

No. 21-12243

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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STATE OF FLORIDA,  
*Plaintiff-Appellee,*

v.

XAVIER BECERRA, SECRETARY OF HEALTH AND  
HUMAN SERVICES, *et al.*,  
  
*Defendants-Appellants.*

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On Appeal from the United States District Court for the  
Middle District of Florida (Hon. Steven D. Merryday)  
Case No. 8:21-cv-00839-SDM-AAS

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**BRIEF OF AMICUS CURIAE MARC S. YOUNG**  
**IN LIMITED SUPPORT OF X. BECERRA, ET AL**  
**IN OPPOSITION TO PRELIMINARY INJUNCTION**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned certifies that the following listed persons and entities, as described in Eleventh Circuit Rule 26.1-2(a) have an interest in the outcome of this case:

Alaska, State of

Alloway, Jessica M.

American Society of Travel Advisors

Becerra, Xavier

Beckenhauer, Eric

Florida, State of

Fuchs, Kimberly

Harrington, Sarah E.

Harrison, Lael A.

Harvey, Jr., David S.

Hilborn, Jason H.

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Kercher, Ryan G.

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Lobasso, Peter N.

Merryday, Honorable Steven D., U.S. District Court Judge

Office of the Attorney General of Alaska

Office of the Attorney General of Florida

Office of the Attorney General of Texas

Patel, Anita J.

Percival, II, James Hamilton

Porcelli, Anthony E.

Powell, Amy

Sansone, Honorable Amanda Arnold, U.S. Magistrate Judge

Schouest, Bamdas, Soshea & Ben Maier PLLC

Springer, Brian J.

Stockel, Eric J.

Texas, State of

U.S. Centers for Disease Control and Prevention

U.S. Department of Health and Human Services

United States of America

Varner, III, Joseph H.

Walensky, Rochelle

Wenger, Edward

Young, Marc Steven.

Also

Cooper, Jonathan, G.

Oceania Cruises S. De R.L., d/b/a Oceania Cruises

NCL (Bahamas) Ltd., d/b/a Norwegian Cruise Line

Norwegian Cruise Line Holdings Ltd (“NCLH”)

O’Sullivan, John F.

Quinn Emanuel Urquhart & Sullivan, LLP

Seven Seas Cruises S. De R.L., d/b/a Regent Seven Seas Cruises

Shaffer, Derek L.

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Respectfully submitted this 9<sup>th</sup> day of August 2021.

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**STATEMENT OF IDENTITY OF AMICUS**

*Amicus Curiae* Marc S. Young, P.E. (“*Amicus*”), is a licensed engineer in four states (Texas, Alaska, Louisiana and Arizona), with extensive experience working with offshore oil and gas and maritime related issues, both in the United States and abroad. A detailed description of his background is set forth in the Appendix.

Marc S. Young was an *Amicus* in the original District Court Case that is the basis for this appeal and is listed as an interested party. His interest is due to a former case filed in Federal District Court of South Texas, Houston, Division in June of 2020 and dismissed in September 2020 without prejudice due to agreed standing issue at the time that has since been resolved.

No counsel has authored this brief in part or in whole. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *Amicus*, contributed money that was intended to fund preparing or submitting this brief.

Pursuant to Fed. R. App. P. 29(a)(2), *Amicus* has consulted with the counsel for both Plaintiff-Appellee and Defendant-Appellant. The former while not agreeing with my analysis has responded with “consent to my filing an amicus brief” and the latter with “take no position and defers to the judgment of the Court” Therefore, neither have objected to *Amicus*’ request to file this brief.

## **STATEMENT OF THE ISSUES**

1. Whether the Federal District Court of Middle Florida (“District Court”) has erred in granting a preliminary injunction, and in doing so has ruled that the Center for Disease Control has exceeded their authority and not properly followed the required federal Administrative Procedures in making their Orders restricting the “free Pratique” for cruise ships. A Preliminary Injunction and Order which the Court ruled the State of Florida had standing to litigate in federal court.

2. Whether the Government’s No Sail Orders and Conditional Sail Orders raise significant concerns that they had shut down an entire industry and by doing so had caused sufficient damage to the State of Florida to justify a preliminary injunction that would make the CDC’s Orders a recommendation versus a mandate for all ships sailing from Florida Ports.

## **SUMMARY OF ARGUMENT**

*Amicus* originally appeared in this case to support of the State of Florida and the Preliminary Injunction and Denial of a Stay, offering research expertise and experience on four central issues. Namely, the CDC’s power to grant controlled free pratique is limited by international agreement. The regulations they are relying on, were put in place to implement those international health and prior agreements. The increasingly losses being experienced by not only the State of

Florida, but their citizens and citizens from other states that sail from Florida Ports.

Citizens who have their constitutional right to liberty to travel <sup>1</sup> being denied without due process and is further being denied as cruises are cancelled and the right to travel is not being fulfilled. The direct causation is because of the government's current No Sail and Conditional Sail orders. Liberty that would be threatened if the CDC is allowed to maintain their current Conditional Sail or No Sail Orders. Yet even with these arguments substantiated, when full consideration is made, there is a single constitutional point on which the District Court has erred. Its error is twofold. The Constitution demands the US government shows "*no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another State*"<sup>2</sup> <sup>3</sup>. Thus, the first error is that the Preliminary Injunction must apply to all ships in all U.S. Ports with respect to the Conditional Sail Order by the CDC being only a suggestion or guidance. The Second is that the ATRA on its face, which was passed as an Act of Congress, and signed into law by the President, is itself unconstitutional, since it singles out only the Alaska and Washington Ports and offends the same equality language mandated by the

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<sup>1</sup> See *Saenz v. Roe*, 526 U.S. 489 (1999) (internal citations omitted) cited by *Amicus Curiae* Brief by American Society of Travel Advisors on Page 17 (Case No. 8:21-cv-839-SDM-AAS Docket 42-1)

<sup>2</sup> Clause 6.1, Section 9, Article I, U.S. Constitution

<sup>3</sup> See Passenger Cases (*Smith v. Turner*), 48 U.S. (7 How.) 283, 437 (1849) (opinion of Justice Wayne) Pg 420 "That all should be-alike, in respect to commerce and navigation, *is an enjoined constitutional equality, which can neither be interrupted by Congress nor by the States.*"

Constitution.

*First*, the Federal Court of Middle Florida (“Court”) did not err in concluding that the Center for Disease Control grossly exceeded their authority in shutting down an entire industry versus the power they should have exerted. The District Court did not err in limiting the power to State and Local Control although the CDC is the National Focal Point for the International Health Regulations. Based on ratification exception for the IHR in 2007<sup>4</sup>, the *competent authority*<sup>5</sup> is delegated the power to inspect ships to ensure compliance with the sanitation provisions of those regulations. The sanitation provisions of the IHR are closely aligned with the statutory language and the interpretation by the District Court of that language.<sup>6</sup> On that basis, and that basis alone, if not assumed by the

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<sup>4</sup> Appendix 2 IHR Reservations and Understanding UNITED STATES OF AMERICA “*The Government of the United States of America reserves the right to assume obligations under these Regulations in a manner consistent with its fundamental principles of federalism. With respect to obligations concerning the development, strengthening, and maintenance of the core capacity requirements set forth in Annex 1, these Regulations shall be implemented by the Federal Government or the state governments, as appropriate and in accordance with our Constitution, to the extent that the implementation of these obligations comes under the legal jurisdiction of the Federal Government. To the extent that such obligations come under the legal jurisdiction of the state governments, the Federal Government shall bring such obligations with a favorable recommendation to the notice of the appropriate state authorities.*

<sup>5</sup> Per IHR Section 1 Definition: “*means an authority responsible for the implementation and application of health measures under these Regulations*”

<sup>6</sup> See second sentence of 42 U.S.C. 264(a) and Article 22 WHO International Health Regulations, discussed in the Amicus Curiae Brief Exhibit 3: *Analysis of the CDC “No Sail Orders” and “Conditional Sail Orders” and their allowed control of the affected Individual versus operator control of a conveyance during a*

state or local authorities, based on our form of federalism, is the CDC is allowed to limit the granting of free pratique to ships entering or leaving U.S. Ports<sup>7</sup>.

*Second*, the Fifth Amendment and lack of Due Process concerns presented by the Government's lack of appeal for impact of the government's orders by cruisers that are resulting in cancellation of many, if not most cruises, even today. The State of Florida has presented substantial evidence establishing, at a minimum, a *prima facie* case that government actions have resulted in loss of revenues due to these cancellations. But impact of these same cancellations are multiplied many times over when the impact of the cancellations are applied to the customers of the Cruise Lines. Mr. Young, in his *amicus curiae* brief that was accepted by the Court, details the refusal of the CDC to even consider the granting of permit to travel or to even consider an appeal to that refusal of a person impacted by their order(s). Clearly a denial of any form of due process.

*Thirdly*, the very reason for the *Amicus*'s original *Amicus Curiae* brief in the original District Court was premised on a July 2<sup>nd</sup> Cruise to Alaska. That cruise was cancelled by Royal Caribbean, even after the ATRA had been passed by Congress during the course of the District Court hearings. It is perceived that cancellation was due to the inability of the cruise line to fully comply with the CDC's Conditional Sail Order provisions, even in light of the ATRA waiver

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*national declared emergency by the CDC.*

<sup>7</sup> See *Amicus Curiae* Brief Exhibit 3 on Page 10 of the discussion on 42 CFR 71.31 (b) and 42 CFR 71.31 (b) and the definition of *public health prevention measures*.

although no factual basis was provided *Amicus* by the cruise line. And yet was the ATRA even constitutional?

## **ARGUMENT**

### **I. THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT APPEARS TO HAVE PROPERLY GIVEN CONSIDERATION TO THE INTERNATIONAL LAW RELATED TO THIS CASE.**

A. *Amicus* in *Amicus Curiae* brief, accepted by the Judge Merryday, (See Dkt 21-1 and 21-2 and Dkt 77 ) noted in Argument A of the brief, that the CDC's powers to act with respect to ships is very limited.<sup>8</sup> Even the CDC's Vessel Sanitation Program is a voluntary program and not a mandate.<sup>9</sup>

B. The consideration of "Other Measures" language becomes much less ambiguous when viewed through the lens of the IHR Article 43 as discussed in the Amicus Brief .<sup>10 11</sup>

C. The Argument B of the brief and the three examples provided, support the District Court's determination of the Arbitrary and Capricious nature of the CDC's Actions, as related to the International Law and Multinational Treaty obligation considerations.<sup>12</sup>

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<sup>8</sup> See; Pages 7-12 (Case 8:21-cv-00839-SDM-AAS Document 21-1 *Amicus* Brief )

<sup>9</sup> See; CDC's Vessel Sanitation Program Operations Manual 2020 (Authority)

<sup>10</sup> See; Pgs. 13-14&fn 13 (Case 8:21-cv-00839 Doc. 21-1 *Amicus* Brief )

<sup>11</sup> See; Pg. 7 (Case 8:21-cv-00839 Doc. 21-2 *Amicus* Brief Exhibit 3

<sup>12</sup> See; Pages 13-14 (Case 8:21-cv-00839 Doc. 21-1 *Amicus* Brief)

***II. THE DISTRICT COURT PROPERLY CONSIDERED EVIDENCE OF THE INCREASINGLY LOSSES OF REVENUES AND CANCELLATIONS FACED BY THE CRUISE INDUSTRY***

A. In addition to the evidence presented by the State of Florida, the *Amicus*, both as an individual and as part of a class of individuals, is suffering on a daily basis loss of time value for fully paid reservations made and subsequently cancelled that have yet to be repaid by the cruise lines<sup>13</sup>.

B. The State of Florida's loss of revenues for port fees and taxes, and unemployment paid, while significant, may be pale in comparison to these losses if allowed to continue for a class of customers of the cruise lines who have had reservations, some fully paid, since prior to the pandemic, and still not refunded.

C. Further the risk to losses due to potential bankruptcy filings if cruise lines are not allowed to fully reopen is a significant risk to both investors and creditors of many of the cruise lines. Many of these same cruise lines are headquartered in the State of Florida.

D. Though the State of Florida has tried to establish direct losses, there are many others who have a vested interest in the outcome of this appeal. The many impacts argued by this *Amicus* in his *Amicus Curiae* Brief have come to fruition.

***III. THE DISTRICT COURT PROPERLY CONSIDERED THE TIMELY NATURE OF THE STATE OF FLORIDA'S PETITION***

A. Some have questioned the ability of a change of the CDC Conditional

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<sup>13</sup> As of July 15, 2021, an outstanding balance for *Amicus* of \$2,516 was still owed for cancelled cruises. Over \$25,000 in total cruise reservations outstanding.

Sail Order from a mandatory order to a recommendation by the CDC and if it will act to further impede the restoration of sailing of cruise ships<sup>14</sup>. This is claimed to be an interference from state laws that are regulating the requirements for proof of vaccination by businesses in a particular state.

B. On the basis of the International Health Regulations, a consideration of WHO recommendations is required, and are detailed in Article 43 for “*Other Measures*” when adopted by Party States to the Agreement.<sup>15</sup> Footnote 12<sup>16</sup> of the *Amicus Curiae* Brief, details the latest recommendation with respect to vaccination.

C. The World Health Organization as of its Interim Position Paper on 5 February 2021 was not recommending proof of Covid-19 vaccination for international travel as a condition for departure or entry. The latest 2 July 2021 Guidance (although not considered applicable to cruise liners) is now advocating Proof of Vaccination should be allowed to avoid subsequent testing or quarantine upon international travel, but proof of vaccination for international travel as a condition for departure or entry is still not recommended.

D. What is a bit problematic for the case being developed by the fellow *Amicus*, NCHL in this case and in the federal District Court in Miami, is the simple

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<sup>14</sup> See Brief of *Amicus Curiae* NCLH, In Support of Appellants’ Motion for Stay Pending Appeal filed July 13 under a Motion for Leave to File... of same date in this case.

<sup>15</sup> See; Pages 7 (Case 8:21-cv-00839-SDM-AAS Doc. 21-1 *Amicus* Brief Exhibit 3)

<sup>16</sup> See; Pages 10 (Case 8:21-cv-00839-SDM-AAS Doc. 21-1 *Amicus* Brief )

fact that the CDC has never made a part of its Conditional Sail Order, a requirement for vaccination. It was simply an option that allowed a cruise line, as an alternative to having to sail a high cost test cruise to verify for the CDC their protocols worked.

E. It is supported by the regulations and the public health measures clearly delineated in the definition of 42 CFR 71.1 of “*Public health prevention measures* means the assessment of an individual through non-invasive procedures and other means, such as observation, questioning, review of travel documents, **records review**, and other non-invasive means, **to determine the individual's health status and potential public health risk to others.**” (Emphasis added). This is clearly the role of the local ports “Competent Authority” which can be delegated to the conveyance operator to collect under Annex 4 of the IHR.

F. It should be noted that the narrower order that the District Court allowed to have been submitted by July 2, 2021, by the CDC could have allowed for this narrow, IHR supported view of the **Public Health Prevention Measures** as what the CDC was allowed to “order”. Clearly this along with their power to isolate, quarantine and conditionally release those individuals that pose a risk to transmit a listed communicable disease is still within the power the CDC or the designated “Competent Authority” should and must retain, but must be exercised on a case-by-case basis, not a global industry wide basis.

G. The CDC by their actions of ignoring the provisions of the International

Health Regulations, has given rise to many of their partners in that multi-national agreement instituting their own set of “other measures” which is now plaguing the traveling public with an almost unintelligible maze of regulations, vaccination and quarantine requirements. The exact opposite of the intent of that agreement.

H. The CDC by its own regulations, self-professed statements in prior federal register filings on their Quarantine and Isolation Regulations and the International Health regulations is supposed to adopt the least restrictive method by which to try to control the spread of a communicable disease. Just complying with the articles of their international obligations under the IHR and insisting that other member nations do so as well should be the least restrictive method. Further the right to expand these requirements beyond this country’s own borders or coastal water limits should run afoul of numerous other international treaties and laws.

#### ***IV. THE DISTRICT COURT IMPROPERLY LIMITED THE INJUNCTION TO THE STATE OF FLORIDA***

Clause 6 of Section 9 of Article I of the U.S. Constitution explicitly states that “*No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; ....*”. Limiting the reach of the preliminary injunction to only Florida ports and allowing the CDC to only allow their orders to be guidance or suggestions at those ports yet allowing the CDC to fully enforce their Conditional Sail Order at other U.S. ports creates a conflict with the constitutional provisions of this section of the U.S. Constitution. Because the

government has interjected the ATRA into consideration in this case, the constitutionality issue is ripe for consideration and for the District Court to rule on.

### **CONCLUSION**

Plaintiff-Appellee presented sufficient evidence of standing and of the abuse by the CDC of its powers under the federal statutes, and its obligations under international law. However, the District Court's well-reasoned and lengthy preliminary injunction order is flawed in its final implementation. By limiting it to just Florida ports, the constitutional requirement for equality in port regulations is violated. This Court should remand the Injunction Order back to the District Court to remedy this inequality and order it for all US Ports, including Alaska's and Washington's. Further the ATRA is fatally flawed and unconstitutional if it allows different "commerce" regulations at Alaska & Washington ports versus other U.S. ports.

This Appeals Court should remand the case to the District Court for further consideration of a modified Preliminary Injunction structured to make the CDC Conditional Sail Order just guidance or a recommendation at ALL U.S. ports and ignores the ATRA, further ruling if the ATRA is *Per Se* invalid due to its own conflict with the No Port Preference clause.

Dated: August 9, 2021,

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,  
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This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced type-face using Microsoft Word for Microsoft 365 in 14 point Times New Roman.

DATED: August 9, 2021

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**CERTIFICATE OF SERVICE**

I certify that on August 9, 2021, I caused the foregoing brief to be filed and served electronically via the Court's ECF System.

DATED: August 9, 2021

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**APPENDIX:  
DESCRIPTIONS OF AMICUS CURIAE**

*Amicus Curiae Marc Steven Young, P.E.*, is a licensed chemical engineer in Texas, Oklahoma, Alaska, Arizona and Louisiana. He has over 40 years of experience which includes engineering projects internationally in such diverse places as London, Bergen, Abidjan, Bangkok, Jakarta. He has maritime project experience offshore Canada and the Offshore U.S., Offshore Brazil, Offshore West Africa. He has participated in task groups that developed and revised safety practices used in regulations for offshore and subsea facilities. He has been a facilities engineer for process plants and facilities in the Houston Ship Channel and Texas and Louisiana Gulf Coast area. He has also served as a senior and staff planning analyst for a major fortune 500 company's Interstate Pipeline Company with a major offshore presence.

Although retired as of 2015, he still provides consulting services both for plant process and facility engineering. Working as a consultant for attorney's he has developed reports for expert witness testimony. His experience with litigation, includes both in a support role, working with Attorneys to write contracts and agreements in as a business development representative and in support of legal during business litigation in the era of pipeline take or pay litigation. He has been in Pro Se roles in U.S. bankruptcy court as an unsecured creditor and served as a chairman of an unsecured creditors committee due to default by a litigant on a

judgement obtained.

As a farmer and a rancher, he has dealt with litigation issues related to property and easements. Issues with the U.S. Department of Agriculture and the NRCS. He has participated as a party in disputes over water rights and obtained grants to use of easements for access roads.

As a former county party official, state and federal office candidate, he has worked in both a party affiliation, and in legislative efforts to get rules, regulations and legislation both written, drafted, amended and voted upon.

Though not an attorney, he has tried to obtain counsel in every instance, take legal help when it is offered, but has not allowed the fact that many attorneys are just not willing to represent the small litigant to stop him from asserting his rights or privileges or sharing his perspective in cases that have a direct effect on him.