think this -- the way I read the
19 order -- and I can tell you the exact page number.

20 (Pause in proceedings.)

21 MR. HILBORN: So on page 19 of the order, it says that
22 the order is enforceable through the provisions of 18 U.S.C.
23 3559, 3557, some other statutes, and then these two regulations
24 that I just read to you, 42CFR70.18 and 71.2.

25 So my understanding of the order is that they don't --

1 THE COURT: Have a sense of the mercy for the court
2 reporter. When you're rattling off numbers, if you would just
3 slow down a bit.

4 MR. HILBORN: Yes, sir.

5 THE COURT: She'll be much more pleasant during lunch
6 hour if you --

7 MR. HILBORN: Yes, sir, I apologize.

8 So the two main regulations that I'm talking about
9 here are 42CFR70.18 and 71.2.

10 THE COURT: Excellent.

11 MR. HILBORN: And to Your Honor's question about do
12 they have to be sailing to violate that, the way I read the
13 order is that that is -- that is how they're enforcing the
14 entire order. So if you had violated the order, then you're
15 now subject to those possible penalties.

16 THE COURT: Now, if you sail with passengers and
17 you're not in compliance with the --

18 MR. HILBORN: Certainly if you do that. I think
19 there's -- there's other ways to violate the order. You know,
20 at one point the order says that you can't even apply for a
21 certificate to sail until you certify that you've complied with
22 all the previous requirements. And so I'm not sure if that
23 would also count as a violation of the order, but absolutely if
24 you're sailing without going through the framework.

25 THE COURT: Okay.

1 MR. HILBORN: Now for the statute. And again, that's
2 Section 264.

3 THE COURT: I have it in front of me.

4 MR. HILBORN: Perfect. And that's what the order
5 relies on for its authority. Now, there's two competing
6 interpretations out there right now in the federal courts of
7 Section 264(a). Argues in the majority, and that includes the
8 Sixth Circuit, and just last week the Federal District Court
9 for the District of Columbia. Two district courts, though,
10 have agreed with the defendants here. So I want to divide my
11 discussion on the statute into two parts because A, our reading
12 is the better reading and the majority view; and B, perhaps
13 more importantly, the CDC loses even on their own reading.

14 So I'll start with the text to get situated. And I
15 know Your Honor has it in front of you, so I'll try to just
16 provide an objective paraphrase.

17 Section 264 --

18 THE COURT: In your memorandum, you said that -- in
19 your motion for preliminary injunction, you said that the
20 statute says that the CDC can only -- you use the word
21 "only" -- do the things that are listed in the statute. But
22 the statute doesn't say "only," does it?

23 MR. HILBORN: That's correct, Your Honor. And I don't
24 have that portion of our brief in front of me, but we certainly
25 would -- we are not saying that this --

1 THE COURT: I have it in front of me.

2 MR. HILBORN: Perfect.

3 THE COURT: Would you like me to read it to you?

4 MR. HILBORN: No, I, of course, trust you.

5 But we are not saying that the list there is
6 exhaustive. And so --

7 THE COURT: No. Well, I took you to mean and the
8 things implied fairly by the term "other measures" understood
9 in the normal manner of statutory understanding.

10 MR. HILBORN: Sure.

11 THE COURT: But only those things.

12 MR. HILBORN: Only things like those, yes. And I do
13 think that is our position.

14 THE COURT: Well, that is an interpretation, but it
15 doesn't -- I mean, the CDC did the same thing. When they wrote
16 the rule, they stuck the word "including" in there in the rule,
17 which is not also in the statute. So the State of Florida
18 oozes the word "only" into its interpretation and the CDC oozes
19 the term "including" into its regulation each sort of targeted
20 addiction. All right. But go ahead.

21 MR. HILBORN: So I don't think we need to read the
22 statute then.

23 THE COURT: Well, I mean, there's still a lot of
24 ambiguity in there or a lot of argument available, but I didn't
25 mean to preempt any statutory argument.

1 MR. HILBORN: Sure. I think the basic debate between
2 the two readings that are floating out there right now is
3 whether the first sentence stands totally on its own in
4 isolation or whether it's narrow and informed by the second
5 sentence. And now we think it's the latter and that it is,
6 indeed, narrowed and informed by the second sentence, and
7 there's a few reasons for that.

8 So first, just sticking purely to the text, we think
9 that the phrases "for purposes of carrying out" and "such
10 regulations" -- referring to the such regulations in the first
11 sentence -- and "provide for" show that the sentence two is
12 describing the types of things the sentence one may authorize.
13 And I think that becomes especially clear when you apply canons
14 of construction and when you look to the fact that we know that
15 statutes have to be read in their overall context and as a
16 whole and in a way that a avoids surplusage.

17 So if the first sentence were as broad as the
18 defendants say, it would give the CDC power to make any
19 regulations that they deem necessary, and importantly, the
20 power to enforce those regulations is already found in the
21 first sentence where it says "make and enforce." So if the
22 second sentence were a separate grant of authority as the
23 defendants say, rather than being connected to the first
24 sentence, the second sentence would be surplusage. The powers
25 granted under the second sentence would already exist in the

1 first sentence. And the same is true of the subsections in
2 Section 264, as well as the next statutory Sections 265 and
3 266, which both purport to provide the CDC with the power to
4 make certain regulations.

5 But again, if the first sentence already gave them
6 that power, then those provisions would be superfluous.
7 There'd be no need for them because the Secretary would already
8 have nearly limitless power.

9 Now looking more specifically at the second
10 sentence -- and Your Honor referenced this already -- we
11 explain in our brief that canons like ejusdem generis and
12 noscitur a sociis call for reading other measures in light of
13 the more specific enumerated measures before it, in and around
14 it. And so we think that these other measures in the second
15 sentence should be related to things like inspection, light
16 fumigation and light disinfection.

17 And again, I think our reading becomes more clear when
18 you talk about the major questions doctrine. Now, the
19 defendants misconstrue the major questions doctrine in their
20 brief at Footnote 22, so I want to be clear about what it
21 provides. It does not say, as the defendants suggest, that
22 Congress never allows agencies to answer major questions.
23 Instead, it provides that "Congress speaks clearly if it wishes
24 to assign to an agency decisions of vast economic and political
25 significance." And given the economic harm the CDC has caused

1 with this authority that they claim, we think the doctrine
2 applies. And certainly the CDC cannot identify a clear
3 statement from Congress giving it the authority that it claims,
4 and the fact that courts have disagreed on this also shows that
5 there is no clear statement.

6 And as I mentioned, there are courts out there that
7 have agreed with us. So we talk a lot about the Tiger Lily
8 case in our brief, which was by the Sixth Circuit, examining
9 the exact same statute that the CDC claims gives them the power
10 here and the Sixth Circuit reason that the CDC's broad
11 construction of 264(a) is incorrect. And as I said, so did the
12 Federal District Court for the District of Columbia just last
13 week and another eviction moratorium case decided on summary
14 judgment. Now, both of those opinions track our arguments here
15 and they explain why the first sentence of Section 264 does not
16 give the CDC the broad power that it claims.

17 THE COURT: You would agree that a rent moratorium
18 is -- or an eviction moratorium, excuse me, is more distant by
19 far from the core function at the CDC than the management of
20 COVID-19 on cruise vessels. I'm sure you'd agree with that.

21 MR. HILBORN: I'd agree that an eviction moratorium
22 involving landlord/tenant relations is farther than things like
23 inspecting and managing disease on a cruise ship, yes.

24 Now, again though, this is about what 264 -- what CDC
25 claims is their power under 264, which is just like the

1 eviction moratorium case as far as their argument goes. And I
2 think a telling example of how far they think their power goes
3 here under the same statute is that in the DDC case, which is
4 the Alabama Realtors. It's at 1:20- --

5 THE COURT: I've got it.

6 MR. HILBORN: Okay, perfect.

7 So in the argument the Court actually pressed the CDC
8 to identify limits on their power, and they couldn't do so
9 meaningfully. The CDC admitted that they think they have the
10 power under Section 264(a) to forcibly vaccinate the rest of
11 the country. Now, the State of Florida is absolutely in favor
12 of vaccinations, but that's a radical power for a federal
13 agency to claim.

14 Now moving to applying our interpretation of the
15 statute to the conditional sailing order, I think it goes
16 without saying that the statute does not allow the CDC to shut
17 down the industry. That's exactly what they did, and the
18 cruise industry remains shut down for what is now pushing 15
19 months from the first no sail order. And according, again, to
20 the CDC's best estimates, that will push things out over a year
21 and a half of the cruise industry being shut down.

22 And we think that the fact that it has had the affect
23 of extending the lockdown orders for at least nine more months
24 is sufficient alone to find ultra vires. But even still,
25 assuming that the website updates changed anything, the order

1 imposes many additional requirements that we think Section 264
2 does not provide the CDC with the authority to require. So
3 just to stay high level, we can start with these Phase 2 test
4 sailings that have been mentioned already.

5 THE COURT: Before we go on from the statute, you
6 know, the -- well, bear with me just a second, but let's look
7 at the second sentence. I'd be interested to see what your
8 construction is. Let's assume that it wasn't written out
9 margin to margin like this, that it was framed up with numbers
10 and romanettes and things like that, okay? Let's take a look
11 at it.

12 "For the purpose of carrying out" and et cetera. So
13 it's clearly an introductory clause down to the word "such,"
14 right? So you would put a colon there and hit the single --
15 hit the return and come back and put a one by "inspection,"
16 right? And then you'd put a two by "fumigation," right?

17 MR. HILBORN: Sure.

18 THE COURT: You would put a three by "disinfection," a
19 four by "sanitation," five by "pest extermination." And then
20 would you put a six in front of "destruction"?

21 MR. HILBORN: Would I?

22 THE COURT: Well, would whomever the pertinent person
23 is. I guess it's me for the moment. Should I put a six by
24 "destruction"?

25 MR. HILBORN: I think Your Honor could do that.

1 THE COURT: But would it be right?

2 MR. HILBORN: Huh?

3 THE COURT: Would it be correct?

4 MR. HILBORN: I don't --

5 THE COURT: Let's phrase it a little differently then.

6 Would I then go back to the wider margin with "of animals and
7 articles"? So does it say, in other words, "Inspection of
8 animals and articles, fumigation of animals and articles found
9 to be so infect" -- does it?

10 MR. HILBORN: So --

11 THE COURT: Or does it say "Inspection, fumigation,
12 disinfection and then destruction of animals and articles found
13 to be so infected"? Or does the "found to be so infected" --
14 in other words, does that "of animals or articles found to be
15 so infected," does that distribute across the rest of the
16 sentence or is it isolated after "destruction"?

17 MR. HILBORN: Right. So I see where Your Honor is
18 going. So the Northern District of Ohio and I believe also the
19 DDC case interpreted this to be a list of inspected --
20 inspection, fumigation and disinfection as applying to animals
21 or articles, which I believe that's how I understand Your
22 Honor's question to be.

23 THE COURT: Uh-huh.

24 MR. HILBORN: Now --

25 THE COURT: So it would be read in that case as if

1 there were an "and" between extermination and destruction.
2 That's reading it as if there's an "and" there, right?

3 MR. HILBORN: I think so, Your Honor. But -- so as
4 the Northern District of Ohio pointed out, though --

5 THE COURT: Well, let's just talk about what we think
6 it says. If you have an argument to advance, go ahead. I'm
7 sorry, I didn't mean to interrupt you.

8 MR. HILBORN: The argument I would advance is it
9 follows the Skyworks case in the Northern District of Ohio
10 decision where the Court there said whether this statute is
11 getting at the inspection and the fumigation and the
12 disinfection is restricted to applying to animals or articles.

13 THE COURT: Uh-huh.

14 MR. HILBORN: Either it's that, or either way it's
15 referring to inspection and fumigation which is commonly
16 understood as also applying to limited certain articles.

17 THE COURT: Uh-huh.

18 MR. HILBORN: And so the Court in Skyworks found that
19 either way it didn't really have an affect on the Court's
20 interpretation of other measures, and I think that would be our
21 position here.

22 THE COURT: All right. Thank you.

23 MR. HILBORN: And so I think I left off at examples in
24 the order even if the website updates actually did anything,
25 and I mentioned Phase 2 test sailing.

1 So these test sails are to last for two to seven days
2 with volunteer passengers, and they essentially amount to the
3 CDC requiring the cruises to run experiments for the CDC on the
4 cruise industry's own dime. And I don't see anywhere in
5 Section 264 that allows for something like that. Section 264
6 allows the CDC to inspect ships and see if anything needs
7 disinfection on them, but forcing the cruise industry to
8 conduct experimental sailings at their own expense is nothing
9 like forcing the industry to allow the CDC to inspect their
10 ships.

11 Now, to my second point -- and I actually think this
12 might be more important because in some ways Your Honor doesn't
13 actually have to wade into the debate over the interpretation
14 of the statute because the CDC still loses on their own. Let
15 me explain why that's the case.

16 So the first sentence, again just isolating it which
17 is what the CDC does, it authorizes two things. It authorizes
18 making regulations and enforcing regulations. But according to
19 the defendants, the conditional sailing order is not a
20 regulation or a rule, it's just an order. That's not making
21 regulations, and the detailed order isn't enforcement either,
22 it's adding requirements, not enforcing them.

23 Now, the second sentence does say "providing for." So
24 I suppose the defendants could say well, "providing for" would
25 allow us to pass an order. But if that's true, then the

1 defendants are already under second sentence. Again, they
2 can't travel under the first sentence here because they don't
3 claim to be making a regulation, and however broadly you want
4 to read the first sentence, it only authorizes making
5 regulations.

6 THE COURT: And enforcing them.

7 MR. HILBORN: Yes. Yes, Your Honor, and enforcing
8 them. And our position is that the order is not an enforcement
9 action because it's laying out all sorts of requirements that
10 must be followed.

11 Now, that concludes most of my presentation on the
12 statute, and I'm ready to move to the regulations unless Your
13 Honor has more questions.

14 THE COURT: No, go ahead.

15 MR. HILBORN: Now, if Section 264 does not provide the
16 statutory authority for the order, then the regulations cannot
17 somehow augment that authority. So I'll just address them
18 briefly.

19 The CDC relies on three primary regulations. The
20 first two are Regulations 71.31(b) and 71.32(b). Those address
21 what the CDC can do to arriving ships from foreign ports. And
22 we give examples in our brief, but Part 71, more broadly
23 including those two specific regulations, centers on allowing
24 the CDC to inspect arriving ships and through noninvasive
25 measures determine if anyone is sick. That makes sense because

1 the point of Part 71 -- and this is in its scope at 71.1 -- is
2 to prevent the introduction of diseases from foreign countries
3 into the United States. Nowhere in those two regulations, or
4 all of Part 71 more broadly, is there any inkling of the
5 ability to shut down the industry or requires something like
6 test sails.

7 Now, the other regulation, 70.2, is flawed from the
8 start as a threshold matter that regulation addresses
9 interstate quarantine. My understanding is that other laws
10 like the Jones Act prevent cruise ships from traveling directly
11 from one state to another state. So I'm not actually sure how
12 70.2, again under interstate quarantine, applies to the cruise
13 industry at all. But more important, 70.2 prevents the CDC
14 from exercising any authority that 70.2 grants it until the CDC
15 determines that the measures taken by the state, including its
16 political subdivisions -- the regulations explicitly mention
17 that -- are insufficient.

18 Now, the order does pay lip service to that
19 requirement, but it reasons that because cruise ships travel
20 interstate, state measures are not sufficient. Now, that does
21 not follow, but even if that were enough to satisfy 70.2, the
22 CDC could always satisfy that precondition and the CDC
23 completely ignored --

24 THE COURT: Say that again.

25 MR. HILBORN: So if the CDC's argument that because

1 cruise ships travel interstate is enough to satisfy the
2 precondition of 70.2, then that would almost always be the
3 case. Because it's worth remembering that these regulations --
4 so the CDC gets at cruise ships because the regulations --

5 THE COURT: Yeah.

6 MR. HILBORN: -- cruise ships are in the regulations
7 for carrier. Carrier includes cars, trains, planes and other
8 forms of transportation. So we think if all it takes is that
9 one of these forms of transportation travels interstate for
10 them to exercise their authority under 70.2 --

11 THE COURT: But to preempt the State -- to preempt the
12 State regulation.

13 MR. HILBORN: I don't --

14 THE COURT: Well, "preempt" -- "preempt" is a loaded
15 word.

16 MR. HILBORN: Right.

17 THE COURT: To -- it's the equivalent of an
18 insufficiency of the State regulation.

19 MR. HILBORN: Right. And to then intervene --

20 THE COURT: Right.

21 MR. HILBORN: -- I think is --

22 THE COURT: You argue -- excuse me. The State of
23 Florida argues at page 12 that the CDC never considered the
24 adequacy of Florida's measures. And --

25 MR. HILBORN: Correct.

1 THE COURT: -- the CDC argues that 26 and 36 of their
2 memorandum, according to my reading, that Florida never
3 explained what those supposed measures are -- I'm quoting
4 them -- much less how they are sufficient to prevent contagion.
5 So could you briefly tell me -- would you identify those for
6 the CDC what measures you're talking about?

7 MR. HILBORN: Sure. And those measures are actually
8 right in front of the CDC when they entered the order. So the
9 CDC submitted exhibits here, it's Defendants' Exhibit A that
10 shows a comment that they received from Port Canaveral in
11 September 2020. And that comment devotes the entire paragraph
12 to the safety measures being Port Canaveral, which is a
13 political subdivision of the state and which is explicitly
14 mentioned in Regulation 70.2. And the order doesn't mention
15 any of that, Your Honor. And as far as the CDC trying to put
16 the burden on us to, I guess, show what we've done, 70.2 puts
17 the burden on them to make that determination. So that would
18 be my response to those arguments.

19 THE COURT: And their dismissal of the state
20 regulation was a global one.

21 MR. HILBORN: Correct.

22 THE COURT: Was it the same event that dismissed
23 Florida's state regulation is the same one that just missed
24 Alaska's state regulation?

25 MR. HILBORN: That's correct, Your Honor. And I think

1 if you --

2 THE COURT: It's a global dismissal of the entire
3 regulation. It's inadequate based on the fact that the
4 transportation is international?

5 MR. HILBORN: Right. And I think if you look at it --

6 THE COURT: Does that apply to all the other vessels
7 that are coming in and out of the Port of Tampa every day that
8 have crews on them from foreign countries, and is the state --
9 is the Port of Tampa incapable of regulating them as well?

10 MR. HILBORN: I'm sorry. Can you ask that one more
11 time?

12 THE COURT: Well, passenger vessels, cruise vessels
13 are not the only vessels that come in and out of the Port of
14 Tampa, in fact, not even most of them. It's a very busy bulk
15 port. I think it may be the eighth busiest one in the world.
16 And all of those vessels must -- there's been a late-breaking
17 development, they're all piloted and crewed by human beings
18 from places like Adelaide, Australia and North Africa and
19 phosphate and mines and things like that.

20 So I was wondering, is CDC regulating them, or do you
21 know?

22 MR. HILBORN: I don't know if they're regulating the
23 cargo ships. Now, I think under their theory of their case
24 here, they absolutely could. All they would have to do is pass
25 a quick little order again. So -- and I think they could do

1 the same thing with cars and with trains and even the airline
2 industry under their theory of this case. But again, that's
3 just the 70.2 precondition.

4 And so even putting that aside, 70.2 contains similar
5 language as 264. Now, Your Honor pointed out earlier that
6 there's the word "including" there. I don't know if that's
7 enough to knock out ejusdem generis. But even assuming it is,
8 you would still have noscitur a sociis. And again, the
9 regulation cannot be providing for more power than Section 264
10 does, so I think it should be interpreted similarly.

11 THE COURT: And I didn't say that it did. I just said
12 they were sort of oozing in that correction, the same way you
13 were sort of oozing it back in the other direction by using
14 "only."

15 MR. HILBORN: Sure.

16 THE COURT: That's fairly accurate.

17 MR. HILBORN: So that's all I have for --

18 THE COURT: It may not be successful, but it'll be
19 fair.

20 MR. HILBORN: That's all I have for statutory and
21 regulatory analysis, and I'll go ahead and move to arbitrary
22 and capricious.

23 (Court reporter clarification.)

24 MR. HILBORN: Arbitrary and capricious, our claims
25 under that.

1 THE COURT: All right, sir.

2 MR. HILBORN: So I think I can cover these.

3 THE COURT: Okay. Let me just make it clear. I'm
4 sorry. The regulations -- when you said that the CDC never
5 considered the adequacy of Florida's measures, just real
6 quickly, what measures were you talking about that you -- that
7 they had not considered?

8 MR. HILBORN: I think the perfect example is in
9 Exhibit A of what they submitted to Your Honor and more
10 specifically at page 20. And that's a comment from Port
11 Canaveral one month before the conditional sailing order was --
12 was issued. And it --

13 THE COURT: Were there others?

14 MR. HILBORN: I -- I don't know.

15 THE COURT: Were there other submissions from the
16 industry or -- that -- that was from the port and not from an
17 operator at the port, as I understand it.

18 MR. HILBORN: That's correct, Your Honor. And the
19 defendant submitted selected comments. There were multiple
20 comments received according to the order. I -- I haven't gone
21 through them.

22 THE COURT: And if they were considered, you've not
23 seen any evidence of that consideration?

24 MR. HILBORN: I don't think there's anything in the
25 order that considers something like what Port Canaveral

1 submitted and the safety measures they were taking as of
2 September 2020.

3 THE COURT: Let me ask you this: What you ask for in
4 your motion and in your complaint is -- well, you asked for two
5 or three variations of the same thing, but it's basically to
6 enjoin the CDC from enforcing the conditional sailing order,
7 right?

8 MR. HILBORN: Correct.

9 THE COURT: There are some variations to that, but
10 what then would govern the safety of passengers in the cruise
11 industry in the state of Florida?

12 MR. HILBORN: So the order itself refers to the
13 Healthy Sail Panel, and that's something that the industry has
14 put together themselves to implement their own safety
15 regulations. So I think that would be the primary governing
16 document. Now, of course, there's still Part 70 and Part 71
17 that have other regulations in place, but certainly, the order
18 and its forepart framework would not apply to the cruise
19 industry.

20 THE COURT: So it would be governed by the industry's
21 panel --

22 MR. HILBORN: Definitely that and then --

23 THE COURT: -- protocols.

24 MR. HILBORN: And whatever regulations and measures
25 already are in existence, which I -- I don't know, and I

1 apologize.

2 THE COURT: So it would be a matter of choice with the
3 industry. Does the industry somehow enforce -- does it have an
4 enforcement mechanism against itself, or is it voluntary?

5 MR. HILBORN: Voluntary for -- for the passengers or
6 voluntary for the cruise industry to --

7 THE COURT: Well, whatever the safety regulations
8 are --

9 MR. HILBORN: Sure.

10 THE COURT: -- to which you refer.

11 MR. HILBORN: Sure, yes. I believe that they're
12 voluntary --

13 THE COURT: When I talked about the adequacy of
14 Florida's -- that you talk about -- this is a quote from your
15 paper -- "consider the adequacy of Florida's measures." I
16 wanted to know what you meant by "Florida's measures." Because
17 then the CDC goes on and responds directly to that argument and
18 says Florida never explains what those supposed measures are,
19 much less how they are sufficient to prevent contagion.

20 So you've made a fair comment; they've made a fair
21 response. So basically asking you to resolve this for me.
22 What measures are you -- you talked about Florida's measures,
23 and I take from your answer a second ago that Florida doesn't
24 have measures. It's the industry that has measures. And then
25 my question would be how are they sufficient to echoing the

1 CDC's comment? How are they sufficient to prevent contagion?

2 MR. HILBORN: Right. So the question before the Court
3 is the CDC's actions at the time they issued the order and the
4 decision to issue the order. And so at the time that --

5 THE COURT: Right now, the issue is preliminary
6 injunction.

7 MR. HILBORN: Sure.

8 THE COURT: And that has to do with harm.

9 MR. HILBORN: Sure.

10 THE COURT: So back to the question, which is what
11 measures did Florida -- what are Florida's measures? And two,
12 how are they sufficient to prevent contagion?

13 MR. HILBORN: And this is for the 70.2 precondition,
14 correct?

15 THE COURT: I don't know what the measures are, and
16 the CDC claims that they don't because Florida, according to
17 them, has never specified them.

18 MR. HILBORN: Right. And I think it's on the burden
19 of the CDC to determine that our measures are insufficient and
20 so they need to at least discuss that. And at the time they
21 made the order, they knew measures that Port Canaveral was
22 taking, as an example, to combat COVID-19.

23 THE COURT: So your response is that Florida's
24 measures are Canaveral's measures. If I asked you the same
25 question about Tampa, Port of Tampa, do they have measures that

1 they were taking that were --

2 MR. HILBORN: So some --

3 THE COURT: I'm trying to get a handle on this little
4 argument that I've identified here --

5 MR. HILBORN: Sure.

6 THE COURT: -- in the -- between the two memorandums.
7 So --

8 MR. HILBORN: So 70.2 specifically includes the
9 political subdivision. So that does include the ports. I
10 don't know of the measures that Tampa was taking as of October
11 2020.

12 THE COURT: But they've been found insufficient by --

13 MR. HILBORN: The CDC found them insufficient, yes.

14 With --

15 THE COURT: And you don't have any evidence that the
16 CDC considered them specifically or made any determination
17 about whatever provisions Port of Tampa might make -- might
18 have been making.

19 MR. HILBORN: No, I don't. All I have is the order
20 and the reasons given in the order.

21 THE COURT: Okay.

22 MR. HILBORN: Now, for arbitrary and capricious, and I
23 think this kind of ties in, the CDC argues that the Court must
24 evaluate the order at the time it was issued, so October 2020.
25 Now, we go through the reasons that the orders are arbitrary

1 and capricious in our brief, so I just want to touch quickly on
2 a few.

3 The first is that the CDC concluded that the benefits
4 of opening the cruise industry outweigh keeping it locked down,
5 but then they proceeded -- we know now that they proceeded to
6 keep it locked down. And that's not at all rationally
7 connected to the CDC's conclusion.

8 Second, the CDC failed to explain its differential
9 treatment of the cruise industry. Many other industries
10 involve settings like cruises, airlines, casinos, hotels,
11 restaurants --

12 (Court reporter admonition.)

13 MR. HILBORN: Many other industries involve settings
14 like cruises, airlines, casinos, hotels, restaurants. But
15 unlike cruises, those industries have not been locked down by
16 the CDC. And even if the CDC had a good reason for doing that,
17 they needed to explain that in the order. And the Supreme
18 Court has explained that it's not the role of courts to
19 speculate on the reasons that support the agency's decision.
20 That's the Encino case we cite in our brief, among others. The
21 agency has to actually give an explanation for that and be
22 judged on that at the time they took the action.

23 And third, the CDC grounded its order on the state of
24 affairs at the beginning of the pandemic, and we didn't
25 understand the virus and we didn't have vaccines. But the CDC

1 knew that vaccines would be available only a few months into
2 the order. Yet the order doesn't even mention that, and the
3 order was due to last for at least a year.

4 Now, unless the Court has questions about that, I'll
5 move to notice and comment.

6 (Court reporter clarification.)

7 MR. HILBORN: Notice and comment. And I'll grab a
8 quick water, sorry.

9 So I think notice and comment would go a long way to
10 reign in the CDC's actions here. First, the order is
11 absolutely a legislative rule.

12 THE COURT: I would like to just ask one or two quick
13 questions. Under this notion of arbitrary and capricious, you
14 point out that -- or claim that the CDC didn't consider the
15 ongoing operation of foreign cruise lines. Isn't that one of
16 the -- I think you state that -- I think that's stated in both
17 the complaint and the motion for preliminary injunction.

18 MR. HILBORN: Yes.

19 THE COURT: How long have those cruise lines been
20 operating?

21 MR. HILBORN: I believe since at least July 2020.

22 THE COURT: Is there a reservoir of data in existence
23 about their history?

24 MR. HILBORN: So I think we can look to paragraph 80
25 of the -- of the declaration that the CDC submitted, and I'll

1 go ahead and turn that now -- to that now.

2 So again, this is the Treffiletti declaration. Now,
3 you see that --

4 THE COURT: I suppose the question -- if the premise
5 is right that you consider this as of October, then the
6 question would be not what's in the Treffiletti declaration
7 because there's a whole lot in there.

8 MR. HILBORN: Correct, Your Honor.

9 So we -- we don't think that anything added by the
10 technical instructions should save the arbitrary and capricious
11 analysis because Your Honor should consider the order at the
12 time that it was entered. Now, if Your Honor is inclined to
13 consider the technical instructions, then that's when our
14 argument comes in of considering what's going on now. Because
15 I think -- I think that's their reasoning that the technical
16 instructions can be considered now and it added a whole bunch
17 of requirements.

18 And so --

19 THE COURT: In other words, they want the benefit of
20 now, but they don't want the responsibility for now.

21 MR. HILBORN: Correct, Your Honor.

22 THE COURT: So that's good if you can work that.

23 MR. HILBORN: So that's where our looking at foreign
24 countries comes in.

25 THE COURT: All right. But my question was -- had to

1 do with the foreign cruise lines. And was there data available
2 in October, for example, about that?

3 MR. HILBORN: So --

4 THE COURT: Because I understand your -- your tack is
5 on conditional sailing order as of October.

6 MR. HILBORN: Correct.

7 THE COURT: It's pretty reasonable to say that the
8 President of the United States had assured everybody, at least
9 not everyone believed him, but said there was going to be
10 within weeks a vaccine and that you sort of raised that
11 specter. And then you say, well, there's also the fact that
12 the foreign cruise lines or sailing. Was there a reservoir of
13 data available to the CDC in October 2020 that would have
14 verified the safety of the protocols that were then in effect
15 if -- I assume there were some, maybe not -- in the -- in the
16 foreign cruise line industry? I think I seem to remember that
17 you specified the ones in Europe and maybe the ones in Northern
18 Europe. Maybe I just made that up.

19 MR. HILBORN: So the -- the data I have is what the
20 CDC submitted for data from July 2020 to February 2021, which
21 we can talk about. Now, again, though, when we -- when we're
22 arguing that the CDC needs to be looking to the -- to the
23 cruise lines now and the success of the cruise lines now to
24 open up the industry, Your Honor pointed out kind of the
25 inconsistencies of the premise. And my point is that if Your

1 Honor is inclined to consider the technical instructions,
2 that's when I would push that argument. Because if the
3 technical instructions are relevant and do inform the analysis
4 and the CDC gets to constantly change things as things change
5 on the ground, well, something changing on the ground right now
6 that the CDC should then be looking at is the success of
7 foreign cruises abroad.

8 THE COURT: I guess my question was should they have
9 looked at that in October 2020?

10 MR. HILBORN: I think that yes, they should have
11 looked at it in October 2020. And that --

12 THE COURT: And did they?

13 MR. HILBORN: I don't think that the conditional
14 sailing order mentions it. Now, the no sail orders do mention
15 it, and they mention it in a negative light as a reason -- they
16 say that, well, Europe and others have shut down cruises. So
17 we're -- it's either that they have shut down cruises or it's
18 not going well. I can't remember. And so they shut it down in
19 the no sail order. I don't think they bring that back up in
20 the conditional sailing order, but I could be recalling it
21 incorrectly.

22 THE COURT: All right, sir.

23 MR. HILBORN: So now for notice and comment, and as I
24 said, I think that would go a long way to reign in the CDC's
25 actions here. The order is absolutely a legislative rule that

1 should have gone through and needs to go through notice and
2 comment.

3 Now, the Eleventh Circuit has said that a legislative
4 rule creates new law, new rights and new duties. That's the
5 Warshauer case at 577 F.3d 1330. The order purports to create
6 new binding duties with the force of law that carry again
7 criminal and civil penalties for failing to follow it. And the
8 order has also been utilized to lock down the cruise industry.
9 So we think it's absolutely a legislative rule.

10 Now, the defendants do say that they had good cause
11 not to go through notice and comment because of the emergency
12 of the pandemic. So let's think about that for a second. By
13 the time of the conditional sailing order in October, the CDC
14 had already shut down the industry for six months. The
15 conditional sailing order the CDC says was about returning to
16 sailing, not locking down the cruise industry. So the CDC
17 wants you to believe that there was an emergency from the
18 pandemic because there were ships at sea full of infection and
19 they were coming ashore. But again, the -- when the
20 conditional sailing order was signed, the cruise industry had
21 been shut down for six months.

22 Now, to invoke good cause based on an emergency, the
23 rule needs to be doing something to remedy the emergency. The
24 Mack Trucks case that we cite in our brief discusses that, and
25 they give an example of mining safety regulations where the

1 agency had to hurry up these regulations to save a disaster
2 from happening. That's an emergency-based good cause. Now,
3 what was the emergency justifying good cause to abandon notice
4 and comment for the conditional sailing order? Was it that the
5 cruise ships were not sailing and that they needed to return to
6 sailing? The only way that the CDC believed that there was an
7 emergency is if they believed the conditional sailing order was
8 extending the lockdown to keep the ships locked down. And we
9 now know that's exactly what it did.

10 Now, if the pandemic really poses such a problem for
11 the CDC that they could not have gone through notice and
12 comment, then, at a minimum, they should have done what the
13 Federal Government has done for decades and issued an
14 interim-final rule. And that's where the agency makes a rule
15 effective without comment, but it solicits comment at the time
16 of publication and then it adjusts the final rule based on
17 those comments. That's the compromise here to the extent there
18 even needs to be one.

19 But again, as we also explained in our brief -- and
20 the CDC doesn't respond to this -- good cause, even if it
21 exists, is a temporary necessity. Eventually, you need to take
22 the rule through notice and comment. And I think that notice
23 and comment would at least potentially solve the problem of
24 criminal liability for failing to comply with constantly
25 changing Internet guidance.

1 (Court reporter clarification.)

2 MR. HILBORN: I said that I think that notice and
3 comment would at least potentially solve the problem of
4 criminal liability for failing to comply with constantly
5 changing Internet guidance.

6 Now to briefly touch on our constitutional claims
7 before getting into standing and irreparable harm. Of course
8 we first think that avoiding the constitutional issues
9 altogether is another reason to adopt argue of the statute.
10 But if the Court disagrees with that, then it must address the
11 constitutional issues. Now, for nondelegation, there is no
12 intelligible principal under the CDC's construction of the
13 statute. They can do anything so long as it is in the name of
14 preventing the spread of disease.

15 And again, I've mentioned these regulations and the
16 definition of "carrier." And I think that's an example where,
17 because ships are under the definition of carrier and so too
18 are cars, trains and planes, holding in the CDC's favor here
19 means that they can do the exact same thing to cars, trains and
20 airlines. But again, the CDC's reading of Section 264(a) is
21 even broader, and I mentioned that in two weeks ago, that they
22 think that -- I mentioned that two weeks ago in DDC, that they
23 think that that means that they have the power to mandate
24 universal vaccination. And again, we're in favor of that, but
25 whether you should get vaccinated is a different question than

1 whether an agency can force you to do so under 264(a).

2 Now, again, standing, which I'm sure Your Honor wants
3 to talk about. So we assert three financial injuries: paying
4 millions in unemployment benefits, losing millions in lost tax
5 dollars and losing millions on port revenue. Now, I'll walk
6 through each of those in a second, but first, I just want to
7 point out that in the Eleventh Circuit economic injury gives
8 state standing. That's the Alabama v. Army Corps case that we
9 cite in our brief where the Eleventh Circuit readily concluded
10 that Florida had standing to sue over allegedly illegal agency
11 action that might adversely impact Florida's economy.

12 Defendants, again, do not address that case in their brief.
13 And I think that I could really stop there, but like I said,
14 I'll go through each one.

15 First is unemployment. And again, the defendants only
16 address unemployment in a footnote under the irreparable harm
17 section. And I don't think I'm actually giving up any ground
18 to actually say that that -- our unemployment theory, I think,
19 is the most obvious theory that we have. Because a pocketbook
20 injury is the quintessential injury-in-fact, and whatever
21 "special solicitude" means under the Massachusetts v. EPA case,
22 it can't mean that we somehow have less standing than a private
23 litigant otherwise would to seek redress for financial harm.
24 And in the Chiles case that we cited in our brief that's by the
25 Eleventh Circuit, the Court concluded that a county's having to

1 expend additional money on police personnel to control prison
2 riots was the epitome of an injury-in-fact.

3 And there's also support in other federal appellate
4 courts like the DC Circuit. One example is the *Air Housing v.*
5 *EPA* case, which is 906 F.3d 1049. And the DC Circuit said that
6 states have pocketbook standing to sue based on expenses they
7 had previously made and may incur again based on the EPA's
8 failing to properly regulate chemical accidents. So that's our
9 unemployment standing.

10 Now for tax dollars, the defendants focus a lot on
11 that. There's at least two Supreme Court cases that support
12 that. It's the *Gladstone Realtors* case, which is 441 U.S. 91,
13 and *Wyoming v. Oklahoma*, which is 502 U.S. 437. Now, the
14 defendants cite out-of-circuit cases involving tax dollars
15 standing over generalized grievances of harm to the economy as
16 a whole, which then decrease the overall tax base and then
17 decrease tax dollars to the state. That is not what we're
18 bringing here. We point to the loss of tax dollars specific to
19 the CDC shutting down the cruise industry, and that's enough.

20 Now for the ports, our position is that, as the
21 Florida Attorney General's Office, unlike other state agencies,
22 we have standing to sue to assert any harm to the state of
23 Florida, including its political subdivisions. And we think
24 that's particularly true for the ports because they are purely
25 creatures of the Florida legislature.

1 And as for redressability, the CDC acknowledges that
2 more people in ships will be sailing if Your Honor grants an
3 injunction than if you don't. And you can look to their brief
4 at page 11, at page 44, and then I think the best evidence of
5 that is paragraph 77 of their declaration. And we only need to
6 show that Your Honor's entering an injunction will mitigate our
7 alleged injuries. We don't actually need to show that we would
8 be fully redressed. Again, that's the Massachusetts v. EPA
9 case. So long as one cruise line sails again or one cruise
10 employee gets rehired, we satisfy redressability. And as far
11 as depending on third parties, the Supreme Court recently
12 explained in the commerce case, which we cite in our brief,
13 that you can rely on third parties if they are likely to react
14 in predictable ways. We know that cruise lines and passengers
15 want to cruise again.

16 Now for irreparable harm, the CDC argues that our harm
17 is not substantial enough. I don't think that's actually true,
18 but I know that that's not the correct legal test. In the
19 Eleventh Circuit, in the older Beck case, not to mention the
20 Second, Third, Sixth, Ninth, and Tenth Circuits, they all hold
21 that the lack of the availability of money damages because of
22 sovereign immunity provides for irreparable harm based on
23 financial injury. And I'll point out that our irreparable harm
24 is not just based on the financial injuries, but it also flows
25 from the cruise ships permanently leaving Florida if they are

1 not allowed to sail soon.

2 And finally, for balance of the equities, it is always
3 in the public interest to make the federal government follow
4 the law. The order puts hundreds of thousands of Floridians
5 out of work, and livelihoods are being destroyed. If the
6 Federal Government is going to do that, they better make sure
7 they have the authority and follow proper procedures and turn
8 square corners. And further, the record shows, as we
9 discussed, the cruises have been successful abroad, the
10 Americans are actually flying overseas to go on them, and that
11 the chances of catching COVID on these cruises has been lower
12 than on land.

13 Now, the CDC's declaration at paragraph 80 laments
14 that foreign cruises have resulted in what they call
15 "outbreaks" of five people or one person. But that just shows
16 that the protocols that the cruise industry has adopted and are
17 using is working because that's containing COVID. If one
18 person on a cruise ship is all that got COVID, COVID was
19 contained on that cruise ship and it cannot be that the
20 denominator here is zero COVID. Even the CDC's Dear Colleague
21 letter admits that cruising will never be a zero-risk activity,
22 nor will any of the number of other activities that the CDC is
23 not currently prohibiting.

24 The question --

25 THE COURT: It never has been.

1 MR. HILBORN: What was that?

2 THE COURT: I would have asked, do you know a safe
3 activity, one with zero risk?

4 MR. HILBORN: No. Certainly not driving to the
5 courthouse today.

6 THE COURT: Yeah. Coming here today, yeah, everybody
7 was at risk.

8 MR. HILBORN: Right, and --

9 THE COURT: I think I've been hit in my car twice
10 coming back and forth to the courthouse.

11 MR. HILBORN: So along those lines, the question is
12 whether responsible cruising presents a disproportionate risk.
13 We submit that it doesn't, and I think I'll pause there and see
14 if the Court has any more questions. Otherwise, I'll save my
15 remaining points for rebuttal.

16 THE COURT: Otherwise you'll what?

17 MR. HILBORN: I'll save my remaining points for
18 rebuttal.

19 THE COURT: I do have some other questions. I
20 promised you I wouldn't ask as many as I already have, but at
21 least at the present.

22 Do you know what part of the port revenue is
23 attributable to the cruise -- cruise industry? I mean, for
24 instance, I don't think there's a lot of cargo in and out at
25 Canaveral, and -- just nuclear submarines and passenger vessels

1 at Canaveral, I think, and fishermen.

2 MR. HILBORN: I don't know the full breakdown. But
3 again, for standing we only need to show that we would suffer
4 one dollar of harm. And if you excuse me, Your Honor, can I
5 actually confer with my co-counsel real quick?

6 THE COURT: You can always get information if it
7 helps.

8 MR. HILBORN: Sorry, Your Honor.

9 THE COURT: This is not an audition, this is an
10 argument. So if somebody can help, sure, you can -- what do
11 they call it on that game show? You can, what, dial a friend
12 or whatever it is?

13 MR. HILBORN: Phone a friend, yes.

14 THE COURT: Call him. Poor Ms. Powell has no friends
15 there, so maybe that's --

16 MR. HILBORN: So --

17 THE COURT: -- not equitable.

18 MR. HILBORN: So just quickly, Your Honor, after --
19 after conferring with co-counsel, I actually can represent that
20 the moment that ultimately triggered our lawsuit was the April
21 guidance. It came out April 2nd, which I think was six days
22 before we filed our complaint, and also seeing the industry's
23 reaction to that guidance as not actually moving the ball
24 forward.

25 THE COURT: The -- I don't know if this is a fair

1 question or not, but certainly the CDC asks that -- so let me
2 just see what your response is to it.

3 Why didn't the industry sue then? And we certainly
4 could've avoided this big standing argument that way, right?

5 MR. HILBORN: So I --

6 THE COURT: Or do you know?

7 MR. HILBORN: Well, so point one, I don't think it's
8 relevant because I think we have independent injuries of the
9 cruise industry.

10 THE COURT: I understand that. Okay.

11 MR. HILBORN: Point two, I don't think that it would
12 come as a surprise to anyone that there's times when regulated
13 parties are perhaps hesitant to sue the regulators specifically
14 when they're repeat players and have to continue the
15 relationship. So that's what I'll say to that.

16 THE COURT: All right. Another one of the things
17 that -- I don't have the page citation for this, but it
18 certainly pervades the CDC's argument about whether the present
19 regulatory array is a pathway to sailing or a lockdown. From
20 my perspective, the question is your injury needs to be real
21 and immediate in order to justify an injunction.

22 MR. HILBORN: Correct.

23 THE COURT: So if it's possible that the industry can
24 resume activity within weeks, how is it that the State claims a
25 real and immediate injury?

1 MR. HILBORN: So I think we're being harmed as we
2 stand here today and we will be harmed tomorrow as the cruise
3 industry continues to be shut down. Now, I think the CDC wants
4 Your Honor to evaluate the order as if it just came out
5 yesterday, and let's take that. If it had just come out
6 yesterday and it was only going to last for three weeks and it
7 was invalid, I don't think that would allow them to escape
8 injunction of it. And I think that's essentially similar to
9 what's occurring here. So we're going to be harmed tomorrow,
10 and that's the question for irreparable harm in entering an
11 injunction.

12 THE COURT: And a month from now.

13 MR. HILBORN: And a month from now. That's part of
14 the problem. Yes, they do say that there's a path to sailing.
15 They said that in October. I don't know.

16 THE COURT: At least part of your standing claim is
17 *parens patriae*, and isn't it a general principle that the state
18 of Florida cannot sue *parens patriae* to protect a citizen
19 against an action by the United States of America?

20 MR. HILBORN: So I don't think --

21 THE COURT: They might be able to assert it against
22 someone, but since *Massachusetts vs. Mellon* and things like
23 that, it's unclear, I guess, where the balance -- well, I think
24 it's unclear where the balance of almost any of this is -- are,
25 but isn't that a little bit attenuated?

1 MR. HILBORN: So we are not asserting a *parens patriae*
2 theory of standing here. We're asserting the three distinct
3 financial harms to us as a sovereign, let alone a quasi
4 sovereign, and I think that's all that Your Honor --

5 THE COURT: So you're not making any assertion of
6 standing *parens patriae*? I thought that you had, but I might
7 be mistaken.

8 MR. HILBORN: The three theories of standing we have
9 are the three financial harms that I spoke with -- about with
10 Your Honor. Now, I'm certainly not going to concede that we
11 could not bring a *parens patriae* action, because as Your Honor
12 points out, I think that's certainly unsettled.

13 THE COURT: Well, it may not be unsettled if you
14 assert a federal constitutional violation or violation of
15 federal statute for regulation as the basis for that, but
16 anyway.

17 All right. Okay. So you're finished for a while?

18 MR. HILBORN: Yes, Your Honor.

19 THE COURT: Is that what you were saying?

20 MR. HILBORN: Yes, Your Honor.

21 THE COURT: All right. Well, we've been going for
22 about an hour and 15 minutes. It may be a good time to take a
23 recess before we recognize Ms. Powell. Does that sound like a
24 good idea? So we'll be in recess for about 10 or 15 minutes,
25 and then we'll come back and recognize Ms. Powell. Maybe I

1 should install a phone so she can phone in -- phone a friend.

2 MS. POWELL: I don't need friends.

3 THE COURT: Thank you.

4 (Off the record at 10:15 a.m.)

5 (On the record at 10:41 a.m.)

6 THE COURT: All right, Ms. Powell. Good morning.

7 MS. POWELL: Good morning.

8 Your Honor, the CDC --

9 THE COURT: Ms. Powell, if it suits you, there's a
10 little switch right there on that -- do you see that little
11 metal switch? If you flick that switch, that thing will lower
12 a little bit.

13 MS. POWELL: I did just lower it a little bit more.
14 Yeah, I'm much shorter than Mr. Hilborn.

15 THE COURT: You know, they spent an enormous amount of
16 money buying that thing and for -- you can run it on down if
17 you want to because --

18 MS. POWELL: I'm good. This is fine for me, if it
19 works for you.

20 THE COURT: I used to joke with counsel that if
21 Kareem Abdul-Jabbar ever decides to come through the Middle
22 District of Florida to practice law, that's his lectern right
23 there because it will -- you'd be amazed how high that --

24 MS. POWELL: Cover me right up.

25 THE COURT: It would. It would. But it won't go down

1 far enough. We have quite a few counsel who come in who are
2 five-six or less, and it doesn't help them much. I just wanted
3 two -- what I want -- what I asked them to do was just give me
4 two inexpensive lecterns so that counsel could stand up there
5 at the same time. But no. Instead of that, the government
6 gave me just one --

7 MS. POWELL: One expensive one.

8 THE COURT: -- expensive monster. And I won't go into
9 the whole story but this -- well, maybe I will. This panel
10 over here -- see those two little door handle -- door things
11 down there? If you open that up, there's a whiteboard behind
12 that and it pulls out maybe a foot or so on these expensive
13 springs, these kind of things. And they anticipated that some
14 lawyer would use that for jury presentations. Can you imagine
15 that? Of course no lawyer has ever done so or would in a
16 million years. It would be crazy to do that. Half the jury
17 wouldn't even be able to read it.

18 And then the thing that failed -- if you see that
19 black strip along the top there I was telling you this morning?

20 MS. POWELL: Uh-huh.

21 THE COURT: That screen lowers from that.

22 MS. POWELL: Uh-huh.

23 THE COURT: We had a surge and two or three of them in
24 the building won't now work. Anyway, that's that. You'd think
25 that the General Services Administration, who's your landlord

1 as well as mine, after building courthouses for more than 200
2 years or however long they've been in existence would have it
3 down by now. You'd be wrong.

4 All right, Ms. Powell. Good morning.

5 MS. POWELL: Good morning.

6 The CDC has imposed reasonable safety protocols as a
7 condition -- a temporary condition -- on the operation of large
8 cruise ships in the United States, acting pursuant to well
9 understood authority in this area.

10 The State of Florida's motion asks this Court to
11 vacate all of those conditions -- not just some of them, but
12 all of them -- a demand that's not only inconsistent with the
13 law, it is dangerous. Cruise ships were the setting of
14 particularly deadly outbreaks at the outset of the pandemic,
15 and it's been found that they were uniquely problematic.
16 COVID-19 transmitted easily and quickly in crowded and confined
17 conditions on board and then traveled around the world with
18 passenger, ship and crew.

19 THE COURT: Let me stop you, Ms. Powell. The initial
20 no sail order in March of 2020. The duration of that was what?

21 MS. POWELL: I think the first one may have been a
22 month or two. I'm not sure exactly.

23 THE COURT: And then was I correct that there were
24 three more or four more, or were there a total of three or
25 four?

1 MS. POWELL: I think there was the no sail order and
2 three extensions.

3 THE COURT: Three extensions, right. That's what I
4 have. And they were, more or less, 90 days apiece?

5 MS. POWELL: More or less. I think the last one was
6 30 days.

7 THE COURT: That accounts for why it's not longer.
8 Okay. And the conditional sail order is a one-year order,
9 right?

10 MS. POWELL: Probably. It expires in November 2021 or
11 it expires at the end of the public health emergency or when
12 the Secretary or CDC sees fit to rescind it.

13 THE COURT: So we don't know when it ends, but it'll
14 be --

15 MS. POWELL: It could expire earlier.

16 THE COURT: -- no longer than November '22 -- '21.

17 MS. POWELL: 2021. It could, of course, at that time
18 be extended in theory depending, but there would need to be new
19 factual findings.

20 THE COURT: Would those -- would there need to be a
21 notice and comment to extend it again?

22 MS. POWELL: If they did -- I'm not sure. It depends
23 on what they did instead.

24 THE COURT: I see.

25 MS. POWELL: Of course the CDC has taken the position

1 that this is an order, effectively conditions on a license
2 rather than a rule, such that notice and comment is not
3 required and, in the alternative, made a good cause finding.
4 In theory, they could do that again or they could submit it to
5 notice and comment again if they give themselves sufficient
6 time and if there were sufficient time based on
7 rapidly-changing conditions.

8 THE COURT: But the result is, at least for the
9 first -- for the duration of the no sail order, that the cruise
10 industry was halted from March until October.

11 MS. POWELL: So most of the cruise industry had
12 actually voluntarily shut down before that.

13 THE COURT: Did we agree on the 95-percent number?
14 Was that the number that everybody sort of is using?

15 MS. POWELL: For those who are part of CLIA or?

16 THE COURT: I don't know. You said "most of it."
17 What percentage did you mean?

18 MS. POWELL: I don't know. I don't know a precise
19 number. There are some small ship operators that are not
20 members of CLIA is my understanding, but I don't know how many.

21 THE COURT: They had shut down before the no sail
22 order, right?

23 MS. POWELL: Yes. The industry had generally shut
24 down before the order. The CDC continued that and as condition
25 of granting free pratique required such ships to disembark all

1 passengers and not embark more pending the duration of the
2 order.

3 THE COURT: Did the fact that the cruise industry had
4 voluntarily shut down affect the assessment of whether there
5 was an emergency at that moment?

6 MS. POWELL: Yes. It's certainly taken into account
7 in the order. They note and acknowledge that the cruise
8 industry thought it was an emergency too and necessary to shut
9 down, and they considered it necessary to impose the no sail
10 order on top of that, in light of the fact that there were
11 other operators and that they thought the pause in operations
12 needed to continue for some time.

13 THE COURT: So your understanding is that people who
14 are in the industry but not in the industry group were
15 operating.

16 MS. POWELL: I don't know actually. They were not
17 obligated to not operate in the same way that the cruise
18 industry itself had said that it would not operate. There's no
19 data in the order itself as to who was in operation where.

20 THE COURT: So when the October '20 order was entered,
21 the industry had been halted since March?

22 MS. POWELL: Yes.

23 THE COURT: And presumably no one was going to be able
24 to comply immediately, so there was implicit in the October '20
25 order, at best, some period of additional time that the

1 industry was going to be shut or closed.

2 MS. POWELL: That's correct. And Phase 1 required a
3 couple of things. One is it required mass testing of crew
4 members on board and gave them at least 30 days to do that.
5 And it contemplated the procurement and installation of on
6 board testing capacity so that future passengers and crew could
7 be tested as necessary on board without waiting for shoreside
8 laboratories. And that was all going to take some time.

9 THE COURT: Right.

10 MS. POWELL: It did, in fact, as the Treffiletti
11 declaration explains, take somewhat longer than expected
12 because the equipment wasn't available.

13 THE COURT: And in terms of the resumption of sailing,
14 it was necessary to have these Phase 2 specifications,
15 guidelines, technical guidance or whatever you want to call it,
16 that had to be promulgated, right?

17 MS. POWELL: Correct.

18 THE COURT: So in October of 2020, fair to say that
19 everyone understood that the industry was probably going to be
20 shut down under the CDC's mandate for at least a year total
21 from March -- at least into March 2021?

22 MS. POWELL: Oh, I think that is a fair assessment,
23 yes.

24 THE COURT: I wonder if in trying to get a grasp on
25 some of the issues in this case -- I think everybody has talked

1 about -- and certainly the CDC did -- about instances
2 historically of -- I don't know that you used the term of
3 "peculiar federal interest," but there was certainly a
4 historical federal interest in comings and goings at ports and
5 some of the old Supreme Court cases addressed quarantine. One
6 of the more amusing ones is the quarantine of the green teas --
7 the -- you know, the low-quality teas. And that was a Supreme
8 Court case about whether the CDC could quarantine tea. And
9 there appears to be some precedent for at least the detention
10 of a vessel long enough to conduct inspections and some of the
11 things that are listed in the statute, fumigation and the like.

12 Do you know of an instance in United States history
13 where a vessel has been detained under this sort of authority,
14 quarantined as it were, for, say, more than three months?

15 MS. POWELL: So I don't know about specific time
16 frames. I do know that CDC has previously, even before this
17 pandemic, issued no sail orders to ships under its vessel
18 sanitation program and other things where they found that a
19 particular ship was a problem.

20 THE COURT: Right.

21 MS. POWELL: Now --

22 THE COURT: They have done that ship per ship.

23 MS. POWELL: Yes.

24 THE COURT: Do you know of any instance in United
25 States history where they've done it for an industry?

1 MS. POWELL: So it might depend on what you call an
2 industry.

3 THE COURT: All right.

4 MS. POWELL: There are certainly Public Health Service
5 Act regulations and things that ban things nationwide. The
6 ones that have been litigated are things which are, I realize,
7 not terribly analogous here, but things like the sale of baby
8 turtles is prohibited. There's also a ban on the sale of some
9 sort of prairie dog, but things like that where they've issued
10 nationwide bans pursuant to the Public Health Service Act.

11 THE COURT: But you don't know of the quarantining of
12 a vessel, single vessel for, say, a year or more?

13 MS. POWELL: I don't know any time duration. So no, I
14 don't have an example I could give you.

15 THE COURT: Well, I couldn't find one.

16 MS. POWELL: Yeah.

17 THE COURT: I scrambled back, and I don't see one --
18 the baby turtle thing wasn't because of any baby turtle disease
19 that was going to affect human beings, right?

20 MS. POWELL: It was actually.

21 THE COURT: Was it?

22 MS. POWELL: Yeah.

23 THE COURT: What was it?

24 MS. POWELL: I think the baby turtles were carriers of
25 salmonella and children like to put them in their mouths or

1 something like that, and that led to outbreaks in the past.

2 THE COURT: They probably don't like to put them in
3 their mouth a second time.

4 MS. POWELL: Yeah, wouldn't think so.

5 THE COURT: But not -- so your response is you think
6 that there have been effective national quarantines on
7 contagion -- on the basis of contagion, historically?

8 MS. POWELL: So I wouldn't call those quarantines,
9 right.

10 THE COURT: Right.

11 MS. POWELL: That's a use of the Public Health Service
12 Act. They aren't quarantines.

13 THE COURT: They're bannings --

14 MS. POWELL: Yes.

15 THE COURT: -- or prohibitions or something.

16 MS. POWELL: Yes, they -- and the Vessel Sanitation
17 Program that's described in the Treffiletti declaration imposes
18 specific requirements on certain kinds of ships to do certain
19 sorts of sanitation measures to prevent the sorts of
20 gastroenteritis problems that were a problem aboard cruise
21 ships specifically.

22 THE COURT: But in those situations, some ships would
23 comply and presumably go away after an inspection unaffected
24 and other vessels, if noncompliant, would be detained. Those
25 specific items satisfied, and if they were, then they would be

1 released --

2 MS. POWELL: That's true. The condition --

3 THE COURT: -- or permitted into port as the case
4 might be.

5 MS. POWELL: That's right. The conditions are imposed
6 on a nationwide basis is my understanding. But they are
7 complied with on a ship-by-ship basis. And I want to resist
8 the --

9 THE COURT: And that didn't happen here, right? I
10 mean, this is -- this is -- this would apply presumably to a
11 ship with no instances of -- of COVID on the ship and ones
12 without.

13 MS. POWELL: It is a -- so I want to resist a little
14 bit the idea that the CSO requires a shutdown, which is
15 language that plaintiff has used that I don't think is
16 accurate. The no sail order and the industry suspension
17 effectively required a temporary shutdown.

18 THE COURT: We agreed that it effectively created a
19 shutdown at least through March of 2021. The question is the
20 duration of the shutdown that it created.

21 MS. POWELL: Well, the question is what the CSO did,
22 which I agree --

23 THE COURT: I asked you if the industry was not shut
24 down, if the effect of the CSO was not to shut down the
25 industry for a total at a minimum of March '20 to March '21,

1 and you agreed.

2 MS. POWELL: Well, the effect of the CSO was to make
3 sure it could not -- that ships could not start back up until
4 conditions were in place, which would take, at a minimum, a few
5 more months.

6 THE COURT: Right.

7 MS. POWELL: Now we are now in a place --

8 THE COURT: So are we splitting the difference between
9 what is a set of conditions that cannot be satisfied for six
10 months and a shutdown for six months? Is that the difference
11 that we're focused on?

12 MS. POWELL: Yes.

13 THE COURT: And how much of a difference is that?

14 MS. POWELL: A fairly significant one.

15 THE COURT: And identify the significance -- material
16 significance of that distinction.

17 MS. POWELL: Well, for example, I think plaintiff
18 concedes that a lot of the conditions are perfectly lawful and
19 within the CDC's authority. Conditions within the CSO and the
20 now promulgated --

21 THE COURT: I'm sorry. The difference -- the question
22 was what is the difference in material terms between issuing a
23 set of -- between issuing an order that says you can't sail for
24 six months and issuing a set of conditions that restricts
25 sailings that -- which conditions cannot be satisfied under any

1 circumstances for six months?

2 MS. POWELL: Well, I think as a factual difference,
3 you are correct, right. It'll take them a while to meet it.
4 There is, however, a legal difference. It is the difference
5 between saying you cannot drive or you can drive after you pass
6 a driving course and a test and get your driver's license. And
7 that is what is being required here.

8 THE COURT: Not if you have a contract to drive for
9 money in 30 days and you can't get a driver's license test for
10 six months -- or for two months, you're done.

11 MS. POWELL: The analogy gets a bit strained, I
12 realize. But it is a set of conditions that takes a certain
13 amount of time to meet, and they can meet them now.

14 THE COURT: They can meet them now, but they couldn't
15 meet them, we've agreed, until March at best.

16 MS. POWELL: Probably, yes.

17 THE COURT: Okay. All right. We don't know of an
18 instance in United States history where an industry has been
19 closed because of -- of a quarantine of this nature.

20 MS. POWELL: Unless you count something like baby
21 turtles as an industry.

22 THE COURT: Unless we count the turtles, and I
23 would --

24 MS. POWELL: I would add that --

25 THE COURT: I don't think that would be an industry.

1 I don't -- that's certainly the distribution of a product, but
2 I don't think we'd be shutting down an industry. It would
3 be -- maybe if you said the sale of -- retail sale of pets,
4 that might come closer to an industry or something like that.

5 MS. POWELL: I would say this is somewhere in between,
6 right. Remember there are currently 59 ships that are subject
7 to the CSO because they intend to operate in U.S. waters. So
8 yes, it is an industry, but it is a clearly identified set of
9 ships. There may be more in the future as more enter U.S.
10 waters or intend to operate, but it is currently 59 ships that
11 are subject to the order.

12 THE COURT: You mean today?

13 MS. POWELL: Yes, as of yesterday when I asked.

14 THE COURT: Were there 59 in March of 2020?

15 MS. POWELL: There were more then. I don't recall the
16 number.

17 THE COURT: All right. So the rest of them have gone
18 away. Okay.

19 MS. POWELL: They tend to circulate in and out of U.S.
20 waters on a seasonal basis, so...

21 THE COURT: So we don't know actually what the
22 operating U.S. cruise industry -- you're not saying that the
23 operating U.S. cruise industry over a year comprises 59
24 vessels, right?

25 MS. POWELL: No. I'm saying that the number of

1 vessels that have said they intend to operate in U.S. waters
2 this year is 59.

3 THE COURT: Okay.

4 MS. POWELL: And it's not under any circumstances
5 thousands of vessels, like...

6 THE COURT: No.

7 MS. POWELL: We are talking a clearly identifiable set
8 of vessels.

9 THE COURT: Correct.

10 MS. POWELL: I'm happy to be directed where the Court
11 likes if you want me to jump into the statutory interpretation.
12 I was going to touch on standing and harm first.

13 THE COURT: As you like.

14 MS. POWELL: Okay. With standing, plaintiffs have to
15 establish standing for the specific form of relief sought.
16 Here, they have not and cannot seek redress for their lost tax
17 revenues and other injuries of last year. None of those past
18 injuries are fairly traceable to defendants, nor redressable by
19 this Court in any event. But the Supreme Court says to seek
20 relief looking forward, you have to look at injury going
21 forward. And, in fact, plaintiffs have to show a certainly
22 impending future injury.

23 Here -- so we have to look at where we are now. The
24 cruise industry, which has not joined this lawsuit, has
25 advocated for lifting the CSO, but that is because they say

1 they want to restart operations around July. The CDC -- in
2 fact, they don't want to restart operations. They want to
3 begin a phased resumption of operations around July. The CDC
4 has said that with the currently issued guidance, i.e.
5 everything that came out last week, the industry can resume
6 phased operations beginning around July.

7 Now, that's a prediction. There are uncertainties
8 built in, but what plaintiffs have to prove here is a certainly
9 impending future difference. They haven't put in anything that
10 would predict the difference for the state of Florida's
11 finances between operating with the CSO and without the CSO.
12 They have pointed generally to harm to their citizens and
13 economy. I understand them to now be abjuring the *parens*
14 *patriae* argument. That leaves them with -- they said tax
15 revenues, unemployment and port fees. Everything they put in
16 goes to past injuries on those fronts. With respect to tax
17 revenues, the Supreme Court has actually recognized, including
18 in one of the cases they cite, that a state cannot establish
19 standing based on indirect effects on general tax revenues.

20 THE COURT: No, that's -- that's precisely what they
21 said, but that's indirect effects on general revenues. And
22 they're not really doing that according to counsel in the first
23 presentation. His position was that they were establishing a
24 direct effect to a specified very narrow revenue that the
25 Supreme Court didn't say never based it on any revenue. It's

1 just sort of a revenue to the general fund of the State.

2 MS. POWELL: Right.

3 THE COURT: They're talking about the ports which
4 operate, of course, with a distinctive revenue extreme.

5 MS. POWELL: Sure. They've asserted three different
6 injuries. One was this affect on their general tax revenues,
7 and that is all that declaration -- I forget which one it was
8 now -- reflects, which is general tax revenues effects on their
9 income tax and sales tax collected that are affected indirectly
10 because the cruise ship industry was not operating last year.

11 Those are past revenues, but they're also not
12 connected to a specific tax on cruise industries. So the
13 exception to the general rule that tax revenues aren't
14 sufficient was explained in Wyoming v. Oklahoma where there was
15 a specific challenged action which targeted a specific tax
16 collection of another state. This coal extraction tax for
17 taking the coal out of state, and it targeted that tax because
18 it didn't want the other state's citizens paying that tax
19 instead of their own.

20 So they have no similar link here to a direct cruise
21 ship industry specific tax. I think that injury falls away.
22 Their unemployment benefits, now, the only thing they've put
23 in, of course, is about their past losses, not a prediction of
24 future losses nor anything that attributes those losses to the
25 conditional sailing order. The individuals who are currently

1 or were in 2020 on unemployment are no more likely in the
2 result of an injunction to seek employment with the cruise
3 industry as opposed to elsewhere. So it's not an injury this
4 Court can necessarily redress. And we know that the cruise
5 industry hires primarily abroad, so it's not particularly
6 likely that it would be redressed given that the industry
7 primarily hires foreign workers.

8 And the third was the port fees.

9 THE COURT: Did they limit -- did Florida limit its
10 claim about unemployment to crew members?

11 MS. POWELL: It was unclear to me. I think it was
12 broader than crew members, and some of those are certainly --
13 there are, obviously, some employees who are hired in the
14 United States. But whether as a result of an injunction here
15 those people would be hired specifically by the cruise industry
16 and get off unemployment is at best speculative.

17 The port fees is a little harder to know how to
18 respond to. All they have is a declaration indicating total
19 port revenues from last year without tying those specifically
20 to the cruise industry, even much less what would be collected
21 if the injunction were lifted.

22 And I don't think that the case they specifically
23 refer to, the Army Corps of Engineer case is particularly
24 helpful to them. Ultimately, the court -- the Eleventh Circuit
25 does, in fact, mention the economy, but it is based upon the

1 State's sovereign rights in an economic and other interest in
2 water. It is litigation about the federal management of water
3 reservoir and that it recognizes the State's sort of unique
4 rights in its own land, although it does mention the downstream
5 economic effects as well. I think it's pretty clear under the
6 sort of environmental injury type cases the State's control
7 over its land, air and water tends to give rise to standing,
8 and nothing similar here with respect to cruise ships.

9 THE COURT: So -- I mean, there are -- there are, for
10 instance, fuel that's put on those cruise ships, right?

11 MS. POWELL: Uh-huh.

12 THE COURT: And that's taxed by the state of Florida
13 in addition to the United States?

14 MS. POWELL: I presume so.

15 THE COURT: And there are -- there are motel rooms,
16 the occupancy of which is taxed by the state of Florida very
17 heavily, I might say. That's a good source of revenue for the
18 state of Florida, which accounts for one of the reasons why you
19 referenced to an income tax. I know it was inadvertent, but we
20 don't have one. And there are, of course, the portage fees.
21 But, you know, there are people operating the tugs. There are
22 people operating food services for the vessels. They take on a
23 lot of food, they take on a lot of fuel, they take on water.
24 They stay in motel rooms, baggage has to get handled,
25 passengers have to be delivered.

1 A lot of people fly into Tampa International Airport
2 and then transport from the airport to the -- to the port,
3 which is right here. My window overlooks it, as a matter of
4 fact. So I see and hear the comings and goings of the vessels
5 when they're coming and going.

6 But is that -- is that fair game for the state of
7 Florida to say that all those people are unemployed to the
8 extent that they were -- if you're handling baggage on a
9 passenger ship, or handling -- driving people back and forth to
10 the passenger ships, you probably are unemployed. Or if you're
11 not -- if you're a pilot for a tug and there's no vessel to
12 position, you're unemployed. But they didn't detail that in
13 any event, that's for sure.

14 MS. POWELL: True, they did not. And I think they
15 have to, to fall within that exception to the tax issue. Some
16 of those -- I mean, I don't want to overstate any case, right?
17 I am not arguing that this has zero effect on the economy of
18 the state of Florida, you know.

19 THE COURT: Right. That wouldn't be --

20 MS. POWELL: No.

21 THE COURT: -- a viable position.

22 MS. POWELL: That's not where we are. We're arguing
23 that they haven't showed a specific pecuniary or territorial
24 interest in the outcome of -- especially of this particular
25 injunction, that they have to show that it wouldn't --

1 THE COURT: They haven't quantified the loss --

2 MS. POWELL: Correct.

3 THE COURT: -- that they're asking me to weigh. But
4 didn't they say \$82 million?

5 MS. POWELL: I think that was, like, total tax
6 revenues from 2020 when the cruise industry was voluntarily
7 shut down and tourism was at another -- there were lots of
8 problems other than the no sail orders, which are no longer
9 even in effect. Like, to bring this injunction, they have to
10 tie an injury specifically to the CSO, which is hard to do when
11 the cruise industry has said that all they want to do is open
12 operations in July, and the CDC has said they think they can
13 open operations in July.

14 To transition hopefully smoothly, the same analysis
15 goes to irreparable harm as well. In Swain vs. Junior, the
16 Eleventh Circuit's analysis is particularly helpful. The
17 Eleventh Circuit found that the district court had erred in
18 issuing a mandatory injunction without -- which changed the
19 status quo without making specific findings about what would
20 have happened with and without the injunction, but it had to
21 consider specifically the other measures that were -- that
22 would take place absent an injunction and whether or not those
23 would ameliorate the harm. Plaintiff hasn't even attempted to
24 do that here and tie any injury to the CSO.

25 Counsel argued about all these uncertainties, and they

1 weren't sure whether the cruise industry could open. We don't
2 think that's sufficient to establish standing because it's not
3 a "certainly impending" future injury, and certainly not
4 sufficient to establish the irreparable harm necessary for the
5 extraordinary remedy of a preliminary injunction. Thus --

6 THE COURT: Your use of the term "status quo" -- I
7 know there was a little bit of a discussion about this in the
8 motion and in your response. You are treating the status
9 quo -- you're treating the term "status quo" to mean the
10 circumstance with the CSO in order -- in effect.

11 MS. POWELL: Correct.

12 THE COURT: Often, that phrase is "status quo ante."
13 Somebody begins to do something, a litigant comes to court and
14 wants them to stop doing this and restore the status quo ante.
15 And there's certainly plenty of precedent for stopping the
16 status quo ante, so I'm not sure -- maybe this is another
17 semantic problem there, but it's also a real distinction. Very
18 often, litigants, when they ask for an injunctive relief, want
19 me to enjoin something that's being done and restore the status
20 quo ante. I take that to be what the State's doing, which
21 seems to be entirely within the purview of the power of
22 injunction.

23 MS. POWELL: I mean, we're not arguing --

24 THE COURT: It would be a mandatory injunction if I
25 ordered you to build a new port.

1 MS. POWELL: I think the Eleventh Circuit --

2 THE COURT: It would be a status quo ante if I ordered
3 you to stop building the one that you're building. You know, I
4 know you're not. So anyway, not to quibble about that, but I
5 did -- the reason that that argument didn't appeal to me
6 particularly was because it is not a mandatory injunction. It
7 is a typical negative injunction, which is to stop enforcing --
8 that they seek, which is to stop enforcing this order.

9 MS. POWELL: I'm not sure we agree, but I understand
10 the point.

11 THE COURT: It requires you to defer, to not act
12 rather than to act, and it restores the status quo ante if they
13 get it.

14 MS. POWELL: So the status quo ante of February 2020,
15 in which cruise operations are not subject to any COVID-19
16 controls?

17 THE COURT: That was the question that I was trying to
18 ask counsel in the first thing, which is, what is it that he
19 wants, what is it that he exactly is asking me to do, and
20 what -- what regime will be in place if he were to be rewarded
21 that relief? So, yes, that's exactly what I asked him, and
22 that's what I came around to ask you the same thing in a little
23 bit different way. But that's what I understood him to be
24 asking me to do, is to restore the status quo ante, although I
25 don't think they said it that way.

1 MS. POWELL: No, the Government certainly wouldn't
2 characterize it that way, but I take your point.

3 So we think that even if plaintiff had shown some
4 diminution in tax revenue that they have not established here
5 because they haven't shown it, it's a diminution that could be
6 redressed by an injunction. It's not the sort of irreparable
7 injury -- significant irreparable injury that warrants the
8 still extraordinary remedy of the preliminary injunction.

9 THE COURT: And your primary argument that they can't
10 show redressability is that they can't -- there's no guarantee,
11 and they therefore cannot assure that people will actually --
12 if -- assume however long it would take the industry to begin
13 sailing, they can't guarantee who -- not who, how many
14 passengers would be on those vessels, how many of the vessels
15 there would be, and therefore what revenue would be involved.

16 MS. POWELL: I want to acknowledge there's a lot of
17 uncertainty sort of involved in that, what the landscape looks
18 like if the CSO is enjoined. It is true that there would be no
19 prohibition at that point on resuming operations, but the
20 cruise industry has said they want to resume in July. There
21 aren't any pending plans to resume before that. That is part
22 of their advocacy for lifting the CSO, is that they want to
23 resume in July. So there's no reason to think they would
24 necessarily start sooner. If they did, if they skipped some of
25 the safety steps that we think are absolutely necessary, that

1 would pose a significant danger to the public health. CDC has
2 made findings about outbreaks in the past. Sooner or later,
3 someone will skip a safety step. The question is whether there
4 are sufficient response plans in place to deal with it and
5 contain it so that it does not become a significant outbreak.

6 And --

7 THE COURT: When you say that the cruise industry
8 wants to resume in July, I think everyone would agree that they
9 do want to resume in July. The question is, would they also
10 want to resume in June? Are you saying that you have some
11 information suggesting that the cruise industry does not want
12 to or think it's capable of resuming operations before July in
13 a safe manner?

14 MS. POWELL: I think that is consistent with what the
15 cruise industry itself has said. The statement from the cruise
16 industry that we put into the record says they want the CSO
17 lifted now so that they can resume operations in July.

18 THE COURT: Oh, I see. You meant -- you meant resume
19 operations in July without the CSO.

20 MS. POWELL: Yes.

21 THE COURT: I see.

22 MS. POWELL: But that is the fastest they have said
23 that they think they can do so safely.

24 THE COURT: And that statement is in the record?

25 MS. POWELL: Yes, it is. It is in -- I got my exhibit

1 list.

2 THE COURT: Even without a citation, if you can just
3 give me a descriptor of where it is, I can probably find it.

4 MS. POWELL: Sure. It appears most directly in
5 Defendants' Exhibit 8, which is a statement from the cruise
6 industry.

7 THE COURT: I see.

8 MS. POWELL: It is strongly implied in Exhibit B to
9 the Treffiletti declaration, which is the CDC's Dear Colleague
10 letter that says "consistent with our understanding of what you
11 want" -- I'm paraphrasing, but -- "we hope that operations can
12 begin around midsummer." And the Treffiletti declaration
13 itself says something similar to that effect.

14 Counsel argued that sovereign immunity means that any
15 injury will do just one ship. I don't think that's consistent
16 with the case law. It is true that the United States has
17 sovereign immunity and they cannot recover damages against the
18 United States or its agencies. It is not true that one dollar
19 of injury will suffice for the extraordinary remedy of
20 preliminary injunction, and the Eleventh Circuit hasn't held
21 otherwise. It has to be a significant injury, and they haven't
22 even attempted to quantify the forward-looking injury here.

23 And I'm happy to move onto the merits if you don't
24 have questions about that.

25 THE COURT: About standing?

1 MS. POWELL: Or harm.

2 THE COURT: Or harm. Go ahead. I may have some
3 questions later.

4 MS. POWELL: Sure.

5 THE COURT: I promised both of you I wouldn't
6 interrupt too many times during your direct. I think I'm
7 subject to contempt by Mr. Hilborn on the first presentation,
8 so...

9 MS. POWELL: I don't really like listening to myself
10 talk. I'd rather answer the Court's questions.

11 THE COURT: I see.

12 MS. POWELL: On the CDC's statutory authority, we
13 begin, of course, with the text of the statute, which I know
14 you have in front of you and was read earlier. I think this
15 flexible language vests a great deal of discretion in the
16 Secretary to determine what is necessary to prevent the
17 introduction, transmission or spread of the disease, focusing
18 on transmission across state and international borders.

19 THE COURT: I understand you were asked elsewhere
20 exactly how far that authority goes. Is there some bound to
21 it -- identifiable bound to how -- to your authority?

22 MS. POWELL: Yes. At a bare minimum, the CDC needs to
23 be making a finding that there is a risk of the interstate or
24 international transmission of the disease at issue. So that's
25 one very important bound, and they have to find that the

1 measures are necessary to control it.

2 THE COURT: Then I'll rephrase it. Is there any bound
3 on what measures the CDC can implement?

4 MS. POWELL: I'm not sure what you -- I thought I just
5 answered that question, so maybe I didn't understand it.

6 THE COURT: No. You asked -- you answered the
7 question, is there any bound on when they can resort to
8 measures. That's the question that you answered, which is not
9 the question I intended to ask because I knew that answer. The
10 question that I intended to ask that I understand you were
11 asked elsewhere, quite understandably, was, what is the bound
12 on the remedial measures that the CDC has at its control?

13 For instance, we found out here it can issue a no
14 sailing order that closes an industry, or I'm sure counsel
15 would remind me, claims that it can under its statutory grant.
16 Are there any bounds on CDC's authority? Could it shut down
17 the airline industry?

18 MS. POWELL: So the answer is the bound in the statute
19 is clearly that it be necessary. That -- and I think that
20 bounds of necessary is going to be pretty expansive during a
21 public health emergency. It's going to depend on the specific
22 findings of the CDC and that circumstances. I don't want to --
23 I don't feel like for this case in particular we need to
24 explore the outer edges of the Public Health Service Act
25 authority because what the CDC has done here is regulate the

1 conveyances of interstate and international travel during an
2 emergency in which those specific conveyances as a category
3 were found to pose a risk of transmission of the disease
4 because of the characteristics of those conveyances.

5 This is not playing --

6 THE COURT: I understand you regulated it at least so
7 far by halting it.

8 MS. POWELL: Correct. There was --

9 THE COURT: So I'm asking is there any bound -- so you
10 could do anything that the CDC -- and I guess this is the
11 Secretary, Mr. Becerra. I guess if he thinks it's necessary
12 and there's some kind of emergency, he can do it under this
13 statute. So my question is, could he shut down transportation
14 in general? That is, stop the airline industry, the train
15 industry, the bus industry, which, you know, the Greyhound
16 folks and people like that, stop the sail service, which I
17 guess that's -- everyone would regard that as extreme, right?
18 Stop the Acela service. Is there a bound on what he can --
19 what he can do on a finding necessary?

20 MS. POWELL: It had to -- it would have to include the
21 findings. It's all subject to APA review at least absent some
22 unusual condition.

23 THE COURT: Well, it --

24 MS. POWELL: So --

25 THE COURT: -- it wasn't subject to it here. It's

1 just done.

2 MS. POWELL: I mean, it's subject to APA review by a
3 court, Your Honor.

4 THE COURT: Well, that's --

5 MS. POWELL: The question is whether the -- the
6 Secretary in those instances, if they shut down all travel,
7 have acted arbitrarily. And maybe that would be arbitrary. It
8 sounds awfully arbitrary to just -- to shut down all car
9 travel.

10 THE COURT: Well, in this --

11 MS. POWELL: And if it's interstate car travel --

12 THE COURT: -- in this circumstance --

13 MS. POWELL: Yeah.

14 THE COURT: -- could he have shut down the airline
15 industry because of the -- because we didn't know -- as you
16 said, we didn't know what the contagion level was and other
17 factors and all these kind of things in this situation. Could
18 he have just shut down the airline industry?

19 MS. POWELL: If he had made a finding that the
20 airlines were specifically contributing to the spread of the
21 interstate and international spread of the disease and that
22 this was necessary. And then there would be questions about
23 whether that was arbitrary under the circumstances, whether his
24 findings were sufficient. So I think that yes, the statutory
25 authority would encompass that. That doesn't mean it's

1 justified, but when we're talking about the --

2 THE COURT: When you say the statutory authority,
3 then, your -- your position is that he could -- he could impose
4 any remedy that he found to be necessary subject to judicial
5 review of arbitrary capricious.

6 MS. POWELL: Yes.

7 THE COURT: Close the border?

8 MS. POWELL: We did that subject to different
9 authority.

10 THE COURT: Well, indeed. So the president can close
11 the border under -- let's say suppose the president hadn't done
12 it or had come out and said, I won't do it. It's not
13 necessary. In fact, very prominent people said the president
14 shouldn't have done it. So then can the director of CDC come
15 out the next day and say, well, I'm going to do it -- and I
16 almost said trump the president -- supersedes -- supersedes the
17 president's authority?

18 MS. POWELL: Well, they can't supersede the
19 president's authority if the president -- if the president can
20 overrule them, but they can issue orders about the border and,
21 in fact, have, some of which have, in fact, been challenged or
22 are now in court. That's separate authority for doing that --

23 THE COURT: Which border?

24 MS. POWELL: Huh?

25 THE COURT: Which border?

1 MS. POWELL: So the -- so the section -- I'm going to
2 mess this up.

3 THE COURT: You're talking about ports of entry?

4 MS. POWELL: Yes.

5 THE COURT: Okay.

6 MS. POWELL: They have imposed significant
7 restrictions on ports of entry in their operation. And, in
8 fact, the president's order actually closed the northern and
9 southern borders for a time. So that is, in fact, authority
10 they've exercised. But primarily, there's a separate section
11 of the statute that deals with that though, and I think we
12 would argue it is supplemented by this section of the statute
13 as well, but the sort of conveyances of international commerce
14 we're talking about.

15 THE COURT: You said a moment ago that the
16 president -- the president could overrule the secretary of HHS
17 on this. Did I understand you to say that?

18 MS. POWELL: I don't know if that's correct, actually.
19 I'm sorry I misspoke.

20 THE COURT: Yeah, I don't -- I didn't spot that
21 anywhere that he could. I think the question that I asked is
22 yes, he could if the President of the United States said, No, I
23 refuse to do what President Trump did, I refuse to stop airline
24 flights back and forth from -- where was it -- Europe and China
25 and maybe some other places and the CDC director could come out

1 or HSS secretary could come out the next day and say, Well, I'm
2 going to do it under this authority.

3 MS. POWELL: That just might have some compelling
4 arbitrary capricious arguments in that case.

5 THE COURT: And they would be -- they would be subject
6 to litigation.

7 MS. POWELL: Yes.

8 THE COURT: So they could file a suit.

9 MS. POWELL: Yes.

10 THE COURT: And that suit would -- okay.

11 MS. POWELL: But again, all of that goes to sort of
12 the outer limits of what the CDC can do. What the CSO does --

13 THE COURT: Well, I'm trying to get to the point of
14 what the outer limit is, and you just say it's just what they
15 find necessary.

16 MS. POWELL: Yes, I think that's correct. There
17 are --

18 THE COURT: Which means it's not identifiable.

19 MS. POWELL: Well, it means that it's flexible based
20 on discretion intentionally conferred upon the Secretary with
21 these specific kinds of findings, right? It is intended to be
22 flexible language. Congress knows how to legislate broadly and
23 how to do so narrowly. They legislated broadly here.

24 I think some of the wind goes out of plaintiff's sails
25 there. Again, that was not intended, I apologize.

1 THE COURT: It happens.

2 MS. POWELL: Completely inappropriate.

3 When plaintiff concedes that the regulations
4 themselves are within the authority and only disputes that the
5 CSO itself is. We think the CSO is within the regulations.
6 They provide that upon finding that a carrier may be infected
7 or contaminated, the CDC can require a list of public health
8 measures and the CDC can require as a condition of free
9 pratique the ability to begin operations in U.S. ports, can
10 impose reasonable safety protocols of various kinds.

11 That's exactly what the CSO does. Now, plaintiff
12 argues that those take too long or effectively shut down, but
13 all of that goes to whether or not they're reasonable under the
14 circumstances, whether they are too time-consuming or too
15 onerous. They don't go to whether or not they fall within the
16 regulations in the statute.

17 Frankly, if there were any gaps in the CDC's
18 regulatory authority here with respect to arriving carriers, we
19 think it's amply filled in by Part 70.2 which permits the CDC
20 to act in the event of inadequate local control. Plaintiffs
21 are quite correct, of course, that the CDC didn't find that
22 some port was acting negligently or that there was a specific
23 inappropriate action by a local authority. They didn't think
24 that was necessary under the circumstances because they make
25 the common-sense conclusion that cruise ships have motors and

1 rudders and are primarily international vessels and mostly
2 foreign-flagged and they move from jurisdiction to
3 jurisdiction, and it is impossible for any local port to
4 inspect and enforce outside their jurisdiction.

5 THE COURT: That was the basis on which the CDC found
6 the state standards insufficient, is that right?

7 MS. POWELL: Yes, and that local control was
8 inadequate during the course of this pandemic for where that
9 specific reason, that --

10 THE COURT: You've -- so the CDC found that -- so
11 almost sort of as an abstract matter as a generalization as --
12 I think I've described it as a global determination earlier,
13 that local control was inadequate to deal with international
14 travel.

15 MS. POWELL: During the course of the pandemic based
16 on specific findings about cruise ships which have been known
17 to be the source of international transmission of the disease.

18 THE COURT: As have airlines, right?

19 MS. POWELL: Probably. I don't know if they've done
20 anything like on the scale for any specific flight, obviously
21 doesn't carry thousands of people most likely, much less
22 require the sort of enormous response efforts that were
23 necessary to disembark cruise ships and provide for quarantine
24 and isolation facilities for thousands of people on one ship.

25 THE COURT: Well, let me make sure that I understand.

1 Did you find that -- I'm sorry about this new thing, I know you
2 weren't involved in this any more than I was --

3 MS. POWELL: That's all right.

4 THE COURT: -- and Mr. Hilborn.

5 Did the CDC examine what, if any, controls were in
6 place and determine them inadequate?

7 MS. POWELL: No. In the sense of making specific
8 findings about them, certainly not. There are things that CDC
9 was aware of as a result of the public comment period and
10 things like that at the time of the CSO.

11 I want to --

12 THE COURT: Is there -- is there some regulation or
13 requirement for health that the CDC is requiring now or will
14 require as the resumption of sailing occurs that could not be
15 imposed by the State?

16 MS. POWELL: Yes.

17 THE COURT: And that -- I include the port.

18 MS. POWELL: Yes.

19 THE COURT: And what is that?

20 MS. POWELL: States can't impose any measure outside
21 their jurisdictions. So they can't inspect a ship that is
22 currently in Mexico or Galveston before it enters U.S. waters.

23 THE COURT: They can't -- say that again.

24 MS. POWELL: They can't, for example, inspect a ship
25 or issue citations for a ship that's outside their

1 jurisdiction.

2 THE COURT: Correct. But the -- the State or its
3 subdivisions could enact inspection and entry requirements for
4 any port, right?

5 MS. POWELL: It could. And if all -- every state
6 court --

7 THE COURT: So my question was, was there anything
8 that the CDC can impose or condition on -- create as a
9 condition of entry into a port or disembarkation from a
10 court -- is that the right word -- from a vessel that the
11 State, in its political subdivisions, could not impose?

12 MS. POWELL: So if the question is whether every
13 jurisdiction and port in the country could get together and
14 impose the CDC protocols for their port and whether that would
15 work just as well, quite possibly, but the inter-jurisdictional
16 enforcement would be complicated at best. I would note that
17 the comments that Florida pointed to in their presentation
18 actually sort of undermined that.

19 THE COURT: Are there any restrictions on traveling
20 from one American port to another American port?

21 MS. POWELL: Currently, not that I'm aware of. The --

22 THE COURT: But you didn't look and say, Well, does
23 Port Canaveral have adequate --

24 MS. POWELL: Well, they don't, and they told us they
25 don't. So for example --

1 THE COURT: Well, excuse me for invoking privilege.
2 But you didn't look -- as I understand it from what first
3 counsel said, you didn't look at to determine whether Port
4 Canaveral was adequate -- had adequate controls or whether Port
5 Tampa did or whether the port in Fort Lauderdale did or Miami
6 or whatever's there and the port in Galveston and assess each
7 one of theirs and determine whether there were some ports that
8 should be allowed to sail and some not. You made a global
9 determination that it was not possible for the state to
10 regulate and dismissed them out of hand as a whole, if I
11 understand what the CDC did based on what counsel has said.

12 MS. POWELL: I don't know that we would phrase it that
13 way, but it is --

14 THE COURT: I'm sure you wouldn't.

15 MS. POWELL: It is accurate that they did not make
16 port-specific findings. We don't think that's required given
17 the nature of cruise ships and international and interstate
18 travel, nor do the ports agree with that. The comments
19 submitted by plaintiffs in one -- or sorry, the comments
20 pointed to by plaintiff that we submitted are comments from
21 their ports saying the CDC needs to impose protocols. The CDC
22 needs to make sure that these cruise ship operators are working
23 with us on emergency response planning which is exactly what
24 the CSO does. They say we need CDC's help.

25 So it's not accurate that CDC wasn't aware and didn't

1 think of these things. CDC is, obviously, well aware that
2 local ports in general don't have broad-spectrum regulations on
3 cruise ships, which is why they knew it was necessary as a
4 broad matter. The fact they didn't make specific findings
5 about Tampa or Canaveral or Galveston is not helpful to
6 plaintiff, especially when their own ports are saying we need
7 CDC authority in this area.

8 To be more specific --

9 THE COURT: Well, the statute does seem to have
10 some -- 264 does seem to have some reference to specific
11 instances, doesn't it?

12 MS. POWELL: Where?

13 THE COURT: Where?

14 MS. POWELL: Sorry, yeah.

15 THE COURT: Well, where is the generalization,
16 probably would be the way I would phrase it.

17 MS. POWELL: Well, 264(a) says "The Secretary can make
18 and enforce regulations such as in his judgment are necessary
19 to prevent the transmission of the disease."

20 And plaintiff goes to the second --

21 THE COURT: And then where it says for the purposes of
22 carrying this out, it can do a number of things. And each one
23 of them says -- each one of the things on that list says "of
24 animals or articles found to be so infected or contaminated."
25 And that's -- I mean, that's sort of an individualization or a

1 specification requirement, isn't it?

2 MS. POWELL: Sort of. I am reasonably certain that
3 that "found to be so infected or contaminated" phrase applies
4 only to destruction. I realize the DDC court found otherwise,
5 but bear with me for a moment. If it applied to everything in
6 the preceding list, it would also apply to inspection, which
7 means you can only inspect things after you'd found them to
8 be -- the "so infected or contaminated," which doesn't make any
9 sense. It's also consistent with the legislative history --

10 THE COURT: Assuming inspection means to determine
11 whether it's infected and not to determine where it -- where,
12 say, in a building or in a warehouse or in the port.

13 MS. POWELL: Correct. And that is how --

14 THE COURT: Or a vessel.

15 MS. POWELL: Correct. And that is how we would
16 normally use it, inspection to see if there's an infection.

17 THE COURT: Or to find out where the infection is,
18 already -- already knowing that there's one.

19 MS. POWELL: Right. So I don't think the DDC court's
20 analysis that that phrase applies to everything before makes
21 any sense.

22 THE COURT: It's a little bit awkward, isn't it,
23 because you've got that "and" down there, that "and other
24 measures," and there's no -- if there was an "and" between
25 extermination and destruction, that would be really clear,

1 wouldn't it?

2 MS. POWELL: Yeah. And it's just not --

3 THE COURT: I couldn't tell. Did you say "yeah"?

4 MS. POWELL: Yes.

5 THE COURT: Okay.

6 MS. POWELL: Sorry.

7 I would add that I think that's supported by the House
8 report on this bill from 1944. There's not a lot in there, but
9 one thing that is in there is that it is intended to clarify
10 that the Secretary has the authority to destroy private
11 property, not just do the other things. So I think that is at
12 least somewhat helpful to our reading. And I think the
13 sentence on its face appears to be illustrative examples, not a
14 limiting sentence in any way, and that conclusion is buttressed
15 by the sections that follow. Those sections are about
16 quarantine of individuals, and they explicitly modify (a) --
17 they modify Subsection (a). They say, you know, for
18 regulations issued under this section. But quarantine, of
19 course, is not one of the things listed in 264(a), even though
20 the following sections go on to impose limits on them.

21 So I think the idea that this sentence is not limiting
22 is reasonably clear from the sentence itself, but also from the
23 sections that follow.

24 THE COURT: Well, there's one thing that struck me
25 about it. I had never read it until this case came up. I'd

1 never seen it. I didn't know what it said. First thing that
2 struck me about it when I read it was it seems like given the
3 expansiveness of the first sentence, that the second sentence
4 seemed almost trivial. That examples there seemed almost
5 trivial given the reading that it's being given now by the CDC.
6 I mean, there's a real stark difference between closing down
7 the airlines, closing down the cruise ship industry, closing
8 the border contrary to the president and fumigating a place
9 found to be infected or killing a pig. There's a pretty wide
10 gap in there. And it's sort of odd to understand why such a --
11 an expansive grant of authority in the first sentence would be
12 so minutely conditioned.

13 MS. POWELL: I can think of two reasons.

14 THE COURT: All right.

15 MS. POWELL: One is what I said before -- that they
16 wanted to clarify that you could destroy property, and I don't
17 think that's limited to --

18 THE COURT: And that would be -- that would have some
19 significance --

20 MS. POWELL: Yeah.

21 THE COURT: -- because it might -- it would clearly be
22 incompensable --

23 MS. POWELL: Yeah. Yes.

24 THE COURT: -- if that authority's right here to do
25 that and there's -- you won't be troubled with lawsuits.

1 MS. POWELL: Right.

2 THE COURT: So it's easy to understand why they would
3 say that about destruction of animals and articles.

4 MS. POWELL: The others --

5 THE COURT: By the way, do you think a cruise ship --
6 I'm not saying you've said this, but I'm just -- in fact, I
7 don't think you have -- but is a cruise ship an article?

8 MS. POWELL: Yes.

9 THE COURT: You think a cruise ship is an article?

10 MS. POWELL: I do.

11 THE COURT: I mean, one of the judges had talked about
12 that, didn't he, in one of these cases?

13 MS. POWELL: Eviction -- they didn't think an eviction
14 was an article, which is, obviously, a very different
15 conclusion. My -- my follow-up point on this is even if I'm
16 wrong and our --

17 THE COURT: About the article -- the definition of
18 "articles"?

19 MS. POWELL: No, I think I'm right about that. But
20 even if I'm wrong that the sentence is not -- the second
21 sentence isn't a limit, if the sentence is a limit, the sorts
22 of things it describes -- inspection and hygiene measures and
23 destruction of property -- are, in fact, what the CSO requires.
24 It takes them time to do what the CSO requires, but it requires
25 testing and sanitation and hygiene and basically a practice

1 run -- a fire drill to test the safety protocols. That's in
2 line with the things listed in that article, and it applies to
3 a site or article that is specifically found to be infected
4 here, I mean this category of cruise ships.

5 So I mean, plaintiffs cite and we tussle over,
6 obviously, the significance of those eviction order cases, but
7 this Court's obviously not tasked with deciding the validity of
8 the eviction order which is much farther afield, as you know,
9 than the regulation of cruise ships is, nor does this Court
10 need to decide whether a whole sail shutdown falls within it.
11 That might've been the case if they sued last year when the no
12 sail orders were in effect, but they haven't.

13 What's in effect here is a set of preconditions that
14 will take some time to implement, a set of preconditions on
15 operation that the cruise ships fully expect they can meet and
16 that the CDC expects them to meet. Those safety conditions are
17 akin to the other things that are listed in the statute. And
18 the question of whether or not it's reasonable to shut down an
19 industry, all of -- and things like that sort of goes to the
20 reasonability. Plaintiffs count to -- not to whether we could
21 do it if it were warranted under the circumstances.

22 I'm happy to move on to the arbitrary and capricious
23 claims, but do you have further questions about the statute or
24 regulations?

25 THE COURT: I do. The concept of an article -- I'm

1 not sure how important it is here to this case, but since we're
2 all here together and on the topic, it's a word that has --
3 it's used in several contexts, but this is I think in the same
4 context as an article of clothing.

5 MS. POWELL: It's a thing. It's not an animal or a
6 person. I would call it an article.

7 THE COURT: An object.

8 MS. POWELL: Just like we could call a car an article.

9 THE COURT: What would a car be an article of?

10 MS. POWELL: Is that a thing? An article of
11 something?

12 THE COURT: We would say an article of clothing.

13 MS. POWELL: But we don't call a desk an article of --

14 THE COURT: Furniture.

15 MS. POWELL: Furniture? Is it an article of
16 furniture?

17 THE COURT: I think it's a lot closer to that than --

18 MS. POWELL: I've never heard the term "article of
19 furniture."

20 THE COURT: -- that a -- that a aircraft carrier is --
21 what is that an article -- is that an article?

22 MS. POWELL: Article of vessel, if one had to use that
23 terminology. But I think there's lots of things we would not
24 say "article of" about.

25 THE COURT: Well, I do too. That's a pretty

1 bizarre --

2 MS. POWELL: Yeah.

3 THE COURT: -- way to express tangible objects, isn't
4 it?

5 MS. POWELL: Right, but so is --

6 THE COURT: In fact, it almost seems -- you know what
7 it sounds like to me? Some trivial object or some -- but --
8 but in any event, an infected object.

9 MS. POWELL: Article? Well, I think "article"
10 encompasses objects.

11 THE COURT: Any object.

12 MS. POWELL: I don't have any legislative history or
13 other things to support that, but I think the ordinary usage
14 would encompass objects whether or not you could describe those
15 as an article of something, but...

16 THE COURT: That was a poor choice of words, not by
17 far the only poor choice Congress has ever made but --

18 MS. POWELL: Sure.

19 THE COURT: -- or even the worst one by far.

20 MS. POWELL: Sure.

21 THE COURT: But it is -- it is -- you know, I don't
22 want to get in trouble with anyone and I love animals, but
23 destruction of an animal who's infected with contagious disease
24 is to be expected and the destruction of some article that's
25 been exposed to something that can be -- result in contagion

1 from a surface, I suppose, is to be expected. But this isn't
2 even a question of a cruise ship. I mean, this gives -- first
3 of all, you give -- the CDC's quite predictably given the
4 statute a broad breadth and it's given a conditioning clause of
5 broad breadth and now it's giving all the individual words
6 including expanding "article" -- the word "article" to mean a
7 cruise ship.

8 MS. POWELL: I think Congress intentionally legislated
9 broadly here and gave the CDC the authority to do things as
10 long as it had findings sufficient to support them. And to
11 reemphasize, even if that second sentence is intending to be
12 limiting, I think the other measures covers this because the
13 other measures that are imposed by the CSO, as contrasted with
14 the no sail orders of last year, the other measures are a lot
15 like what's listed here. It's inspection and hygiene measures.
16 There's more to it of course. The sort of emergency response
17 planning and that sorts of thing but it is in fact a lot like
18 the list of items of actions that are listed here.

19 Moving on to the arbitrary and capricious claim --

20 THE COURT: So if we were having the delegation
21 argument -- or nondelegation argument, depending which side
22 you're on -- your defense of the -- against the nondelegation
23 attack would be that the statute is limited by the term and
24 only by the term "necessary."

25 MS. POWELL: And also by there have to be findings

1 about interstate or international transmission of a -- of a
2 communicable disease.

3 THE COURT: Necessary to prevent.

4 MS. POWELL: Yes.

5 THE COURT: So anything, anything necessary to prevent
6 that.

7 MS. POWELL: Yes.

8 THE COURT: So can you see why Article III judges are
9 a little uncomfortable with that because -- and why some of
10 them have said, Well, in order to avoid facing the next issue
11 that that presents, I'm going to find that there is a nearer
12 and more approximate bound than that?

13 MS. POWELL: You know, it is part of the reason we
14 make the argument that we fall within the narrower
15 interpretation as well or to -- like to see limits. I would
16 posit, though, that the sorts of intelligible principles
17 here about --

18 THE COURT: Only because the constitution invested the
19 legislative power in Congress.

20 MS. POWELL: Yes. But Congress has repeatedly done
21 delegations like this one which have been upheld by the courts.
22 I really don't think that the Public Health Service Act is
23 going to be the first act struck down by the Supreme Court in
24 30 some years when it contains principles and findings that the
25 CDC -- that the Secretary has to make in order to utilize it.

1 Those are meaningful. "Necessary" isn't just anything, it
2 means they have to find that it's necessary.

3 THE COURT: Well, several courts have gone out of
4 their way to avoid putting that question to the court.

5 MS. POWELL: Yes. And others have found that we were
6 correct in our interpretation. I thought the Chambless opinion
7 was particularly persuasive in analyzing this question, and it
8 goes through the other nondelegation cases and the types of --
9 types of delegations that have been upheld. They use very
10 similar language.

11 On the arbitrary and capricious claim --

12 THE COURT: They used language in the grant clause.
13 They use very similar language in the grant clause. Those
14 grant clauses were not followed by one of these peculiar -- for
15 the purpose of carrying out and enforcing clauses. I don't
16 believe any of those circumstances had a -- I mean, for
17 shorthand, just say "carrying out" clause. They didn't have a
18 similar carrying out clause, did they?

19 MS. POWELL: At least one of them has something along
20 the lines of making enforced regulations, that it is about
21 promulgating regulations that meet the certain standards.

22 THE COURT: Well, that's in the first sentence. You
23 clearly have the authority to make enforced regulations. And
24 the question is how to conduct the enforcement. And the other
25 ones didn't have a follow-up sentence that says "for the

1 purpose of carrying out and enforcing." And "enforcing"
2 appears in the first sentence and the second and, more or less,
3 "measures" does too.

4 MS. POWELL: I don't know that that makes it
5 significantly different from the other cases, but I'm afraid I
6 did not print out the other statutory language and bring it
7 with me.

8 THE COURT: Yeah. Well, I didn't either, so...

9 MS. POWELL: Yeah.

10 THE COURT: There has to be limits on how much you can
11 bring.

12 MS. POWELL: I am comfortable -- I understand there
13 have to be limits. I feel like the specificity of the language
14 here about interstate and international transmission and the
15 necessary language are meaningful limits. They're certainly
16 intelligible principles.

17 THE COURT: They are on the field for regulation.
18 They are -- and I don't understand the State to be arguing that
19 they're not on the field of regulation. But on the -- on the
20 carrying out and enforcing part, the question is what remedial
21 measures are authorized by the statute.

22 MS. POWELL: That's interesting. Well, you know,
23 the -- to the extent that --

24 THE COURT: Of course part of your argument is that
25 this was not rulemaking.

1 MS. POWELL: Right. So that is part of our argument.
2 If the Court was not convinced that this fell within --

3 THE COURT: That this is a regulation but not a rule?

4 MS. POWELL: No. We think -- we think it is an order
5 rather than a rule. If we're wrong about that, the CDC made
6 the alternative finding that there's good cause. So if the
7 Court thinks it needs to be a regulation, it is that as well in
8 the -- it is stated as that as well. And the question would be
9 the adequacy of the good cause finding, right? If it needs to
10 be -- if it would be legitimate as a regulation rather than as
11 an enforcement order, the question then becomes is the good
12 cause finding sufficient. Because the CDC did do that in the
13 alternative, right? As long as it's not wholly outside CDC's
14 authority in any way, the question would be whether it is
15 within the good cause exception.

16 THE COURT: Yeah. That's one of the questions that
17 appears, yes.

18 MS. POWELL: Arbitrary and capricious claim, I'd like
19 to begin, of course, with the general principal that deference
20 is due to public health authorities during a crisis. And
21 notably absent from any filing of the plaintiff is any opinion
22 from a public health authority anywhere, including their own,
23 that lifting the CSO would be a good idea or even that it would
24 be not that bad an idea. There's nothing in the record that
25 would indicate some disagreement from public health authorities

1 on this front.

2 Plaintiffs point to several things that CDC supposedly
3 failed to consider. I think given the deference due and the
4 lack of disagreement among the experts who are relevant here,
5 that deference is due to the CDC on these. The first was
6 vaccines. At the time of the CSO, there were not vaccines
7 available. So of course there are not detailed findings about
8 them and how effective they are and whether they warrant the
9 CSO. Rather, the CDC has incorporated them as it has moved
10 forward.

11 And it has, in fact, incorporated them to the extent
12 plaintiff -- I don't think that plaintiff is challenging the
13 technical instructions or guidance. They have said they are
14 not doing that, only the CSO. And since the information wasn't
15 available at the time of the CSO, I don't see how CDC can be
16 faulted for it.

17 To the extent --

18 THE COURT: Well, I think part of it is there was good
19 reason on October 20th to think that the vaccine was imminent.
20 And the rule is, at least on its face, in effect for a year.
21 And not -- not a month after the effective date of the order,
22 the vaccine was underway.

23 MS. POWELL: Sure, but not widely available until much
24 more recently, and even now it doesn't justify the lifting of
25 the CSO. If CDC finds at some point that it justifies lifting

1 the CSO, they will. The Treffiletti declaration has an
2 explanation for why it doesn't now justify lifting the CSO. It
3 is something the CDC has thought about, and they've continually
4 engaged with state and local authorities and with the cruise
5 industry on the specific question and how the availability of
6 vaccines will affect operations going forward.

7 So for example, one of the things they have done is
8 created an exception to the simulated sailing requirement.
9 They don't have to do a full simulated voyage as long as they
10 can maintain a highly vaccinated set of crew and passengers
11 with a highly effective vaccine. Thus far, of course, they
12 have not -- cruise ships have not submitted any plans for how
13 to do that in light of the various difficulties posed with
14 vaccinating crew and passengers.

15 Now that the vaccine is widely available in the United
16 States, it is available to passengers from the United States,
17 in any case. But it's complicated by things like Florida's
18 law, which purports to prohibit checking -- sorry, purports to
19 prohibit requiring proof of vaccination from customers.

20 THE COURT: Was that a law or an executive order?

21 MS. POWELL: It was an executive order. I believe it
22 was then signed into law by the legislature, is my
23 understanding.

24 THE COURT: Have you read that law?

25 MS. POWELL: I read the executive order. I've not

1 seen what was passed.

2 THE COURT: I meant to ask the State's counsel about
3 that.

4 MS. POWELL: Oh. I know the cruise industry --

5 THE COURT: What is the relationship between that
6 statute and that order? That order -- and my -- my
7 recollection is I didn't -- ambiguous. I did not reread that
8 before today, but doesn't that prohibit a private business from
9 requiring vaccination as a condition to do business or travel?

10 MS. POWELL: That is my understanding.

11 THE COURT: So what is the relationship between that
12 and a member of the cruise industry saying "We are not
13 requiring this as a condition of your traveling, the CDC is
14 requiring this as a condition of our sailing with you on
15 board"? And do we know that the statute or the executive order
16 would purport to supercede -- well, do we know what the
17 interplay is between those two things?

18 MS. POWELL: I can tell you from CDC's perspective
19 that at this time, CDC does not believe it has taken action to
20 preempt the Florida law in question. It doesn't mean it could
21 not.

22 THE COURT: No, but I think my question was, can the
23 cruise ship operator say to the State, "We are not the source
24 of this requirement," and therefore run afoul of the state
25 statute? This is a requirement of the CDC, and certainly the

1 legislation in the state of Florida cannot prevent the CDC from
2 promulgating a regulation that says 95 percent vaccination is
3 required.

4 MS. POWELL: That is a good question. It might be
5 better directed to the State of Florida as to whether their law
6 would prohibit that. We have not claimed to preempt the state
7 law. Like we have not said --

8 THE COURT: Well, what was the --

9 MS. POWELL: -- "you have to require this
10 information."

11 THE COURT: You suggested that Governor DeSantis's
12 order would interfere with -- in a footnote in your memorandum,
13 I think you suggested that you'd made a determination that
14 Governor DeSantis's order would interfere with resumption of
15 sailing.

16 MS. POWELL: I think we said it would complicate
17 matters, but yes.

18 THE COURT: Complicate matters -- interfere, much like
19 the differences -- distinction we were talking about before.
20 But I also wonder what the basis for that was.

21 MS. POWELL: Because the order, on its face, prohibits
22 them from asking customers, i.e. passengers, whether or not
23 they've been vaccinated and requiring them to show proof.

24 THE COURT: And my question to you was, isn't their
25 response to that likely to be "We're not, the CDC is. Here's

1 their -- here's their guidance"?

2 MS. POWELL: The problem is the CDC is not requiring
3 it at this point. The CDC has offered this up as an option for
4 cruise ships and has not purported to preempt state law on the
5 question.

6 THE COURT: That's --

7 MS. POWELL: That could change. And my understanding
8 is the cruise industry is in negotiation with the governor's
9 office. I don't know what is transpiring.

10 THE COURT: I'm sure they are. In light of what --

11 MS. POWELL: Yeah, I don't have any idea what is
12 transpiring other than what I read in the newspapers on the
13 question, which is that cruise ships are threatening to up
14 anchor.

15 THE COURT: I'm in the same spot you are.

16 MS. POWELL: Yeah. But all that to say, even aside
17 from Florida law, there's a question of how to get vaccinations
18 for crew members who are largely foreign nationals. And they
19 may have access to vaccination in their own country, or the
20 cruise ships will have to procure it, but they're not yet
21 commercially available. So I know some cruise lines may be
22 attempting to negotiate with states, but that is a work in
23 progress.

24 In other words, there's not currently a way to ensure
25 that vaccinations are sufficient to ensure a safe voyage. It's

1 something the CDC continues to look at and will continually
2 reevaluate.

3 THE COURT: Has the CDC looked at the availability of
4 a vaccination, for example, in Tampa?

5 MS. POWELL: In a specific location, no.

6 THE COURT: Well, because when you say it's not
7 commercially available, I don't know what you mean by
8 "commercially available." You mean available for a price,
9 but --

10 MS. POWELL: It's not available to --

11 THE COURT: In the state of Florida, vaccinations are
12 available almost everywhere you look. And you can get one in
13 about 60 seconds, literally, just right down the street here.
14 Walk in, get your vaccination, and you're done.

15 MS. POWELL: I don't know that those are available to
16 foreign nationals, for example, operating on the --

17 THE COURT: I don't know that either.

18 MS. POWELL: -- cruise ships offshore, which is why
19 cruise ships are in negotiations trying to procure vaccines.
20 That's my understanding.

21 I am, admittedly, not an expert in the ins and outs of
22 what is made available to who in Florida, but it is my
23 understanding that --

24 THE COURT: Nor am I.

25 MS. POWELL: -- that one cannot --

1 THE COURT: But I didn't promulgate a regulation,
2 so...

3 MS. POWELL: Well, it is my understanding that the
4 cruise lines cannot, say, go buy a bunch of vaccines for their
5 current foreign crew members who are all on board ship, much
6 less the ones that they still want to bring on ship who are
7 abroad.

8 Plaintiffs --

9 THE COURT: Yes. But Governor DeSantis can't win. He
10 gets blasted for making these things available at Publix, and
11 then he gets blasted for not making them available.

12 MS. POWELL: Yes.

13 THE COURT: He can't win.

14 All right. Go ahead.

15 MS. POWELL: Yes, I fully acknowledge that the way to
16 handle these public health initiatives and vaccinations is, at
17 best, complicated.

18 THE COURT: Yeah.

19 MS. POWELL: And that's one of the reasons we can't
20 just assume that vaccines solve everything right now and that
21 it is safe to resume cruising as normal when we don't know how
22 many people are vaccinated, when we don't know if it's possible
23 to vaccinate crew.

24 Plaintiff argues that the CDC failed to consider the
25 assertive foreign cruise operations. It's not entirely

1 accurate. As plaintiff's counsel acknowledged, some of the
2 early information about foreign cruises is discussed in the
3 extensions of the no sail order, which is incorporated by
4 reference into the CSO. Also, that information is, in fact, in
5 the public record to some extent. And there's additional
6 information in the Treffiletti declaration --

7 THE COURT: Do we understand what the success of the
8 foreign cruise lines is in cruising while controlling
9 transmission?

10 MS. POWELL: We do not have a full picture. We know
11 there have been some outbreaks. The European cruises largely
12 are not collecting the data that would be necessary to fully
13 evaluate those cruise operations and their impact. They're
14 not, for example, doing disembarkation testing of passengers to
15 see who may have caught it on board, nor contract tracing after
16 that. And that's the sort of data that the CDC wants to see,
17 certainly before cruise operations are wide open.

18 Second, we -- the other -- other cruise operations may
19 be collecting such data. For example, we're led to believe
20 that operations in Singapore are highly effective. They are,
21 of course, a country where there is very little community
22 spread of COVID-19 at all, and they're not letting foreign
23 nationals on those cruises for the most part. They're very
24 contained. They're subject to strict orders, which look a lot
25 like the CSO, in fact, only more restrictive. Other countries,

1 of course, are continuing to ban cruise operations. Canada
2 through 2022, which is going to prevent Alaska from having a
3 regular cruise season. Australia has said they'll do a
4 framework for reopening but have not announced it yet.

5 In other words, it's not as though the United States
6 is lagging behind the rest of the world on reopening. Everyone
7 thinks it's safe. Lots of people think it's not at all safe,
8 including our neighbor to the north. And those who have
9 reopened have had mixed results and/or are not collecting
10 enough data.

11 THE COURT: And I talked to this -- to counsel earlier
12 about this topic, but everybody has used this word "safe." I
13 think both of you used it in your -- in your memorandums.
14 What -- what does that mean, "safe"?

15 MS. POWELL: It doesn't mean there's zero risk. It
16 doesn't --

17 THE COURT: Excuse me?

18 MS. POWELL: It does not mean there is zero risk. We
19 realize at this point that COVID-19 is circulating and it will
20 appear aboard cruise ships.

21 THE COURT: Well, so will -- we've always had
22 contagion on board --

23 MS. POWELL: Sure.

24 THE COURT: -- all means of mass transit, haven't we?

25 MS. POWELL: Sure. And the contagion of COVID-19 that

1 was on board cruise ships beginning in January 2020 was
2 catastrophic. The number of deaths associated with it, the
3 extent to which it spread it around the globe, the enormous
4 response of government response efforts to --

5 THE COURT: I understand that, but it does have
6 something to do with what level of risk is acceptable --

7 MS. POWELL: Yes.

8 THE COURT: -- and because there's always a level of
9 risk of contagion, you know, when you go out of the house or
10 even if you stay in the house. So the question is -- and I
11 don't mean to trivialize it, but the question is, what do you
12 mean -- what did you mean in your memorandum when you used the
13 word "safe"?

14 MS. POWELL: So what the CDC means and what they've
15 described is that if there is COVID-19 aboard ship, they want
16 to be able to contain it and safely respond without creating a
17 massive transmission on board and without creating a huge drag
18 on state, local and federal resources. That is the goal. It's
19 not that it will never appear on board. It's that it can be
20 managed on board and they can prevent a significant outbreak.

21 Now, the operations manual sets a certain standard at
22 which a cruise has to be shut down when so many people are
23 infected. I don't remember exactly what it is, but the goal,
24 in general terms, is to ensure that any -- any transmission can
25 be contained on board and not create a significant drag on

1 resources.

2 THE COURT: All right. Before we go on to another
3 subject -- I guess we already did because you've talked about
4 the foreign cruise lines, but I notice that neither the State
5 nor the CDC mentioned therapeutics in their papers. I mean,
6 not only do we have vaccines, but we have a much, much greater
7 advanced set of therapeutics available. Does that play into
8 this at all, in other words, if you have -- if you have a case
9 that becomes much more treatable?

10 MS. POWELL: I mean, in the abstract it certainly does
11 in that I think if we still had a completely untreatable
12 disease we might not be considering reopening at all. So it
13 plays into it in that sense. There's nothing in the record
14 right now about that specifically, but it's not as though it's
15 not taken into account. I think if we had a untreatable
16 disease with no vaccine or therapeutic we would be in a very
17 different situation.

18 THE COURT: Right. We do have a disease that has a
19 very low mortality rate.

20 MS. POWELL: Certainly lower than it was. It's more
21 transmissible and far less fatal than we initially thought.

22 THE COURT: Correct.

23 MS. POWELL: Which does not mean there are not still
24 significant number of cases and hospitalizations and serious
25 illness.

1 THE COURT: Those -- the serious illnesses and the
2 deaths were clustered, weren't they, in certain identifiable
3 groups?

4 MS. POWELL: I'm not sure. I mean, yes, certain
5 groups are more at risk than others.

6 THE COURT: People my age and older.

7 MS. POWELL: Yes, yes. The older demographic is at
8 risk. It's something they found to be an issue on cruise
9 ships, which typically have an older demographic in the
10 passenger population, that that might be why so many people
11 became ill and died aboard the Diamond Princess.

12 Plaintiff argues, at least in their papers now that I
13 heard it today --

14 THE COURT: Well, one of the things they argue about
15 is that the CDC has dealt with this as kind of an
16 all-or-nothing proposition and hasn't look looked at
17 intermediate resolutions.

18 MS. POWELL: That is exactly where I was going, Your
19 Honor --

20 THE COURT: Good.

21 MS. POWELL: -- because it's not true. It is perhaps
22 an --

23 THE COURT: As soon as you make this, we're going to
24 take the lunch hour.

25 MS. POWELL: Excellent.

1 THE COURT: Okay. Because you've been standing there
2 an hour and a half, which is about as long as you should have
3 to stand.

4 MS. POWELL: It is perhaps an accusation that could've
5 been levelled at the no sail orders of last year -- that it was
6 an all-or-nothing approach. That is not what we have now. We
7 have a path to reopening just subject to certain safety
8 preconditions that cruise lines, we believe, are able to meet
9 and will meet relatively soon.

10 So to the extent that was an issue, it is no longer an
11 issue. And the CDC specifically considered in the CSO on the
12 face of it -- not talking about post-talk rationalizations --
13 but in the CSO considered the recommendations of the cruise
14 industry and the measures they had adopted and, in many cases,
15 agreed with them and adopted those specific measures as
16 guidance and requirements. But the CDC made specific findings
17 that continued public health oversight was necessary, that some
18 additional things were required on top of the measures that the
19 cruise industry was adopting on its own, as well as the
20 oversight to make sure that they were implemented correctly and
21 consistently.

22 I think history will certainly show that, sooner or
23 later, when there are safety precautions required, someone will
24 not implement them as they're supposed to. Having federal
25 public health oversight can mitigate the impact of that and

1 prevent it from happening.

2 Plaintiff argues that it's -- we have still failed to
3 explain why the cruise industry is different than other
4 industries. It appears both in the CSO -- on the face of the
5 CSO, the explanation there as well as the more detail in the
6 Treffiletti declaration, but it really is different. The
7 confining people in close confined spaces for long periods of
8 time is, in fact, the problem. They found it was enormously
9 difficult to implement isolation and quarantine measures on
10 board so that even during the period of the no sail order when
11 the only people on board were crew members and the limited
12 number of crew members, many cruise ships had difficulty
13 controlling COVID-19 aboard. In those unusual situations where
14 there were no passenger operations, they still had some spread
15 on board and had trouble implementing the social distancing and
16 safety measures that are necessary.

17 So when we saw at the beginning of the pandemic these
18 astonishingly high transmission rates on board the --
19 reproductive rate of the virus at the time I think was around 3
20 or 4 they thought from the early data in Wuhan, whereas on the
21 Diamond Princess it was more like 14.8. This sort of
22 astonishingly higher rate is due to the unique conditions
23 aboard a cruise ship. In order to reduce that now -- it would
24 be reduced now -- now it's simply because of vaccines and other
25 things. We know more about the virus now. It is still going

1 to be higher than it is in other settings in light of the
2 conditions on board the cruise ships.

3 And that is my presentation on the arbitrary and
4 capricious claim.

5 THE COURT: Well, then that's a good place to stop for
6 lunch.

7 MS. POWELL: Okay.

8 THE COURT: And we'll take up right there when we
9 return.

10 So thank you all for your patience this morning and I
11 appreciate your argument and I look forward to seeing you at
12 how about 1:30? It's an hour and 15 minutes for lunch. Is
13 that enough for everybody? Or at least two of you? Maybe the
14 rest, but okay. I'll see you then. Thank you.

15 (Off the record at 12:11 p.m.)

16 (On the record at 2:04 p.m.)

17 THE COURT: I hope everyone had a relaxing and
18 pleasant lunch hour.

19 Ms. Powell, I believe we were going to come back to
20 you --

21 MS. POWELL: Yes.

22 THE COURT: -- at this point.

23 MS. POWELL: Yes. I don't have too much more.

24 THE COURT: Okay.

25 MS. POWELL: I'm, of course, happy to answer the

1 Court's questions whenever.

2 THE COURT: Okay. Well, I have one just left over
3 from this morning that my lawyers wanted me to get out of the
4 way, and I think rightly so. And this is not a challenge of
5 any kind. I just want to make sure I understand exactly what
6 you're saying -- what the CDC is saying. I also tell my clerks
7 and others not to use too many pronouns, and here I am doing
8 that.

9 If I understand correctly, CDC's position is that the
10 conditional sailing order, as its name suggests, is an order
11 only and it is an order that conditions a license and it is not
12 a rule or regulation, and therefore the rulemaking regimen was
13 inapplicable and there was no need for a formal notice and
14 comment period, no reason for a determination of good cause and
15 the like, is that correct?

16 MS. POWELL: Except for the word "only," that is all
17 correct.

18 THE COURT: Where was the "only"?

19 MS. POWELL: Way back in the beginning, when we
20 said -- I believe you said it is "only" an order and not a
21 rule. We said we believe it is an order and not a rule, but if
22 we're wrong and it is a rule, there is good cause to forgo
23 notice and comment.

24 THE COURT: Right. So maybe I should have said your
25 preferred or --

1 MS. POWELL: Yes.

2 THE COURT: -- primary view of this --

3 MS. POWELL: Correct.

4 THE COURT: -- and identify the license to which you
5 refer when you say a condition on a license. What -- identify
6 that license.

7 MS. POWELL: The regulations authorize CDC to place
8 conditions on controlled free pratique, which is itself, by its
9 nature, a license. It's defined in the regulations -- sorry, I
10 don't have the definition in front of me, but it is essentially
11 permission to enter a U.S. port and begin operations.

12 THE COURT: Enter only?

13 MS. POWELL: I think that's correct.

14 THE COURT: "Pratique" is by -- by definition, entry.

15 MS. POWELL: I think that's correct.

16 THE COURT: So does that govern a vessel, for
17 instance, more to Port Canaveral?

18 MS. POWELL: It's continued free pratique can be
19 conditioned -- can have conditions on it, yes. Those
20 conditions can be changed.

21 THE COURT: All right.

22 MS. POWELL: I think that's correct.

23 THE COURT: Was --

24 MS. POWELL: I would --

25 THE COURT: Okay. Given CDC's preferred theory, do I

1 understand you to say that the request for public information,
2 I think is what you called it, was voluntary or -- I don't want
3 to say "gratuitous" because that sounds like some kind of
4 pejorative, but it was done, not -- it wasn't required?

5 MS. POWELL: I think that's correct. It was
6 intentionally done in order to capture many of the benefits
7 that --

8 THE COURT: Yes.

9 MS. POWELL: -- notice and comment can require. The
10 CDC wanted to have a formal, or relatively formal, means to
11 solicit input from the public and the industry and local and
12 public health authorities.

13 THE COURT: But I don't know of any reason that would
14 have been mandatory to do that. And what is the source -- you
15 say their regulations authorize the issuance of an order
16 conditioning license.

17 MS. POWELL: Yes. The CDC --

18 THE COURT: And are those regulations promulgated
19 under 264(a) also?

20 MS. POWELL: Yes.

21 THE COURT: As other measures?

22 MS. POWELL: Yes.

23 THE COURT: Okay. All right.

24 MS. POWELL: Yes. Part 71 has measures that authorize
25 CDC to impose conditions on controlled free pratique and to

1 take other measures with respect to carriers that pose -- I
2 forget the exact language, but something to the affect of "may
3 be contaminated with a communicable disease."

4 (Court reporter admonition.)

5 THE COURT: Yeah, you --

6 MS. POWELL: I apologize. I will slow down.

7 THE COURT: I couldn't understand that either. I
8 don't mean to be a --

9 MS. POWELL: No, it's fine.

10 THE COURT: -- but if I could just ask you to say that
11 again. You were talking about the difference, I think, between
12 70 and 71 of the regulations.

13 MS. POWELL: 71 authorize -- so it's -- 71.32(b)
14 authorizes the CDC, upon a finding that a carrier is or may be
15 contaminated, they can require various public health measures,
16 including other measures, with respect to that vessel. 7 -- I
17 don't have the number written down here. A different part of
18 71 says that CDC can issue controlled free pratique stipulating
19 what measures must be carried out before they can enter a U.S.
20 port and begin operations.

21 THE COURT: Which is the definition of "controlled
22 free pratique."

23 MS. POWELL: Yes.

24 THE COURT: Okay. But that's on an arriving carrier?

25 MS. POWELL: Yes.

1 THE COURT: But you sort of mean that, as a practical
2 matter, that means all carriers?

3 MS. POWELL: Well, in this situation where we have --
4 well, certainly within Florida, entirely foreign-flagged
5 carriers were in -- either in U.S. ports or about to arrive in
6 U.S. ports at the time the no sail order was issued and have
7 been -- either left U.S. waters or remained where they were
8 since then -- or in the same situation they were since then.
9 So yes, we are treating them as arriving carriers for that
10 situation.

11 THE COURT: All right.

12 MS. POWELL: I would add that I don't -- based on the
13 arguments plaintiffs have made and the sorts of health measures
14 that plaintiff agrees would be lawful, it seems accurate to say
15 that there would not be any dispute that the CDC could issue
16 such an order with respect to a single vessel; that the CDC, if
17 it found --

18 THE COURT: Okay. You caught me off guard there.
19 What -- just hold on a second.

20 (Pause in proceedings.)

21 THE COURT: Yes. Okay. I have you.

22 MS. POWELL: That the CDC, if they found a vessel was
23 contaminated, could issue an order saying, you know, disembark
24 all your passengers, stop, and you cannot restart until you've
25 met this list of preconditions including good emergency

1 planning, good sanitary measures, testing your new sanitary
2 measures. That seems, to me, like something CDC could
3 obviously do, even under plaintiff's theory of the statute and
4 regulations.

5 THE COURT: Does that apply as well if you found that
6 out about some vessel entering the port as well as exiting the
7 port for an international destination?

8 MS. POWELL: Perhaps.

9 THE COURT: Okay.

10 MS. POWELL: So ships have left U.S. ports during the
11 period of the no sail order, and we did not say that the no
12 sail order stopped that from happening. So I don't know that
13 they would necessarily be prohibited from doing that. I don't
14 want to speak too broadly here, but the point I was getting to
15 was that I think it's really clear that the CDC could do this
16 for one vessel upon findings. The question is whether CDC can
17 do this for a category, a readily identifiable category of
18 vessels who know who they are and who it applies to without it
19 becoming a rule that's subject to notice and comment
20 rulemaking.

21 I think at least under these unusual circumstances
22 where there was catastrophic outbreaks on board cruise ships at
23 the beginning of a pandemic that we did not know how to handle
24 at the time and emergency measures were being implemented, now
25 we're at the CSO stage and we are acting with respect to the

1 same category on a temporary basis to impose safety measures
2 that are the best ones available on current scientific
3 evidence. I think it's also justified.

4 But that sort of gets us to the not-a-rule argument.
5 If it is a rule, we do think the good cause finding is solid
6 here. The statute says that the agency can find that notice
7 and comment rulemaking is impractical and necessary or contrary
8 to the public interest. CDC specifically found in the
9 alternative to its not-a-rule interpretation that it was --
10 would be justified to skip notice and comment rulemaking here.

11 THE COURT: For -- for the conditional sail order?

12 MS. POWELL: Yes.

13 THE COURT: And -- and that, after nine months,
14 certainly that raises the eyebrow --

15 MS. POWELL: Understood.

16 THE COURT: -- as to why -- so we come here today so
17 many months into this, more than a year, and looking at some
18 more months, and we've never had a notice and comment and we've
19 never had a rulemaking, and is that reasonable? Why was it
20 unreasonable for the October 20th procedure not to have invoked
21 the full formalities before continuing a general shutdown such
22 as this? Or maybe, but why was it arbitrary -- why was it not
23 arbitrary and capricious to do that?

24 MS. POWELL: So the good cause is based on their
25 finding as of October 2020, right? And as of October 2020,

1 they found that it would be unsafe to allow cruise ships to
2 resume operations without --

3 THE COURT: Well, they found that as of October 2020
4 without any notice and comment.

5 MS. POWELL: Correct.

6 THE COURT: And the question is, why couldn't you have
7 done that?

8 MS. POWELL: So there were two options as of October
9 2020. They finally had a framework drafted based on the best
10 scientific evidence available. They could have proposed that
11 draft.

12 THE COURT: Yes.

13 MS. POWELL: But in the interim, they would have been
14 continuing the no sail order because they made a specific
15 finding that it would be --

16 THE COURT: Actually, they can propose one and enforce
17 it pending comment, can't they, in the short term?

18 MS. POWELL: An interim final rule?

19 THE COURT: Yeah.

20 MS. POWELL: They also have to have good cause to do
21 that. They have good cause to do one, I guess --

22 THE COURT: If they had good cause to do the more
23 extreme -- take the more extreme measure, they, by definition,
24 had good cause to take a less extreme measure.

25 MS. POWELL: Yes.

1 THE COURT: Well, then why didn't they? Because
2 they're obligated to do the least restrictive thing, aren't
3 they?

4 MS. POWELL: I don't know that that's accurate,
5 actually. I don't know that the case law says if you can do an
6 interim final rule with interim comment, that you have to do
7 it. It does say if you can -- if you have the --

8 THE COURT: It does say you have to use the least
9 restrictive measure. The statutes and rules say that, don't
10 they?

11 MS. POWELL: I don't think that includes the mandatory
12 use of an interim final rule. Sorry, I'm not recalling
13 specific cases on the subject. But what the CDC did instead,
14 of course, is solicit public comment before -- while they were
15 drafting the rule so that they had the benefit of that. And
16 that goes into the good cause finding, not just the prejudicial
17 error argument that we've made. It goes into the good cause
18 finding that they had solicited public comment rather
19 specifically on the reopening of cruise lines and how to do it.

20 It's also justified because while they specifically
21 found that immediate resumption of operations would be unsafe,
22 anything they imposed was going to be somewhat temporary and
23 transient. And the public and the states and the local health
24 authorities would have the opportunity to participate in the
25 next phases of that, and, in fact, they have. Not only did

1 they submit public comments to the request for information
2 that's cited, they've also participated extensively in the
3 development of the technical instructions.

4 The extensive interaction with the industry and the
5 public over the CSO, including the collection and consideration
6 of comments and data from them, I think, forms an important
7 part of the good cause analysis; that it doesn't make sense to
8 wait another 30 days to even begin implementing a framework if
9 they're involved in the development of it.

10 It seems that, at least to some extent, plaintiff
11 wouldn't necessarily disagree with all of that -- that if CDC
12 had gone through a rulemaking that plaintiff says is required
13 for sort of full notice and comment before putting it into
14 effect, there would have been a no sail order in effect in the
15 interim. We found good cause to depart from that. We have --
16 then we have good cause to proceed in a different manner,
17 especially since here it specifically solicits and incorporates
18 the input of the states and local health authorities and the
19 public.

20 When it comes to prejudicial error, courts don't
21 require the plaintiff to show that any particular comment would
22 have changed the result. That is accurate, but there does have
23 to be some showing that there was some inability of them to
24 provide input or influence the outcome in the way they would
25 like. The only thing plaintiff has pointed to here is that

1 it's not going as fast as they would like, and that seems to be
2 the sort of comment that CDC has specifically considered during
3 this process and continues to consider in the development of
4 the guidance and technical instructions.

5 To wrap up briefly, the remedy demanded here really is
6 extraordinary in the way that preliminary injunctions are
7 extraordinary. Whether or not you consider it a mandatory
8 injunction, it's wholesale vacatur of the order in a way that
9 countermands the uncontradicted public health advice -- public
10 health conclusions in the record. There is uncertainty about
11 what happens going forward, and I want to acknowledge that.

12 But in balancing the relative interests of the United
13 States and the public versus the financial interests of the
14 state of Florida, you have to compare what happens if the CSO
15 remains in place versus what happens if it's lifted. With the
16 former, if it remains in place, we expect, based on our current
17 understanding of where the cruise lines are and where the
18 agency is, that they will begin opening -- they will begin a
19 phased resumption of operations by midsummer and that they will
20 do so with specific safety protocols in place based on the best
21 available current scientific evidence inspected and enforced by
22 federal authorities with the consent of local authorities.

23 That doesn't guarantee there will be zero outbreaks,
24 but we have every reason to think it will allow outbreaks to be
25 managed and contained. Absent a CSO on the other hand --

1 cruise lines have said they would like to reopen by midsummer,
2 i.e. around the same timeframe. But absent a CSO, they would
3 be doing so against public health's advice with the CDC's
4 explicit travel notice in place saying people should not do it.
5 And it's unclear what the cruise lines would do, what state and
6 local health authorities would do in other places if they
7 weren't, you know, empowered by the agreements language in the
8 CSO whether cruising would really be able to resume everywhere.

9 So it's unclear whether they would restart. If they
10 did, they might restart slower. If some did restart, and they
11 may, they may do so without proper safety protocols in place.
12 And that, of course, is where the real danger arises from our
13 perspective. If they restart operations somewhere without
14 proper safety protocols in place and an outbreak occurs, it can
15 be immensely costly. Even a single cruise ship with a single
16 outbreak can dump enormous costs on some local health
17 authorities, as well as the CDC to manage it.

18 History shows us that some of them will, in fact,
19 eventually skip over some safety measures. The risk of
20 additional outbreak in that situation is significant.

21 Other things that go to the balancing of the harms, I
22 think, Your Honor. The plaintiff, while they demand the
23 wholesale vacatur of the CSO, they actually admit elsewhere
24 that certain aspects of it seem to be within the CDC's
25 authority, i.e. requirements for sanitation and hygiene and

1 masking and social distancing -- those sorts of requirements
2 are part of the CSO. They're built into it by the CDC's
3 guidance and technical instructions, and I think they're
4 plainly within the agency's authority. And those too would be
5 undone by the vacatur that the plaintiffs have asked for here.

6 And finally, if the Court is weighing against these
7 serious public health risks, it's worth noting that, even if
8 the Government loses on summary judgment, it's not clear that
9 vacatur would be the appropriate remedy then. The Eleventh
10 Circuit has recognized -- and I think it's called Black Warrior
11 Riverkeeper -- that vacatur is not always the appropriate
12 remedy for APA violations, especially arbitrary and capricious
13 violations or certain procedural violations that don't
14 necessarily create such deficiencies in the rule that it needs
15 to be vacated immediately. And those situations, often the
16 most appropriate remedy for the error, is to remand to the
17 agency. But plaintiffs haven't asked for what because what
18 they really want is for cruising to reopen immediately. That
19 is not going to happen regardless, and I think that -- and I
20 just ask the Court to consider seriously and weigh heavily the
21 uncontradicted public health advice here.

22 THE COURT: And what are the instructions that
23 accompany the remand?

24 MS. POWELL: Well, it would depend on what error the
25 Court finds. I don't think the -- you know, the lesson of the

1 Supreme Court is the Court can't order a particular outcomes
2 when it does a remand like that, but it can set time frames and
3 explain what the error was and don't redo that error. So if
4 the Court thought notice and comment rule making was necessary,
5 it could remand for the agency to begin notice and comment
6 without vacating the rule in the interim.

7 THE COURT: You know -- and I take it that's the end
8 of your --

9 MS. POWELL: Yes.

10 THE COURT: -- presentation. You know, one of the
11 things that's troublesome here, just in general from the
12 standpoint of my looking at what the CDC has done, is as one of
13 my clients used to say, my feet are planted firmly in shifting
14 sand. This was within business negotiations. There aren't any
15 time limits. Everything is subject to change. Everything is
16 subject to delay. I don't think I did ask you all yet if the
17 six-month delay between -- after October 20th and before April
18 whatever it was, 20th, was unreasonable on its face. But
19 there's been delay.

20 There are places you can point for that delay, but I
21 don't know that they explicitly have said this -- maybe they
22 did, but I have to feel that the industry, which is not a
23 party, and certainly the State of Florida in terms of its
24 interests wonder just exactly when and if during 2021 there's
25 any real prospect of cruise resumption, the -- I think wasn't

1 the -- I think the State of Florida cited this with some glee
2 on page 1 or 2 of their -- of their memorandum, that the CDC
3 director or someone -- maybe it was the Secretary -- testified,
4 when asked by Senator Murkowski, when will we resume, said I
5 don't know. Well, I don't think the state of Florida knows. I
6 don't think the -- then surely -- excuse me -- then, surely,
7 the state of Florida doesn't know. And I don't think the CDC
8 would hide that from the Secretary if they knew knowing he was
9 going before Congress to testify, including the Senator from
10 Alaska.

11 So -- and it's so easy to slide forward here, and
12 everyone knows this is a seasonal industry and not -- I think
13 it actually goes 365 but in very different quantities,
14 noticeable out my window. But what is a fair -- when does this
15 become facially unreasonable? When do these -- I mean, as you
16 say, you came out with something May 5. I read those things.
17 I mean, that -- I got irritated just reading them. There were
18 so many things there, it's obviously going to take a long time
19 for anybody to read them, dispatch staff to comply with them.
20 It's not quite stonewalling, but it looks like it's certainly
21 not with an eye toward expedition, let's put it that way.

22 MS. POWELL: Your Honor, you asked a lot of questions
23 in there.

24 THE COURT: Well, I did.

25 MS. POWELL: Let me --

1 THE COURT: They amount to there's not any reliable
2 end to the no sail -- to the effective and practical no sail.
3 If there is one, what is it?

4 MS. POWELL: I think what plaintiffs have called an
5 effective no sail order, I don't think that's accurate. But I
6 think if it were accurate, it ended last week when the guidance
7 was issued. Plaintiff's lawsuit was premised on this
8 misconception that we were stuck in Phase 1 or 2A indefinitely.
9 That was never accurate. I think the Treffiletti declaration
10 has some compelling explanation for what was happening in the
11 interim. Phase 1 was where these testing requirements and the
12 procurement of on board testing and that took longer than
13 expected because the testing equipment was not available. And
14 they wanted to get at least most of the cruise operators
15 through it.

16 And at the same time, they were briefing leadership
17 and developing the new guidance and reviewing the data from the
18 testing that was being conducted during that time to develop
19 the guidance. So it took them a while to get out the Phase 2
20 guidance. They got that out before the rest of the guidance
21 because it was going to take -- because that was a prerequisite
22 for the simulated voyages, i.e. the rest of Phase 2. So they
23 wanted the cruise lines to be able to get started on that, and
24 they did. They got started on it.

25 (Court reporter admonition.)

1 MS. POWELL: I apologize. And they did. They got
2 started on it. They also complained a lot about how slowly the
3 CDC was moving for sure, and it was during that time frame that
4 the -- I think it was Director Walensky was asked about it at
5 Congress. And she was asked what date they would reopen, and
6 she said she did not know, which is not surprising. We don't
7 have a date certain even now, nor at that time had they
8 finished and finalized the guidance which would provide some
9 time frame for when the reopening would occur.

10 Now we have that guidance for the remainder of the
11 phases. They know how to apply to do a simulated voyage. They
12 know they can skip that step if they have a plan in place for a
13 highly-vaccinated voyage. They know how to report back data to
14 the CDC on the simulated voyage and they know how to apply for
15 a conditional sailing certificate. And an operations manual
16 that's available now and is being updated fairly constantly
17 provides guidance on how cruise ship operations should occur
18 during the rest of the period of the conditional sailing order.

19 As of yesterday, we didn't have any applications for
20 either vaccinated voyages or simulated voyages, but I imagine
21 that is a matter of time. Now, the original CSO plaintiffs are
22 right, the CDC asked for 30 days in which to make a decision on
23 such applications. In the Dear Colleague letter that he
24 referenced, they said that that is a guideline and they will do
25 their best to act as quickly as possible. They expect to

1 respond to applications in around five days.

2 That means that the fate of the cruise lines and when
3 they reopen at this point is entirely within their hands. They
4 can move through the phases at the speed at which they can.
5 Yes, CDC will have to process applications, but there's
6 certainly no reason for this Court to presume at the
7 preliminary injunction stage, in the absence of any evidence,
8 that the CDC will drag their feet on that. It was simply never
9 the case that the CDC was not planning on reopening. It took
10 longer than expected to draft all the guidance and get it in
11 place so that cruise lines could move through the phases of
12 reopening. But longer than expected is not the same thing as
13 inherently unreasonable.

14 Now, we also have arguments in the briefs that I think
15 should dispose of their own reasonable delay claim that they
16 have to identify a specific mandatory agency action that's
17 mandated by a statute or reg before a Court can mandate it,
18 and -- and we think the actions are reasonable here. But even
19 aside from that, any such claim is moot. I think that was the
20 heart of plaintiff's claim, even though they didn't frame it
21 that way, that what they were really upset about was that this
22 was taking too long, not that it's outside CDC's authority or
23 inherently arbitrary, just that it was taking a while. Any
24 claim to that effect is now moot. The guidance is out there
25 and the cruise lines can move through it. We have predicted,

1 and I have not yet heard objection from the cruise lines
2 industry or seen it, that they don't think they can meet their
3 July targeted reopening.

4 THE COURT: All right. I don't promise to ask you a
5 few more questions at the end after I talk again to opposing
6 counsel, but thank you very much. Have you argued several of
7 those other cases as well? I think I saw your name on a couple
8 of them, didn't I?

9 MS. POWELL: I was not on the eviction cases. I was
10 consultant on them.

11 THE COURT: I see.

12 All right. Welcome back.

13 MR. HILBORN: Thank you, Your Honor.

14 So I just have a few quick points.

15 First, I think it's important to explain why we know
16 that cruises and passengers will be sailing more quickly with
17 an injunction than without. Now, we just heard the defendant
18 say that they don't have a date certain, even now, when they
19 can say exactly when cruises will be sailing.

20 THE COURT: Now, what she said was that it was in the
21 hands of the industry and therefore --

22 MR. HILBORN: She did say that too, yes.

23 THE COURT: If that's true, then she wouldn't know
24 because she's not the industry. So I think what she said was
25 as of May 5th -- or maybe it was the earlier thing -- but that

1 it's -- in other words, circumstances have changed since the
2 suit was filed and it's now in the hands of the industry, less
3 somewhere between 5 and 30 days for an approval.

4 MR. HILBORN: Right. And so I also heard her mention
5 the original conditional sailing order, and we think that
6 there's only ever been one conditional sailing order and that
7 Your Honor should evaluate the conditional sailing order at the
8 time it was entered without the existence of any of these
9 technical instructions that now are purporting to modify it.

10 But let me explain, though, and walk you through why I
11 think that we know that cruises and passengers will be sailing
12 more quickly if Your Honor enters an injunction. So on page 11
13 of their brief -- and they've said it here today -- that the
14 cruise lines abdicated lifting the conditional sailing order.
15 Now, if you go to page 44 of their brief --

16 THE COURT: I have been to page 44 of their brief.

17 MR. HILBORN: Okay. Perfect. Sorry. They say that
18 "Allowing cruise ship operators to immediately return to
19 unrestricted passenger sailing would exacerbate and amplify the
20 spread of the disease." Now, we disagree that bad things are
21 happening, but that argument presupposes that if Your Honor
22 enters an injunction there's going to be more people sailing
23 and cruises actually happening than if Your Honor doesn't.

24 And I think that becomes even more clear in paragraph
25 77 of their declaration. And then this is in the context of

1 talking about airline travelers flying overseas to go on
2 cruises, and they say that "Experience and common sense suggest
3 that that number who are going overseas to cruise is
4 significantly less than those passengers who would choose to
5 cruise from a port in the United States if cruise ship
6 operations were to immediately resume."

7 And we think that those arguments and those
8 submissions presupposes that if Your Honor enters an injunction
9 there's going to be more people cruising and -- more people
10 cruising and more ships cruising than otherwise. And you
11 talked a lot about this with the defendants, and I do think
12 it's important to note that they have moved the ball here at
13 least twice already. So in April 2020 in that no sail order
14 they say, again, "If you, as a condition of obtaining a
15 controlled free pratique, do these 14 things." Then there's
16 the July no sail order and then the September 2020 no sail
17 order.

18 And in the September 2020 no sail order they recognize
19 that at least 11 ships had done those 14 things, but they say
20 that they need more time. And then the conditional sailing
21 order comes out in October and again extends the lockdown. And
22 we think that it's a reasonable inference that cruises -- who
23 again the defendants admit have asked to lift the order --
24 would sail faster and sooner without an order that is operated
25 as a lockdown for the last 14 or 15 months.

1 Now I want to go back to State measures, which we
2 talked about earlier, and I think there's really two distinct
3 points there that I don't think I was clear enough about. So
4 first, to the extent State measures go to the harm of
5 reopening, there you consider not just the State measures but
6 also the industry measures. And you also consider what's going
7 on now presently. And we're not aware of any member of the
8 industry that does not actually want to sail safely because of
9 course it's in their interest to do so.

10 Now, the second distinct point is if we're talking
11 just about 70.2, the regulation that has the precondition,
12 there you consider only the State measures in the political
13 subdivisions and you consider that only at the time of October
14 when the order was issued. And we've confirmed that the
15 State -- one thing that the State is offering now -- sorry.
16 This actually goes to my first point. I'm sorry, Your Honor.
17 We've confirmed that the State is offering free vaccines to
18 nonresidents -- so not just residents anymore, but
19 nonresidents, And we think that goes to the harm from the State
20 measures from the first section.

21 THE COURT: Nonresidents of Florida or noncitizens?

22 MR. HILBORN: So I realize there is a legal
23 distinction there. I can confirm that we're offering it to
24 nonresidents and --

25 THE COURT: Well, I'll take notice that there are --

1 that there are --

2 MR. HILBORN: More than just residents.

3 THE COURT: -- nonresidents of Hillsborough County in
4 the state of Florida. We had a swarm of people and -- swarm
5 into Florida to their -- to their rental condo or something to
6 get a -- to get their vaccine, from New York and places.

7 MR. HILBORN: Oh wow. And then on that --

8 THE COURT: And resident -- I know resident
9 noncitizens who have their -- can get the vaccine, but people
10 who are transient aliens -- I don't know. Is that what you're
11 saying, that you --

12 MR. HILBORN: All I'm saying is that I think in your
13 discussion with the defendants' counsel it came up that whether
14 you had to be an actual resident of Florida to receive a
15 vaccine, and I --

16 THE COURT: A citizen from another state coming here
17 getting ready to board?

18 MR. HILBORN: That's my understanding, that you no
19 longer have to be an actual resident.

20 THE COURT: But there wouldn't be much of that because
21 of the waiting period for the two-shot thing and the effective
22 time. They'd have to come two weeks -- actually, they'd have
23 to come, what, four weeks early, right? Two weeks between shot
24 one and shot two, and then two weeks from shot two until they
25 can clear.

1 MR. HILBORN: Correct. I think it depends on the
2 vaccine, correct.

3 THE COURT: Well, in any event, would be two weeks.

4 MR. HILBORN: Right. Yes. Yes.

5 Now for the equities, again they cite these outbreaks
6 in Europe of five or one person as their best evidence. Now,
7 they do on the same paragraph --

8 THE COURT: I'm sorry. An outbreak of what?

9 MR. HILBORN: Of one person or five people, and they
10 call that an outbreak over in Europe.

11 Now, in the same paragraph they do give an example of
12 whether there, I'll say, was an actual outbreak of 200 people.
13 But the CEO of that ship publicly apologized for not following
14 the protocols that were in place. And I'll note that for these
15 same examples of five person -- five people or one person, the
16 timeline on that is up to I want to say February 2021, so still
17 not exactly in vaccine land there.

18 And Your Honor also asked about *parens patriae*. So
19 *parens patriae* considerations are relevant to the equities. So
20 we talked about all the Floridians that are out of work and
21 again the harm to our state, which the defendants' counsel
22 recognized that Florida is being harmed by this order. And
23 again, there's lots of focus on all this health data and best
24 scientific data. At some point, they need to actually point to
25 that data in the order. And then it's also not just about --

1 balancing the equities is balancing the equities. So yes, we
2 need to consider the public health considerations. But again,
3 we need to consider also that the industry is shut down, that
4 people are out of work, and also that it's always in the
5 federal -- in the public interest for the federal government to
6 follow the law.

7 And then last point on standing. We submit many
8 exhibits that are not just limited to our declarations. So in
9 our brief at page 22, we cite reports from each port that shows
10 tax revenues. That's Exhibits 20 to 24, as well as Exhibit 27.
11 And then for the ports as well, we submit Exhibit 2 at pages 9
12 to 10. So it's not just the declarations that we're relying on
13 here.

14 And there was a few points in defendants' presentation
15 where --

16 THE COURT: Now that you've had time to think a bit
17 more about it -- you know, I did ask about Florida's measures
18 earlier, and I pointed out the specific phrases that were in
19 conflict in the two papers from the CDC and Florida. Is there
20 some set of measures that has been attendered by Florida or the
21 industry to CDC or to the Court that say these are the measures
22 that we think are the ones that should be prevailing, not the
23 burdensome and too long delayed measures of the CDC?

24 MR. HILBORN: I think I would just point Your Honor
25 again to the Healthy Sail Panel protocols that the order itself

1 discusses. And then as far as Florida as well, I mentioned the
2 vaccines.

3 THE COURT: And those Healthy Sail protocols, was it
4 protocols or plan? I know it's a "P." What is it?

5 MR. HILBORN: I think it's Healthy Sail plan.

6 THE COURT: Plan.

7 MR. HILBORN: That has protocols in place.

8 THE COURT: The industry is ready to observe those?

9 MR. HILBORN: I probably can't make a representation
10 like that on --

11 THE COURT: Let me ask this. Suppose that Director
12 Valencia said, Okay, you're right, give me those instructions
13 and we'll make an emergency order and you can sail when you
14 comply with those.

15 MR. HILBORN: Well, I think it would --

16 THE COURT: What would happen then? Be ready to go in
17 a month? Or what -- because you're not arguing it to be an
18 unregulated, are you? Or are you?

19 MR. HILBORN: We are arguing that the conditional
20 sailing order goes above and beyond what the CDC is allowed to
21 do, whether -- whether that's viewed as a shutdown or whether
22 that's viewed just on its face by the requirements that it
23 imposes.

24 THE COURT: But you're asking me to set it aside.

25 MR. HILBORN: Correct.

1 THE COURT: If I set it aside, then what becomes the
2 governing regime? So I was saying, well, let's assume a
3 miracle viewed from your vantage point -- vantage and say that
4 Director Valencia says, All right, we'll accept the Healthy
5 Sail plan. You're really right. Then how long is it going to
6 be until you can sail, or is the industry compliant with that
7 uniformly now? Or is CDC then going to have to inspect all the
8 vessels over the next month or two and decide whether they're
9 compliant with that?

10 MR. HILBORN: I don't know the answer to that, Your
11 Honor. I'm sorry.

12 THE COURT: Does that strike you as pertinent to my
13 decision?

14 MR. HILBORN: I can see how it's pertinent -- I
15 understand Your Honor's concern about the public health concern
16 and when weighing vaccines.

17 THE COURT: And weighing the balance of --

18 MR. HILBORN: Absolutely. Absolutely. And I think
19 that makes sense. I think --

20 THE COURT: I'm having trouble understanding what one
21 side of that is. I know what the CDC's solution to that is.

22 MR. HILBORN: So I think the other side of the
23 solution is that yes, it would be the industry regulating
24 itself which they have every incentive to do.

25 THE COURT: And that's the Healthy Sail plan, at least

1 those who subscribe to it?

2 MR. HILBORN: That's my understanding, again from the
3 description in the order.

4 THE COURT: And does it contemplate that the state of
5 Florida, for example, or the port captain or the CDC or
6 somebody will confirm compliance?

7 MR. HILBORN: I don't -- I don't know.

8 THE COURT: Do you know whether some vessels are more
9 compliant right now than others are?

10 MR. HILBORN: I do not know.

11 THE COURT: All right.

12 MR. HILBORN: Thank you for your time, Your Honor.

13 THE COURT: Well, thank you. Let me just take a
14 minute or two more of your time since I've got you here and may
15 not get you back again. So just bear with me a minute, okay?

16 MR. HILBORN: Sure.

17 THE COURT: The CDC claims that the American Rescue
18 Plan reimburses its state for its unemployment spending. Is
19 that so, and if so, what is the effect of that on the
20 unemployment compensation component of your standing argument?
21 It has three prongs I know, but what is it?

22 MR. HILBORN: So that declaration that we submitted
23 already backs out any federal reimbursements. So it's just
24 pure costs to the state.

25 (Pause in proceedings.)

1 THE COURT: You know, I understand your argument that
2 part of the CDC's argument is assuming -- well, that's too
3 complicated. I didn't see any quantification and you didn't
4 promise it, but I didn't see any or any attempt to project what
5 the level of subscription to voyages would be. I suppose it's
6 fair to say you don't contend that they're going to -- that
7 passengers will immediately return to pre-pandemic levels. It
8 will probably be a gradual one, maybe not.

9 MR. HILBORN: I think it's fair to say that it'll
10 probably be gradual. But again, as long as some come back,
11 that's enough for standing redressability.

12 (Court reporter clarification.)

13 MR. HILBORN: Redressability.

14 THE COURT: Excuse me? You all are whispering back
15 and forth and I can't hear. What was said?

16 MR. HILBORN: I said -- I repeated myself that I said
17 standing and redressability.

18 THE COURT: Right.

19 Okay. Four of your counts are APA counts, and one is
20 this nondelegation count which we really don't talk about too
21 much, in many respects the most fun, I believe. In all
22 respects, it's the most fun. But the standing requirements are
23 not identical. Constitutional standing is one thing and APA
24 standing is another. And I don't remember whether we've talked
25 about this zone of interest concept, but I believe CDC does

1 object to the notion that Florida is a litigant that is in the
2 zone of interests intended for protection or benefit by a
3 particularized federal statute or regulation.

4 And your response to that APA zone of interest
5 standing point is what?

6 MR. HILBORN: It's that HHS already recognized that we
7 are in the zone of interest by promulgating Rule 70.2, which
8 first requires CDC to determine that our measures are
9 inadequate. And then I would note too that the Supreme Court,
10 every chance it has gotten over the last 20 years has --
11 there's two ways to say this -- has expanded the zone of
12 interests for purposes of that test. And we explain that in
13 our brief and it only needs to be arguably within the zone. We
14 don't need to show that Congress had intended or had a purpose
15 to have us be in the zone and we cite those cases in our brief.

16 THE COURT: And your standing argument for
17 constitutional standing is based on the three-prong revenue
18 argument only, is that right? Is that what you told me, I
19 think, at the outset of your argument?

20 MR. HILBORN: Yes, we're not bringing *parens patriae*.

21 THE COURT: And you're not asserting any other form of
22 governmental standing? In other words, you're not saying that
23 some governmental or quasi sovereignty interest in regulating
24 the ports or something like that is a -- an interest that the
25 state is entitled to litigate if it's impinged?

1 MR. HILBORN: I'm not considering that it isn't, but
2 we aren't pushing that here.

3 THE COURT: There were a few words in your memo that
4 suggested that to me at least. I just wanted to make sure.

5 MR. HILBORN: But again, I do think that those
6 interests are relevant for the equities and analysis.

7 (Court reporter clarification.)

8 MR. HILBORN: Analysis.

9 (Pause in proceedings.)

10 THE COURT: All right. Thank you very much.

11 MR. HILBORN: Thank you, Your Honor.

12 MS. POWELL: Your Honor, I just have two quick points,
13 but if you're done I can be done as well.

14 THE COURT: You may.

15 MS. POWELL: Thank you.

16 The first was you had reminded me of our zone of
17 interest argument that I'd like to very briefly respond to
18 plaintiffs on. The essential argument is that Florida is not
19 the proper plaintiff here not because they have nothing to do
20 with the regulation, but because the interests they have
21 asserted here are not interests within the zone of interest of
22 the statute or regulations. So the relevant Supreme Court
23 cases don't ask whether the regulations in any way consider the
24 plaintiff. It looks at the particular interests asserted by
25 those plaintiffs, so in this case Florida's tax revenues and

1 unemployment benefits, which I think are plainly not within the
2 zone of interest or even properly considered in developing
3 these public health regulations.

4 Second point, I thought of this for both times
5 plaintiff's counsel was speaking, and I kept forgetting to come
6 back to it. He had pointed to -- it says local measures, these
7 comments submitted by the local ports as some proof that CDC
8 did not consider local measures that exist. I think this book
9 answers that point and also perhaps goes to standing to some
10 extent in that the local ports in Florida virtually asked for
11 these measures in the CSO. They may have wanted them more
12 quickly.

13 But for example, in -- let's see Exhibit A to the
14 Treffiletti declaration on PDF page 14. The Florida Ports
15 Council says, "We recommend that the CDC, in partnership with
16 the Florida Department of Health, develop a set of guidelines
17 and protocols for the transportation and medical treatment for
18 any people on board a returning ship after a COVID-19" --

19 THE COURT: Slow down. Slow down a bit. If you're
20 going to read it, read it so that the reporter can --

21 MS. POWELL: You are correct. Sorry.

22 -- "develop a set of guidelines and protocols for the
23 transportation and medical treatment for any people on board a
24 returning ship after a COVID-19 outbreak is identified." Then
25 it includes details about those guidelines. And there is

1 another one from the Port Everglades Department that says, for
2 example, that the port -- that "Broward County urges the CDC to
3 act quickly to develop standard protocols and guidelines that
4 can be used by our cruise line partners to submit and
5 expeditiously receive approvals from the CDC to resume sailings
6 from the U.S. ports."

7 Now, these are the public comments from September. So
8 before the CSO asking that the CDC impose requirements very
9 much like the CSO, in fact, does suggesting that they believed
10 the local measures alone could not solve the problem. And
11 that's background information that the CDC had when it found
12 that local measures were obviously inadequate to solve the
13 problem and the local ports in Florida agree.

14 And my last point was that contrary to my previous
15 joke to the Court, I did, in fact, phone a friend during the
16 break and asked them if they could send me some language from
17 some of the nondelegation cases. If the Court is interested,
18 they looked some up for me, of delegations of broad authority
19 that have been upheld by the court.

20 THE COURT: Just give me the case name. I probably am
21 familiar with it.

22 MS. POWELL: Got it.

23 THE COURT: You can assume that I've looked pretty
24 closely at that myself.

25 MS. POWELL: All right. I am happy to rest then,

1 unless the Court has questions.

2 THE COURT: Did they mention the Justice Gorsuch's
3 opinion in Gundy?

4 MS. POWELL: Yes.

5 THE COURT: Well, I would say that most anything said
6 before that and particularly after Justice Kavanaugh's dissent
7 to the circ denial and the addition of Justice Barrett, I have
8 no idea what that court might rule because there have been a
9 lot of indications that the agencies are continuing to bound
10 outward without bound and that there are a lot of people very,
11 very uneasy about that.

12 MS. POWELL: Understood, Your Honor. And I recognize
13 the CDC has put forward a broad reading here of what we believe
14 is flexible authority. I would be remiss if I did not point
15 out there are other narrower readings that would still
16 authorize extensive regulation of international cruise ships.

17 THE COURT: Well, I think that's probably right.
18 There might well be. None that have been made. Well, that
19 might not be correct. But it is unsettling, I will say that,
20 and I think there are a lot of people unsettled about it, about
21 the extent of some of these delegations and the amount of
22 authority that it exercised.

23 MS. POWELL: Understood. I really just --

24 THE COURT: In a way that is, in fact, exercised, they
25 in the United States.

1 MS. POWELL: Understood. I -- I don't think --

2 THE COURT: I'm not criticizing the Director or the
3 Secretary or anyone else --

4 MS. POWELL: Understood.

5 THE COURT: -- as a general matter.

6 MS. POWELL: I just I think that we don't have to get
7 to really the outer edges of the CDC's authority here to get at
8 the regulation of international cruise ships.

9 THE COURT: Just a couple of technical questions, I
10 guess. Let me make sure I get this right. 71 -- 42 -- excuse
11 me, 42CFR70 -- 42CFR71.1 finds detention as the temporary
12 holding of a ship. And "apprehension" in quotes -- I'm making
13 quotation marks with my fingers -- and "surveillance" --
14 quotation marks again -- are limited to, quotation marks,
15 "temporary duration." How does the CDC interpret the term
16 "temporary" when 42 U.S.C. 243(c)(2) defines temporary as not
17 in excess of six months and 42 U.S.C. 319 has a -- restricts
18 temporary to 30 days?

19 MS. POWELL: So two things. One, I wouldn't interpret
20 anything in the CSO as detaining ships. They are free to
21 leave. It does prevent them from resuming passen --

22 THE COURT: Well, it's not a detention in the sense
23 that it's permanent, but it is a temporary holding --

24 MS. POWELL: It's --

25 THE COURT: -- of a ship.

1 MS. POWELL: It's not because they are free to leave.
2 It does impose conditions on passenger operations. So they
3 cannot begin passenger operations, but that in and of itself, I
4 do not believe, is a detention.

5 THE COURT: It's not a holding.

6 MS. POWELL: Yes.

7 THE COURT: Holding or detention.

8 MS. POWELL: Yes. So I would not consider that a
9 detention. Even if it were, I don't think this -- the
10 applicable statute and regs here themselves define that
11 detention in such a way that's limited to X number of days.
12 It's rather the time necessary to do the public health measures
13 that are required. I forget the precise terminology, but it
14 can be detained for the time necessary to implement the public
15 health measures or something to that affect. And that is
16 typically how we would define it in those circumstances, which
17 again, I don't think the CSO does.

18 THE COURT: I think you and I -- I think it was you
19 and I were discussing earlier this concept of the least
20 restrictive means.

21 MS. POWELL: Yes.

22 THE COURT: And if I read it correctly, 82 FR 6890
23 says that "In implementing quarantine, isolation or other
24 public health measures" -- there's other measures again -- "HHS
25 CDC will seek to use the least restrictive means necessary to

1 prevent the spread of communicable disease." So that was why I
2 asked the question about --

3 MS. POWELL: Got it.

4 THE COURT: -- why -- what was -- whether what was
5 being done was the least restrictive means that were available.

6 MS. POWELL: Understood. I -- I think they are, to be
7 clear, based on the CDC's findings that they're necessary to
8 prevent transmission in the circumstance.

9 THE COURT: Because if they're not the least
10 restrictive means, they're not necessary by definition.

11 MS. POWELL: Right.

12 THE COURT: Right.

13 MS. POWELL: Right. I think that's right. I think a
14 lot of where we've had to really parse that language is when it
15 comes to quarantine of individuals, whether the least
16 restrictive means of apprehending and detaining people is being
17 used. That's not at issue in this CSO.

18 THE COURT: Yeah. We get that in bail cases.

19 MS. POWELL: I don't think we have had any or we've
20 had very little litigation about that, I should say, but there
21 has been some.

22 THE COURT: The -- I'm sorry. I have a lot of
23 acronyms running through my brain here.

24 MS. POWELL: Happens to me.

25 THE COURT: The one from the industry, the safety

1 plan.

2 MS. POWELL: The Healthy Sail Panel.

3 THE COURT: Healthy Sail plan. Have you or have you
4 not affirmed that that has been evaluated by CDC to determine
5 whether it or some modification or enhancement of it might be a
6 least restrictive means to accomplish the goals?

7 MS. POWELL: Yes. It is explicitly described and
8 considered in the CSO itself. CDC representatives were there
9 as observers and for informal discussions with the participants
10 in the Healthy Sail Panel who developed the planning documents
11 that came out of that. The Treffiletti declaration describes
12 more detail about what they were doing there and why, and that,
13 in fact, they ultimately adopted some of the recommendations of
14 the Healthy Sail Panel and imposed additional ones. The --
15 sort of a lot of the emergency planning sort of elements of the
16 CSO actually originally came out of the Healthy Sail plan.

17 THE COURT: I remember the discussion of their being
18 there and I remember the mention of the plan in the CSO, which
19 is not electronic reading.

20 MS. POWELL: No.

21 THE COURT: But I don't remember them -- yes, they --
22 it was the root of some of the things that they did, but I
23 don't -- I don't recall them saying, but it is otherwise
24 inadequate for this reason. Or did they say that?

25 MS. POWELL: What they concluded in the CSO is that

1 despite those very positive measures and developments that a
2 continued public health oversight was needed for enforcement
3 purposes, and there are some things in the CSO that were not in
4 the Healthy Sail Panel recommendations, as sort of standard
5 requirements. But the biggest thing, of course, is just
6 continued public health orders, yes.

7 THE COURT: In order to determine what those were, do
8 I have to go back and just take the Healthy Sail plan and the
9 CSO and compare it, or is there a place in there where they say
10 the Healthy Sail plan was inadequate for these reasons?

11 MS. POWELL: It is not that explicit.

12 THE COURT: I didn't think so because I was looking
13 for it and I didn't remember it.

14 MS. POWELL: It is not that explicit. So for example,
15 I'm not recalling the specific language, but the Healthy Sail
16 plan suggested sort of practicing disembarkation measures in
17 emergency situations. That became the, among other things,
18 the -- it became part of the requirement for simulated voyages
19 that they practice those emergency operations, that sort of
20 thing. But there are more requirements built in to the
21 simulated voyages than that alone, for example. A lot of that
22 is about data collection to see how well it works at mitigating
23 the transmission of COVID-19.

24 (Pause in proceedings.)

25 THE COURT: I think we're through.

1 MS. POWELL: Thank you, Your Honor.

2 THE COURT: Thank you very much. Thank you. Let's
3 see. The State of Florida's brief is due next Wednesday, I
4 think.

5 MR. HILBORN: Yes, Your Honor.

6 THE COURT: All right. And we have a couple of
7 motions to intervene that are outstanding. But other than
8 that, we'll just await your brief, right, and then we'll --
9 it's possible we might have to have some kind of follow up, but
10 we can do that by other means if necessary, or meet here again
11 if it's convenient, depending on the portion -- proportion of
12 that.

13 Well, thank you very much. I appreciate your
14 patience. I know it was a long list of questions that I had,
15 and you had a lot -- there are a lot of points and a lot of
16 arguments back and forth. It was a very busy little case for
17 such a short time.

18 So I thank you very much. And just to say hello, I'd
19 like to see Ms. Powell and the lawyers at the bench for the
20 State just in my office chambers. Just come on around.
21 Mr. Fish will let you in, and we'll get a chance to say hi.

22 Okay. Thank you very much. We're in adjournment, and
23 I'll rule as quickly as I can.

24 (The proceedings adjourned at 3:10 p.m.)

25 --oOo--

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

COUNTY OF HILLSBOROUGH)
) SS.
STATE OF FLORIDA)

I, Shayna Montgomery, Official Court Reporter, Registered Merit Reporter, in and for the United States District Court for the Middle District of Florida, do hereby certify that I reported, stenographically, the foregoing proceedings at the time and place hereinbefore set forth; that the same was thereafter reduced to typewritten form by means of computer-aided transcription; and I do further certify that this is a true and correct transcription of my stenographic notes.

DATED: 05/13/2021

S:/SHAYNA MONTGOMERY

SHAYNA MONTGOMERY, CSR, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER