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November 8, 2022

VIA ECF
David J. Smith, Clerk
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303-6147

Re: *Norwegian Cruise Line Holdings Ltd, v. State Surgeon General*, No. 21-12729-BB

Dear Mr. Smith,

Plaintiffs-Appellees Norwegian Cruise Line Holdings Ltd., NCL (Bahamas) Ltd. ("Norwegian Cruise Line"), Seven Seas Cruises S. de R.L. LLC ("Regent Seven Seas Cruises"), and Oceania Cruises S. de R.L. ("Oceania Cruises") (together, "NCLH") respectfully submit this "supplemental letter brief[] on whether this appeal is moot." October 25, 2022 Order.

NCLH believes that this appeal is moot because NCLH no longer has any interest in its outcome. Following marked changes in the public-health landscape between the onset of the COVID-19 pandemic and now, NCLH no longer requires documentation of COVID-19 vaccination as a requirement to board its Florida cruises. Once NCLH stopped requiring such documentation, the parties ceased to have a live dispute regarding the constitutionality of Florida's ban on "requir[ing] patrons or customers to provide any documentation certifying COVID-19 vaccination." Fla. Stat. § 381.00316(1). Correspondingly, the parties ceased to have a live dispute over the preliminary injunction that is the sole subject of the appeal, for NCLH was no longer undertaking or contemplating conduct that could violate Florida's statute at issue and thus warrant,

even arguably, continuation of the preliminary injunction. Recognizing as much, NCLH alerted this Court as well as the district court to intervening developments that rendered moot any dispute over the preliminary injunction and called for lifting of the preliminary injunction irrespective of how the merits of this appeal might be resolved. Where, as here, an appeal of a preliminary ruling has fallen moot during the pendency of appeal, the appropriate course under this Court's precedent is to dismiss the appeal without resolving the merits.

I. Factual Background & Procedural History

On July 13, 2021, NCLH challenged Florida's statute prohibiting any business in the state from "requir[ing] patrons or customers to provide any documentation certifying COVID-19 vaccination." Fla. Stat. § 381.00316(1). NCLH maintained that Florida's statute would cause irreparable harm because vaccine documentation, ensuring that all passengers are vaccinated, was necessary in order for cruise ships to resume sailing safely and soundly at the time, particularly given health risks, recommended protocols, and the requirements of relevant foreign jurisdictions. After NCLH moved for a preliminary injunction, the district court preliminarily enjoined the Florida Surgeon General from enforcing Florida's prohibition on requiring vaccine documentation against NCLH. The express, essential premise of the district court's order granting the preliminary injunction was that "NCLH ha[d] adopted a policy requiring all passengers on its vessels to be fully vaccinated against COVID-19 and to provide documentation confirming their vaccination status before boarding," and that Florida's statute at issue "prevent[ed] them from implementing the vaccination policy for vessels departing from Florida." Dkt. 43 at 1–2.

The Defendant-Appellant Florida Surgeon General noticed an appeal from the preliminary injunction. The parties completed briefing and this Court heard oral argument on May 18, 2022; this appeal was then taken under submission.

On October 3, 2022, Norwegian Cruise Line announced that it had "updated its health and safety guidelines" to be "more aligned with other global travel organizations" in light of "the significant, positive progress in the public health environment."[1] In particular, Norwegian Cruise Line "remov[ed] all COVID-19 testing, masking and vaccination requirements" for its cruises, effective the following day, October 4.[2] In parallel, Oceania Cruises and Regent Seven Seas Cruises shifted to affording passengers the flexibility now to choose between presenting proof of vaccination or a negative COVID test.[3] As Norwegian Cruise Line has been advertising on its website, "[w]ith the relaxation of travel requirements around the world, [it is] thrilled to welcome all guests back on [its] ships to cruise freely to the places they've been dreaming of—regardless of vaccination status and with no testing requirements."[4]

On October 4, NCLH filed with this Court a Suggestion of Mootness reporting these developments and "respectfully suggest[ing] that this appeal is likely moot." Pls.'-Appellees' Suggestion of Mootness at 3 (Oct. 4, 2022). NCLH explained that "the Court's 'usual practice' [under such circumstances] is to 'dismiss[] moot appeals without vacating the underlying district court order.'" *Id.* (quoting *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1122 (11th Cir. 1995)). NCLH that same day also filed a parallel submission with the district court seeking an

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[1] Press Release, Norwegian Cruise Line, *Norwegian Cruise Line To Eliminate COVID-19 Testing, Masking and Vaccination Requirements Beginning Oct. 4, 2022* (Oct. 3, 2022), https://www.ncl.com/newsroom/norwegian-cruise-line-to-eliminate-covid-19-testing-masking-and-vaccination-requirements-beginning-oct-4-2022.

[2] *Id*.

[3] Oceania Cruises, *Sail Safe* (Oct. 12, 2022), https://www.oceaniacruises.com/sites/default/files/2022-10/sail-safe-programpdf-5.pdf; Regent Seven Seas Cruises, *Sail Safe Health and Safety Programs* (Sept. 13, 2022), https://www.rssc.com/HEALTHSAFETYPROTOCOLS.

[4] Norwegian Cruise Line, *Sail Safe*, https://www.ncl.com/sail-safe (Oct. 4, 2022); *see also id*. (Q: "Will all guests be required to be vaccinated prior to the cruise?" A: "Effective for sailings 10/4/22 and beyond, all guests regardless of vaccination status are able to sail and with no testing requirements. This does not supersede country specific requirements [link to travel requirements by country].").

indicative ruling, consistent with Federal Rule of Appellate Procedure 12.1 and Federal Rule of Civil Procedure 62.1, to the effect that the preliminary injunction should now be lifted. Dkt. 53.

Two days later, this Court issued an opinion vacating the preliminary injunction on the merits. Op. (Oct. 6, 2022). Neither the majority opinion nor the dissenting opinion addressed the issue of mootness. *Id.* On October 14, the district court denied NCLH's motion for an indicative ruling as moot, "[i]n light of the Eleventh Circuit's opinion." Dkt. 55.

II. Because NCLH No Longer Has Any Interest In the Outcome Of This Dispute, There Is No Case Or Controversy And This Appeal Is Moot.

This is an appeal from a preliminary injunction against a statute that prohibits a business practice NCLH is no longer engaging in, for now and for the foreseeable future. NCLH continues to recognize that it cannot claim relief from a statute that is not presently or foreseeably posing any injury to NCLH. It follows that this appeal has fallen moot.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "Mootness can occur due to a change in circumstances," *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328 (11th Cir. 2004), such as "by reason of intervening events," *Brooks*, 59 F.3d at 1119 (citations omitted). In light of the changed public health landscape, NCLH has ceased requiring vaccination against COVID-19 for its passengers or documentation of the same. Norwegian Cruise Line, for example, has made a public commitment that it is "thrilled to welcome all guests back . . . regardless of vaccination status." *See supra* n.4.

Courts across the country have recognized changed circumstances associated with dissipation of the COVID-19 pandemic and relaxation of institutional protocols that specially accounted for it. *See, e.g.*, *Thompson v. DeWine*, 7 F.4th 521, 526 (6th Cir. 2021), *cert. denied*, 212 L. Ed. 2d 236 (Mar. 7, 2022) (observing that "[a] once-in-a-lifetime global pandemic prompted

unprecedented stay-at-home orders . . . . But the situation today differs markedly from a year ago."); *Cty. of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021), *cert. denied sub nom. Butler Cty., Pa. v. Wolf*, 211 L. Ed. 2d 482 (Jan. 10, 2022) (recognizing that between March 2020 and August 2021, "circumstances changed. On the health front, society has learned more about how COVID-19 spreads and the efficacy of masks, therapeutics have been developed, and vaccines have been manufactured and distributed. In fact, more than 60% of Pennsylvanians have received a COVID vaccine.").

Much as NCLH did, this Court recently relaxed its own COVID-19 safety protocols "after consideration of the updated guidance from the Centers for Disease Control and Prevention ('CDC') and other local, regional, and national government officials regarding the COVID-19 pandemic." *See* General Order 54, United States Court of Appeals for the Eleventh Circuit (Sept. 8, 2022), *available at* https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder54.pdf (vacating General Order 53, which among other things, provided that "[a]ll court staff, on-site contractors, and visitors must verify their vaccination status prior to being allowed entry to court facilities").

That NCLH had, in the past, formerly required vaccination documentation does not confer permanent jurisdiction for courts to decide whether it can theoretically resume doing so under auspices of a preliminary injunction. Rather, dispute over the preliminary injunction fell moot once NCLH abandoned the policy and practice animating the preliminary injunction. "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). "[A] case becomes moot when events after its commencement 'create a situation in which the court can no longer give the plaintiff meaningful relief.'" *State of Fla. v. Dep't of Health & Hum. Servs.*, 19

F.4th 1271, 1280 (11th Cir. 2021) (quoting *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1308 (11th Cir. 2011)); *see also Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000). Such is the case here: The preliminary injunction affords no protection to NCLH because NCLH is no longer "implementing the vaccination policy for vessels departing from Florida" that Florida's law would "prevent[]" but the preliminary injunction would permit. Dkt. 43 at 2. Simply stated, NCLH has no reason or motive to violate Florida law irrespective of how this appeal might be resolved. Because NCLH was already complying with § 381.00316 of its own volition and in response to changed external realities, NCLH lost any interest in challenging its application to NCLH or invoking further protections of the preliminary injunction.[5]

This Court's "review must be in the light of [NCLH's] rule as it now stands, not as it stood when the judgment below was entered." *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978). Mootness has swept away many appeals during the pandemic. Courts have held appeals moot when the underlying challenged order or policy was rescinded in light of the changing public health landscape and lessening COVID-19 concerns. This has occurred most commonly where a litigant challenged an emergency order imposed by a state or local government that was subsequently rescinded or expired. *See, e.g.*, *Case v. Ivey*, No. 21-12276, 2022 WL 2441578, at *1 (11th Cir. July 5, 2022) ("Although they briefed the issue, plaintiffs conceded at oral argument that their

[5] In its response to NCLH's Suggestion of Mootness, the State gestured to Norwegian's statement that its revised policy "does not supersede country specific requirements." Response at 1 n.1. But no country-specific requirements have implicated any cruises departing from Florida, when NCLH filed its suggestion of mootness or since. Vanishingly few countries have continued to insist upon vaccination documentation, and none is visited by NCLH vessels departing from Florida. *See* Norwegian Cruise Line, *Travel Requirements by Country*, https://www.ncl.com/travel-requirements-by-country (listing countries with travel requirements such as vaccination, testing, or travel insurance).

claims for injunctive relief were rendered moot when the Governor rescinded the orders. *See* Oral Arg. at 1:35–1:40, 2:55–3:10."); *Johnson v. Governor of New Jersey*, No. 21-1795, 2022 WL 767035, at *3 (3d Cir. Mar. 14, 2022); *Reale v. Lamont*, No. 20-3707-CV, 2022 WL 175489, at *1 (2d Cir. Jan. 20, 2022); *Eden, LLC v. Just.*, 36 F.4th 166, 168 (4th Cir. 2022); *Resurrection Sch. v. Hertel*, 35 F.4th 524, 528 (6th Cir. 2022); *Cty. of Butler*, 8 F.4th at 231; *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 162 (4th Cir. 2021); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 843 F. App'x 707, 709 (6th Cir. 2021); *S. Wind Women's Ctr. LLC v. Stitt*, 823 F. App'x 677, 681 (10th Cir. 2020).

The same result has followed after private plaintiffs made decisions that mooted challenges to a COVID-19 policy. For example, in *DiMartile v. Cuomo*, 834 F. App'x 677, 678 (2d Cir. 2021), an engaged couple seeking to hold a wedding obtained a preliminary injunction against a New York regulation prohibiting large non-essential gatherings. When the couple's plans changed and they no longer sought to marry, however, the Second Circuit determined there was "no longer a 'Case' or 'Controversy' for purposes of Article III [of the Constitution]." *Id.* (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

While "well-established exceptions to the mootness doctrine" may preserve jurisdiction, *Brooks*, 59 F.3d at 1120–21, the requisite exceptional circumstances are absent here. Contrary to Florida's prior submission, the mere possibility that "a destination country requires [proof of vaccination]" in the future does not preserve a live controversy. Resp. to Pls.'-Appellees' Suggestion of Mootness, at 1 (Oct. 14, 2022). To begin, Florida itself emphasized that foreign jurisdictions had ceased requiring vaccination documentation from travelers in its Rule 28(j) letter to this Court. *See* Rule 28(j) letter (May 6, 2022). In the letter, Florida submitted that, because The Bahamas and the U.S. Virgin Islands no longer required vaccination documentation, "it would

not be 'whistling past ***today's realities***' to 'posit[ ] that testing could substitute for vaccine documentation.'" *Id*. at 1 (emphasis added) (quoting Pls.'-Appellees' Br. 44). In any event, it is indeed "today's realities," not tomorrow's theoretical possibilities, that determine mootness. "[A] speculative, abstract set of factual circumstances that may or may not come to pass . . . cannot keep the current appeal of the preliminary injunction ruling, tied as it is to the prior [circumstances], from being moot." *BankWest, Inc. v. Baker*, 446 F.3d 1358, 1367 (11th Cir. 2006).

Here, Florida not only fails to cite any foreign destinations that require proof of vaccination given "today's realities," but has denied that any destination answers to that description. Because the "speculative, abstract" possibility that a foreign jurisdiction may resume requiring proof of vaccination "may or may not come to pass," it "cannot keep the current appeal of the preliminary injunction ruling, tied as it is to the prior [circumstances], from being moot." *BankWest*, 446 F.3d at 1367.

Nor does the future prospect of a renewed pandemic bring into play the "capable of repetition yet evading review" exception to mootness. Again, there must be more than a theoretical possibility of the precipitating action recurring against the complaining party again; it must be a reasonable expectation or a demonstrated probability. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). A number of courts have well explained why no such expectation exists here. *See Eden, LLC*, 36 F.4th at 171 (stating that "whatever course the COVID-19 pandemic takes, a return to restrictions like those challenged here is highly unlikely" and collecting cases across circuits); *Cty. of Butler*, 8 F.4th at 231 ("Nor can we say that there is a reasonable expectation that the same complaining parties will be subject to the same orders again. Defendants have represented that the public health landscape has so fundamentally changed that 'what we were facing in this case is not what you would be facing going forward.'"). Nor do cases like this threaten to "evade review." To the

contrary, numerous, comparable challenges have been fully and finally resolved on their merits during the period in question; in this very case, Florida presumably could have accomplished the same result had it sought expedited treatment of its appeal, which it opted not to do.

The same reasons prevent application of the voluntary-cessation rule here. In short, "there is no reasonable expectation that the voluntarily ceased activity will, in fact, actually recur after the termination of the suit." *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004). NCLH seeks to welcome as many cruise passengers as it safely can; it has no intent to reinstate the vaccine documentation policy absent a renewed pandemic—a scenario that is speculative, remote, and not within the planning or expectations of NCLH (joined by countless other businesses).

In sum, no meaningful relief for NCLH is possible and the "threat of future harm" has "dissipated." *Adler v. Duval Cty. Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997). Any resolution of this dispute would be "solely about the meaning of a law, abstracted from any concrete actual or threatened harm." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

III. This Appeal Should Be Dismissed Without Vacating The District Court's Order.

In this posture, "[a]ny decision on the merits of a moot case would" ostensibly constitute "an impermissible advisory opinion." *Adler*, 112 F.3d at 1477; *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority to give opinions upon moot questions or abstract propositions.") (citation and quotation marks omitted). Accordingly, this Court is "divested of jurisdiction and must dismiss the appeal" without deciding the merits. *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993).

In appeals from a preliminary injunction such as this, the Court's "usual practice" is to "dismiss[] moot appeals without vacating the underlying district court order." *Brooks*, 59 F.3d at

1122 (citation omitted); *see Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 795 (11th Cir. 2020) (citing *Brooks* and declining request to "vacate the district court's prior order in this case implementing a preliminary injunction"). While permanent injunctions (reflecting final adjudication of the merits) present different circumstances that may warrant vacatur of the injunction, the preliminary injunction at issue here poses "no res judicata effect and the rationale of the *Munsingwear* doctrine thus is inapplicable." *Hand v. Desantis*, 946 F.3d 1272, 1275 n.5 (11th Cir. 2020) (quoting approvingly *F.T.C. v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977)).

For these reasons, NCLH respectfully reiterates its suggestion that the proper disposition of this appeal would be simply to dismiss it without vacating the district court's preliminary injunction.

Respectfully submitted,

/s/ Derek L. Shaffer
Derek L. Shaffer
Counsel for Plaintiffs-Appellees

cc: ECF Service List

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, undersigned counsel hereby certifies that Defendant-Appellant's certificate of interested persons is correct and complete.

Norwegian Cruise Line Holdings Ltd., a Bermuda company; NCL (Bahamas) Ltd., d/b/a Norwegian Cruise Line ("NCLB"), a Bermuda company; Oceania Cruises S. De R.L., d/b/a Oceania Cruises ("Oceania"), a Panama limited liability company; and Seven Seas Cruises S. De R.L., d/b/a Regent Seven Seas Cruises ("Regent Seven Seas"), a Panama limited liability company, file the following corporate disclosure statement:

1. Norwegian Cruise Line Holdings Ltd. is publicly traded on the New York Stock Exchange under ticker symbol "NCLH." There are no parent corporations or publicly-held corporations that hold ten percent or more of Norwegian Cruise Line Holdings Ltd.'s stock.
2. NCLB is a wholly-owned subsidiary of NCL International, Ltd., a Bermuda company, which in turn is a wholly-owned subsidiary of Arrasas Limited, an Isle of Man company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd. ("NCLC"), a Bermuda company, which in turn is a wholly-owned subsidiary of Norwegian Cruise Line Holdings Ltd.
3. Oceania is a subsidiary of Prestige Cruise Holdings S. de R.L. (99.99%) ("Prestige Cruises Holdings"), and Prestige Cruises International S. de R.L. (0.01%) ("Prestige Cruises International"), each a Panama limited liability company. Prestige Cruise Holdings is a subsidiary of Prestige Cruises International (99.99%) and NCLC (0.01%). Prestige Cruises

International is a subsidiary of NCLC (99.99%) and Norwegian Cruise Line Holdings Ltd. (0.01%). NCLC is a wholly-owned subsidiary of Norwegian Cruise Line Holdings Ltd.

4. Regent Seven Seas is a subsidiary of Classic Cruises, LLC, a Delaware limited liability company ("Classic Cruises") and Classic Cruises II, LLC, a Delaware limited liability company ("Classic Cruises II"), each of which hold a 50% interest in Regent Seven Seas. Classic Cruises and Classic Cruises II are in turn wholly-owned subsidiaries of Prestige Cruise Holdings. Prestige Cruise Holdings is a subsidiary of Prestige Cruises International (99.99%) and NCLC (0.01%). Prestige Cruises International is a subsidiary of NCLC (99.99%) and Norwegian Cruise Line Holdings Ltd. (0.01%). NCLC is a wholly-owned subsidiary of Norwegian Cruise Line Holdings Ltd.