Case No. 21-11159

United States Court of Appeals for the Fifth Circuit

DAVID SAMBRANO, on their own behalf and on behalf of all others similarly situated; DAVID CASTILLO, on their own behalf and on behalf of all others similarly situated; KIMBERLY HAMILTON, on their own behalf and on behalf of all others similarly situated; DEBRA JENNEFER THAL JONAS, on their own behalf and on behalf of all others similarly situated; GENISE KINCANNON, on their own behalf and on behalf of all others similarly situated; SETH TURNBOUGH, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED AIRLINES, INCORPORATED,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division, No. 4:21-cv-01074-P

BRIEF OF APPELLANTS

John C. Sullivan
S | L LAW PLLC
610 Uptown Boulevard, Suite 2000
Cedar Hill, TX 75104
Telephone: (469) 523-1351
Facsimile: (469) 613-0891
john.sullivan@the-sl-lawfirm.com

Robert C. Wiegand
Melissa J. Swindle
STEWART WIEGAND & OWENS PC
325 N. St. Paul Street, Suite 3750
Dallas, TX 75201
Telephone: (469) 899-9800
Facsimile: (469) 899-9810
bob.wiegand@swolegal.com

Gene C. Schaerr
Counsel of Record
Mark R. Paoletta
Brian J. Field
Joshua J. Prince
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
Facsimile: (202) 776-0136
gschaerr@schaerr-jaffe.com

Counsel for Appellants

DECEMBER 20, 2021

CERTIFICATE OF INTERESTED PERSONS

No. 21-11159

DAVID SAMBRANO, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; DAVID CASTILLO, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; KIMBERLY HAMILTON, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; DEBRA JENNEFER THAL JONAS, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; GENISE KINCANNON, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; SETH TURNBOUGH, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED

v.

UNITED AIRLINES, INCORPORATED

The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellants:	David Sambrano, David Castillo, Kimberly Hamilton, Debra Jennefer Thal Jonas, Genise Kincannon, Seth Turnbough
Counsel for Plaintiffs-Appellants:	SCHAERR | JAFFE LLP Gene C. Schaerr (gschaerr@schaerr-jaffe.com) Mark R. Paoletta (mpaoletta@schaerr-jaffe.com) Brian J. Field (bfield@schaerr-jaffe.com) Kenneth A. Klukowski (kklukowski@schaerr-jaffe.com)

	Joshua J. Prince (jprince@schaerr-jaffe.com) Annika M. Boone (aboone@schaerr-jaffe.com) S | L LAW PLLC John C. Sullivan (john.sullivan@the-sl-lawfirm.com) STEWART WIEGAND & OWENS PC Robert C. Wiegand (bob.wiegand@swolegal.com) Melissa J. Swindle (melissa.swindle@swolegal.com)
Defendant-Appellee:	United Airlines, Incorporated
Counsel for Defendant-Appellee:	JONES DAY Donald J. Munro (dmunro@jonesday.com) Alexander V. Maugeri (amaugeri@jonesday.com) Hashim M. Mooppan (hmmooppan@jonesday.com) Jordan M. Matthews (jmatthews@jonesday.com) KELLY HART & HALLMAN LLP Russell D. Cawyer (Russell.cawyer@kellyhart.com) SEYFARTH SHAW, L.L.P. Esteban Shardonofsky (sshardonofsky@seyfarth.com)
Other interested entity:	Airline Employees 4 Health Freedom

/s/ Gene C. Schaerr
Gene C. Schaerr

Counsel of Record for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is scheduled in this case for January 3, 2022. Appellants' Petition for Initial Hearing *En Banc* is currently pending.

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This case is not about whether a private company may institute a COVID-19 vaccine mandate. Instead, this appeal presents a narrow question: Do workers suffer immediate and irreparable injury when an employer—particularly an airline like United—offers only indefinite unpaid leave as an "accommodation?" Indeed, as Judge Ho recognized, the deeper issue presented in this case is whether an employer may leverage its position to coerce employees to abandon their beliefs. As Appellants demonstrated during the district court proceedings, United's false accommodation is causing them serious irreparable injuries.

This Court recently recognized that one such irreparable injury occurs every day when Appellants are forced to choose between their beliefs and health, on the one hand, and their families, on the other hand—in other words, between their "jobs and jabs." *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). As Judge Ho stated in dissenting from the denial of an injunction pending appeal in this very case, to ignore this harm is to "misunderstand the entire nature of religious conviction at its most foundational level." *Sambrano v. United Airlines, Inc.*, 2021 WL 5881819, at *3 (5th Cir. Dec. 13, 2021) (Ho, J., dissenting).

But that is only one of the irreparable injuries United is causing. Airlines are a highly specialized and unique operation. While on unpaid leave, Appellants lose opportunities to bid on unique job opportunities within United—opportunities that often arise only sporadically and may never be available to the employee again. And for pilots, who face mandatory retirement at age 65, the impact of missed opportunities is particularly serious. ROA.3703:23–04:1. Neither United nor the district court has explained what remedy could possibly be available after trial to remedy those lost opportunities.

Similarly, Appellants will lose their seniority while on unpaid leave and, as United's own witness testified, because of collective-bargaining considerations, the district court cannot order retroactive reinstatement of Appellants' seniority. Accordingly, in an industry where "seniority is everything," ROA.4167, this loss will be permanent.

Finally, extended unpaid leave is costing Appellants their housing, the ability to receive life-saving medical treatment, and their children's education. While the district court may be able to provide backpay after trial, many of these harms cannot be remedied through monetary damages.

Accordingly, this case clearly falls within the category of employment discrimination cases where "the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974). If this is not such a case, it is unclear what else would be required. The Court should reverse the district court's holding that Appellants had not demonstrated irreparable injury.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1) because it is an appeal of an order that denied Appellants' motion for preliminary injunction and motion for reconsideration. Appellants timely appealed by filing a notice of appeal within 30 days of the district court's November 8, 2021 Order denying Appellants' motion for preliminary injunction and November 19, 2021 Order denying Appellants' motion for reconsideration. *See Sambrano v. United Airlines, Inc.*, No. 4:21-cv-1074-P, 2021 WL 5178829 (N.D. Tex. Nov. 8, 2021) (ROA.3263–77); *Sambrano v. United Airlines, Inc.*, No. 4:21-cv-1074-P, 2021 WL 5445463 (N.D. Tex. Nov. 19, 2021) (ROA.3407–10).

ISSUE PRESENTED

Whether the district court erred in concluding that Appellants had not demonstrated irreparable injury.

STATEMENT OF THE CASE

A. Factual background

1. United's COVID-19 vaccine mandate

By Spring 2020, COVID-19 was spreading rapidly around the world. At that time, United began implementing certain mitigation measures for its workforce, including requiring employees to wear masks and maintain distance from others. ROA.3727:13–28:8. On August 6, 2021, United announced that all employees must receive a COVID-19 vaccine within five weeks of the U.S. Food and Drug Administration ("FDA") granting full approval of a vaccine, or five weeks after September 20, 2021, whichever came first. ROA.3728–30. On August 23, 2021, the FDA approved a form of Pfizer's COVID-19 vaccine, and United employees were required to receive a vaccine by September 27, 2021. ROA.3730. For most employees, United's mandate is absolute—there is no alternative for periodic testing, mask wearing, or social distancing. Employees must choose vaccination or termination. For employees who requested an accommodation and survived United's discriminatory and retaliatory accommodation process, United offered them indefinite

unpaid leave. *See* ROA.115 ¶ 11; ROA.131 ¶ 10; *see also* ROA.3731:21–32:16, 3746:8–47:7, 3748:9–18.

In this respect, United's policy differs substantially from other COVID-19 mandates. For instance, some of the Federal Government's recent vaccine mandates require vaccination *or* periodic testing.[1] Similarly, other major airlines permit testing in lieu of vaccination. ROA.594. And the European Union's digital COVID-19 certificate considers the following as equivalent: (1) COVID-19 vaccination; (2) negative COVID-19 test; or (3) having previously recovered from COVID-19. ROA.656.[2]

According to United, it instituted this mandate to increase safety among its workforce. Yet, United does not require any passenger on its planes to be vaccinated. ROA.3842:23–25. It does not require its employees from other countries to be vaccinated, despite those employees working and coming into contact with United crews from the United States. ROA.3858–59. And pilots from other airlines who fly in the

[1] The White House, *Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies* (Nov. 4, 2021), https://tinyurl.com/mecvujh7.

[2] Citing EU Digital COVID Certificate, European Commission, https://tinyurl.com/5n96wb68.

cockpit jumpseat on United planes need not be vaccinated. ROA.3843:20–44:14. Further, because of the advanced air filtration system United uses on all of its planes, ROA.3807, it is "virtually impossible for one person to transmit COVID to another" on a United flight, ROA.3647:3–10. As United explains in its marketing materials, it partnered with the Cleveland Clinic to study the safety of its aircraft during the COVID-19 pandemic. ROA.3791:15–92:16, 3802:7–9, 4290. And United points its customers to the results of that study, as well as a Department of Defense study, "showing that aircraft cabins are among the safest of public indoor environments." ROA.3807:6–12. In fact, United tells its customers that "even when the plane is full, on average only 0.003% of infected air particles could enter the breathing zone of seated, masked passengers[.]" ROA.4292.

As United's Chief Executive Officer Scott Kirby recently boasted to a congressional committee, because of those filtration systems, "the airplane is the safest place that you can be indoors," including places like an intensive care unit. *Oversight of the U.S. Airline Industry Before the S. Comm. on Com., Sci., & Transp.*, 117th Cong. (2021) (Dec. 15, 2021 video testimony of Scott Kirby, CEO, United Airlines, at 56:24)

("Oversight Hr'g).[3] Further, Mr. Kirby explained that because of the airflow within planes, sitting next to a passenger in a United plane is equivalent to sitting 15 feet from the person in a typical building. *Id.* at 56:42.

Accordingly, United has demonstrated that its mandatory vaccine policy is driven by marketing, not safety. In fact, just last week Mr. Kirby emphasized how he believed United's vaccine mandate set it apart from other airlines. *See* Oversight Hr'g at 2:16:10–2:16:35.

2. United's "accommodation" process

When United announced its vaccine mandate, it stated that employees could request accommodations for religious or health reasons. But United also made clear that those requests were likely to be denied. In fact, Mr. Kirby threatened his employees to "be very careful about" requesting such accommodations and said that "very few" people would "get through the medical and religious exemption process." ROA.745 ¶ 15. Instead, Mr. Kirby derisively described such employees as "all [of a] sudden decid[ing] I'm really religious." *Id.*

[3] https://www.c-span.org/video/?516667-1/airline-oversight-hearing.

Mr. Kirby's public threats were just one part of United's public pressure on its employees to abandon their faith and health. In August 2021, United also began sending postcards to all employees who had not yet provided proof of vaccination. ROA.1097–98. Those postcards stated that United had not received evidence of vaccination for the recipient employee. ROA.1097. By sending postcards, rather than letters, United broadcast its employee's vaccine status to all who saw them—including family members who might join United in trying to coerce the employee to abandon his beliefs or health. ROA.1097.

For the accommodation request process, United required employees to submit requests through a United system—Help Hub—by August 31, 2021. ROA.3734–35:2. The Help Hub system required an employee to select either a religious accommodation *or* a medical accommodation, but not both. ROA.3630:8–15. Many requests received after August 31, 2021, were denied as untimely. ROA.3659:22–24.

For the majority of accommodation requests, United did not engage in the interactive process with the employee. ROA.136 ¶ 7, 140 ¶ 4. But when it did, United's interactive process consisted of questioning the legitimacy of an employee's religious beliefs or medical conditions.

ROA.660. For instance, when an employee requested an exemption based on a religious objection to the vaccine's use of fetal cell lines in the development and testing process, United responded by asking: "Are you aware if any vaccines or medications you have previously received were created, researched, or tested or otherwise involved the use of stem cells," and if so, "please explain why receiving such vaccines or medications were not a violation of your sincerely held religious belief." ROA.3700, 4000, 4011. United further asked: "What about your religious belief prevents you from getting the COVID vaccines, but not taking other types of medicine[?]" ROA.37, 136 ¶ 7, 3738.

Additionally, United demanded that several requesters provide (on a short 3-day timeline) a letter from a pastor or third-party attesting to the employees' beliefs. ROA.3686:5–22. And some employees seeking medical accommodations received demands for medical certifications, while others did not. ROA.38, 122, 660.

On September 9, 2021, United announced that for any accommodation request granted, the employee would be placed on unpaid leave starting October 2, 2021, without any company-paid benefits. ROA.4280; *see also* ROA.3612:16–19, 3677:21–79:9, 4011. United further

stated that unpaid leave would last until the COVID-19 pandemic "meaningfully" subsides, ROA.3701:14–19, which United stated could be up to 72 months, ROA.2964.

Since then, and after Appellants filed this lawsuit, United temporarily changed course for a select group of employees—dividing employees into "above the wing employees" and "below the wing employees." For some "above the wing employees"—pilots and flight attendants—United maintains that they will remain on unpaid leave indefinitely. ROA.3775:12–18. In fact, United announced in October 2021 that it will keep those employees on unpaid leave until the "nationwide daily case counts" are "no more than 10,000 new cases per day for at least 21 consecutive days on a rolling 7-day average." ROA.3177. As Appellants' expert explained, the daily case count has not been close to that number for any sustained period (much less 21 days) since the pandemic began. ROA.3193. In other words, United's announcement confirmed that its "temporary" accommodation of unpaid leave for "above the wing employees" is actually "permanent."

For other "above the wing employees," United offered temporary reassignments where the employees may work in different (less

prestigious) positions for up to 59 days. ROA.3622:13–15. After that time, these employees are set to be placed on unpaid leave until the end of the COVID-19 pandemic. ROA.3758:20–59:2.

Finally, United has allowed "below the wing employees"—those who do not interact with customers—to return to work, provided that they agree to wear respirators (whether working inside or outside), submit to periodic testing, eat all meals outside, and maintain distance from other employees. ROA.3382, 3750:14–25, 3764:17–65:2. United has not stated whether these temporary accommodations will be continued. ROA.3758:12 ("[N]o accommodation is permanent."). If not, these employees will also be placed on unpaid leave. ROA.3758:13–23.

3. Appellants and their irreparable injuries

Appellants are six United employees who requested religious or medical accommodations. They initiated this lawsuit on behalf of themselves and a class of similarly situated United employees. Appellants Sambrano and Turnbough are pilots.[4] ROA.29, 31. Mr.

[4] Mr. Turnbough's claims against United were ultimately dismissed after the Court found it lacked personal jurisdiction over United for his claims. ROA.3259. Although Appellants disagree with the district court's holding, they do not challenge it here because this Court need not reverse that decision now to reverse the district court's holding that Appellants had not sufficiently demonstrated irreparable harm.

Castillo is an Aircraft Technician. ROA.29. Ms. Hamilton is a Station Operations Representative who works in an office setting. ROA.30. Ms. Jonas is a United Club Representative at Dallas-Fort Worth Airport, where she works in the United Club lounge. ROA.30. And Ms. Kincannon is a flight attendant. ROA.30.

Appellants Sambrano, Castillo, Hamilton, and Kincannon requested religious accommodations based on their belief that the COVID-19 vaccines were developed or tested using aborted fetal tissue and that it is sinful to use anything derived from abortion. ROA.41, 42, 44, 47. Additionally, Appellants Sambrano, Castillo, and Kincannon attempted to request medical accommodations because they previously recovered from COVID-19 and were concerned about the medical risks posed by receiving a vaccine while already possessing natural immunity to COVID-19. ROA.41, 43, 47.

Ms. Jonas requested a medial accommodation due to her severe allergies. ROA.130–31. And Mr. Turnbough requested a medical accommodation because he has relapsing/remitting multiple sclerosis and his neurologist recommended that he not receive the vaccine due to a concern that it might trigger a "cytokine storm"—a condition where an

individual's immune system is over-stimulated and begins attacking healthy tissue and organs. ROA.48, 121.

Although Appellants had different careers and worked in different work environments, United responded by stating that each would be "accommodated" with unpaid leave through the end of the COVID-19 pandemic. ROA.3701:14–19, 3775:12–20.

Extended unpaid leave has serious consequences for Appellants. Mr. Castillo testified that he lives paycheck to paycheck and that he will be "out on the street" if he is put on unpaid leave. ROA.366:18–10. He further testified that even his truck, which provides at least some shelter, would only be available for a short time, as he would be unable to continue making his payments. ROA.4003. But Mr. Castillo's homelessness is only one of the many harms he faces. He is a diabetic who would be unable to pay for necessary medication without medical insurance. ROA.4003. Ms. Hamilton similarly faces difficult medical questions, as her husband, who has cancer, relies on her medical insurance for treatment. ROA.3994. Her husband quit his full-time job to focus on recovering not long before United threatened to place her on unpaid leave. ROA.3619. Ms. Hamilton testified that extended unpaid

leave will force her husband to either find alternative treatment or discontinue treatment altogether. ROA.3619:18–20:25, 3994.

As noted, Mr. Turnbough has multiple sclerosis and depends on significant medical care, which is impacted by a loss of medical insurance and income. ROA.3699:11–3700:8. And without his job, he will be unable to pay for the considerable medical treatments he requires. ROA.4000. Ms. Jonas, who provides her family's only source of income will be unable to provide her disabled husband with the medical care he needs. ROA.4007. For Mr. Sambrano, extended unpaid leave will require his family to "make difficult choices regarding the college education of three children." ROA.3991.

Under similar pressure, other United employees have acquiesced to United's threats, forsaking their beliefs and health to provide for their families. David Lockwood was just one example—he tried to resist as long as possible, to no avail. Eventually, in order to survive, he acquiesced to United's threats, forsaking his faith by taking the vaccine against his beliefs. To this day he suffers from that decision. ROA.4015 ¶¶ 8–9.

4. Alternative accommodations that would impose at most minimal cost on United

Despite United providing indefinite unpaid leave as an "accommodation," Appellants identified several other accommodations available. For instance, Appellants' expert, Dr. Jayanta Bhattacharya, testified that there are at least three alternative accommodations available to United: (1) periodic COVID-19 testing; (2) symptom screening; and (3) antibody testing. ROA.4080–83. And another expert, Fred Bates, testified that each alternative accommodation could be implemented with little to no cost for United. ROA.4161–65. In fact, these accommodations would likely be costless for United as Appellants offered to pay for their own tests and United already had systems in place for the employees to report test results. ROA.3621:6–13, 3649:3–5.

B. Procedural background

To protect Appellants and similarly situated United employees from irreparable injury, Appellants filed a class action complaint on September 21, 2021, claiming that United's actions violated Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act ("ADA"). ROA.28. The next day, Appellants filed a motion for a temporary restraining order ("TRO") and preliminary injunction.

ROA.66. Shortly before the TRO hearing, United agreed to a temporary delay of its plan to place employees on unpaid leave. ROA.3183. Based on that agreement, the district court held the TRO motion in abeyance and scheduled a preliminary injunction hearing. *Id.*

On the eve of the preliminary injunction hearing, United filed a motion to dismiss for lack of subject-matter jurisdiction. ROA.473. The district court postponed the preliminary injunction hearing and ordered expedited briefing on the motion to dismiss. ROA.494. Shortly thereafter, the district court entered a TRO because United's policy could "compel[ ] [employees] to take a vaccination in violation of their religious beliefs or medical restrictions." ROA.649.

In advance of the preliminary injunction hearing, Appellants filed an amended complaint on October 12, 2021. ROA.650. On October 13 and 14, the district court held an evidentiary hearing on the preliminary-injunction motion. On November 1, 2021, Appellants filed a motion for provisional class certification, which remains pending. ROA.3228.

After the preliminary injunction hearing, the district court ordered supplemental briefing to address whether any collective bargaining agreements impacted United's ability to provide accommodations beyond

unpaid leave. ROA.683. While the district court was considering these issues, and while the Parties engaged in mediation, *see* ROA.3144, the district court extended the TRO, concluding again that absent injunctive relief, United employees may be "compelled to take a vaccination in violation of their religious beliefs or medical restrictions," ROA.3183–85.

On November 8, 2021, the district court issued its decision on the motion for preliminary injunction, denying Appellants' motion. In that Order, the district court concluded that Appellants' claims "appear compelling and convincing at this stage." ROA.3275. The district court further stated that it was "disturbed by United's seemingly calloused approach to its employees' deeply personal concerns with injecting a foreign substance into their bodies." ROA.3276. And this was "especially true since United stated on the record that 99% of its employees are vaccinated and that there is virtually no chance to transmit COVID-19 on its planes." ROA.3276. Yet, the district court concluded that the Appellants had not sufficiently satisfied its understanding of the irreparable injury requirements. ROA.3276–77.

The district court rejected the Appellants' "impossible choice" theory of irreparable injury, concluding that United's employees may

simply choose to "endure unpaid leave" rather than receive the vaccine. ROA.3269. The district court also rejected the argument that being deprived of a religious liberty in this context is an irreparable injury. ROA.3269. Continuing, the district court held that there was no irreparable injury to Appellant's job status because it could order United to place "accommodated" employees back into their seniority positions upon return. ROA.3270–71. Finally, the district court concluded that other injuries—loss of income, benefits, and downstream effects of the same—were not irreparable because backpay would be available if Appellants are ultimately successful. ROA.3271–74.

On November 11, 2021, Appellants filed a motion for limited reconsideration, noting that the district court overlooked a key injury—lost bidding opportunities. ROA.3278. Appellants explained that these lost opportunities could not be remedied by a return to seniority positions later. ROA.3279–83. Rather, the opportunities are lost forever and cannot be quantified. ROA.3283. The district court denied this motion on November 19, 2021, stating that it could remedy these injuries through an order returning employees to their seniority positions. ROA.3407.

Thereafter, Appellants sought an injunction pending appeal, first with the district court, ROA.3422, and then in this Court. On December 13, 2021, this Court denied the emergency motion for injunction pending appeal. In a thorough dissent, Judge Ho explained that this case is "very different" from a "garden variety case of unlawful termination." *Sambrano*, 2021 WL 5881819, at *2 (Ho, J., dissenting). Rather than facing only the "loss of a paycheck," Judge Ho emphasized that United's policy presented its religious employees with a "crisis of conscience," the "most horrifying of Hobson's choices." *Id.* He correctly recognized that being put to the choice between "one's faith and one's livelihood" is a "quintessentially irreparable injury, warranting preliminary injunctive relief" regardless whether that choice is "instigated by government or industry." *Id.* at *2–3.

Judge Ho also explained why it would be wrong to disregard cases finding irreparable harm resulting from the denial of First Amendment rights—whether "statutory [or] constitutional," the denial of the right to free exercise "cannot be adequately compensated monetarily." *Id.* at *3 (citing *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)). Irreparable harm, after all, "focus[es] on the plaintiff," not on "the identity of the

defendant." *Id*. And because both the "person who acquiesces to United's mandate" and the "person who refuses" is left to "wrestle with self-doubt" about whether he "hurt his family" or has "lived up to the calling of his faith," Judge Ho explained that the "earthly reward of monetary damages" was insufficient to "compensate for these profound challenges." *Id.*

SUMMARY OF ARGUMENT

The district court erred when it concluded that Appellants had not demonstrated irreparable injury. An injury is irreparable "if it cannot be undone through monetary remedies." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quotation marks omitted). Appellants have demonstrated several forms of irreparable injury.

Most obviously, United is forcing them to choose between their beliefs and their jobs, which this Court has already held is an irreparable injury. *BST*, 17 F.4th at 618.[5] Extended unpaid leave will also cost

[5] *BST* and several other cases challenging the federal government's private employer mandate were subsequently consolidated pursuant to 28 U.S.C. § 2112(a)(3), and the Sixth Circuit recently dissolved the stay that this Court issued in *BST*. *See In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing*, --- F.4th ----, 2021 WL 5989357 (6th Cir. Dec. 17, 2021). The Sixth Circuit did not address or contradict this Court's conclusion that the impossible

Appellants their important seniority positions and, separately, opportunities to bid for positions, upgrades, transfers, vacations, and schedules that are unavailable while Appellants are unpaid leave. Finally, extended indefinite leave will cause serious injuries to Appellants' lives and families, causing homelessness, lost medical treatment, and lost education opportunities. At each turn, monetary damages will be no answer for these injuries and this Court should reverse the district court's holding that Appellants did not demonstrate irreparable injury.

In light of the many alternative accommodations that would impose minimal if any cost on United, as well as the lack of support in the record or science for a vaccine mandate that can brook no exceptions, it is clear that United allowed its marketing plans to drive its decisions, rather than federal civil rights law. The irreparable harms left in its wake should be stopped now so that the Court may issue meaningful relief later.

"job or jab" decision constitutes an irreparable harm. Rather, the Sixth Circuit's irreparable harm analysis focused exclusively on balancing the costs of a stay. *Id.* at *18–19. The Supreme Court is currently reviewing that dissolution. *See* No. 21A243 (U.S. pending Dec. 20, 2021).

ARGUMENT

Each day United forces Appellants to remain on unpaid leave, they suffer irreparable injuries, including (1) the necessity of choosing between their beliefs and their careers; (2) losing unique or otherwise lucrative career opportunities that come along only rarely; (3) lost seniority, and (4) other injuries to their personal and professional lives. At each turn, the district court erred by concluding that these injuries are not irreparable. Although this Court reviews the district court's decision denying a motion for preliminary injunction for an abuse of discretion, *Robinson v. Hunt County*, 921 F.3d 440, 451 (5th Cir. 2019), a decision like the district court's, which is "grounded in erroneous legal principles[,] is reviewed *de novo*[,]" *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001). The district court grounded its decision on incorrect legal principles and this Court should reverse the district court's conclusion that Appellants are not suffering irreparable injuries.

I. United Irreparably Injures Appellants by Forcing them to Choose Between their Jobs and their Beliefs or Health.

In an apparent effort to gain a competitive advantage in its business, United forces its employees to receive the COVID-19 vaccine or

leave the workforce. To do so, United holds its employees' income over their heads, threatening years of unpaid leave if they do not acquiesce. Each morning, these employees face the choice between "job(s) and … jab(s)." *BST*, 17 F.4th at 618.

The weight of that choice is acute. Many employees who were put on unpaid leave when the district court denied the motion for preliminary injunction have now received their final partial paychecks. They are now sent barreling into the holidays with no income or benefits, solely because of their religious beliefs or health concerns. And each day the pressure to choose between a "job[ ] and … jab[ ]" becomes heavier. For some employees, United has been successful—they have decided that their "obligation[ ]" to "feed[ ] and hous[e] their children" requires them to receive the vaccine, notwithstanding their beliefs. *Sambrano*, 2021 WL 5881819, at *2 (Ho, J., dissenting); *see also* ROA.140–41 ¶¶ 1, 3, 6. But others are holding strong and resisting United's coercion. That choice—the decision between "job(s) and … jab(s)"—is an irreparable harm. *BST*, 17 F.4th at 618.

A. A deprivation of statutory religious freedom rights causes the same irreparable harm as a deprivation of First Amendment rights.

There is no dispute that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). The same is true with statutory anti-discrimination and religious-freedom rights.

1. Indeed, Title VII's religious-accommodation provision has its roots in the First Amendment and it exists to prohibit private employers from engaging in religious discrimination in the same way government was already prohibited. As this Court has stated, Title VII's legislative history shows that it was "intended to protect the same rights in private employment as the Constitution protects[.]" *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116-17 (5th Cir. 1972). The Seventh Circuit similarly stated: "At the risk of belaboring the obvious, Title VII aimed to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (7th Cir. 2013).

Academics agree. Title VII "reveals congressional concern for the protection of religious rights in the area of private employment to the same extent these rights have been protected from governmental interference by the Constitution." Raymond Suberlak, *Title VII: An Employer's View of Religious Discrimination Since the 1972 Amendment*, 7 LOY. U. CHI. L.J. 97, 103-04 (1976). Indeed, Title VII "was a fitting compliment to the Supreme Court's own pro-accommodation view of the Free Exercise Clause." James Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, 6 U. PA. J. CONST. L. 525, 572 (2004); *see also* Maj. Christopher D. Jones, *Redefining "Religious Beliefs" Under Title VII: The Conscience as the Gateway to Protection*, 72 A.F. L. REV. 1, 9-10 (2015) (Title VII "protects these same beliefs by prohibiting discrimination in the workplace.").

Contrary to the district court's conclusion (ROA.3269), as Judge Ho recently noted, "it does not matter if a claim of religious interference is 'statutory rather than constitutional' in nature." *Sambrano*, 2021 WL 5881819, at *3 (Ho, J., dissenting) (quoting *Jolly*, 76 F.3d at 482). The result is the same—an employee is prohibited from exercising her

religious beliefs and that harm "cannot be adequately compensated monetarily." *Jolly*, 76 F.3d at 482.

Jolly is instructive and persuasive. There an inmate challenged the conditions of his confinement under the Religious Freedom Restoration Act ("RFRA") and the Eighth Amendment, and sought preliminary injunctive relief. *Id.* at 471. The defendants argued that the inmate did not suffer any irreparable harm because "plaintiff's free exercise claim is statutory rather than constitutional." *Id.* at 482. The Second Circuit held that he was irreparably injured because his "statutory" "free exercise claim … cannot be adequately compensated monetarily." *Id.*

The Tenth Circuit reached a similar conclusion in *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001), holding that statutory violations of an individual's ability to exercise religious beliefs causes irreparable harm in the same way as a deprivation of First Amendment rights. *See id.* at 963 (discussing RFRA claims). In that context, the Tenth Circuit held that the district court "committed legal error in holding Plaintiff had not satisfied the irreparable injury prong of the preliminary injunction analysis" because "the relief available to Plaintiff after trial would not adequately compensate him for the alleged violations of his religious

rights[.]" *Id.*; *see also O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1187 (10th Cir. 2003) (holding in RFRA context that irreparable "harm ensues from the denial of free exercise"), *aff'd*, 546 U.S. 418 (2006).

These principles apply equally to Title VII religious-accommodation claims. Indeed, where, as here, a "statute was enacted for the express purpose of protecting the First Amendment rights of individuals, the allegations that the defendants have violated this statute also triggers the same concerns that led the courts to hold that these violations result in a presumption of irreparable harm." *Murphy v. Zoning Comm'n of Town of New Milford*, 148 F. Supp. 2d 173, 180–81 (D. Conn. 2001) (citing *Jolly*, 76 F.3d at 482).

Judge Ho's dissent underscores why this must be true for Appellants' Title VII claims:

> The person who acquiesces to United's mandate despite his faith doesn't lose any pay. But he will have to wrestle with self-doubt—questioning whether he has lived up to the calling of his faith. Likewise, the person who refuses must also wrestle with self-doubt—questioning whether his faith has hurt his family, and whether living up to his commitments was worth sacrificing the interests of his loved ones.

Sambrano, 2021 WL 5881819, at *3 (Ho, J., dissenting). As Judge Ho concluded, the notion "that the earthly reward of monetary damages could compensate for these profound challenges of faith is to misunderstand the entire nature of religious conviction at its most foundational level. And that is so whether the mandate comes from D.C. or the C-Suite." *Id.*

2. For this same reason, this case does not present the mine-run employment dispute. ROA.3273. Appellants do not face only the "ubiquitous" harms present in "employment discrimination disputes[.]" *Id*. If Appellants acquiesce to United's coercion, as some other employees have, there is no way to undo that decision by removing the vaccine. Accordingly, the impossible choice for Appellants differs from other religious accommodation cases where a job applicant or employee faces decisions whether to work on the Sabbath, *see Vaughn v. Waffle House, Inc.*, 263 F. Supp. 2d 1075 (N.D. Tex. 2003), wear a headscarf, *see EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), or change grooming practices, *see Ware v. Louisiana Department of Corrections*, 866 F.3d 263 (5th Cir. 2017). Unlike the plaintiffs in those cases, Appellants face a choice that will have permanent (and potentially eternal)

consequences. For this reason, this Court has already held that forcing an employee to decide between "job(s) and … jab(s)" is an irreparable harm. *BST*, 17 F.4th at 618. And it is undisputed that Appellants face this choice daily.

B. The district court's contrary conclusion finds no support in binding precedent or the record.

The district court, which reacted favorably to Appellants' claims on the merits, resisted this conclusion as to irreparable injury for four flawed reasons.

First, the district court seemed to confuse an employer's general ability to require vaccination with the situation here, where United is blatantly violating federal law by forcing an employee to choose between "a job and a jab." To be sure, no law *generally* prohibits an employer from imposing a vaccine mandate that requires employees to choose between "a job and a jab." But, absent undue hardship (which United has not seriously alleged or shown), Title VII and the ADA prohibit an employer from coercing employees to violate their faith or health. 42 U.S.C. § 2000e(j); 42 U.S.C. § 12112(b)(5)(A). And that is why those statutes also prohibit employers from punishing employees because of religious or

medical needs for accommodation. *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004); 42 U.S.C. § 12203.

By contrast, under the district court's apparent logic, employees can always choose whether to assert their religious beliefs or submit to the employer's will. ROA.3269–70. In other words, the district court seems to believe that United is immunized from a claim of irreparable injury because an employee could always voluntarily decide to violate his beliefs. Were that correct, little would be left of Title VII or the ADA. Because it is not correct, United must be held responsible for the harms caused by what the district court correctly recognized (at ROA.3276–77) as a regime of false accommodations. And here, that harm is irreparable because United is forcing employees to violate their faith and health to receive a vaccine that will compromise either their faith or their health—the effects of which cannot be reversed or compensated later.

Especially with respect to religious exemptions, there simply is no way to compensate someone for the forced violation of religious beliefs. The question "whether he has lived up to the calling of his faith" will never subside. *Sambrano*, 2021 WL 5881819, at *3 (Ho, J., dissenting).

Second, the district court incorrectly concluded that "[i]t is undisputed that United exempted Plaintiffs from the vaccine mandate." ROA.3269. Not so. Indeed, that one-off assertion conflicts with other well-reasoned portions of the district court's decision, recognizing that United's "accommodation" of indefinite unpaid leave was the functional equivalent of termination. ROA.3276 (noting that United has offered only a "trifling pittance of indefinite unpaid leave"). The district court further recognized that United's actions were calloused and that United *could* provide legitimate accommodations for its employees. *Id.* But on these facts, to say that United is "not [denying employees] the freedom to exercise their religious beliefs" blinks reality. ROA.3269.

Third, the district court failed to confront that United's false accommodations are causing daily violations of religious freedom. ROA.3268–69 n.8. Many employees do not have the means to continue providing for their families in order to withstand United's coercion. ROA.140, 4003. While the district court believed it can remedy lost wages later, that will only be an option for financially secure employees—those with financial limitations will be forced to abandon their religious beliefs to put food on the table. And backpay will not remedy that harm.

If this standard were the law, federal civil rights laws would be reserved for the wealthy.

Finally, the district court erred in concluding that its decision was dictated by precedent. ROA.3277, 3409. Although the district court repeatedly stated that it was "bound by precedent," its discussion of the impossible choice noticeably fails to identify any binding precedent. ROA.3277. The district court cited *Roman Catholic Diocese*, 141 S. Ct. at 67, for the undisputed proposition that a loss of First Amendment rights "unquestionably constitutes irreparable injury." ROA.3269. But the district court refused to apply this to Appellants' claims, relying exclusively on two unpublished decisions from district courts outside this Circuit. ROA.3269–70. Similarly, when the district court stated that it would "decline[ ] to elevate statutory protections from private-company-discrimination to the level of constitutional protections from government encroachment," ROA.3270, the district court overlooked this Court's recognition that Title VII was "intended to protect the same rights in private employment as the Constitution protects[.]" *Riley*, 464 F.2d at 1116–17.

And even when presented with this Court's *BST* decision, the district court again rejected Appellants' impossible choice theory of injury, stating again that it was "bound by precedent," which apparently did not include *BST*. ROA.3409. In fact, to this day, the district court has not identified a single binding authority supporting its holding that a deprivation of a statutory right to religious exercise is treated differently for the purposes of irreparable harm than a constitutional right to religious exercise. But to its credit, the district court expressly requested this Court's guidance on this important question. ROA.3409–10.

Because there is no way to remedy the injuries caused by this impossible choice, Appellants have shown irreparable harm and this Court should reverse the district court's decision.

II. Appellants are Irreparably Injured by the Loss of Bidding Opportunities on Unique, Long-Term Positions.

Appellants also face a second and independent irreparable injury: While on unpaid leave, they will miss the opportunity to bid for unique, long-term career opportunities within United—lost opportunities that cannot be quantified or remedied. As the evidence below established, an airline employee's ability to bid on open positions "determines your

ability to hold a set schedule, have time off, or take vacations." ROA.4167. The results of these bids "affect [each] employee's quality of life[.]" *Id.* And this extends beyond pilots: "[a] mechanic may lose the opportunity to bid for a position working inside the aircraft and thus, upon return, he will be forced to work a job outside in the heat or cold." *Id.* Similarly, "[a]n employee working inside the airport may lose the opportunity to bid for a position in a more desirable terminal." *Id.*

In short, each employee on unpaid leave "during a time when bids are made for particular job locations, flight routes, or schedules … will lose out on the opportunity to secure the selections that would otherwise be available based on his or her seniority." *Id.* Moreover, "[o]nce called back to work, those selections will have already been made and the accommodated employee *will not be able to go back* and bid for such positions." ROA.4167–68 (emphasis added).

1. Witness testimony confirmed the irreparable harm caused by lost bidding opportunities. As Ms. Hamilton explained, any placement on unpaid leave "affects your position for bidding your normal work line, your position for bidding your vacation time, your personal holidays … where you are in line if layoffs occur[,] … flight benefits[,] [and] every

single thing you do every day[.]" ROA.3617:19–18:1. "If you're out on leave, you can't do anything" about bidding for new, desirable jobs that become available. ROA.3618:18–19 (cleaned up). And as Ms. Hamilton confirmed, those missed opportunities are lost forever—they cannot be replaced with money. ROA.3619:1–4.

Mr. Sambrano similarly explained how the bidding process affects one's fleet (*i.e.*, where a pilot is stationed), one's seat on the airplane (captain or first officer), and the type of airplane a pilot flies. ROA.3639:3–5. Those bids are not trivial—the bidding outcome "affects the life at home in every aspect" as it "determines the house that you are able to afford[,]" "the place that you want to live in[,]" "the schools your children go to[,]" "the time off that one has[,]" "whether I'm going to be there for my kids – or my children's events, [and] whether I'm going to be there for the family events[.]" ROA.3641:4–13.

Here again, Mr. Sambrano explained that, upon return from unpaid leave, those bidding opportunities are lost forever—he cannot go back and obtain the positions and benefits that would have been available to him had he not been on unpaid leave. ROA.3640:11–15.

As Mr. Castillo explained, the same is true for mechanics. "The lower seniority guys got job assignments like cleaning the lavatory filters, and the higher seniority guys didn't have to do that." ROA.3661:23–25. Similarly, lower seniority mechanics "got the tire changes and the brake changes and the lube jobs, and the higher seniority guys on the line didn't have to do that, because lower seniority guys were coming in from the hangar." ROA.3662:2–6. The lower seniority mechanics were assigned to the "dirty, heavy lifting jobs," while the more senior mechanics handled the "more cush [sic] jobs, like working on the aircraft fixing a seat back." ROA.3662:7–11.

Moreover, contrary to what the district court apparently believes, ROA.3270–71, an order placing employees retroactively back into their seniority positions will not remedy those harms. Such an order would only ensure that they are able to make *future* bids with their seniority level intact. But that is "no answer for the fact that Plaintiffs will have forever lost the opportunity to bid on various jobs, schedules, and benefits." ROA.3102 n.3.

2. These lost opportunities are not incidental aspects of one's career. "It affects flight benefits," and "[i]t affects if there are openings

for specialty positions." ROA.3617:24–25. Many desirable positions are only rarely "open," and United employees wait their entire careers for opportunities to bid for a particular position. In fact, as Ms. Hamilton explained, bidding opportunities are "so important that I understand that there are agents who are jumping up and down—and I mean, literally, jumping up and down—in excitement[.]" ROA.3615:21–24. That is because they now "have the opportunity to move up in seniority," and thereby enjoy a greater likelihood of successfully bidding on the most desirable positions, because United has placed so many employees on unpaid leave. ROA.3615:24–25.

For instance, international purser positions for flight attendants—a lucrative position with the best schedules, routes, prestige, and pay—are only occasionally open for bids, including a recent opening. ROA.3389–90 ¶¶ 2–5. Flight attendants on unpaid leave when such a lucrative or otherwise desirable position comes open for bidding, may miss their one-in-a-career chance to bid for such a position.

Take, for example, a flight attendant who has worked for United for many years, slowly working her way up the seniority chain and waiting for an international purser position to be open on a route to a particular

international location where she has family. After dutifully working for United for many years, this position finally comes open. Except, the flight attendant is on unpaid leave and cannot bid for the position, which is unlikely to come open again before she retires. *See* ROA.3389–90 (explaining that the position has only opened twice in twenty-one years). That loss cannot be remedied through money damages.

The same is true for the pilot who lives in New York, but is based in San Francisco. Each time she works, she has to travel to her base airport before flying her scheduled routes. She desperately wants to fly as a Captain on a Boeing 787 and be based out of New York where her family lives—a popular location and position. She has waited years for such an opening. And when the position is finally open, she misses it because she is on unpaid leave. And as she is nearing retirement, she will likely never have another opportunity.

Other examples abound—the mechanic who has been waiting for a position to open at a particular "station" where he will be more senior and insulated from layoffs, *see* ROA.3662:19–63:8, or the United Club Representative who has been waiting for an opening in the busiest

United Club, because representatives are able to earn a bonus of $50-$100 for every United credit card applicant she signs up, ROA.3383 ¶ 9.

Again, money damages cannot remedy those harms. As the district court recognized, a harm is irreparable where "money damages would not fully repair the harm." ROA.3268 (citation omitted). Yet the district court did not address how money damages could repair the injuries caused by lost bidding opportunities. Nor could it. Those opportunities are lost forever, and there is no way to identify each opportunity that was lost and the impact of that lost opportunity. The harms are thus clearly irreparable because they "cannot be quantified[.]" *Emerald City Mgmt., LLC v. Kahn*, 624 F. App'x 223, 225 (5th Cir. 2015); *see also Lakedreams v. Taylor*, 932 F.2d 1103, 1109 (5th Cir. 1991) (noting that when an injury is "especially difficult to calculate, a finding of irreparable harm may be appropriate").

Rather, the only way to prevent those harms is through a preliminary injunction, allowing Appellants to continue working and bidding on positions. Accordingly, the Court should reverse the district court's holding that Appellants have not demonstrated irreparable injury caused by the loss of bidding opportunities.

III. Appellants are Irreparably Injured by the Loss of Seniority.

Appellants are also irreparably injured by the impact indefinite unpaid leave will have on their seniority. As Appellants' expert Fred Bates testified, "[i]n airlines, seniority is everything." ROA.4167 ¶ 57. For example, seniority determines an airline employee's ability to bid on "your aircraft/seat/base/job location[.]" *Id.* When an employee joins an airline, he or she receives a seniority number "and your relative seniority follows you for your entire airline career." *Id.* As one progresses through his or her career with United, that relative seniority becomes higher and brings along several career benefits. And, of course, since one receives a seniority number when joining an airline, an "accommodated" employee who decides to quit and go to another airline will start at the bottom rung of seniority, which will have serious consequences for the remainder of his career.

For instance, a higher seniority number protects an employee during a furlough, as "the most junior pilots are cut" first. *Id.*; *see also* ROA.3638:11–16. And then on recall after a furlough, the employees with higher seniority numbers are recalled first. ROA.3638:19–20. Similarly, when "a particular base … is reduced or … goes away,"

seniority determines the order in which employees from that base are "accommodated somewhere else." ROA.3638:24–39:5.

1. When an employee is placed on unpaid leave, "[a]nyone who passes [Appellants] in seniority … will forever be senior to them, even if the suspended employee w[as] hired first." ROA.4168. As the record demonstrates, this will have profound and unquantifiable effects for each Appellant, and similarly situated employees, for the rest of their careers. *See Emerald City Mgmt.*, 624 F. App'x at 225 (harms are irreparable when they "cannot be quantified").

In addition to the expert testimony Appellants provided, ROA.4166–68, United's witness Kirk Limacher agreed that Appellants will permanently lose their seniority positions while they are on unpaid leave. ROA.3748:19–22. Indeed, he testified that "[n]o," United could not "make changes to when someone's seniority accrues without suffering consequences as a result of the collective-bargaining agreement." ROA.3748:19–22. Mr. Limacher's testimony is the *only* evidence in the record addressing seniority upon return, and it proves unequivocally that United cannot reinstate an employee into his seniority position upon return.

2. The district court simply rejected these facts and concluded that it could remedy this injury. ROA.3271. In the main, the district court relied on this Court's decision in *Moseley v. Goodyear Tire & Rubber Co.*, 612 F.2d 187 (5th Cir. 1980), which stated that a court's "power to order … affirmative action" under Title VII "*includes the granting of remedial seniority*." ROA.3271 (quoting *Moseley*, 612 F.2d at 191). But the district court failed to address the fact that *Moseley* also stated that "remedial seniority may *not* be used to displace or 'bump' a permanent employee working a regular assignment." *Moseley*, 612 F.2d at 191.

In rejecting the district court's finding that certain employees had been impermissibly bumped by the company in that case, this Court noted in *Moseley* that the bumped employees "retained their jobs in the trucking department," "continue[d] to receive the same hourly wage and still dr[o]ve the same trucks," "ha[d] the same opportunity to make equal amounts of money," and may even have "receive[d] a larger number of work opportunities" than before their coworkers were granted remedial seniority. *Id.* at 192.

Not so here. Attempting to place Appellants back into their seniority positions would bump other employees, whose seniority had

accrued while Appellants were forced out on indefinite leave, out of their positions. ROA.3748:19–22. And, unlike the employees in *Moseley* who had largely the same jobs if not different schedules, the record here shows just the opposite: If Appellants miss bids, opportunities to fly certain routes or to pilot certain planes may not come up again for the rest of their careers. ROA.3617:17–25, 3638:1–40:23, 3680:3–17.

Thus, rather than support the district court's decision, *Moseley* refutes it. Indeed, given how prestigious some positions are, any judicial action that displaces vaccinated employees to remedy the harms United imposed on Appellants would impose the very harms on which the *Moseley* court expressly recognized that case turned. Put differently, because only one person can work in any particular job, giving it to one of the Appellants would take it away from the vaccinated employees. That is precisely the problem that Mr. Limacher identified when he testified that "accommodated" employees could not be reinstated to their seniority positions upon return. *See* ROA.3748:19–22.

Moseley thus confirms that the district court *cannot* retroactively place Appellants in their relative seniority positions. And if United were to try to do so, it would undoubtedly lead to significant grievances and

litigation. *See id.* Moreover, there is no way to know that a future judge considering those claims will agree with the district judge here. Rather, it is entirely possible that a district court judge in such future litigation will reverse the order placing Appellants in their seniority position.

All this underscores the irreparable nature of Appellants' loss of seniority. And because the district court "ignored the[se] facts," its conclusion on this point was also "erroneous." *Century Hotels v. United States*, 952 F.2d 107, 110 (5th Cir. 1992).

IV. Appellants are Irreparably Harmed by the Downstream Effects of Unpaid Leave.

Appellants are also suffering many other personal and professional irreparable harms.

1. Appellants' irreparable personal harms originate with the loss of income and medical insurance that will cause irreparable injury. And while United may be able to compensate some injuries with lost wages, that will not remedy other injuries that *directly result* from this loss of salary. This includes homelessness, foregone medical treatment, and other serious harms for which monetary damages will be no answer.

For instance, Ms. Hamilton will lose the income and medical insurance that she currently uses to pay for her husband's cancer

treatment. *See* ROA.3994 ¶¶ 11–14. Mr. Castillo is facing homelessness. *See* ROA.4003 ¶ 13. Mr. Sambrano faces significant decisions about his children's education, and a potential inability to provide them with the opportunities he and they most desire. *See* ROA.3991 ¶ 17. Similarly, Ms. Jonas' husband is disabled, and his care requires her salary and medical insurance. *See* ROA.4007 ¶ 11. If she is placed onto extended unpaid leave, she will be unable to provide her husband with the care he needs during the time she is on leave. *See id.*

Again, these harms cannot be remedied after the fact. Serious physical and psychological consequences of impending homelessness, loss of life-saving medical treatment, and changes in education decisions due to lost income cannot be remedied through money damages. *See Dennis Melancon*, 703 F.3d at 279.

Unsurprisingly, the Supreme Court has found that, despite the availability of backpay later, a court may nonetheless issue an injunction to prevent the harms associated with lost income during a suspension. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53, 72 (2006). Additionally, the Supreme Court has "recognize[d] that cases may arise in which the circumstances surrounding an employee's discharge, together with the

resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." *Sampson*, 415 U.S. at 92 n.68. As shown above, this is just such a case, and Appellants have demonstrated that they are suffering irreparable injuries.

2. In addition to the ways lost income and benefits will harm Appellants in the personal lives, they will also suffer irreparable professional harms. Airline employees have perishable skills that require frequent work and training to stay fresh. ROA.4166–67. For that reason, pilots must complete training on a regular basis, rather than annually. ROA.3991.

For example, as Mr. Turnbough testified, the FAA recognizes the importance of routine training: If a pilot goes 90 days without "at least three takeoffs and three landings," they lose the ability to fly without first "go[ing] back to [the] training center and receiv[ing] more training." ROA.3704:21–05:1. He then explained that any time lost cannot be regained because it limits the time they are able to fly (and thus earn and save), before the mandatory retirement age of 65. ROA.3703:5–14.

The record also shows that flight attendants must "keep[ ] skills fresh by handling unexpected incidents on flights." ROA.4166. Extended

leave "will irreparably prevent pilots and flight attendants from keeping those skills fresh." ROA.4167.

In light of these serious harms, this case differs from the typical employment discrimination case where monetary damages can make an employee whole after trial. Rather, this case falls squarely within the Supreme Court's *Sampson* decision as it substantially "depart[s] from the normal situation that irreparable injury might be found." 415 U.S. at 92 n.68.

CONCLUSION

This Court has already held that an employee is irreparably injured when her employer forces a choice between "job(s) and jab(s)." It should do so again here as United is forcing this same choice onto Appellants. Moreover, United's draconian vaccine mandate—to which it unlawfully refuses to provide any exceptions other than the false accommodation of unpaid leave—is causing Appellants several other forms of irreparable injuries. Appellants are losing their seniority positions, and they are currently missing bidding opportunities that will impact the future of their careers with United. And indefinite unpaid leave is substantially

injuring Appellants and their families as they face homelessness, lost medical treatments, and difficult decisions about education.

None of these harms can be remedied through money damages. Accordingly, the Court should reverse the district court's decision holding that Appellants had not demonstrated legally sufficient irreparable harm to warrant a preliminary injunction.

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Respectfully submitted,

/s/ Gene C. Schaerr
Gene C. Schaerr
Counsel of Record
Mark R. Paoletta
Brian J. Field
Joshua J. Prince
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

John C. Sullivan
S | L LAW PLLC
610 Uptown Boulevard, Suite 2000
Cedar Hill, TX 75104
Telephone: (469) 523-1351
john.sullivan@the-sl-lawfirm.com

Robert C. Wiegand
Melissa J. Swindle
STEWART WIEGAND & OWENS PC
325 N. St. Paul Street, Suite 3750
Dallas, TX 75201
Telephone: (469) 899-9800
bob.wiegand@swolegal.com

Counsel for Appellants

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on December 20, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Gene C. Schaerr
Gene C. Schaerr

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,102 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Office 2016 in 14-point Century Schoolbook font.

I further certify that (1) all privacy redactions have been made; and (2) that the brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Gene C. Schaerr
Gene C. Schaerr

Dated: December 20, 2021