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## Maritime Magic: How Cruise Lines Can Avoid State Law Compliance Through Passenger Contracts

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# Maritime Magic: How Cruise Lines Can Avoid State Law Compliance Through Passenger Contracts

CAMERON CHUBACK\*

*Florida Statutes section 381.00316 prohibits businesses in Florida from requiring consumers to provide documentary proof of COVID-19 vaccination to access businesses' goods and services. Norwegian Cruise Line Holdings ("NCLH") has recently challenged section 381.00316's applicability to its cruise operations because NCLH believes that requiring its passengers to provide documentary proof of COVID-19 vaccination is the one constant that allows NCLH's cruise ships to smoothly access foreign ports, which have differing COVID-19 protocols and rules. In Norwegian Cruise Line Holdings, Ltd. v. Rivkees, the United States District Court for the Southern District of Florida ruled in favor of NCLH on this challenge, stating that section 381.00316 violated NCLH's First Amendment rights and the dormant Commerce Clause of the U.S. Constitution. This decision is now on appeal in the United States Court of Appeals for the Eleventh Circuit.*

*This Comment argues that NCLH could have brought another claim to deflect section 381.00316's applicability to NCLH's cruise operations: a claim of admiralty jurisdiction. A claim of admiralty jurisdiction would have likely led the court to determine that NCLH's passenger ticket contract, which contains provisions that require passengers to provide documentary proof of COVID-19 vaccination before*

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*boarding NCLH's ships, is a maritime contract that is subject only to federal maritime law and not Florida state law. Thus, section 381.00316 cannot prohibit NCLH's requirement of passengers' documentary proof of COVID-19 vaccination. This Comment discusses the value of bringing an admiralty jurisdiction claim in this context, and highlights how businesses that create and enter maritime contracts, particularly other cruise lines conducting cruises out of Florida, can take advantage of an admiralty jurisdiction claim to avoid compliance with state laws that burden their operations.*

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## INTRODUCTION

Many businesses have altered their operations in an effort to function optimally in a world that has still not fully emerged from the COVID-19 pandemic.<sup>1</sup> One such business is Norwegian Cruise Line Holdings, Ltd. (“NCLH”), the parent company of the famous Norwegian Cruise Line, whose cruise ships travel to destinations all over the world.<sup>2</sup> With government restrictions on the cruise industry easing in recent times,<sup>3</sup> NCLH, recognizing the unique risks in viral transmission aboard cruise ships, amended its passenger ticket contract to require all passengers to show proof of COVID-19 vaccination before boarding its ships.<sup>4</sup> This operational alteration was meant to facilitate smooth access to global ports and to ensure that NCLH’s cruises were maximally safe for passengers, crew, and the communities where NCLH’s ships visit.<sup>5</sup>

However, Florida Statutes section 381.00316, has thrown a legal wrench in NCLH’s plan for fully vaccinated cruises.<sup>6</sup> The statute prohibits all businesses operating in Florida from requiring consumers to show proof of COVID-19 vaccination to access businesses’ goods or services.<sup>7</sup> On its face, this statute appears to prohibit NCLH from requiring its passengers to show proof of COVID-19 vaccination before boarding its ships.<sup>8</sup> To challenge this prohibition, NCLH sued the Surgeon General of Florida in *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*,<sup>9</sup> now on appeal in the Eleventh Circuit,<sup>10</sup>

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<sup>1</sup> Sharon Stang, *Impact of the Coronavirus Pandemic on Businesses and Employees by Industry*, U.S. BUREAU OF LABOR STATISTICS (Jul. 2021), <https://www.bls.gov/spotlight/2021/impact-of-the-coronavirus-pandemic-on-businesses-and-employees-by-industry/home.htm>.

<sup>2</sup> *About*, NORWEGIAN CRUISE LINE HOLDINGS LTD., <https://www.nclh.com/about> (last visited Jan. 1, 2022).

<sup>3</sup> *See infra* notes 28–44.

<sup>4</sup> *See infra* notes 20, 46.

<sup>5</sup> *See infra* notes 46, 82.

<sup>6</sup> *See Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1148 (S.D. Fla. 2021), *appeal docketed*, No. 21-12729 (11th Cir. Aug. 11, 2021).

<sup>7</sup> FLA. STAT. § 381.00316(1) (2021).

<sup>8</sup> *See Rivkees*, 553 F. Supp. 3d at 1148.

<sup>9</sup> *Id.* at 1147–48.

<sup>10</sup> Civil Appeal Statement, *Norwegian Cruise Line Holdings, Ltd. v. State Surgeon Gen.*, No. 21-12729 (11th Cir. Aug. 11, 2021).

to enjoin section 381.00316's governance of NCLH's vaccine documentation requirement.<sup>11</sup> Judge Williams of the Southern District of Florida agreed with NCLH's mostly constitutional claims and consequently enjoined section 381.00316's governance of NCLH's vaccine documentation requirement.<sup>12</sup>

One claim notably absent from NCLH's complaint and Judge Williams' order was a claim of admiralty jurisdiction.<sup>13</sup> NCLH's requirement of proof of COVID-19 vaccination was embodied in its passenger contracts,<sup>14</sup> which are maritime contracts.<sup>15</sup> Because federal law, and not state law, generally governs maritime contracts,<sup>16</sup> NCLH could have asserted admiralty jurisdiction and on that basis enforced the contract, which in effect would have exempted NCLH from section 381.00316's prohibition on requiring proof of COVID-19 vaccination.<sup>17</sup>

Part I of this Comment provides background information on *Rivkees*, including the series of events that led to NCLH's complaint and the claims NCLH made. Part I also summarizes the law concerning the most pertinent question following an admiralty jurisdiction claim in a case involving a maritime contract: whether federal maritime law or state law governs the maritime contract. Part II analyzes whether NCLH could have won on an admiralty jurisdiction claim. Part II also compares an admiralty jurisdiction claim with a dormant Commerce Clause claim, a functionally similar claim that

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<sup>11</sup> See *infra* note 53.

<sup>12</sup> See *infra* notes 87, 120.

<sup>13</sup> See *infra* note 201. The opening paragraph of Section II.A defines "admiralty jurisdiction claim" as used in this Comment. See *infra* Section II.A. Also, this Comment uses the terms "admiralty" and "maritime" interchangeably to refer to the body of law "that covers all contracts, torts, injuries or offenses that take place on navigable waters." See *Balaschak v. Royal Caribbean Cruises, Ltd.*, No. 09-21196-CIV, 2009 WL 8659594, at \*2 n.4 (S.D. Fla. Sept. 14, 2009) (citing 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-1 (4th ed. 2004)); see also *What Is Admiralty Law?*, FINDLAW, <https://www.findlaw.com/hirealawyer/choosing-the-right-lawyer/admiralty-law.html> (last updated Oct. 8, 2020).

<sup>14</sup> See *infra* note 121.

<sup>15</sup> See *infra* note 205.

<sup>16</sup> See *infra* note 125.

<sup>17</sup> See *infra* Section II.A.

NCLH successfully brought,<sup>18</sup> and analyzes whether bringing an admiralty jurisdiction claim is worthwhile given the similarity between the two claims.

## I. BACKGROUND

### A. *Origins of Rivkees*

In March 2020, businesses began to shut down all around the world as a result of the COVID-19 pandemic.<sup>19</sup> Cruise lines were no exception, especially because of the unique environment aboard cruise ships: close quarters for living, dining, and entertainment, generally indoors, facilitates much person-to-person contact and thereby creates a heightened risk of viral transmission.<sup>20</sup> Outbreaks of COVID-19 on cruises that set sail at the beginning of the pandemic showed the realization of this risk.<sup>21</sup> On the *Diamond Princess*, 712 of the 3,711 people onboard were infected with COVID-19, and nine people died.<sup>22</sup> During two voyages of the *Grand Princess*, 159 people were infected with COVID-19, and eight people died.<sup>23</sup>

Acknowledging the increased risk of COVID-19 outbreak aboard their ships, “NCLH and other members of the Cruise Line International Association (‘CLIA’) voluntarily suspended all cruise ship operations for thirty days.”<sup>24</sup> The Centers for Disease Control and Prevention (“CDC”) began regulating the cruise industry at this point as well.<sup>25</sup> The CDC’s first cruise-related regulation was its No Sail Order (“NSO”) issued on March 24, 2020,<sup>26</sup> “which prohibited cruise ship operators from continuing operations unless approved by

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<sup>18</sup> See *infra* Section II.B.

<sup>19</sup> See *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1148 (S.D. Fla. 2021), *appeal docketed*, No. 21-12729 (11th Cir. Aug. 11, 2021).

<sup>20</sup> See *id.* at 1151 (citing No Sail Order and Suspension of Further Embarkation, 85 Fed. Reg. 16628, 16629–30 (Mar. 24, 2020) [hereinafter *No Sail Order*]).

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *No Sail Order*, *supra* note 20.

the U.S. Coast Guard in consultation with the CDC.”<sup>27</sup> After the NSO expired on October 31, 2020, the CDC issued its Conditional Sailing Order (“CSO”) on November 4, 2020,<sup>28</sup> “which established a four-step framework for a phased resumption of cruise ship passenger operations.”<sup>29</sup> Criticism of the CSO’s framework arose because it “lacked sufficient implementing instructions” and was burdensome, which increased the likelihood that cruise ships would not sail in 2021.<sup>30</sup> The most burdensome step of the CSO framework was the second step: “performing simulated voyages designed to test a cruise ship operators’ [sic] ability to mitigate COVID-19 on cruise ships.”<sup>31</sup> To try to alleviate the burden for the cruise lines, the CDC stated, in a “Dear Colleague” letter on April 28, 2021 and a set of technical instructions issued on May 14, 2021, that instead of performing simulated voyages, cruise lines could satisfy step two of the CSO framework by attesting that ninety-five percent of crew and passengers were vaccinated for COVID-19 (“Attestation Method”).<sup>32</sup> The CDC subsequently issued an operation manual on May 26, 2021, “setting forth mandatory COVID-19 protocols for simulated and restricted passenger voyages,” and “more lenient, alternative operational possibilities for ships with” at least ninety-five percent of crew and passengers vaccinated.<sup>33</sup>

Nevertheless, Florida determined that the CSO framework, especially its second step, “would delay the reopening of the cruise industry,”<sup>34</sup> which would have the effect of “crippling the industry and causing the state to lose hundreds of millions of dollars.”<sup>35</sup> Florida consequently sued the CDC in the Middle District of Florida in

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<sup>27</sup> *Rivkees*, F. Supp. 3d at 1151.

<sup>28</sup> Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew, 85 Fed. Reg. 70153 (Nov. 4, 2020).

<sup>29</sup> *Rivkees*, F. Supp. 3d at 1151 (internal quotation marks omitted).

<sup>30</sup> *See id.* at 1152.

<sup>31</sup> *See id.* at 1151 (internal quotation marks omitted).

<sup>32</sup> *Id.* at 1152.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Michael Levenson, *Judge Blocks C.D.C. from Enforcing Virus Rules for Cruise Ships in Florida*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2021/06/18/us/cdc-covid-cruises.html>.



*State v. Becerra*,<sup>36</sup> “seeking to strike down the CSO and its subsequent instructions.”<sup>37</sup> The Middle District of Florida granted a preliminary injunction prohibiting the CDC from enforcing the CSO and its subsequent instructions on cruise lines operating cruises in Florida.<sup>38</sup> The Middle District of Florida’s support for its preliminary injunction included the following: (1) Florida was likely to prevail on the merits of its claim that the CSO and its subsequent instructions “exceed the authority delegated to [the] CDC under [United States Code, Title 42,] Section 264(a);”<sup>39</sup> (2) Florida would suffer irreparable harm in the form of continued lost state revenue from the lack of cruise operations in Florida or even potential abandonment of Florida’s ports by the cruise lines as a result of the continued imposition of the CSO and its subsequent instructions;<sup>40</sup> (3) “COVID-19 no longer threatens the public’s health to the same extent presented at the start of the pandemic or when [the] CDC issued the [CSO]” as to justify the continued imposition of the CSO and its subsequent instructions;<sup>41</sup> and (4) it is in the public interest of Florida for Florida’s local economy to be healthy, which requires a healthy cruise industry—something that cannot be achieved with continued imposition of the CSO and its subsequent instructions.<sup>42</sup> Moreover, the Middle District of Florida ordered that the CSO be stayed in Florida until July 18, 2021, at which point the CSO and its subsequent instructions would become “non-binding” guidelines.<sup>43</sup> The Eleventh Circuit later denied the CDC’s request for a stay of the injunction pending resolution of its appeal of the district court’s order.<sup>44</sup>

Despite the Middle District of Florida’s ruling, all cruise lines operating in Florida have agreed to voluntarily continue following

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<sup>36</sup> 544 F. Supp. 3d 1241 (M.D. Fla. 2021), *appeal dismissed sub nom.* *State v. Dep’t of Health and Hum. Servs.*, No. 21-12243 (11th Cir. Jan. 19, 2022).

<sup>37</sup> *See Rivkees*, 553 F. Supp. 3d at 1152.

<sup>38</sup> *Id.*; *Becerra*, 544 F. Supp. 3d at 1304–05.

<sup>39</sup> *Becerra*, 544 F. Supp. 3d at 1304–05.

<sup>40</sup> *See id.* at 1299–1305.

<sup>41</sup> *See id.* at 1303–04.

<sup>42</sup> *See id.* at 1304 (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (“The effect on the health of the local economy is a proper consideration in the public interest analysis.”)).

<sup>43</sup> *Rivkees*, 553 F. Supp. 3d at 1152.

<sup>44</sup> *Id.* at 1152–53.

the CSO and its subsequent instructions.<sup>45</sup> Indeed, NCLH implemented a policy of requiring 100% of crew and passengers to be vaccinated for COVID-19, and all passengers must show proof of such vaccination before boarding.<sup>46</sup> This policy was intended “to prevent a COVID-19 outbreak onboard, build brand trust and goodwill with customers, ensure compliance with the attestation [NCLH] submitted to the CDC, and take advantage of the leniency afforded cruise ships with 95 percent vaccinated passengers and crew under the CDC’s Operation Manual.”<sup>47</sup>

However, Florida Statutes section 381.00316, enacted on July 1, 2021,<sup>48</sup> essentially impeded NCLH’s plan for fully vaccinated cruises. Section 381.00316 states:

A business entity, as defined in s. 768.38 to include any business operating in this state, may not require patrons or customers to provide any documentation certifying COVID-19 vaccination or postinfection recovery to gain access to, entry upon, or service from the business operations in this state. This subsection does not otherwise restrict businesses from instituting screening protocols consistent with authoritative or controlling government-issued guidance to protect public health.<sup>49</sup>

Put simply, section 381.00316 prohibits businesses from requiring patrons to provide proof of COVID-19 vaccination to access businesses’ goods and services.<sup>50</sup> Furthermore, section 381.00316 punishes businesses for each violation with a fine of up to \$5,000.<sup>51</sup> This statute, on its face, prohibits NCLH’s plan for fully vaccinated cruises, which NCLH claimed would seriously harm its interstate

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<sup>45</sup> *Id.* at 1153.

<sup>46</sup> *Id.* at 1154.

<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> FLA. STAT. § 381.00316(1) (2021).

<sup>50</sup> *See id.*

<sup>51</sup> FLA. STAT. § 381.00316(4) (2021).

and foreign cruise operations amid the ongoing COVID-19 pandemic.<sup>52</sup> Therefore, on July 13, 2021, NCLH sued Dr. Scott Rivkees, the Surgeon General of Florida and the head of the Florida Department of Health, in the Southern District of Florida seeking to enjoin section 381.00316's applicability to NCLH's proof of COVID-19 vaccination requirement.<sup>53</sup>

### B. Rivkees: *Claims, Defenses, and Rulings*

NCLH's complaint in *Rivkees* asked for declaratory and injunctive relief against the Surgeon General of Florida so that section 381.00316 could not be enforced against NCLH.<sup>54</sup> NCLH made four claims in favor of its request for injunction: (1) federal preemption, (2) violation of First Amendment free speech, (3) violation of the dormant Commerce Clause, and (4) violation of Fourteenth Amendment substantive due process.<sup>55</sup> The dormant Commerce Clause claim will be discussed last and in the most detail because it greatly resembles an admiralty jurisdiction claim, the centerpiece of this Comment's analysis.<sup>56</sup>

#### 1. FEDERAL PREEMPTION CLAIM

In its federal preemption claim, NCLH asserted that the CDC's CSO, technical instructions, and operation manual were all federal regulations that the CDC created pursuant to its regulatory authority

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<sup>52</sup> Complaint at 16–17, *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 2021 WL 2945834 (S.D. Fla. July 13, 2021) (No. 1:21-cv-22492) [hereinafter *Complaint*].

<sup>53</sup> *See Rivkees*, 553 F. Supp. 3d at 1147–48. NCLH sued Dr. Rivkees because “[a]s Surgeon General, [he] is the head of the Florida Department of Health, which is responsible for enforcing the relevant provisions of Florida Statute § 381.00316.” *See Complaint*, *supra* note 52, at 3 (internal citations omitted).

<sup>54</sup> *Complaint*, *supra* note 52, at 1, 19.

<sup>55</sup> *Id.* at 2. This Comment's discussion of the federal preemption and substantive due process claims do not include Dr. Rivkees' defenses thereto. This is because the source of the court filings used for this Comment, Bloomberg Law, did not make Dr. Rivkees' answer to the complaint freely available. Any information on Dr. Rivkees' defenses discussed in this Comment is derived from the district court order.

<sup>56</sup> *See infra* Section II.B.

under 42 U.S.C. § 264.<sup>57</sup> These regulations centered around the CSO's requirement that a cruise line pursuing satisfaction of step two of the CSO framework under the Attestation Method verify that at least ninety-five percent of crew and passengers are fully vaccinated for COVID-19.<sup>58</sup> NCLH claimed that "[o]btaining vaccine documentation is the only adequate and reliable way of verifying" that at least ninety-five percent of crew and passengers are vaccinated.<sup>59</sup> Because section 381.00316 prohibits such requirement of proof of COVID-19 vaccination and thereby conflicts with the CDC regulations, NCLH claimed that the CDC regulations preempted section 381.00316 under 42 U.S.C. § 264(e).<sup>60</sup> The district court order did not address the merits of the federal preemption claim because NCLH was likely to succeed on the merits of its First Amendment free speech and dormant Commerce Clause claims,<sup>61</sup> which the district court addressed extensively.<sup>62</sup>

## 2. FIRST AMENDMENT FREE SPEECH CLAIM

In its First Amendment claim, NCLH asserted that section 381.00316 presents a content-based, speaker-based, and listener-based restriction on the transmission of health-related information between businesses and their customers.<sup>63</sup> Because COVID-19 vaccination documentation is health-related, NCLH claimed that any state restriction on such speech must pass "strict scrutiny or some other form of heightened scrutiny."<sup>64</sup> NCLH claimed that section 381.00316 neither advances a "sufficiently important governmental

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<sup>57</sup> Complaint, *supra* note 52, at 13–14. *See generally* 42 U.S.C. § 264(a) (providing that the United States Surgeon General is authorized to make and enforce regulations designed to stop the spread of communicable diseases).

<sup>58</sup> *See* Complaint, *supra* note 52, at 13–14.

<sup>59</sup> *Id.* at 14.

<sup>60</sup> *Id.* at 13–14. *See generally* 42 U.S.C. § 264(e) (stating that regulations made under 42 U.S.C. § 264 preempt state law "to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title.>").

<sup>61</sup> *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1178 (S.D. Fla. 2021), *appeal docketed*, No. 21-12729 (11th Cir. Aug. 11, 2021).

<sup>62</sup> *See id.* at 1156–78 (reviewing NCLH's First Amendment and dormant Commerce Clause claims).

<sup>63</sup> Complaint, *supra* note 52, at 15. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

<sup>64</sup> Complaint, *supra* note 52, at 15.

interest” in prohibiting transmission of what NCLH called “potentially life-saving information about [passengers’] vaccination status,” nor is section 381.00316 “adequately tailored to any such interest.”<sup>65</sup> Therefore, NCLH claimed section 381.00316 infringes its First Amendment right to free speech.<sup>66</sup>

Dr. Rivkees made two primary arguments to defend against NCLH’s First Amendment claim. The first was that section 381.00316 does not regulate speech at all but is merely an economic regulation that does not implicate the First Amendment.<sup>67</sup> Dr. Rivkees claimed that section 381.00316 “only prohibits business-related conduct: the act of conditioning service on customers providing documentation certifying COVID-19 vaccination.”<sup>68</sup> In other words, Dr. Rivkees argued that section 381.00316 does not implicate the First Amendment “because it only affects what businesses cannot *do* . . . not what they may or may not say.”<sup>69</sup>

The district court disagreed with Dr. Rivkees’ first argument.<sup>70</sup> The district court first stated that “dissemination of information [is] speech within the meaning of the First Amendment.”<sup>71</sup> Accordingly,

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Rivkees*, 553 F. Supp. 3d at 1159.

<sup>68</sup> *Id.* (internal quotation marks omitted).

<sup>69</sup> *Id.* (internal quotation marks omitted).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1158 (alteration in original) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011)). *Sorrell* involved two consolidated lawsuits, one brought by three Vermont data miners and one brought by an association of pharmaceutical manufacturers that made brand-name drugs. *Sorrell*, 564 U.S. at 561. In these lawsuits, the plaintiffs contended that a Vermont statute restricted speech in violation of the First Amendment. The statute “restrict[ed] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors.” *Id.* at 557. Additionally, “[s]ubject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers.” *Id.* The U.S. Supreme Court held that the statute presented a content-based and speaker-based restriction on speech because the statute disfavored marketing (i.e., speech with a particular content) as well as pharmaceutical manufacturers and detailers who conduct marketing for pharmaceutical manufacturers (i.e., particular speakers). *See id.* at 563–64. Moreover, the statute was not merely a commercial regulation because its restrictions were “directed at certain content and [were] aimed at particular speakers.” *See id.* at 566–67. Therefore, heightened judicial scrutiny applied, which requires that, to

transmission of COVID-19 vaccination documentation between a consumer and a business constitutes dissemination of information and thereby speech.<sup>72</sup> The Court next stated that section 381.00316 is “a content-based restriction [of speech] because it singles out documentation regarding a particular subject matter (certification of COVID-19 vaccination or post-infection recovery) and subjects it to restrictions (business may not require them for entry or services) that do not apply to documents regarding other topics” (e.g., documentation of negative COVID-19 test result).<sup>73</sup> Furthermore, the district court was not persuaded that section 381.00316 is merely an economic regulation.<sup>74</sup> The district court stated that an economic regulation does not abridge First Amendment free speech if speech is affected merely incidentally, but a statute has more than an incidental effect on speech if it “is specifically directed at certain content.”<sup>75</sup> Accordingly, the district court held that section 381.00316 does not merely incidentally affect speech because it directly “singles out and disfavors only . . . documentary proof of COVID-19 vaccination.”<sup>76</sup> In sum, the district court rejected Dr. Rivkees’ argument that section 381.00316 is merely an economic regulation that does not implicate the First Amendment.<sup>77</sup>

Dr. Rivkees’ second defense against NCLH’s First Amendment claim was that if section 381.00316 does regulate speech, it regulates commercial speech, which is subject only to the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission of*

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be constitutional, the statute “directly advance[] a substantial governmental interest and that the measure [be] drawn to achieve that interest.” *See id.* at 572. The Court held that the regulation failed to withstand heightened scrutiny and thereby violated the First Amendment because the burdens that the statute imposed on speech impermissibly outweighed Vermont’s proffered interests of protection of medical privacy and achievement of the policy objectives of improved public health and reduced healthcare costs. *See id.* at 571–79.

<sup>72</sup> *See Rivkees*, 553 F. Supp. 3d at 1159.

<sup>73</sup> *Id.* at 1157 (internal quotation marks omitted).

<sup>74</sup> *Id.* at 1159.

<sup>75</sup> *See id.* at 1160–61 (quoting *Sorrell*, 564 U.S. at 567) (internal quotation marks omitted).

<sup>76</sup> *Id.* at 1160.

<sup>77</sup> *See id.* at 1158–62.

*New York*,<sup>78</sup> “a less rigorous form of intermediate scrutiny.”<sup>79</sup> *Central Hudson* gave a four-part test for determining whether a restriction on commercial speech comports with the First Amendment:

[A] restriction on commercial speech is valid under the First Amendment if: (1) the speech is not misleading and does not concern unlawful activity, (2) the government has a substantial interest in restricting the speech, (3) the regulation directly advances the asserted government interest, and (4) the regulation is not more extensive than is necessary to serve that interest.<sup>80</sup>

The district court in *Rivkees* explained that Dr. Rivkees’ commercial speech defense was dead on arrival: the speech that section 381.00316 restricts is not commercial because it “does not relate

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<sup>78</sup> 447 U.S. 557 (1980). *Central Hudson* involved a constitutional challenge by an electric utility company, Central Hudson Gas & Electric Corp. (“Central Hudson”) to a regulation made by New York’s Public Service Commission (“Commission”) that prohibited promotional advertising by an electrical utility on the ground that the regulation restricted commercial speech in violation of the First Amendment. *See id.* at 558, 560. The U.S. Supreme Court applied a four-part test for determining whether the regulation’s restriction of commercial speech was constitutional. *See infra* note 80. Under this test, the Court held that, although the regulation directly advanced New York’s substantial interest in energy conservation, the Commission failed to show that the regulation was not more extensive than necessary to serve that interest. *See Central Hudson*, 447 U.S. at 568–71. Firstly, the ban on any promotional advertising by an electrical utility would prevent the advertising of more energy-efficient products and services, which supports, not undermines, New York’s substantial interest in energy conservation. *See id.* at 570. Secondly, “[t]o further its policy of conservation, the Commission could [have] attempt[ed] to restrict the format and content of Central Hudson’s advertising,” such as “requir[ing] that the advertisement include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future.” *Id.* at 570–71. Because the Commission failed to show that the regulation was not more extensive than necessary to serve New York’s interest in energy conservation, the Court held that the Commission’s regulation restricted commercial speech in violation of the First Amendment. *See id.* at 571.

<sup>79</sup> *See Rivkees*, 553 F. Supp. 3d at 1163.

<sup>80</sup> *See id.* (internal quotation marks omitted); *see also Central Hudson*, 447 U.S. at 566.

solely to an economic interest.”<sup>81</sup> Indeed, NCLH showed that it had non-economic justifications for requiring COVID-19 vaccination documentation, such as “prevent[ing] a COVID-19 outbreak aboard its ships and [in] the communities where it travels.”<sup>82</sup> Additionally, “unlike advertising and marketing,” COVID-19 vaccination documentation does not propose a commercial transaction.<sup>83</sup> The district court went on to say that even if commercial speech were at issue here, section 381.00316 fails the *Central Hudson* test because Dr. Rivkees failed to show (1) that Florida “has a substantial interest in restricting” the transmission of COVID-19 vaccination documentation,<sup>84</sup> (2) that section 381.00316 directly advances Florida’s proffered interests of “protecting the medical privacy of its citizens” and “avoiding discrimination [against unvaccinated Florida residents] through balkanization of the marketplace,”<sup>85</sup> and (3) that section 381.00316 is not more extensive than necessary to serve those interests.<sup>86</sup> In sum, the district court held that section 381.00316 does not restrict commercial speech, and even if it did, it fails the *Central Hudson* test. For the foregoing reasons, the district court ruled that NCLH was likely to succeed on the merits of its First Amendment claim.<sup>87</sup>

### 3. FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIM

In its Fourteenth Amendment substantive due process claim, NCLH claimed that section 381.00316 “violates the fundamental

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<sup>81</sup> See *Rivkees*, 553 F. Supp. 3d at 1163 (internal quotation marks omitted) (quoting *Dana’s R.R. Supply v. Att’y Gen., Fla.*, 807 F.3d 1235, 1246 (11th Cir. 2015) (“Commercial speech is a narrow category of necessarily expressive communication that is related solely to the economic interests of the speaker and its audience, or that does no more than propose a commercial transaction.” (internal quotation marks omitted)) (quoting *Central Hudson*, 447 U.S. at 561 and *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976))).

<sup>82</sup> *Rivkees*, 553 F. Supp. 3d at 1163.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1164–65.

<sup>85</sup> *Id.* at 1164–68 (internal quotation marks omitted).

<sup>86</sup> See *id.* at 1168. It is noteworthy that, according to the district court, Dr. Rivkees failed to show the three enumerated items above because he presented “no evidence” for these items. See *id.* at 1164–68.

<sup>87</sup> *Id.* at 1169.



due process rights of NCLH, its crew, and its passengers to make well-informed medical decisions affecting oneself and to exercise autonomy over one's body."<sup>88</sup> NCLH claimed that section 381.00316 also "prevent[ed] NCLH and its employees from supporting themselves via their chosen occupation, which likewise implicates a fundamental due process right."<sup>89</sup> NCLH stated that strict scrutiny applied to the due process claim because fundamental rights were being affected.<sup>90</sup> NCLH again argued that section 381.00316 fails rational basis review, let alone strict scrutiny; therefore, it violates Fourteenth Amendment substantive due process.<sup>91</sup> The district court order did not mention NCLH's due process claim.<sup>92</sup>

#### 4. DORMANT COMMERCE CLAUSE CLAIM

NCLH claimed that section 381.00316 violates the dormant Commerce Clause of the U.S. Constitution because section 381.00316's prohibition on requiring proof of COVID-19 vaccination from consumers would disrupt or even terminate NCLH's interstate and foreign cruise operations coming out of Florida.<sup>93</sup> The district court described the dormant Commerce Clause as follows:

While the Commerce Clause expressly grants Congress the power to regulate interstate commerce, "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." The dormant Commerce Clause "prevents a [s]tate from 'jeopardizing the

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<sup>88</sup> Complaint, *supra* note 52, at 18 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (listing several substantive due process rights related to the body, such as the right to bodily integrity and the right to abortion)).

<sup>89</sup> *Id.* (citing *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 920 (W.D. Pa. 2020) ("[T]he right of citizens to support themselves by engaging in a chosen occupation is deeply rooted in our nation's legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth Amendment.")).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See generally *Rivkees*, 553 F. Supp. 3d at 1147–80.

<sup>93</sup> Complaint, *supra* note 52, at 16.

welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear."<sup>94</sup>

In other words, the dormant Commerce Clause "limits the authority of states to enact laws that [directly or] indirectly affect—that substantially burden—interstate commerce."<sup>95</sup> NCLH planned on requiring 100% vaccinated cruises not only to comply with the CSO and its subsequent instructions, but also to effectuate the smoothest and possibly the only practicable way of operating its interstate and foreign cruises.<sup>96</sup> Accordingly, NCLH claimed that section 381.00316's ban on requiring COVID-19 vaccination documentation would impede NCLH's ability to operate its cruises to and from other states and countries as planned, which would result in a massive impairment or even destruction of the interstate and foreign commerce that NCLH creates out of Florida.<sup>97</sup>

When determining the constitutionality of a law under the dormant Commerce Clause, courts use a two-tiered analysis.<sup>98</sup> The first tier of the analysis concerns "whether the law or regulation at issue directly regulates or discriminates against interstate commerce, or has the effect of favoring in-state economic interests."<sup>99</sup> If the law does express such direct economic regulation, it is automatically held invalid unless the state shows that the law advances a legitimate local purpose and a reasonable nondiscriminatory alternative is unavailable to serve such purpose.<sup>100</sup> In this case, the district court determined that the first tier of the analysis did not apply

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<sup>94</sup> *Rivkees*, 553 F. Supp. 3d at 1169 (alteration in original) (citations omitted) (citing *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1243 (11th Cir. 2012) and *Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005)).

<sup>95</sup> *Id.*

<sup>96</sup> *See id.* at 1154, 1174–75.

<sup>97</sup> *See* Complaint, *supra* note 52, at 17.

<sup>98</sup> *Rivkees*, 553 F. Supp. 3d at 1169 (citing *Fla. Transp. Servs., Inc.*, 703 F.3d at 1243).

<sup>99</sup> *Id.* (alteration omitted).

<sup>100</sup> *Id.*

because section 381.00316 “does not *directly* regulate, or affirmatively discriminate against, interstate commerce.”<sup>101</sup>

Because the first tier of the analysis did not apply to section 381.00316, the district court proceeded to the second tier of the analysis, which it described as follows: “if a state’s facially nondiscriminatory law advances a legitimate local interest and has only indirect effects on interstate commerce, courts apply the balancing test from *Pike v. Bruce Church, Inc.*,<sup>102</sup> and invalidate the law only if the burden on interstate commerce *clearly exceeds* the local benefits to the state.”<sup>103</sup> Additionally, the *Pike* test requires courts to “consider whether states could have implemented alternatives that impose smaller, less substantial burdens on interstate commerce.”<sup>104</sup> The district court stated that in his response to NCLH’s dormant Commerce Clause claim, Dr. Rivkees failed to assert any local interest “that justifies [section 381.00316’s] alleged burdens on interstate commerce,” a fact that the district court said in itself makes section

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<sup>101</sup> *Id.* at 1169–70 (emphasis added).

<sup>102</sup> 397 U.S. 137 (1970). *Pike* involved a lawsuit brought by Bruce Church, Inc., a commercial farming company, against Loren J. Pike, the official charged with enforcing the Arizona Fruit and Vegetable Standardization Act, claiming that an order the Pike made pursuant to his enforcement authority under the Act unconstitutionally burdened interstate commerce. *See id.* at 138. To determine the order’s constitutionality, the U.S. Supreme Court applied a test that (1) balanced local state interests and the burdens on interstate commerce to determine whether the burdens on interstate commerce clearly exceeded the local benefits, and (2) inquired as to whether the local state interests “could be promoted . . . with a lesser impact on interstate activities.” *See id.* at 142; *infra* notes 93–94. The Court held that, although Arizona had a legitimate state interest in “protect[ing] and enhanc[ing] the reputation of growers within the State,” the burden it imposed on Bruce Church—the requirement of building and operating an unnecessary and expensive packing plant in Arizona—clearly exceeded Arizona’s local benefits from the order. *See Pike*, 397 U.S. at 143–45. Therefore, the Court held the order unconstitutional. *See id.* at 145.

<sup>103</sup> *Rivkees*, 553 F. Supp. 3d at 1170 (internal citations omitted) (alterations omitted) (emphasis added). The district court elaborated that under *Pike*, “incidental” effects can manifest the “indirect effects” mentioned in the *Pike* test. *See id.*

<sup>104</sup> *Id.* at 1171.

381.00316 fail the *Pike* test.<sup>105</sup> However, the district court referenced Dr. Rivkees' response to NCLH's First Amendment claim to presume that Florida's putative local interests that justify burdening interstate commerce were "protecting the medical privacy of its citizens" and "avoiding discrimination [against unvaccinated Florida residents] through balkanization of the marketplace."<sup>106</sup> The district court said that not only did Dr. Rivkees fail to cite any "relevant authority to support his claim that these objectives constitute legitimate state interests," but he also propounded these interests without explaining "why they are legitimate [state interests] or how they weigh against any burdens that [section 381.00316] imposes on interstate commerce."<sup>107</sup> The district court saw this as problematic because "[Dr. Rivkees'] mere assertion of protecting medical privacy and preventing 'discriminating' against unvaccinated persons, *without more*, fail[ed] to satisfy the dictates of *Pike* and its progeny."<sup>108</sup>

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<sup>105</sup> *Id.* It is worth noting that Dr. Rivkees provided only a three-paragraph response to NCLH's dormant Commerce Clause claim. *Id.* As this Comment discusses, Dr. Rivkees' short, seemingly scant response seems to have contributed greatly to the district court ruling in NCLH's favor on this claim.

<sup>106</sup> *See id.* at 1164, 1171.

<sup>107</sup> *Id.* at 1171.

<sup>108</sup> *See id.* The district court cited multiple cases, including *Pike*, to support this proposition. *Rivkees* and *Pike* both involved nondiscriminatory laws, which justified *Rivkees*' use of the *Pike* test to determine whether section 381.00316 violates the dormant Commerce Clause. *See supra* note 101; *Pike*, 397 U.S. at 142 (applying a test for laws that "regulate[] even-handedly"). The other cases that the district court cited involved discriminatory laws. *See Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008); *Bainbridge v. Turner*, 311 F.3d 1104, 1114 (11th Cir. 2002). In line with the two-tiered analysis approach to dormant Commerce Clause claims, different tests for constitutionality under the dormant Commerce Clause exist for discriminatory and nondiscriminatory laws, respectively. *See supra* note 98–103; *Island Spice*, 542 F.3d at 846. *Pike* did not expressly mention whether the state has the burden of showing something "more" than just asserting an allegedly legitimate state interest—such as showing why its state interests are legitimate and how these interests weigh against the burdens on interstate commerce—as the district court in *Rivkees* suggested. *See Pike*, 397 U.S. at 142–46; *Rivkees*, 553 F. Supp. 3d at 1171. The other cases that the district court cited indicated that the state does have this burden, at least to the extent of showing why its state interests are legitimate. *See Island Spice*, 542 F.3d at 847 ("In general, preserving a small town community is a legitimate purpose . . . , in this instance, Islamorada has not demonstrated that it has any small town character to preserve."); *Bainbridge*, 311 F.3d at 1114 ("This does not mean, however, that

For these reasons, the district court indicated that NCLH was likely to succeed on the merits that section 381.00316 fails the *Pike* test.<sup>109</sup>

Conversely, NCLH made a strong showing for why section 381.00316 “imposes substantial burdens on interstate commerce that will directly affect [NCLH’s] abilities to operate” its cruises.<sup>110</sup> Every country and port that NCLH intended to sail to had “varying, often complicated requirements” regarding COVID-19.<sup>111</sup> Thus, NCLH contended that without requiring COVID-19 vaccination documentation from its passengers, it would be forced to “re-route around Florida or else go through tortured, costly, time-consuming, damaging contortions in order to go to or from Florida relative to other ports, none of which have any such [b]an [on proof of COVID-19 vaccination documentation] and many of which require proof of vaccinations.”<sup>112</sup> Dr. Rivkees contended that NCLH could in fact comply with the COVID-19 requirements of the different ports by engaging in testing and quarantining of passengers.<sup>113</sup> The district

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the State can prevail without *evidence* . . . we find it inadequate the State’s proffered concerns of protecting minors and ensuring orderly markets.” (emphasis in original)). Even though *Pike* and the other cases could be seen as distinguishable because *Pike* involved a nondiscriminatory law and the other cases involved discriminatory laws, it is more likely than not that regardless of whether the law is discriminatory the state has the burden of showing something “more” than just asserting an allegedly legitimate state interest. *See* *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 353 (1977) (“When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”) (citing *Pike*, 397 U.S. at 142, which gives the test for determining the constitutionality of nondiscriminatory laws under the dormant Commerce Clause); *Island Spice*, 542 F.3d at 847 (citing *Hunt*’s test to support its assertion that “[t]he burden is on Islamorada to justify the ordinance’s discriminatory effects.”); *Bainbridge*, 311 F.3d at 1109 (citing *Hunt*’s test). Even if the state does not have this burden under *Pike*, the state could benefit from briefing on the matter, especially when the plaintiff gives considerable evidence in support of substantial burdens on interstate commerce. *See, e.g., Rivkees*, 553 F. Supp. 3d at 1172 (“Plaintiffs are likely to succeed on the merits in showing that Section 381.00316 imposes substantial burdens on interstate commerce . . .”).

<sup>109</sup> *See id.* at 1172.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1173.

<sup>112</sup> *Id.* (internal quotation marks omitted).

<sup>113</sup> *Id.*

court rejected this argument, holding that without COVID-19 vaccination documentation—the “one constant that facilitates cruise line customers’ access” to the different ports—the “myriad, rapidly-changing [COVID-19] requirements” of the different ports “make it not only impractical, but also financially, legally, and logistically onerous for cruise lines like NCLH to comply.”<sup>114</sup> Therefore, the district court held that the burden on NCLH’s interstate and foreign cruise operations that section 381.00316 would cause reflects a burden on interstate commerce that clearly exceeds any local interest that Florida has.<sup>115</sup> Consequently, the district court held that NCLH was likely to succeed on the merits that section 381.00316 fails the second tier of the *Pike* test.<sup>116</sup>

Moreover, the district court stated that Dr. Rivkees did not address *Pike*’s less-restrictive alternatives component and that NCLH can likely “show at the merits stage that there are alternatives that impose lesser burdens on interstate commerce.”<sup>117</sup> The district court

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<sup>114</sup> *Id.* at 1174.

<sup>115</sup> *See id.* at 1175.

<sup>116</sup> *See id.* at 1177.

<sup>117</sup> *Id.* at 1176. It is unlikely that under *Pike*, Dr. Rivkees had the burden of showing that less restrictive alternatives were unavailable. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (“[W]e find that no approach with ‘a lesser impact on interstate activities’ . . . is available.” (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))). Instead, it seems that normally either a plaintiff or the court considers whether less restrictive alternatives were available. *See id.* at 473–74 (mentioning that plaintiff-respondents “suggested several alternative statutory schemes, but these alternatives [were] either more burdensome on commerce than the [law in question] . . . or less likely to be effective” and not mentioning any burden imposed on the state to show that less restrictive alternatives were unavailable); *Diamond Waste, Inc. v. Monroe Cnty.*, 939 F.2d 941, 945 (11th Cir. 1991) (listing possible less restrictive alternatives that the court—not the parties—seemed to have conceived) (citing *Pike*, 397 U.S. at 142). *But see supra* note 108; *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 353 (1977) (“When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it . . . in terms of . . . the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”). Even if Dr. Rivkees did not have this burden under *Pike*, clearly he could have benefitted from briefing on the matter, especially when one could argue that, given that *Rivkees* was a case involving a dormant Commerce Clause claim, it was foreseeable that the court would conceive possible less restrictive alternatives to section 381.00316’s ban on proof of COVID-19 vaccination. *See infra* note 118.

listed some possible less restrictive alternatives that could have worked toward advancing Florida's asserted local interests, such as providing a carveout in the statute for cruise lines or interstate activities and services in general.<sup>118</sup> The district court stated that Dr. Rivkees' failure to show the unavailability of less restrictive alternatives "undermine[d] the survival of Section 381.00316 when applying the *Pike* balancing test."<sup>119</sup> For the foregoing reasons, the district court ruled that NCLH was likely to succeed on the merits of its dormant Commerce Clause claim.<sup>120</sup>

### C. *Cruise Contracts and Admiralty Jurisdiction*

Cruise contracts are maritime contracts, which trigger admiralty jurisdiction.<sup>121</sup> Article III of the U.S. Constitution grants admiralty jurisdiction to federal courts.<sup>122</sup> The Constitution's grant of admiralty jurisdiction to federal courts was meant to maintain uniformity of the maritime law as to protect maritime commerce, which is characteristically interstate and international.<sup>123</sup> Congress understood that granting the individual states admiralty jurisdiction would undermine "the uniformity and consistency at which the Constitution

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<sup>118</sup> *Rivkees*, 553 F. Supp. 3d at 1176.

<sup>119</sup> *Id.* at 1177.

<sup>120</sup> *See id.*

<sup>121</sup> *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23–24 (2004) ("This suit was properly brought in diversity, but it could also be sustained under the admiralty jurisdiction by virtue of the maritime contracts involved.") (citing G. GILMORE & C. BLACK, *LAW OF ADMIRALTY* 31 (2d ed. 1975) ("Ideally, the [admiralty jurisdiction over contracts] out [sic] to include those and only those things *principally connected* with maritime transportation."); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991) ("First, this is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize."); *Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 766 (D.C. Cir. 1992) ("The Milanoviches' cruise ticket is a maritime contract and thus the substantive law to be applied in this case is the general federal maritime law . . ."); *Meadors v. Carnival Corp.*, 281 F. Supp. 3d 1304, 1307 (S.D. Fla. 2017) ("A cruise line contract is a maritime contract governed by general maritime law."); 1 JOHN A. EDGINTON ET AL., *BENEDICT ON ADMIRALTY* § 181, LEXIS+ (coverage through May 2022) [hereinafter *BENEDICT ON ADMIRALTY*] ("[T]he jurisdiction of admiralty in contract depends upon the subject matter of the contract. If the nature and character of the contract is maritime, that is to say, if the contract is related to a maritime service or a maritime transaction, there is admiralty jurisdiction.")

<sup>122</sup> *Norfolk Southern*, 543 U.S. at 23 (citing U.S. CONST. art. III, § 2, cl. 1).

<sup>123</sup> *See id.* at 25, 28.

aimed on all subjects of a commercial character affecting the intercourse of the States and with each other or with foreign states.”<sup>124</sup> Furthermore, maritime contracts are generally governed by federal maritime law.<sup>125</sup> This means that, generally, federal maritime law—not state law—governs not only judicial review of a maritime contract, but also the maritime contract’s creation (i.e., which provisions may or may not be included) and enforceability.<sup>126</sup> However, federal maritime law’s governance of maritime contracts is not absolute,<sup>127</sup> and courts have weighed in on the exceptions for when state law governs a maritime contract instead.<sup>128</sup>

### 1. *WILBURN BOAT CO. v. FIREMAN’S FUND INSURANCE CO.*

*Wilburn Boat Co. v. Fireman’s Fund Insurance Co.* was a unique Supreme Court case that underscored that federal law does

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<sup>124</sup> *Id.* at 28.

<sup>125</sup> See *Milanovich*, 954 F.2d at 766; *Meadors*, 281 F. Supp. 3d at 1307; see also *Kossick v. United Fruit Co.*, 365 U.S. 731, 734–35 (1961) (applying a test that presumes that federal maritime law governs a maritime contract unless the contract is “of such a ‘local’ nature” that state law should apply instead).

<sup>126</sup> The research for this Comment supports this proposition even though no source was found that states this proposition expressly. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) (holding that state legislation is invalid if it contravenes the general maritime law); *Union Fish Co. v. Erickson*, 248 U.S. 308, 312, 314 (1919) (deciding whether a maritime contract can “be nullified by the local laws of a state . . . so as to prevent its enforcement in an admiralty court of the United States” and holding that the state law could not void the maritime contract because “[i]f one state may declare such contracts void for one reason, another may do likewise for another. Thus . . . the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the states.”); see also, e.g., 1 *BENEDICT ON ADMIRALTY*, *supra* note 121, at §§ 112–114, 121, 181 (mentioning nothing that indicates that state law may control the creation of a maritime contract or prohibit its enforcement); 4 *BENEDICT ON ADMIRALTY*, *supra* note 121, at § 1.04 (mentioning nothing that indicates that state law may control the creation of a maritime contract or prohibit its enforcement); Norman J. Ronneberg Jr., *Life Preserver: An Overview of U.S. Maritime Law for Non-Maritime Lawyers*, 26 *U.S.F. MAR. L.J.* 1, 3–4, 26–27 (2013) (highlighting that the “saving to suitors” clause of The Judiciary Act of 1789 is related to remedies and litigation, and requires that substantive maritime law be applied in dispute resolution).

<sup>127</sup> See *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 313 (1955) (“But it does not follow . . . that every term in every maritime contract can only be controlled by some federally defined admiralty rule.”).

<sup>128</sup> See *infra* Sections I.C.1–4.



not have absolute domain over maritime contracts.<sup>129</sup> *Wilburn Boat* involved the burning-down of a houseboat moored on an artificial inland lake located between Texas and Oklahoma.<sup>130</sup> The houseboat was insured under a marine insurance policy that covered fire damage.<sup>131</sup> The owner of the houseboat breached two warranties in the marine insurance policy (a kind of maritime contract)<sup>132</sup>: one that said the houseboat may not be sold or otherwise transferred, and one that said the houseboat must be used only for “private pleasure purposes.”<sup>133</sup> The Court had to determine which law governed fulfillment of the marine insurance policy’s warranties: Texas law, which did not allow an insured’s breach as a defense unless the breach contributed to the loss, or federal maritime law, which the lower courts said allegedly included a rule that any breach of the policy barred recovery.<sup>134</sup> Even though the Court acknowledged that federal maritime law generally governs maritime contracts, the Court stated that not “every term in every maritime contract” needs to be controlled by a federal maritime rule and that the states can at times have regulatory power in maritime matters.<sup>135</sup>

To answer the question of whether federal maritime law or state law applied to this marine insurance policy, the Court laid out a two-part test: “(1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?”<sup>136</sup> As for the first part of the test, the Court said no: no case law or statute existed that “established [an] admiralty rule requiring strict fulfillment of marine insurance warranties . . . .”<sup>137</sup> As for the second part of the test, the Court determined that such a rule was best left to the states’ domain.<sup>138</sup> The Court supported its conclusion by explaining that (1) insurance is an area that “has been a primarily state function” since the country’s inception, (2) Congress passed

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<sup>129</sup> See *Wilburn Boat*, 348 U.S. at 313.

<sup>130</sup> *Id.* at 311.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 312–13.

<sup>133</sup> *Id.* at 311; see also *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 996 F.3d 1161, 1164 (11th Cir. 2021).

<sup>134</sup> *Wilburn Boat*, 348 U.S. at 311–12.

<sup>135</sup> See *id.* at 313–14.

<sup>136</sup> *Id.* at 314.

<sup>137</sup> See *id.* at 314, 316.

<sup>138</sup> *Id.* at 321.

the McCarran Act to “assure that existing state power to regulate insurance would continue,” and (3) the Court’s fashioning of such an admiralty rule “involves varied policy considerations and is obviously one which Congress is peculiarly suited to make.”<sup>139</sup> For these reasons, the Court declined to fashion an admiralty rule in this case, indicating that Texas law and not federal maritime law should apply to the marine insurance policy’s warranties.<sup>140</sup> It is important to note that *Wilburn Boat*’s two-part test has seemingly been confined solely to cases involving marine insurance policies.<sup>141</sup> As discussed later in this Part, the Supreme Court has created more generally applicable tests and principles for determining whether federal maritime law or state law governs a maritime contract.<sup>142</sup>

## 2. *KOSSICK V. UNITED FRUIT CO.*

*Kossick v. United Fruit Co.* established the general test for determining whether federal maritime law or state law governs a maritime contract. *Kossick* involved an oral contract between a seaman and his employer, United Fruit Company, for hospital services the seaman would receive to treat his thyroid ailment.<sup>143</sup> The oral contract provided that if the seaman “enter[ed] a Public Health Service Hospital . . . [United Fruit] would assume responsibility for all consequences of improper or inadequate treatment.”<sup>144</sup> The seaman would receive these public hospital services instead of medical care by a private physician; the seaman seemingly viewed medical care by a private physician as “the full extent of his maritime right to

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<sup>139</sup> See *id.* at 316, 318–20.

<sup>140</sup> See *id.* at 321.

<sup>141</sup> See *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961) (stating that *Wilburn Boat* was not “apposite” to *Kossick*’s determination of whether federal maritime law or state law applied to an oral maritime contract and that “[t]he application of state law in [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented”); *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 996 F.3d 1161, 1166 (11th Cir. 2021) (citing *Irwin v. Eagle Star Ins.*, 455 F.2d 827, 829–30 (5th Cir. 1972) (claiming that “*Kossick* tend[ed] to limit the *Wilburn Boat* opinion to its facts”)); see also Ronneberg, *supra* note 126, at 8 (showing the *Wilburn Boat* test as a marine insurance-related test that is distinct from the tests and principles that apply to maritime contracts generally).

<sup>142</sup> See *infra* Sections I.C.2–3.

<sup>143</sup> *Kossick*, 365 U.S. at 732.

<sup>144</sup> *Id.*

maintenance and cure.”<sup>145</sup> The seaman underwent treatment at a hospital pursuant to the oral contract, “suffered grievous unwonted bodily injury” in the course of the treatment, and brought a diversity complaint in the Southern District of New York to enforce the oral contract as to make the employer pay \$250,000 in damages.<sup>146</sup> The district court dismissed the complaint and the Second Circuit affirmed, holding that the New York Statute of Frauds invalidated the contract because it was not in writing.<sup>147</sup>

The question presented to the Supreme Court on certiorari was which law should apply to the oral contract: the New York Statute of Frauds, which would invalidate the oral contract, or federal maritime law, which would permit enforcement of the contract even though it was not in writing.<sup>148</sup> The Court established a two-part test to determine whether federal maritime law or state law applied to the contract: (1) Was the contract a maritime contract? (2) If so, was the contract “of such a ‘local’ nature” that state law should apply instead of federal maritime law?<sup>149</sup> “Local” as used in the second part of the test meant that “application of state law would not disturb the uniformity of maritime law . . . .”<sup>150</sup>

As for the first part of the test, the Court determined that the oral contract was a maritime contract.<sup>151</sup> The Court acknowledged that whether a contract is a maritime one is a “conceptual rather than spatial” determination that centers on “whether the transaction [that the contract concerns] relates to ships and vessels, masters and mariners, as the agents of commerce.”<sup>152</sup> Using this conceptual approach, the Court acknowledged that the seaman’s consideration under the oral contract was his “good faith forbearance to press what he considered—perhaps erroneously—to be the full extent of his maritime right to maintenance and cure.”<sup>153</sup> In view of this acknowledgment, the Court determined that the contract “was sufficiently

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<sup>145</sup> *See id.* at 738.

<sup>146</sup> *Id.* at 732.

<sup>147</sup> *See id.* at 733.

<sup>148</sup> *See id.* at 733–35.

<sup>149</sup> *Id.* at 735.

<sup>150</sup> *See id.* at 738.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 735–36 (ellipses omitted) (internal citations omitted).

<sup>153</sup> *See id.* at 738.

related to peculiarly maritime concerns” and was thereby a maritime contract.<sup>154</sup>

Moving to the second part of the test, the Court determined that the oral contract was not of such a local nature that state law should apply over federal maritime law.<sup>155</sup> Firstly, the Court recognized that contracts stipulate obligations that parties voluntarily undertake, as opposed to “case[s] of tort liability or public regulations,” which impose obligations on people “simply by virtue of the authority of the State or Federal Government.”<sup>156</sup> The voluntary undertaking of contract obligations creates the presumption of applying the law that will validate the contract.<sup>157</sup> Secondly, the Court said that the oral contract at hand was founded on an inherently non-local concept of providing maintenance and cure for seamen of any nationality at any port.<sup>158</sup> Thus, the Court reasoned that the contract “may well have been made anywhere in the world, and that the validity of it should be judged by one law wherever it was made.”<sup>159</sup> The Court went on to say that New York’s interest in not assisting the accomplishment of contract fraud was insufficient to render the oral contract “peculiarly a matter of state and local concern” given the aforementioned “countervailing considerations.”<sup>160</sup> Therefore, because the Court determined that the oral contract was a maritime one and not of such a local nature that state law should govern, federal maritime law governed the contract, which permitted its enforcement even though it was not in writing.<sup>161</sup>

The Court also mentioned that *Wilburn Boat* and its two-part test were inapposite in this case because “[t]he application of state law in [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing [fulfillment of marine insurance warranties].”<sup>162</sup> Later case law asserted that this language

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<sup>154</sup> *Id.* at 738.

<sup>155</sup> *Id.* at 741.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (internal citation omitted).

<sup>161</sup> *See id.* at 742.

<sup>162</sup> *Id.*; *see Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 314–16 (1955) (discussing whether a federal maritime rule exists regarding fulfillment of marine insurance warranties).

from *Kossick* “tend[ed] to limit the *Wilburn Boat* opinion to its facts,” which had the effect of upholding *Kossick*’s two-part test as the default, general test for determining whether federal maritime law or state law should apply to a maritime contract.<sup>163</sup>

### 3. *NORFOLK SOUTHERN RAILWAY CO. V. KIRBY*

*Norfolk Southern Railway Co. v. Kirby* applied *Kossick*’s two-part test and affirmed that *Kossick*’s test is the default general test for determining whether federal maritime law or state law applies to a maritime contract.<sup>164</sup> *Norfolk Southern* involved a plan to transport ten containers of machinery from Kirby, an Australian manufacturing company, to the General Motors plant located outside Huntsville, Alabama.<sup>165</sup> The logistical plan to get the machinery from Kirby to the General Motors plant was as follows: (1) Kirby contracted with International Cargo Control (“ICC”), an Australian freight forwarding company, to arrange for end-to-end transportation; (2) ICC contracted with Hamburg Süd, a German ocean shipping company, to transport the machinery from Australia to Savannah, Georgia; and (3) Hamburg Süd hired Norfolk Southern Railway Company to transport the machinery from Savannah to the Huntsville plant.<sup>166</sup> The transportation of machinery involved two bills of lading, which the Supreme Court deemed contracts: one between Kirby and ICC, and one between ICC and Hamburg Süd.<sup>167</sup> Both bills of lading included liability limitations for machinery damaged in transit, and through so-called “Himalaya Clauses” the bills extended these liability limitations to “other downstream parties expected to take part in the contract’s execution.”<sup>168</sup> After a Norfolk Southern train derailed in transit between Savannah and Huntsville causing damage to the machinery, Kirby sued Norfolk Southern in the Northern District of Georgia, asserting diversity jurisdiction and

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<sup>163</sup> See *Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 996 F.3d 1161, 1166 (11th Cir. 2021) (citing *Irwin v. Eagle Star Ins.*, 455 F.2d 827, 829–30 (5th Cir. 1972)).

<sup>164</sup> *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22, 23 (2004).

<sup>165</sup> *Id.* at 19.

<sup>166</sup> *Id.* at 19–21.

<sup>167</sup> *Id.* at 18–19, 21.

<sup>168</sup> *Id.* at 20–21.

making claims in tort and contract.<sup>169</sup> The district court held that Kirby's recovery was limited to \$500 per container per the bills' Himalaya Clauses.<sup>170</sup> The Eleventh Circuit reversed, stating that Norfolk Southern did not have privity with the bills of lading and ICC was not acting as Kirby's agent when it made its bill of lading with Hamburg Süd; therefore, Norfolk Southern was not subject to either bill's liability limitations.<sup>171</sup>

The Supreme Court on certiorari determined that whether the Himalaya Clauses' liability limitations applied to Norfolk Southern could be decided by applying *Kossick's* two-part test.<sup>172</sup> As for the first part of the test, the Court determined that the bills of lading were maritime contracts.<sup>173</sup> Using the conceptual rather than spatial approach to determining whether a contract is a maritime one, the Court recognized that although the bills contemplated a land leg of the machinery's transportation, the bills were maritime contracts "because their *primary objective* [was] to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States."<sup>174</sup>

The Court elaborated on the reasoning behind the second part of *Kossick's* two-part test. The Court restated this second part: "[a] maritime contract's interpretation may so implicate local interests as to beckon interpretation by state law."<sup>175</sup> The Court here added that "when state interests cannot be accommodated without defeating a federal interest . . . then federal substantive law should govern."<sup>176</sup> The Court suggested that the uniformity of maritime law is a federal interest that state interests generally cannot overcome because the uniformity of the maritime law protects the "fundamental interest giving rise to maritime jurisdiction[:] . . . *the protection of maritime commerce.*"<sup>177</sup> The bills of lading in this case were for international

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<sup>169</sup> *Id.* at 21.

<sup>170</sup> *Id.* at 21–22.

<sup>171</sup> *See id.* at 22.

<sup>172</sup> *Id.* at 22–23.

<sup>173</sup> *Id.* at 24.

<sup>174</sup> *Id.* (emphasis added).

<sup>175</sup> *Id.* at 27 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961)).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 25, 28 (emphasis added) (citing *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 611 (1991) (quoting *Sisson v. Ruby*, 497 U.S. 358, 367 (1990) (in turn quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)))).

transportation of goods—a form of maritime commerce—and their liability limitation clauses could be applied anywhere in the world.<sup>178</sup> The Court asserted that “[c]onfusion and inefficiency [would] inevitably result if more than one body of law govern[ed]” the meaning of the liability limitation clauses.<sup>179</sup> Understanding the importance of maintaining uniformity of the maritime law and the principle that one law should govern a contract when it could have been made anywhere in the world, the Court determined that federal maritime law and not state law should apply to the bills of lading.<sup>180</sup> With these principles in mind, the Court turned to the merits of the case, applying relevant federal case law and ultimately holding that Norfolk Southern was entitled to the liability limitations as written in the bills of lading.<sup>181</sup>

4. *TRAVELERS PROPERTY CASUALTY CO. OF AMERICA V. OCEAN REEF CHARTERS LLC*

The recent case *Travelers Property Casualty Co. of America v. Ocean Reef Charters LLC* showed the Eleventh Circuit’s begrudging application of *Wilburn Boat*’s two-part test, and suggested it is applicable only in the marine insurance context.<sup>182</sup> *Travelers Property* involved the sinking of a yacht during Hurricane Irma that was insured under a one-year marine insurance policy from Travelers Property Casualty Company.<sup>183</sup> The policy included two express warranties: (1) that Ocean Reef Charters, the yacht’s owner, would employ a professional captain for the yacht, and (2) that Ocean Reef would have a professional crew member onboard the yacht.<sup>184</sup> When Ocean Reef made a claim under the marine insurance policy after the yacht’s sinking, Travelers denied coverage because Ocean Reef breached the two express warranties.<sup>185</sup> Travelers requested sum-

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<sup>178</sup> *Id.* at 28–29.

<sup>179</sup> *Id.* at 29.

<sup>180</sup> *See id.*

<sup>181</sup> *See id.* at 30–36.

<sup>182</sup> *See Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 996 F.3d 1161, 1168 (11th Cir. 2021).

<sup>183</sup> *Id.* at 1163.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

mary judgment in the Southern District of Florida seeking declaration that Travelers owed no coverage to Ocean Reef because of Ocean Reef's breaches.<sup>186</sup> The parties argued about which law should apply in determining whether Ocean Reef's breaches precluded coverage under the policy: federal maritime law, which Travelers argued "requires strict compliance with express warranties in marine insurance contracts," or Florida's "anti-technical statute," which permits coverage if a breach is unrelated to the claimed loss.<sup>187</sup> The district court granted Travelers' request for summary judgment, concluding that the Eleventh Circuit previously fashioned an admiralty rule that requires strict compliance with express warranties in marine insurance policies.<sup>188</sup>

The Eleventh Circuit applied *Wilburn Boat* to determine which law applied because, like *Wilburn Boat*, this case involved breaches of express warranties in a marine insurance policy.<sup>189</sup> Because the Eleventh Circuit acknowledged that *Wilburn Boat* already decided that state courts should have domain over regulating the insurance industry in the absence of a relevant federal admiralty rule, the Eleventh Circuit needed to apply only the first part of *Wilburn Boat*'s test in deciding the case: whether a federal admiralty rule governed the express warranties in question.<sup>190</sup> The Eleventh Circuit explained that the Supreme Court in *Wilburn Boat* determined that "there was no established federal maritime rule requiring strict fulfillment of marine insurance warranties,"<sup>191</sup> which negated the district court's ruling that the Eleventh Circuit previously fashioned an

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<sup>186</sup> Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC, 396 F. Supp. 3d 1170, 1173 (S.D. Fla. 2019) *rev'd*, 996 F.3d 1161 (11th Cir. 2021).

<sup>187</sup> *Travelers Prop.*, 996 F.3d at 1164.

<sup>188</sup> *Id.*; see *Travelers Prop.*, 396 F. Supp. 3d at 1175–76, 1178 (citing Lexington Ins. Co. v. Cooke's Seafood, 835 F.2d 1364, 1366 (11th Cir. 1988) and Hilton Oil Transp. v. Jonas, 75 F.3d 627, 630 (11th Cir. 1996)).

<sup>189</sup> See *Travelers Prop.*, 996 F.3d at 1164.

<sup>190</sup> See *id.* at 1165, 1169 ("Noting that the choice as to what rule to adopt involved policy considerations best left to Congress, the Court concluded that it was going to leave the regulation of marine insurance where it has been—with the states.") (internal quotation marks omitted) (alterations omitted)).

<sup>191</sup> *Id.* at 1164.



admiralty rule that strict compliance was required for express warranties in marine insurance policies.<sup>192</sup> Because *Wilburn Boat* was Supreme Court precedent by which the Eleventh Circuit was bound, the Eleventh Circuit held that Florida's anti-technical statute governed the effect of Ocean Reef's breaches of the marine insurance policy's express warranties.<sup>193</sup>

Despite applying *Wilburn Boat* in this case, the Eleventh Circuit expressed its discontent with *Wilburn Boat*<sup>194</sup> and highlighted two major problems.<sup>195</sup> The first is that it wrongly held that no entrenched federal admiralty rule exists regarding fulfillment of express warranties in marine insurance policies; on the contrary, "all the major admiralty [appellate courts in the United States] had long accepted the literal performance rule."<sup>196</sup> The second was that *Wilburn Boat* undermines the uniformity of the maritime law, which *Kossick* and *Norfolk Southern* deemed unacceptable.<sup>197</sup> Because of the problems it perceived with *Wilburn Boat*, the Eleventh Circuit in this case said that "if [it] were writing on a blank slate, [it] would consider holding that there should be a uniform maritime rule regarding the effect of a breach of an express warranty in a marine insurance policy—and from there determine what that uniform rule should be."<sup>198</sup> Nevertheless, the Eleventh Circuit stated that neither *Kossick*, *Norfolk Southern*, nor the Eleventh Circuit's earlier decisions regarding fulfillment of express warranties in marine insurance policies overruled *Wilburn Boat*.<sup>199</sup> As a result, *Wilburn Boat* is still good law, and the Eleventh Circuit is bound to apply it when appropriate.<sup>200</sup>

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<sup>192</sup> See *id.* at 1168 (explaining that *Wilburn Boat*'s holding that no federal admiralty rule existed regarding fulfillment of express warranties in marine insurance contracts overruled the Eleventh Circuit's holdings in *Cooke's* and *Hilton Oil* that strict compliance with such express warranties is required under federal admiralty law).

<sup>193</sup> *Id.* at 1167, 1170.

<sup>194</sup> *Id.* at 1167.

<sup>195</sup> See *id.* at 1165.

<sup>196</sup> *Id.* (quoting 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 19:15 (6th ed. 2018)).

<sup>197</sup> See *id.*; *Kossick v. United Fruit Co.*, 365 U.S. 731, 738 (1961); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 28 (2004).

<sup>198</sup> See *Travelers Prop.*, 996 F.3d at 1167.

<sup>199</sup> See *id.* at 1166, 1168.

<sup>200</sup> *Id.* at 1167.

## II. ANALYSIS

### A. *NCLH Could Have Won on an Admiralty Jurisdiction Claim*

Notably absent from NCLH's list of claims in its complaint was an admiralty jurisdiction claim.<sup>201</sup> As used in this Comment, an "admiralty jurisdiction claim" comprises two pieces: (1) a claim of admiralty jurisdiction is made because a maritime contract is involved, and (2) following the establishment of admiralty jurisdiction, an assertion is made that under the *Kossick/Norfolk Southern* test<sup>202</sup> (or even the *Wilburn Boat* test),<sup>203</sup> federal maritime law rather than state law governs the relevant provisions of the maritime contract. Based on the legal principles and case law discussed earlier in this Comment,<sup>204</sup> NCLH would have likely succeeded on an admiralty jurisdiction claim such that the district court would have enjoined section 381.00316 from prohibiting NCLH's contractual requirement that passengers show proof of COVID-19 vaccination before boarding its cruise ships.<sup>205</sup>

#### 1. *KOSSICK/NORFOLK SOUTHERN*-BASED ADMIRALTY JURISDICTION CLAIM

NCLH's passenger contracts require that passengers provide proof of COVID-19 vaccination before boarding its cruise ships.<sup>206</sup> Because section 381.00316's ban on requiring proof of COVID-19

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<sup>201</sup> See Complaint, *supra* note 52, at 2.

<sup>202</sup> The rest of this Comment will describe the two-part test as established in *Kossick* and elaborated on in *Norfolk Southern* as the *Kossick/Norfolk Southern* test.

<sup>203</sup> See discussion *infra* Section II.A.2.

<sup>204</sup> See discussion *supra* Section I.C.

<sup>205</sup> See *id.*; NORWEGIAN CRUISE LINE, GUEST TICKET CONTRACT §§ 4(d), 5 (2021), <https://www.ncl.com/sites/default/files/NCL-Guest-Ticket-Contract-04-28-2021.pdf>.

<sup>206</sup> See NORWEGIAN CRUISE LINE, *supra* note 205, at §§ 4(d), 5 (stating guests must comply with "Carrier's COVID-19 Policies and Procedures" set forth in Section 4 and online at <https://www.ncl.com/safe>); *Sail Safe*, NORWEGIAN CRUISE LINE, <https://www.ncl.com/sail-safe> (last visited on Dec. 29, 2021) (requiring guests to "present proof of vaccination at the pier at embarkation in order to board.").

vaccination conflicts with NCLH's maritime passenger contracts,<sup>207</sup> NCLH should have claimed that the *Kossick/Norfolk Southern* two-part test should apply to determine whether section 381.00316 or federal maritime law governs its passenger contracts. NCLH should have asserted the *Kossick/Norfolk Southern* test instead of the *Wilburn Boat* test because the *Kossick/Norfolk Southern* test applies to maritime contracts generally, whereas the *Wilburn Boat* test seems to apply only to marine insurance policies.<sup>208</sup> Under the first part of the *Kossick/Norfolk Southern* test, NCLH should have claimed that the district court had admiralty jurisdiction because its passenger contracts are maritime contracts.<sup>209</sup> Moving to the second part of the test, NCLH should have argued that even if NCLH's COVID-19 vaccination requirement in its passenger contracts "so implicated" Florida's putative local interests that section 381.00316 is meant to advance, section 381.00316 cannot govern this requirement because Florida's interests "cannot be accommodated without defeating" the federal interests of uniformity of the maritime law and the protection of maritime commerce.<sup>210</sup> NCLH should have concluded that because section 381.00316 may not govern NCLH's COVID-19 vaccination requirement in its passenger contracts and no federal law appears to exist that prohibits cruise lines from making such a requirement,<sup>211</sup> NCLH may require its passengers to provide proof of COVID-19 vaccination before boarding its cruise ships.

The district court would have likely agreed with NCLH that section 381.00316 may not govern NCLH's COVID-19 vaccination requirement. The district court would have likely agreed that the *Kossick/Norfolk Southern* test applies to NCLH's passenger contracts and not *Wilburn Boat's* test. This is not only because *Wilburn Boat* seems to be confined to the marine insurance context,<sup>212</sup> but also because the Eleventh Circuit—whose decisions bind and otherwise influence the Southern District of Florida—has expressed discontent

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<sup>207</sup> See *supra* note 121 and accompanying text.

<sup>208</sup> See *supra* note 126 and accompanying text.

<sup>209</sup> See sources cited *supra* note 121.

<sup>210</sup> See *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004); sources cited *infra* notes 215–222, 224–225.

<sup>211</sup> See generally, e.g., 10 BENEDICT ON ADMIRALTY, *supra* note 121, at §§ 11.01–11.08 (discussing topics related to COVID-19 and the cruise industry).

<sup>212</sup> See *supra* note 126 and accompanying text.

with *Wilburn Boat* and is thereby likely reluctant to apply it.<sup>213</sup> Therefore, applying the first part of the *Kossick/Norfolk Southern* test, the district court would have agreed that NCLH's passenger contracts are maritime contracts because much precedent supports this holding, and the district court would thereby declare admiralty jurisdiction.<sup>214</sup>

As for the second part of the test, in accordance with its ruling on NCLH's dormant Commerce Clause claim,<sup>215</sup> the district court would have likely agreed with NCLH that federal maritime law, and not section 381.00316, should govern NCLH's COVID-19 vaccination documentation requirement. Florida's putative local interests that section 381.00316 is meant to advance are Florida residents' right to medical privacy and the prevention of discrimination against unvaccinated Florida residents in the marketplace.<sup>216</sup> Under the *Pike* test, the district court held the burden on interstate commerce that section 381.00316's ban on requiring proof of COVID-19 vaccination created clearly exceeded the benefits to Florida stemming from section 381.00316's purported advancement of Florida's putative local interests; therefore, NCLH was likely to succeed on the merits that section 381.00316 violated the dormant Commerce Clause.<sup>217</sup>

This burden on interstate commerce that the district court recognized in its dormant Commerce Clause analysis under *Pike*—NCLH having to subject its passengers to “an array of diverse quarantining and testing requirements” of various interstate and foreign ports, which would seriously impede NCLH's ability to conduct its interstate and foreign cruise operations<sup>218</sup>—implies the defeat of the federal interests of the uniformity in maritime law and the protection of maritime commerce. Firstly, section 381.00316 disrupts uniformity in maritime law by enacting a unique prohibition on proof of COVID-19 vaccination<sup>219</sup>—the “one constant that facilitates cruise line [passengers'] access to” the various ports that NCLH's cruise

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<sup>213</sup> See *supra* notes 141, 194–198 and accompanying text.

<sup>214</sup> See sources cited *supra* note 121.

<sup>215</sup> See discussion on the similarities and differences between a dormant Commerce Clause claim and an admiralty jurisdiction claim *infra* Section II.B.

<sup>216</sup> *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1171 (S.D. Fla. 2021), *appeal docketed*, No. 21-12729 (11th Cir. Aug. 11, 2021).

<sup>217</sup> See *id.* at 1175, 1177.

<sup>218</sup> See *id.* at 1176.

<sup>219</sup> See *id.* at 1173.

ships visit.<sup>220</sup> Secondly, this disruption of the uniformity of maritime law would seriously impede NCLH's ability to conduct its interstate and foreign cruise operations, which entails impairing interstate commerce<sup>221</sup> (of which maritime commerce is a type).<sup>222</sup>

Because the district court showed in its dormant Commerce Clause analysis how the burden on interstate commerce that section 381.00316 creates implies the defeat of the federal interests of uniformity in the maritime law and the protection of maritime commerce,<sup>223</sup> the district court would have likely held that under the *Kossick/Norfolk Southern* test, Florida's putative local interests could not be accommodated by section 381.00316's ban on requiring proof of COVID-19 vaccination.<sup>224</sup> Therefore, the district court would have likely ruled that NCLH was likely to succeed on the merits of its argument that section 381.00316 may not govern NCLH's COVID-19 vaccination documentation requirement and that NCLH may require its passengers to show proof of COVID-19 vaccination to gain access to its ships.<sup>225</sup>

## 2. *WILBURN BOAT*-BASED ADMIRALTY JURISDICTION CLAIM

Even assuming *arguendo* that the district court applied *Wilburn Boat*'s two-part test to determine which law governs NCLH's COVID-19 vaccination documentation requirement, the district court would have likely still enjoined section 381.00316 from governing. At the onset of its review of this claim, the district court would have established that it had admiralty jurisdiction because the claim involved a maritime contract.<sup>226</sup> As for the first part of the

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<sup>220</sup> *Id.* at 1174.

<sup>221</sup> *See id.* at 1174–75.

<sup>222</sup> *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 461–62 (1994) (Stevens, J., concurring) (referring to maritime commerce as “interstate and foreign”).

<sup>223</sup> *See supra* notes 218–222 and accompanying text.

<sup>224</sup> *See id.* *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25, 27–28 (2004).

<sup>225</sup> *See id.* at 27.

<sup>226</sup> *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955) (“Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction.”).

*Wilburn Boat* test, no federal maritime rule appears to exist regarding requiring proof of COVID-19 vaccination and maritime contracts.<sup>227</sup>

Proceeding to the second part of the test, the district court would have likely fashioned a federal maritime rule that addresses cruise lines requiring proof of COVID-19 vaccination. Unlike the insurance industry discussed *Wilburn Boat*, health care (to which vaccinations are related) is not primarily a state function and states have not primarily dominated its regulation;<sup>228</sup> indeed, health care has been extensively federally regulated.<sup>229</sup> Additionally, Congress has given no indication that it has acquiesced to the states in the regulation of COVID-19 vaccination or, more broadly, COVID-19-related health care.<sup>230</sup>

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<sup>227</sup> See generally, e.g., 1 BENEDICT ON ADMIRALTY, *supra* note 121, at §§ 181–188 (admiralty treatise sections related to maritime contracts); 10 BENEDICT ON ADMIRALTY, *supra* note 121, at §§ 11.01–11.08 (discussing topics related to COVID-19 and the cruise industry).

<sup>228</sup> See *Wilburn Boat*, 348 U.S. at 316–19, 321.

<sup>229</sup> *Burton v. William Beaumont Hosp.*, 373 F. Supp. 2d 707, 721 (E.D. Mich. 2005) (“The health-care industry is highly regulated at the state and federal levels.”); see also *8 Important Regulations in United States Health Care*, REGIS COLL., <https://online.regiscollege.edu/blog/8-important-regulations-united-states-health-care/> (last visited Dec. 31, 2021) (discussing several federal health care laws, such as Medicare, Medicaid, and the Affordable Care Act).

<sup>230</sup> Congress and federal agencies that owe their existence to Congressional legislation have enacted laws that regulate COVID-19-related health care. See, e.g., Kate Goodrich, *How the CARES Act Supports America’s Healthcare System in the Fight Against COVID-19*, JACKSON WALKER (Mar. 30, 2020), <https://www.jw.com/news/insights-cares-act-healthcare-provisions-covid19/> (describing how the CARES Act, Pub. L. No. 116-136 (Mar. 27, 2020), regulates numerous COVID-19 related topics, such as “[r]equir[ing] group health plans and health insurers to cover and reimburse providers of diagnostic testing relating to COVID-19 at pre-emergency-period negotiated rates” and “[r]equir[ing] health plans and issuers to rapidly cover ‘qualifying coronavirus preventative services’”); Greg Stohr, *Supreme Court Blocks Biden’s Shot-or-Test Rule for Workers*, BLOOMBERG (Jan. 13, 2022, 2:31 PM), <https://www.bloomberg.com/news/articles/2022-01-13/supreme-court-halts-osha-rule-that-covered-80-million-workers> (explaining how the U.S. Supreme Court struck down 86 Fed. Reg. 61402 (2021), the emergency temporary standard created by OSHA (a federal agency created by Congress), which “required employers with 100 or more workers to make them get vaccinated or be tested regularly”); *State v. Becerra*, 544 F. Supp. 3d 1241, 1305 (M.D. Fla. 2021), *appeal dismissed sub nom.* *State v. Dep’t of Health and Hum. Servs.*, No. 21-12243 (11th Cir. Jan. 19, 2022). (enjoining the

It is also unlikely that the district court would have deemed a rule answering the question “May a cruise line include provisions in its passenger contracts requiring passengers to show proof of COVID-19 vaccination before boarding its ships?”<sup>231</sup> one that Congress is “peculiarly suited to make.”<sup>232</sup> Firstly, although Congress effectively authorized the creation of the CDC, which created regulations such as the CSO and its subsequent instructions that regulated cruise passenger COVID-19 vaccination, the Middle District of Florida in *Becerra* struck down these regulations, largely because the Middle District of Florida determined that the CDC exceeded its authority in creating these regulations.<sup>233</sup> This ruling indicated that neither Congress nor the federal agencies that Congress has effectively created are the exclusive field-occupiers when it comes to such regulation.<sup>234</sup> Therefore, the district court would have likely acknowledged its “right to make decisional maritime law” in this case on the rule question.<sup>235</sup> Secondly, it is unlikely that the district

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CSO and its subsequent instructions, which were created by the CDC, a federal agency effectively authorized by Congress, from governing cruise lines operating in Florida). *See generally* Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part I)*, 28 J. MAR. L. & COM. 395, 429–33 (1997) (analyzing how the U.S. Supreme Court’s argument in *Wilburn Boat* “that Congress had acquiesced in the regulation of marine insurance by the states” influenced its decision to not fashion an admiralty rule in that case).

<sup>231</sup> This Comment will hereinafter refer to this question as the “rule question.”

<sup>232</sup> *See Wilburn Boat*, 348 U.S. at 320.

<sup>233</sup> *See Becerra*, 544 F. Supp. 3d at 1304.

<sup>234</sup> *See id. But cf. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285–87 (1952) (explaining that although there was “absence of legislation” on the particular issue at hand regarding contribution, “Congress has already enacted much legislation in the area of maritime personal injuries”; for these reasons, the U.S. Supreme Court refused to fashion a new admiralty rule). *But see generally* Ronneberg, *supra* note 126, at 6 (“When Congress has statutorily spoken on an issue or rule of admiralty law, the federal courts ‘sail in occupied waters,’ and cannot significantly alter or amend what Congress has legislated.”).

<sup>235</sup> *See Ronneberg*, *supra* note 126, at 6 (“When, however, Congress has not spoken, [federal courts are] free to exercise [their] authority to create the legal standard and rules which [they] deem[] appropriate for navigation and maritime commerce.”).

court would have viewed itself as incompetent to fashion a rule answering the rule question.<sup>236</sup> The U.S. Supreme Court in *Wilburn Boat* determined that it was incompetent to create a federal admiralty rule because the question it had to answer in fashioning the rule could yield numerous answers that “involve[d] varied policy considerations.”<sup>237</sup> However, the rule question that the district court in *Rivkees* would have faced really could produce only a binary yes-or-no answer: yes, a cruise line may include provisions in its passenger contracts requiring passengers to show proof of COVID-19 vaccination before boarding its ships; or no, it may not. Indeed, the district court seemed to present itself as quite the opposite of incompetent in handling this kind of question: it had a strong understanding of the beneficial impact proof of COVID-19 vaccinations can have on the sustenance of the cruise industry and the burdens on interstate commerce that can result from a lack thereof.<sup>238</sup>

Having determined its authority to fashion a maritime rule and having recognized section 381.00316’s burden on interstate commerce and violation of cruise lines’ right to free speech, the district court would have likely formulated a maritime rule that, regardless of any state law that dictates to the contrary, such as section 381.00316, cruise lines may require passengers to provide proof of COVID-19 vaccination to gain access to their ships.<sup>239</sup> Applying this rule to NCLH, the district court would have ruled that section 381.00316 may not govern NCLH’s COVID-19 vaccination documentation requirement and that NCLH may require its passengers to show proof of COVID-19 vaccination to gain access to its ships.

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<sup>236</sup> See generally Goldstein, *supra* note 230, at 433–35 (discussing how the U.S. Supreme Court in *Wilburn Boat* “justified its decision not to fashion a federal rule on doubts about its competency”).

<sup>237</sup> See *Wilburn Boat*, 348 U.S. at 320; Goldstein, *supra* note 230, at 433–35 (explaining that the U.S. Supreme Court in *Wilburn Boat* had “to choose from a menu of possible rules”).

<sup>238</sup> See *supra* notes 103–120 and accompanying text. See generally Goldstein, *supra* note 230, at 433–34 (explaining that Congress indubitably “possesse[s] certain advantages in shaping law as opposed to” federal courts) (“Congress cannot address all issues.”) (“Courts always must operate within the circumstances a case presents but this limit does not justify declining to fashion rules to decide disputes.”).

<sup>239</sup> See *supra* notes 103–120, 228–238 and accompanying text.



### B. *Comparing the Dormant Commerce Clause Claim with an Admiralty Jurisdiction Claim*

A dormant Commerce Clause claim and an admiralty jurisdiction claim overlap to a notable degree.<sup>240</sup> Therefore, this Section discusses the similarities and differences between the two claims and whether it is worthwhile to bring an admiralty jurisdiction claim in addition to a dormant Commerce Clause claim.

#### 1. SIMILARITIES

The *Pike* test of the dormant Commerce Clause analysis and the *Kossick/Norfolk Southern* test of the admiralty jurisdiction analysis both compare federal and local state interests in determining whether a state law that interferes with a federal interest may govern.<sup>241</sup> Specifically, *Pike* is concerned with clearly excessive burdens on interstate commerce,<sup>242</sup> and *Kossick/Norfolk Southern* is concerned with the defeat of federal interests, namely uniformity in maritime law and the protection of maritime commerce<sup>243</sup> (a type of interstate commerce).<sup>244</sup> Therefore, both analyses can be used to determine whether a state law that interferes with maritime commerce may govern. These similarities suggest that the dormant Commerce Clause claim in *Rivkees* functioned essentially the same as an admiralty jurisdiction claim would have functioned. One could say that an admiralty jurisdiction claim, whether intentionally or not, was already “baked into” NCLH’s dormant Commerce Clause claim.

#### 2. DIFFERENCES

Although both the *Pike* test and the *Kossick/Norfolk Southern* test compare federal interests and local state interests in determining

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<sup>240</sup> See discussion *infra* Section II.B.1.

<sup>241</sup> Compare *Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 553 F. Supp. 3d 1143, 1170 (S.D. Fla. 2021), *appeal docketed*, No. 21-12729 (11th Cir. Aug. 11, 2021) with *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004).

<sup>242</sup> See *Rivkees*, 553 F. Supp. 3d at 1170. See generally *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 668 (1981) (quoting *Consol. Freightways Corp. of Del. v. Kassel*, 475 F. Supp. 544, 551 (S.D. Iowa 1979)) (referring to “the national interest in keeping interstate commerce free from interferences that seriously impede it”).

<sup>243</sup> See *Norfolk Southern*, 543 U.S. at 25, 27.

<sup>244</sup> See *supra* note 222.

whether a state law that interferes with a federal interest may govern, the *Pike* test is a balancing test, whereas the *Kossick/Norfolk Southern* test is a categorical test.<sup>245</sup> The two tests also differ with respect to whose interests they give preference. *Pike*'s balancing test gives preference to state interests by invalidating a state law only if its burden on the federal interest of interstate commerce clearly exceeds its local benefits to the state.<sup>246</sup> The *Kossick/Norfolk Southern*'s categorical test gives preference to federal interests by making paramount the federal interests of uniformity of the maritime law and the protection of maritime commerce in determining whether conflicting state interests may be accommodated by a state law.<sup>247</sup> Additionally, the *Pike* test considers whether states could have implemented alternatives that impose smaller, less substantial burdens on interstate commerce,<sup>248</sup> whereas the *Kossick/Norfolk Southern* test does not seem to include such a consideration.<sup>249</sup>

### 3. THE VALUE OF AN ADMIRALTY JURISDICTION CLAIM

Because it would have likely succeeded, an admiralty jurisdiction claim in *Rivkees* would have been worthwhile for NCLH to make. Firstly, it would have added extra support to NCLH's challenge to section 381.00316's governance of its COVID-19 vaccination documentation requirement. Secondly, it would have been an extra line of defense that Dr. Rivkees would need to defeat on appeal. This is important because, for several reasons, it is likely easier for NCLH to win on an admiralty jurisdiction claim than on a dormant Commerce Clause claim, even though the two claims are

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<sup>245</sup> The words "clearly exceed" from the *Pike* test denote a balancing process. See *Rivkees*, 553 F. Supp. 3d at 1170 (calling the *Pike* test a "balancing test"). Conversely, the *Kossick/Norfolk Southern* test does not include any language that denotes a balancing process, but rather an "either/or" determination of whether "state interests can[] be accommodated without defeating a federal interest" or not. See *Norfolk Southern*, 543 U.S. at 27.

<sup>246</sup> See *Rivkees*, 553 F. Supp. 3d at 1170.

<sup>247</sup> See *Norfolk Southern*, 543 U.S. at 25, 27–29 (citing *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("State law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system, but this limitation still leaves the States a wide scope.")).

<sup>248</sup> *Rivkees*, 553 F. Supp. 3d at 1171.

<sup>249</sup> See generally *Norfolk Southern*, 543 U.S. at 18–36; *Kossick v. United Fruit Co.*, 365 U.S. 731, 731–41 (1961).

functionally similar: the *Kossick/Norfolk Southern* test's categorical requirement that a federal interest be "defeat[ed]" by a state law's accommodation of state law interests in order to preclude state law's governance is likely less arduous to prove than the *Pike* test's requirement that a state law's burden on interstate commerce "clearly exceed[]" the local state benefits.<sup>250</sup> While the *Kossick/Norfolk Southern* test compares both state and federal interests in determining whether a state law may govern a maritime contract, this determination ultimately depends solely upon whether a federal interest is defeated, regardless of how much a maritime contract's interpretation "implicate[s] local interests as to beckon interpretation by state law."<sup>251</sup> This is unlike *Pike*'s balancing test, which ostensibly requires a deeper and more nuanced analysis of the state and federal interests at issue to build legitimate support for why one side's interests outweigh the other's.<sup>252</sup> In addition, the *Kossick/Norfolk Southern* test gives preference to the federal interests of uniformity of the maritime law and the protection of maritime commerce (both of which are at stake in *Rivkees*)<sup>253</sup> in determining whether a state law may govern a maritime contract, whereas the *Pike* test gives preference to state law in making this determination.<sup>254</sup> Therefore, assuming *arguendo* that the Eleventh Circuit reverses the district court's order with respect to all the claims that NCLH actually made, the extra claim of admiralty jurisdiction would likely save NCLH on appeal as to maintain section 381.00316's inapplicability to NCLH's COVID-19 vaccination documentation requirement.

Moreover, assuming *arguendo* that an admiralty jurisdiction claim would have succeeded, it might have even been politically advantageous for NCLH to have brought *only* an admiralty jurisdiction

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<sup>250</sup> Compare *Rivkees*, 553 F. Supp. 3d at 1170, with *Norfolk Southern*, 543 U.S. at 27.

<sup>251</sup> *Norfolk Southern*, 543 U.S. at 27.

<sup>252</sup> See *Rivkees*, 553 F. Supp. 3d at 1170 ("The *Pike* balancing test is a fact-sensitive inquiry.") (citing multiple other cases that support that the *Pike* test is either "fact-sensitive" or "fact-intensive"); *Pike v. Bruch Church, Inc.*, 397 U.S. 137, 142 (1970) ("If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.").

<sup>253</sup> See *infra* notes 215–222 and accompanying text.

<sup>254</sup> See *infra* Section II.B.2.

claim and *no* constitutional claims. Florida Governor Ron DeSantis was passionate in enacting section 381.00316<sup>255</sup>—a statute concerning the evidently politicized topic of vaccine passports.<sup>256</sup> Even though NCLH’s constitutional challenge is as-applied as opposed to facial,<sup>257</sup> NCLH’s victory on this challenge would open the door for businesses from other industries within the state to make similar claims and potentially render the statute obsolete.<sup>258</sup> This could engender political discontent in the Florida government, which could harm the relationship and future dealings between NCLH and the Florida government. Presumably, it has not been NCLH’s intention so much to expose section 381.00316 as wholly unconstitutional and rustle political feathers as it has been to simply ensure it can operate

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<sup>255</sup> See, e.g., Fox News, *Ron DeSantis Vows to Fight ‘Vaccine Passport’ Plan*, YOUTUBE, 0:00–0:30 (Mar. 30, 2021), [https://www.youtube.com/watch?v=0i76G\\_fx5-M](https://www.youtube.com/watch?v=0i76G_fx5-M) (Governor DeSantis saying that “[i]t is completely unacceptable for either the government or the private sector” to require vaccine passports); Forbes Breaking News, *‘I’m Offended’: DeSantis Lambasts Vaccine Passports*, YOUTUBE, 00:00–0:30, 1:35–1:50 (Sept. 3, 2021), <https://www.youtube.com/watch?v=FI30EXdJ6i0> (Governor DeSantis saying that he is “offended” by vaccine passport requirements and does not want a “biomedical security state” that requires people to show vaccine passports “just to be able to live everyday life”).

<sup>256</sup> See, e.g., Allan Smith, *Politicization of ‘Vaccine Passports’ Could Aggravate GOP Hesitancy, Experts Warn*, NBC NEWS (Apr. 6, 2021, 4:31 AM), <https://www.nbcnews.com/politics/politics-news/politicization-vaccine-passports-could-aggravate-gop-hesitancy-experts-warn-n1263048>; Max Fisher, *Vaccine Passports, Covid’s Next Political Flash Point*, N.Y. TIMES (May 8, 2021), <https://www.nytimes.com/2021/03/02/world/europe/passports-covid-vaccine.html>. “Vaccine passport” is another way of saying “documentation certifying COVID-19 vaccination.” *Compare What Is a Vaccine Passport?*, WEBMD, <https://www.webmd.com/vaccines/covid-19-vaccine/vaccine-passport-covid> (last visited Aug. 9, 2021) (explaining that a vaccine passport is “proof that you’ve tested negative for or been protected against certain infections”) with FLA. STAT. § 381.00316(1) (2021) (referring to “documentation certifying COVID-19 vaccination”).

<sup>257</sup> See *Rivkees*, 553 F. Supp. 3d at 1148 (“NCLH brings this as-applied constitutional challenge . . .”).

<sup>258</sup> Nancy Johnson, *Florida Ban on Requiring Vaccine Passports Banned (for Now)*, JDSUPRA (Aug. 10, 2021), <https://www.jdsupra.com/legalnews/florida-ban-on-requiring-vaccine-7958629/> (“While [Judge Williams’s] opinion is limited to the cruise lines that filed the lawsuit, her reasoning [that] the state cannot restrict businesses from asking for documented proof of vaccinations is also likely to be applied in similar circumstances.”).

its fully vaccinated cruises. NCLH's win on an admiralty jurisdiction claim would essentially create a carveout of section 381.00316 for cruise lines. This win would not implicate the constitutionality of the statute as applied to other businesses, and would mitigate the harm, if any, to the relationship between NCLH and the Florida government.

#### CONCLUSION

This Comment showcases the magic of maritime contracts in eluding compliance with state law, and how NCLH could have wielded this magic in eluding compliance with section 381.00316's ban on requiring proof of COVID-19 vaccination. This Comment sheds light on a legal loophole that businesses who create and enter maritime contracts, particularly other cruise lines conducting cruises out of Florida, can take advantage of to avoid compliance with state laws that burden their operations. Such a measure can be especially vital in a commercial environment still entangled in the unpredictable, ever-evolving COVID-19 pandemic.<sup>259</sup>

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<sup>259</sup> See, e.g., *What Is a Vaccine Passport?*, *supra* note 256 (explaining how some business are trying to develop their own digital health passes in response to varying stances on vaccine passports around the world).