

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

STATE OF FLORIDA,

Plaintiff,

v.

XAVIER BECERRA, Secretary of
Health and Human Services, in his
official capacity; HEALTH AND
HUMAN SERVICES; ROCHELLE
WALENSKY, Director of Centers for
Disease Control and Prevention, in
her official capacity; CENTERS
FOR DISEASE CONTROL AND
PREVENTION; UNITED STATES
OF AMERICA,

Defendants.

Case No.: 8:21-cv-00839-SDM-AAS

***AMICUS CURIAE* BRIEF OF THE STATE OF ALASKA IN SUPPORT
OF FLORIDA'S MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The State of Alaska submits this *amicus* brief in support of the State of Florida's motion for preliminary injunction.¹ Alaska does not repeat Florida's arguments. Instead, it submits this brief to provide the Court with more context by explaining how the CDC's nationwide order uniquely affects

¹ Dkt. 9. Alaska also seeks to intervene in this action as a plaintiff, but Alaska's motion is not yet ripe. *See* Dkt. 8.

Alaska and providing additional support for Florida's arguments the that order exceeds the CDC's statutory authority and is arbitrary and capricious, and that the balance of equities and public interest favor a preliminary injunction. Alaska's interests are aligned with Florida's because a denial of Florida's motion may also inhibit Alaska from obtaining relief in time to save its 2021 May-September cruise season.

STATEMENT OF FACTS: ALASKA'S UNIQUE INTERESTS

A. Alaska Is a Major Cruise Destination

Between May and September of 2019, about 1.3 million people visited Alaska by cruise ship. [Ex. 1 at 6]² The majority of cruises travel through Southeast Alaska, typically visiting some or all of the communities of Ketchikan, Sitka, Juneau, Hoonah, Haines and Skagway. [Ex. 1 at 6-7, 30-31]. Some cruises continue to Southcentral Alaska, where passengers often disembark to visit Anchorage, Denali Park and/or Fairbanks by road or rail. [Ex. 1 at 30-32].

² Exhibit 1 [Dkt. 8-1] is the Federal Maritime Commission's "Fact Finding Investigation No. 30, COVID-19 Impact on Cruise Industry, Interim Report: Economic Impact of COVID-19 on the Cruise Industry in Alaska, Washington, and Oregon" dated October 20, 2020 and available online at https://www2.fmc.gov/readingroom/docs/FFno30/20-20_AK_WA_OR_FF30_Final_Interim_Report.pdf). See also Alaska Travel Industry Association, *Alaska Visitor Volume, Winter 2018-19 & Summer 2019* (June 2020) at 7 (available online at https://www.alaskatourism.org/wp-content/uploads/Alaska-Visitor-Volume-2018-19-FINAL-7_1_20.pdf).

Alaska has more “port of call,” as opposed to “home port” passenger visits than any other state: in other words, Alaska is the destination, not the point of embarkation or disembarkation. [Ex. 1 at 6] At ports of call, passengers typically come ashore for the day to shop, eat, drink, and go on shore excursions. [Ex. 1 at 16, Ex. 2 at 7]³

Cruise tourism in Alaska is seasonal, focused between May and September. [Ex. 1 at 5] In 2019, 60% of all visitors to Alaska came by cruise ship. [Ex. 1 at 6] In Southeast Alaska, that number was 90%. [Ex. 1 at 10] Some of the most heavily visited communities in Alaska are quite small. For example, in 2019, the community of Skagway had about 1,000 residents and was visited by about 1,000,000 cruise ship passengers. [Ex. 1 at 21-22] The Alaska Native village of Hoonah had a population of about 800 in 2019 and was visited by about 250,000 cruise ship passengers. [Ex. 1 at 24-25] Needless to say, cruise tourism forms a particularly huge part of the economy in these small ports-of-call. [Ex. 2 at 1] In the words of the Federal Maritime Commission: “In the case of Alaska, there exists an outsized economic impact

³ Exhibit 2 [Dkt. 8-2] is a report by the Alaska Department of Revenue, *et al.*, “Impacts to Alaska from 2020/2021 Cruiseship Season Cancellation” dated April 9, 2021 and available online at <https://gov.alaska.gov/wp-content/uploads/sites/2/04082021-Cruise-Impacts-to-Alaska.pdf>). *See also* Alaska Department of Commerce, *Economic Impact of Alaska’s Visitor Industry 2017* (November 2018) (available online at https://www.commerce.alaska.gov/web/Portals/6/pub/TourismResearch/VisitorImpacts2016-17Report11_2_18.pdf?ver=2018-11-14-120855-690) at 1-7.

from the cessation of cruise activity. While the symptoms are the same as in other parts of the United States, the impact is much greater because of Alaska's distance and economic reliance on the tourism industry and, at the micro level, the almost total reliance of some small towns (and native Alaskans) on the income generated by cruise tourism." [Ex. 1 at 4]

B. Economic Impacts of the Loss of Cruise Tourism in Alaska

The Alaska Department of Revenue estimates the cancellation of the 2020 cruise season resulted in a gross state product loss of about three billion dollars. [Ex. 2 at 2] Alaska's overall economy stands to lose at least another three billion dollars if the 2021 season is similarly canceled. *Id.* Although the total number may not seem large compared to the value of Florida's industry, "the relative per capita impact is perhaps the most significant of any state in the Union." [Ex. 1 at 38]

The State of Alaska directly lost an estimated \$90.3 million in tourism revenues in 2020 through state taxes, fishing and hunting licenses, state park fees, passenger-related revenues, and environmental compliance fees, among other things. [Ex. 2 at 5] And port-of-call municipalities lost significant revenues in passenger fees, sales taxes, and moorage fees, among other things. [Ex. 2 at 3]

C. Other Impacts of the Loss of Cruise Tourism in Alaska

The loss of the 2020 tourism industry goes beyond mere numbers. The small community of Skagway estimates that about a quarter of its population has already moved away due to cancelation of the 2020 season. [Ex. 2 at 4] Businesses in many port communities will permanently close. *Id.* For example, the Alaska Sealife Center in Seward, which is a nonprofit facility that combines the roles of public aquarium, marine research and education center, and wildlife response and rescue service, relies heavily on cruise tourism visitors and may be unable to continue its operations if the 2021 cruise season is cancelled.⁴ [Ex. 1 at 14] Although difficult to quantify, these types of losses to the quality of life in port communities are no less real.

D. Alaska-Specific Concerns Related To the CDC's Conditional Sailing Order

The CDC's order comprehensively impacts Alaska as the vast majority of Alaska's cruise visitors come on ships with a capacity of more than 250 passengers to which the CDC's Conditional Sailing Order applies. [Ex. 1 at 7]

A consideration of the CDC's order unique to Alaska, that may not be of concern to Florida or other more populated states, is the requirement that cruise operators enter into agreements with shoreside medical providers and

⁴ Alaska Sealife Center, "About Us," <https://www.alaskasealife.org/about> (last visited April 22, 2021).

housing facilities for on-shore quarantine and isolation of cruise passengers at each port of call. [Ex. 3 at 2]⁵ For a community like Skagway, which during high season days in 2019 had more than twenty times its population on cruise ships in port, such agreements may be difficult if not impossible to achieve. [Ex. 1 at 22] But Skagway is only about 80 miles⁶ (less than six hours by ship)⁷ from Juneau's more robust medical and lodging facilities.

Finally, Alaska's strong and effective COVID-19 response is a consideration unique to the state. Throughout the pandemic, Alaska's hospitalization rates and death rates have been well below national averages.⁸ And Alaska's COVID-19 vaccination rates have been some of the highest in the nation since the rollout.⁹ Alaska was the first state to make

⁵ Exhibit 3 [Dkt. 9-13] is the CDC's "Technical Instructions for a Cruise Ship Operator's Agreement with Port and Local Health Authorities under CDC's Framework for Conditional Sailing Order," available online at <https://www.cdc.gov/quarantine/cruise/instructions-local-agreements.html>.

⁶ Alaska Marine Highway System, "Skagway," <https://dot.alaska.gov/amhs/comm/skagway.shtml> (last visited April 22, 2021).

⁷ Total running time by Alaska state ferry between Skagway and Juneau is about 5.5 hours, even with a short detour to the port of Haines. Alaska Marine Highway System, "Our Routes," <http://dot.alaska.gov/amhs/route.shtml> (last visited April 22, 2021).

⁸ Zaz Hollander, "Alaska's rate of COVID-19 hospitalization and death in 2020 was far below national averages," Anchorage Daily News (Jan. 29, 2021) (available online at <https://www.adn.com/alaska-news/2021/01/29/alaskas-rate-of-covid-19-hospitalization-and-death-in-2020-was-far-below-national-averages/>).

⁹ Annie Berman, "Alaska rises to No. 1 among states for per-capita coronavirus vaccinations," Anchorage Daily News (Jan. 25, 2021) (available online at <https://www.adn.com/alaska-news/2021/01/25/alaska-rises-to-no-1-among-states-for-per-capita-coronavirus-vaccinations/>); Alaska Office of the Governor, "Alaska

COVID-19 vaccines available to all adult residents.¹⁰ Vaccination rates are particularly high in Southeast Alaska ports of call.¹¹ COVID-19 testing is free and readily available for all visitors arriving from out-of-state,¹² and Alaska has emphasized local autonomy when it comes to policies and testing for travelers to local communities.¹³

Continues to Lead Nation in Vaccination Rates” (press release April 2, 2021) (available online at <https://gov.alaska.gov/newsroom/2021/04/02/alaska-continues-to-lead-nation-in-vaccination-rates/>).

¹⁰ Alaska Office of the Governor, “Dunleavy Announces COVID-19 Vaccine Available to All Alaskans” (press release March 9, 2021) (available online at <https://gov.alaska.gov/newsroom/2021/03/09/dunleavy-announces-covid-19-vaccine-available-to-all-alaskans/>); Scottie Andrew, “Alaska opens vaccines to residents 16 and up, the first state to drop nearly all eligibility requirements,” CNN (March 10, 2021) (available online at <https://www.cnn.com/2021/03/10/us/alaska-covid-vaccine-eligibility-16-and-up-trnd/index.html>).

¹¹ Alaska Department of Health and Social Services, “Alaska COVID-19 Information Hub,” <https://alaska-coronavirus-vaccine-outreach-alaska-dhss.hub.arcgis.com/> (listing percentages of eligible population to have received an initial dose of COVID-19 vaccine as follows: Skagway 77.95%, Juneau 68.69% Haines 66.28%, Hoonah 70.59%, Sitka 68.69%, Ketchikan 55.26%) (last visited April 23, 2021).

¹² Alaska Department of Health and Social Services, “Health Guidance for Alaska Travelers,” <http://dhss.alaska.gov/dph/Epi/id/Pages/COVID-19/travel.aspx> (last visited April 22, 2021).

¹³ Alaska Department of Health and Social Services, “COVID-19 Response and Recovery Health Advisory No. 3 Intrastate Travel” (Feb. 14, 2021) (available online at <https://covid19.alaska.gov/wp-content/uploads/2021/02/02.14.21-Health-Advisory-3-Intrastate-Travel.pdf> (giving guidance for additional local community restrictions). For example, Juneau requires COVID-19 testing before or upon arrival for all travelers from out-of-state, and testing is offered free at the airport. City and Borough of Juneau, “Travel to Juneau from Outside Alaska,” <https://juneau.org/covid-19/covid-19-travel> (last visited April 22, 2021). Skagway recently repealed its testing requirements for travelers based in part on the high levels of vaccination in the community and the desire to attract visitors. Municipality of Skagway, Resolution No. 21-07R (March 18, 2021) (available online at

ARGUMENT

A. The CDC has acted beyond the scope of its authority.

For the reasons stated in Florida’s motion, the CDC’s authority is limited to taking measures that are related to the “inspection, fumigation, disinfection, sanitation, pest extermination, [or] destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection.” 42 U.S.C. § 264(a). As Florida effectively argues, the shuttering of an entire industry is beyond this authority. Additionally, Alaska will point the Court to a few specific ways in which the CDC goes beyond its authority to micromanage the cruise ship industry.

The CDC’s technical guidance for its Conditional Sailing Order requires local port and health authorities to approve agreements ensuring cruise lines have infrastructure in place to manage an outbreak of COVID-19, including providing for shoreside healthcare and housing for individuals in quarantine or isolation. [Ex. 3 at 1] The healthcare agreements must demonstrate “enough medical capacity in the judgement of the local health authorities to care for travelers if an unanticipated outbreak of COVID-19 occurs on board.” [Ex. 3 at 5] And the housing agreements include a litany of specific requirements, including requiring the local port and health authorities to

https://www.skagway.org/sites/default/files/fileattachments/administration/page/43911/res_21-07r_repealing_21-04r_and_20-44r_covid-19_testing_mandate.pdf.

consider the availability of testing, mental health services, pharmacy delivery, security to prevent violations of quarantine, among other things.

[Ex. 3 at 5-7]

The technical guidance also requires that cruise operators include a “vaccination component” in agreements with the port and local health authorities. [Ex. 3 at 3] The cruise ship operator must educate port personnel and travelers about the importance of getting a COVID-19 vaccine and implement a vaccination process. *Id.*

The CDC’s requirement for agreements with port and local health authorities and facilities are well beyond its statutory authority. *See Skyworks Ltd. v. Center for Disease Control and Prevention*, 2021 WL 911720 at *10 (N.D. Ohio 2021) (CDC’s broad reading of its statutory authority was “tantamount to creating a general federal police power.”) The CDC purports to regulate details such as how and where cruise passengers will get medical care and lodging, as well as require cruise operators to develop a program to educate port personnel about COVID-19 vaccines. [Ex. 3 at 1-7] Further, these orders indirectly regulate the State and its municipalities by requiring local port and health authorities to evaluate and approve these agreements according to the CDC’s specific criteria. By asserting such broad authority, the CDC has exceeded its statutory authority and infringed on states’ quasi-sovereign interest, which “also serves as a check on the power of the Federal

Government.” *See Nat’l Fed’n of Indep. Bus. v. Sebelius* 567 U.S. 519, 536 (2012).

Thus, as Florida demonstrates, the main framework of the CDC’s order exceeds its statutory authority. But to fully understand just how far the CDC believes its statutory authority extends, and why it resembles a federal police power, the Court should also review the details of the CDC’s Order.

B. The CDC’s order is arbitrary and capricious.

When reviewing whether an agency acted arbitrarily and capriciously, courts ask whether the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.” *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 781 F.3d 1271, 1288 (11th Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass’n v. U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In addition to Florida’s argument, Alaska offers two specific examples of ways in which the CDC’s order is arbitrary and capricious.

As to the CDC’s failure to consider state-level COVID-19 responses, the CDC failed to consider Alaska’s high vaccination rates. This is no small oversight considering that Alaska is a major domestic cruise destination that was visited by 1.3 million cruise passengers in 2019. [Ex. 1 at 6]

And testing is a specific example of the arbitrary way in which the CDC

imposed more stringent requirements on cruise operators than other industries. The order requires cruise operators to use RT-PCR nucleic acid amplification tests for COVID-19 and discourages the use of antigen tests. 85 Fed. Reg. 70162. PCR tests are more expensive and less readily available than antigen tests.¹⁴ But CDC guidance allows travelers to cruise overseas and fly back to the United States with only a negative antigen test.¹⁵

These are just two examples of ways in which the CDC's order is arbitrary and capricious.

C. The balance of equities and public interest support issuance of a preliminary injunction.

The first two factors of the preliminary injunction analysis are the most critical, *Nken v. Holder*, 556 U.S. 418, 434 (2009), and here Florida has shown that they are met. However, to the extent that this Court considers the second two factors, which merge in this case, *id.* at 435, it should hold that

¹⁴ See Tara Parker-Pope and Katherine Wu, "Covid Testing: What You Need to Know," N.Y. Times (Dec. 9, 2020) ("Antigen tests are among the cheapest (as little as \$5) and speediest tests out there, and can deliver results in about 15 to 30 minutes").

¹⁵ U.S. Centers for Disease Control and Prevention, "Requirement for Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States," <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html> ("Passengers must be tested with a viral test that could be either an antigen test or a nucleic acid amplification test (NAAT)") (last visited April 23, 2021).

they favor an injunction. This Court must weigh the harm to Florida and its citizens against the CDC's abstract interest in public health.¹⁶

An injunction does not equate to resumption of cruising as it was before the pandemic. Cruise operators have developed detailed safety plans to prevent, mitigate and respond to the spread of COVID-19,¹⁷ 85 Fed. Reg. at 62734, and some are already advertising self-imposed safety protocols to consumers.¹⁸ The false comparison undertaken by the CDC in its Conditional Sailing Order of weighing cruising with no safety protocols against cruising under the Conditional Sailing Order does not exist in reality. *See* 85 Fed. Reg. 70156-57 (Nov. 4, 2020) (describing the only two alternatives to the

¹⁶ *See* 85 Fed. Reg. 70153 (Nov. 4, 2020) (“CDC is establishing requirements to mitigate the COVID–19 risk to passengers and crew, prevent the further spread of COVID–19 from cruise ships into U.S. communities, and protect public health and safety.”).

¹⁷ *See* “Recommendations of the Healthy Sail Panel” (Sept. 21, 2020) (available online at <https://www.nclhltd.com/static-files/5492d5db-6745-4b21-b952-49d3639f6e79>).

¹⁸ *See, e.g.*, Royal Caribbean International, “Healthy Sail Center,” <https://www.royalcaribbean.com/the-healthy-sail-center> (requiring all passengers to be vaccinated, describing enhanced air filtration, enhanced cleaning, testing available on board, and contract tracing bracelets for all passengers, among other things) (last visited April 22, 2021); Norwegian Cruise Line, “Sail Safe,” https://www.ncl.com/sail-safe?intcmp=pdt_sl_SAILSAFE (requiring all passengers and crew to be vaccinated, describing enhanced air filtration, enhanced cleaning, testing available on board, requiring face coverings in public indoor areas, and reducing capacity to enhance social distancing, among other things) (last visited April 22, 2021); Celebrity Cruises, “Healthy At Sea Protocols,” <https://www.celebritycruises.com/health-and-safety> (requiring all passengers and crew to be vaccinated, describing enhanced air filtration, enhanced cleaning, testing available on board, and reducing capacity to enhance social distancing, among other things) (last visited April 22, 2021).

Conditional Sailing Order considered by the CDC as “return to unrestricted passenger operations” and a continuation of the No Sail Order). Furthermore, as already demonstrated, the CDC has failed to take into account safety measures imposed by states and port communities, as they see fit, to protect their own citizens.¹⁹ Thus, a rote invocation of “public health” does not avail the CDC in these final factors, and this Court should find that an injunction is in the public interest.

CONCLUSION

For the foregoing reasons, as well as reasons stated by Florida in its motion, Alaska supports Florida’s request for a preliminary injunction.

¹⁹ See, e.g., Alaska Department of Health and Social Services, “Health Guidance for Alaska Travelers,” <http://dhss.alaska.gov/dph/Epi/id/Pages/COVID-19/travel.aspx> (last visited April 22, 2021); City and Borough of Juneau, “Travel to Juneau from Outside Alaska,” <https://juneau.org/covid-19/covid-19-travel> (last visited April 22, 2021); Municipality of Skagway, Resolution No. 21-07R (March 18, 2021) (available online at https://www.skagway.org/sites/default/files/fileattachments/administration/page/43911/res_21-07r_repealing_21-04r_and_20-44r_covid-19_testing_mandate.pdf). (removing testing requirements for travelers based in part on high levels of vaccination in the community and desire to attract visitors).

DATED: April 26, 2021.

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