Cooper & Kirk
Lawyers
A Professional Limited Liability Company

Charles J. Cooper
(202) 220-9660
ccooper@cooperkirk.com

1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036

(202) 220-9600
Fax (202) 220-9601

November 22, 2022

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

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

Dear Mr. Smith:

Norwegian filed this case to prevent Florida from enforcing against Norwegian the State's law prohibiting businesses from "requir[ing] patrons or customers to provide any documentation certifying COVID-19 vaccination . . . to gain access to, entry upon, or service from the business operations in this state." FLA. STAT. § 381.00316(1). Norwegian obtained a preliminary injunction in the district court and defended that injunction in this Court against the State's appeal. Now, however, Norwegian represents that, effective October 4, 2022, it has "remov[ed] all COVID-19 testing, masking and vaccination requirements" for its cruises. Norwegian's Letter Brief at 3 (Nov. 8, 2022) ("Letter"). Norwegian argues that this change in policy has mooted Florida's appeal because the preliminary injunction prohibits Florida from enforcing "a statute that prohibits a business practice [Norwegian] is no longer engaging in, for now and for the foreseeable future." *Id.* at 4. Norwegian originally raised these arguments in its October 4 "Suggestion of Mootness." This Court issued a published opinion vacating the district court's preliminary injunction on October 6. The Court should maintain its opinion and vacate the district court's judgment on the merits, not on the basis of mootness, because this appeal is still live.

First, Norwegian has not *disclaimed* its vaccination policy but merely *halted* it. Indeed, Norwegian appears still to require COVID-19 vaccination documentation in certain circumstances,

even if not currently for cruises departing from Florida. Second, the voluntary cessation exception to mootness applies. Norwegian's voluntary alteration of its policy does not deprive Florida of its challenge to the preliminary injunction. Accordingly, this appeal is not moot. Should the Court conclude otherwise, it should vacate the district court's order granting the preliminary injunction.

ARGUMENT

"[B]ecause a case or controversy must exist throughout all stages of litigation," this Court "must ensure—up until the moment [the] mandate issues—that intervening events have not mooted the appeal by preventing [the Court] from granting any effectual relief whatever in favor of the appellant." *Vital Pharms., Inc. v. Alfieri*, 23 F.4th 1282, 1288 (11th Cir. 2022) (cleaned up). A case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *BankWest, Inc. v. Baker*, 446 F.3d 1358, 1364 (11th Cir. 2006) (internal quotation marks and citation omitted). The burden of persuading the Court that an appeal is moot lies with the party claiming mootness. *See, e.g.*, *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The burden is a "heavy one." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *see also Bennett v. Jefferson County*, 899 F.3d 1240, 1245 (11th Cir. 2018).

I. This Appeal Is Not Moot.

A. Norwegian Has Not Entirely Rescinded Its Vaccination Documentation Policy.

Norwegian represents that, as of October 4, 2022, it has removed "all COVID-19 testing, masking and vaccination requirements" for its cruises. Letter at 3. Norwegian argues, therefore, that this appeal is moot because the preliminary injunction enjoins Florida from enforcing a statute that prohibits conduct that Norwegian no longer engages in and because Norwegian "cannot claim relief from a statute that is not presently or foreseeably posing any injury" to it. *Id.* at 4.

Nevertheless, Norwegian has not satisfied its heavy burden to establish that the appeal is moot on the basis of rescinding its vaccination policy.

First, Norwegian does not represent that it has abolished its policy forevermore. Instead, Norwegian states that it is not requiring its customers to present documentation certifying COVID-19 vaccination "for now and for the foreseeable future." *Id.* This representation gives no assurances that Norwegian will not reimplement the policy with full force. *See, e.g.*, *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983) ("The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness."). Norwegian's steadfast insistence that Florida's law is unconstitutional is further reason to suspect that Norwegian may seek to resume its policy should it deem circumstances to demand it. *See, e.g.*, *ACLU v. Fla. Bar*, 999 F.2d 1486, 1494–95 (11th Cir. 1993) (no mootness when defendant reasonably might exercise its "discretion to change its policy" back and it continued to assert the old policy's validity); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 833–34 (11th Cir. 1989) (no mootness when defendants "never promised not to resume the prior practice" and "continue[d] to press on appeal that the voluntarily ceased conduct should be declared constitutional").

Second, Norwegian's removal of COVID-19 testing, masking and vaccination requirements for its cruises is not categorical. According to the FAQs on Norwegian's website, although "all guests regardless of vaccination status are able to sail and with no testing requirements," this policy "does not supersede country specific requirements."[1] On the "Travel Requirements by Country" page, Norwegian further explains that "[g]uests may be denied boarding if all country specific requirements are not met."[2] Consequently, it appears that even

[1] *Will all guests be required to be vaccinated prior to the cruise?*, NORWEGIAN CRUISE LINE, https://bit.ly/3MBdFKP (last visited Nov. 22, 2022).

[2] *Travel Requirements By Country*, NORWEGIAN CRUISE LINE, https://bit.ly/3rVR95X (last

having "removed" its policy, Norwegian *will* deny service to customers who decline to or are unable to present documentation certifying COVID-19 vaccination in certain circumstances. Even if there are no such circumstances present on cruises from Florida today,[3] should they arise it is clear from Norwegian's statements that it would seek to require vaccination documentation from customers departing from Florida ports. Accordingly, Norwegian has not satisfied its heavy burden to convince this Court that this appeal is moot and that this Court lacks jurisdiction.

B. Norwegian, As The Prevailing Party In The District Court, Cannot Voluntarily Rescind Its Offending Policy To Moot This Appeal.

"Voluntary cessation" is an "exception to the general rule that a case is mooted by the end of the offending behavior" at issue. *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1282 (11th Cir. 2004). "[V]oluntary cessation of allegedly illegal conduct does not . . . make the case moot." *Id.* at 1283 (internal quotation marks and citation omitted). "The basis for the voluntary-cessation exception is the commonsense concern that a defendant might willingly change its behavior in the hope of avoiding a lawsuit but then, having done so, return to its old ways." *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1267 (11th Cir. 2020) (cleaned up). Accordingly, "the voluntary cessation of challenged conduct will only moot a claim when there is no reasonable expectation that the accused litigant will resume the conduct." *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents*, 633 F.3d 1297, 1309 (11th Cir. 2011) (internal quotation marks and citation omitted).

Although voluntary cessation is often applied where a defendant has voluntarily changed

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visited Nov. 22, 2022).

[3] Norwegian complains that Florida has "fail[ed] to cite any foreign destinations that require proof of vaccination." Letter at 8. But Norwegian itself acknowledges, on its website, that unvaccinated customers *will be unable to cruise* on ships destined for at least two countries: Australia and Fiji. Although Norwegian does not appear to have cruises scheduled to depart from Florida that will visit Australia or Fiji, Australia's and Fiji's country-specific requirements demonstrate that Norwegian will still deny service to customers who do not provide documentation certifying COVID-19 vaccination in certain circumstances.

its conduct, courts have applied the doctrine in situations where a *plaintiff* has done so as well. The logic behind doing so in an appeal such as this one is plain. On appeal from entry of an injunction, the posture of the parties essentially flips—the defendant is challenging the judgment entered by the district court, and the plaintiff is defending it. *See Hollingsworth v. Perry*, 570 U.S. 693, 704–05 (2013). It follows that the plaintiff's conduct in this type of appeal implicates the voluntary cessation doctrine.

The Supreme Court's decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), illustrates how the voluntary cessation doctrine applies in this context. Pap's challenged the constitutionality of a City of Erie ordinance and obtained a permanent injunction from the Pennsylvania Supreme Court. *Id.* at 283–86. Shortly after Erie successfully petitioned the U.S. Supreme Court for certiorari, Pap's filed a motion to dismiss the case as moot, noting that the business at issue was no longer operating as a nude dancing club and that Pap's was not operating a nude dancing club at any other location. *Id.* at 287.

The Supreme Court denied the motion, concluding that the case was not moot. The Court determined that, although "this [was] not a run of the mill voluntary cessation case," because it was the "plaintiff who, having prevailed below, now seeks to have the case declared moot," *id.* at 288, the case was not moot because Pap's could "again decide to operate a nude dancing establishment in Erie," *id.* at 287. As Justice Scalia's opinion concurring in the judgment highlighted, the majority reached this conclusion despite the facts that the nude dancing business no longer existed, the building in which it was located had been sold to a real estate developer, the premises were being used for an unrelated comedy club, and Pap's sole shareholder—who was 72 years old—swore in an affidavit that he had no current interest in any establishment providing nude dancing and no intention to own or operate a nude dancing establishment in the future. *Id.* at

302 (Scalia, J., concurring in the judgment). The Court further determined that "[t]he city ha[d] an ongoing injury because it [was] barred from enforcing the public nudity provisions of its ordinance." *Id.* at 288 (majority op.). "If the challenged ordinance [was] found constitutional, then Erie c[ould] enforce it, and the availability of such relief [was] sufficient to prevent the case from being moot." *Id.* "And Pap's still ha[d] a concrete stake in the outcome of this case because, to the extent Pap's ha[d] an interest in resuming operations, it ha[d] an interest in preserving the judgment of the Pennsylvania Supreme Court." *Id.* The Court further noted that its "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsel[ed] against a finding of mootness." *Id.*

Applying these principles here, Norwegian has failed to meet its "heavy" and "formidable" burden to establish that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1355–56 (11th Cir. 2019) (emphasis added). First, under *City of Erie*, it is clear that this appeal is not moot because of Norwegian's voluntary cessation of its vaccination policy. The Supreme Court concluded in *City of Erie* that the appeal was not moot despite the petitioner having ceased operating his business, sold the property, and swore in a declaration that he had no intention to own or operate a similar business in the future. The same result should obtain here, where Norwegian has not even entirely rescinded its policy and could, consistent with its representations to the Court, reimplement it in full force tomorrow were the facts on the ground to change.

Second, Norwegian has never conceded the validity of Florida's law. *See, e.g.*, *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1187 (11th Cir. 2007). Indeed, in arguing that this appeal is moot, Norwegian asserts only that it has "abandoned the policy and practice animating the preliminary injunction," Letter at 5, and Norwegian previously asserted that the preliminary

injunction "ha[d] served its purpose and need not persist," Suggestion of Mootness ¶ 6 (Oct. 4, 2022)—hardly admissions that Florida's law is likely constitutional. Furthermore, Florida continues to have an ongoing injury because, if the preliminary injunction were not vacated, it is being barred from enforcing § 381.00316 against Norwegian even though this Court has determined that the law is likely constitutional. *See, e.g.*, *City of Erie*, 529 U.S. at 288. And although the preliminary injunction *should* be vacated if the appeal is moot for the reasons we argue below, Norwegian argues that it *should not* be.

Norwegian argues that Florida's statute is "not presently . . . posing any injury" to it because it has rescinded its vaccination documentation policy. Letter at 4. But Norwegian cannot rely on the principle that a case becomes moot where a challenged policy no longer applies to the challenging party. Norwegian's case is unlike cases where courts have concluded that an appeal of a grant or denial of a preliminary injunction was moot because the policy at issue in the case no longer applied to the challengers. *See, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 317–19 (1974) (determining that challenge to law school admission policy was moot because challenger had enrolled in the law school and was set to graduate and would not be subject to the law school's admission process ever again); *Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1477–78 (11th Cir. 1997) (concluding that high school students' challenge to school system's policy was moot because the students had graduated and "there [was] no reasonable expectation that they will be subjected to the same injury again"); *McKinnon v. Talladega County*, 745 F.2d 1360, 1363 (11th Cir. 1984) (explaining that prisoner's transfer or release from a jail moots his claim for injunctive relief with respect to that jail). Florida's law continues to apply to Norwegian, even if it has changed the vaccination documentation policy that was in place throughout this litigation. There is nothing in the preliminary injunction that limits its scope to prevent Florida from enforcing its

law against only the iteration of the vaccination documentation policy in effect when the preliminary injunction was issued. *See Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1180 (S.D. Fla. 2021) ("Defendant is **ENJOINED** from enforcing Section 381.00316 against Plaintiffs pending resolution of the merits of this case."). Therefore, the controversy at the heart of this appeal is not moot.

This case is also unlike *BankWest*. There, the plaintiff banks sued Georgia officials seeking a declaration that provisions of a Georgia statute essentially prohibiting certain types of short-term loans were unconstitutional and an injunction against the enforcement of the law. 446 F.3d at 1361–62. The district court denied plaintiffs' motion for a preliminary injunction, and the plaintiff appealed. While the case was being briefed at the en banc stage, Georgia informed the court that the plaintiffs had ceased to make the type of short-term loans at issue and also withdrew from certain servicing agreements that were the subject of the preliminary injunction ruling because of regulatory actions of the Federal Deposit Insurance Corporation. *Id.* This Court determined that the appeal of the preliminary injunction ruling was moot. Because the plaintiffs had "abandoned their servicing agreements" and were "no longer in a position to offer, or resume offering, the payday loans that were the subject of the preliminary injunction ruling," they "no longer ha[d] a legally cognizable interest in obtaining an injunction against enforcement of the [law]." *Id.* at 1364. By contrast, here, although Norwegian has *altered* its vaccination documentation policy, it has not *abandoned* it. Norwegian is certainly in a position to "resume" enforcing the policy—indeed, it appears that Norwegian does still enforce the policy based on a destination country's travel requirements, even if currently no destinations traveled to from Florida have such a requirement.

What is more, *BankWest* was not a voluntary cessation case. In *BankWest*, the plaintiff lost in the district court and therefore was attacking, and not defending, the district court's ruling.

Therefore, voluntary cessation principles, which place a heavy burden on the allegedly mooting party to establish mootness, did not apply.

II. Even If This Appeal Is Moot, This Court Should Vacate The District Court's Order Granting The Preliminary Injunction.

If this Court does conclude that Florida's appeal is moot, the Court should vacate the district court's order granting Norwegian's motion for a preliminary injunction. "When an issue becomes moot on appeal, [this Court] not only dismiss[es] as to the mooted issue, but also vacate[s] the portion of the district court's order that addresses it." *United States v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1223, 1229 (11th Cir. 2015) (internal quotation marks and citation omitted). The Court "vacate[s] the moot part of the order because a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness to be forced to acquiesce in the judgment." *Id.* at 1230 (internal quotation marks and citation omitted). Thus, in *Secretary, Florida Department of Corrections*, this Court dismissed Florida's appeal from an expired preliminary injunction as moot but vacated the district court's orders entering and clarifying the preliminary injunction because of that mootness. *Id.*

Norwegian maintains that this Court's "usual practice" is to "dismiss[ ] moot appeals without vacating the underlying district court order." Letter at 9–10 (citing *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114 (11th Cir. 1995); *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790 (11th Cir. 2020)). This practice, however, is inapposite here.

First, *Brooks* was not itself a case involving an appeal of a preliminary injunction, so the facts of that case do not directly support the holding with respect to vacating preliminary injunction orders on appeal. *Brooks* instead involved the appeal of an interlocutory order, generally.

Second, the case that *Brooks* relied on for the proposition that this Court does not vacate preliminary injunction orders when the appeal is moot involved a preliminary injunction that by

its own terms had expired. *See Tropicana Prods. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1582 (11th Cir. 1989); *see also Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1258 (11th Cir. 2001). Here, the preliminary injunction would not be expiring "on its own terms." Instead, Norwegian has voluntarily altered its policy, so Norwegian's argument is instead merely that the preliminary injunction no longer has any effect, *not* that it has expired.

Third, this Court has not *always* followed the purportedly "usual practice" of dismissing the appeal without vacating the underlying preliminary injunction order. In *Dow Jones & Co.*, this Court dismissed as moot an appeal of a preliminary injunction and vacated the district court's order. 256 F.3d at 1258–59. And in *United States v. Georgia*, 778 F.3d 1202, 1203–05 (11th Cir. 2015), plaintiffs challenging a Georgia election law obtained a preliminary injunction in the district court, but after the parties had filed their appellate briefs, Georgia enacted a new statute. This Court dismissed the appeal as moot and vacated the district court's judgment. *Id.* at 1205.

Fourth, this case is particularly well-suited to vacatur. "One clear example where vacatur is in order is when mootness occurs through . . . the unilateral action of the party who prevailed in the lower court" because "[i]t would be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of that judgment." *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (cleaned up).

CONCLUSION

This Court should hold this appeal is not moot. In the alternative, it should vacate the district court's order granting Norwegian's motion for a preliminary injunction.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Counsel for Defendant-Appellant

cc: ECF Service List

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant certifies that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

1. Arrasas Ltd., an Isle of Man company, *Parent of NCL International, Ltd.*
2. Bergstrom, William V., *Attorney for Defendant/Appellant*
3. Burck, William A., *Attorney for Plaintiffs/Appellees*
4. Classic Cruises, LLC, *Parent of Seven Seas Cruises S. DE R.L. LLC*
5. Classic Cruises II, *Parent of Seven Seas Cruises S. DE R.L. LLC*
6. Cooper & Kirk, PLLC, *Attorneys for Defendant/Appellant*
7. Cooper, Charles J., *Attorney for Defendant/Appellant*
8. Cooper, Jonathan G., *Attorney for Plaintiffs/Appellees*
9. Del Rio, Frank J., *Declarant*
10. Ladapo, M.D., Ph. D., Joseph A., in his official capacity as State Surgeon General and Head of the Florida Department of Health, *Defendant/Appellant*
11. Laitamaki, Dr. Jukka, *Declarant*
12. Lander, Mark S., *Declarant*
13. Masterman, Joseph O., *Attorney for Defendant/Appellant*
14. NCL (Bahamas) Ltd., *Plaintiff/Appellee*
15. NCL Corporation Ltd., a Bermuda company, *Parent of Arrasas Ltd.*
16. NCL International, Ltd., a Bermuda company, *Parent of NCL (Bahamas) Ltd.*
17. Norwegian Cruise Line Holdings Ltd. (traded on the New York Stock Exchange under ticker symbol NCLH), *Plaintiff/Appellee*
18. O'Sullivan, John F., *Attorney for Plaintiffs/Appellees*

19. Oceania Cruises S. De R.L., *Plaintiff/Appellee*

20. Ostroff, Dr. Stephen, *Declarant*

21. Patterson, Peter A., *Attorney for Defendant/Appellant*

22. Prestige Cruise Holdings S. de R.L., a Panama limited liability company, *Parent of Oceania Cruises S. De R.L.*

23. Prestige Cruises International S. de R.L., a Panama limited liability company, *Parent of Oceania Cruises S. De R.L.*

24. Quinn Emanuel Urquhart & Sullivan, LLP, *Attorneys for Plaintiffs/Appellees*

25. Seven Seas Cruises S. DE R.L. LLC, *Plaintiff/Appellee*

26. Shaffer, Derek L., *Attorney for Plaintiffs/Appellees*

27. Treadwell, Raymond Frederick, *Attorney for Defendant/Appellant*

28. Varone, Nicholas A., *Attorney for Defendant/Appellant*

29. Vieira, Olga M., *Attorney for Plaintiffs/Appellees*

30. Williams, Judge Kathleen M., *District Court Judge*

Apart from the entities listed above, no publicly traded company or corporation has an interest in the outcome of this case or appeal.