No. 21-11159

United States Courts 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

PLAINTIFFS-APPELLANTS' PETITION FOR INITIAL HEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

No. 21-11159

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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:

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Other interested entity:	Airline Employees 4 Health Freedom

/s/ Gene C. Schaerr
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Counsel of Record for Plaintiffs-Appellants

INTRODUCTION AND RULE 35(B)(1) STATEMENT

Four weeks ago, a panel of this Court held that irreparable injury occurs when a vaccine mandate "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). This week, over the dissent of Judge Ho, a panel of the Court reached the opposite conclusion in this very case. *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2021 WL 5881819, at *1 (5th Cir. Dec. 13, 2021) (per curiam), Exhibit 1 hereto. Guidance from the *en banc* Court is necessary to provide a uniform standard on this important and timely question.

Here, Appellants showed that United Airlines, Inc. was threatening them with indefinite unpaid leave—what the district court found to be, effectively, termination—if they received a religious or medical accommodation from United's vaccine mandate. This put Appellants to the same impossible choice that the *BST* panel concluded was an irreparable injury—"a choice between their job(s) and their jab(s)." Yet the district court in this case concluded that this impossible choice was *not* an irreparable injury and, earlier this week, a motions panel denied an injunction pending appeal "for the reasons stated in the district court's . . . Orders." *Id.* at *1. In doing so, as Judge Ho pointed out, the motions panel majority explicitly adopted

the very reasons refuted by *BST*. *Sambrano*, 2021 WL 5881819, at *2–3 (Ho, J., dissenting).

This case presents an exceptionally important issue, and warrants initial *en banc* review, for at least three reasons. First, there is a direct conflict between decisions of this Court. Within a month, this Court has reached opposite conclusions on whether making employees choose between taking a "jab" or losing their "job" is irreparable harm. *Compare BST*, 17 F.4th at 618, *with Sambrano*, 2021 WL 5881819, at *1. Even though the Order in this case is nonprecedential, if allowed to stand it will undoubtedly influence district courts throughout this Circuit, and it reveals a lack of uniformity in this Court's decisions that should be clarified.

Second, the issue of vaccine mandates is exceptionally important in its own right, and the lower courts in this Circuit need direction on whether they may issue preliminary injunctive relief in cases where employers are continuing to violate Title VII (and the ADA) by coercing employees to abandon their beliefs and their health. Thousands of employees across the Circuit are currently facing—or about to face—the same issue, and this Court's uniform guidance on how to resolve their claims of irreparable injury is important.

Third, a decision by the *en banc* Court is necessary to protect United's employees from irreparable injury. As a practical matter, if the motions panel in this case is the same panel for the merits argument—currently set for January 3rd—that

panel has apparently already answered the Question Presented on appeal in favor of United. The district court denied an injunction based *solely* on a purported lack of irreparable harm; and the motions panel just ruled that it agreed with the district court's "reasons" when it denied Appellants' motion for an injunction pending appeal. While Appellants appreciate the speed at which the panel agreed to expedite the appeal, it will likely be for naught without the entire Court's direction. Moving directly to a hearing *en banc* will likely thus be a more efficient use of the parties' and the Court's resources. And, because under the current schedule briefing on the expedited appeal will be finished in time for an oral argument on January 3rd, that schedule may be left in place and will enable the Court to hear this case *en banc* at its sitting later in January.

Moreover, it is apparent that United remains willing to violate its employees' rights, and impose enormous harm on them, in favor of a marketing scheme. The record shows that United wants to boast about a 100% vaccination rate, even if it must coerce employees of faith to quit or abandon their beliefs. And, as Judge Ho noted, this "is a quintessentially irreparable injury, warranting preliminary injunctive relief." *Sambrano*, 2021 WL 5881819, at *2 (Ho, J., dissenting). Because the irreparable harm continues daily, those employees need this question authoritatively answered and returned to the district court as quickly as possible for reconsideration of the preliminary injunction. The district court invited this Court's guidance on the

issue of irreparable harm. ROA.3410. That call should be answered sooner rather than later.

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ISSUE MERITING INITIAL EN BANC CONSIDERATION

This case is not about the COVID-19 vaccine or whether vaccine mandates are lawful or good policy. It is about the irreparable harm that takes occurs when someone who is *exempt* from an employer-mandated vaccine under Title VII of the Civil Rights Act is nevertheless put to an "impossible choice" between their faith and their livelihood. Such a violation of faith and conscience "cannot be undone through monetary remedies." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012); *see Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996). Moreover, Title VII was "intended to protect the same rights in private employment as the Constitution protects." *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116 (5th Cir. 1972), and the loss of "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

Appellants raise a narrow question of whether the district court erred in its assessment of irreparable harm—one that ignored both this Court's holding in *BST* and factual scenarios demonstrating harms that cannot be remedied by money alone. Specifically, *en banc* review is needed to determine whether an employer illegally putting an employee to the "impossible choice" of a "job or a jab" creates irreparable harm, as *BST* held, or does not create irreparable harm, as the motions panel ruled.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

When United announced on August 6, 2021, that all employees must receive a COVID-19 vaccine, the company stated it would comply with Title VII and the ADA by permitting employees to request religious or medical accommodations. ROA.114. Yet United never intended to comply with those laws. Rather, as the district court noted, United's CEO Scott Kirby publicly threatened United employees "to be very careful about" requesting such accommodations, as doing so would "put[] job[s] on the line[.]" ROA.116.

Unsurprisingly, the "interactive process" for those requesting accommodations consisted primarily of United's improperly challenging employees' religious beliefs. ROA.136. United then refused to provide any reasonable accommodations—offering only indefinite unpaid leave. ROA.110. For pilots and flight attendants, that indefinite period of unpaid leave has already begun and they just received their last paycheck on December 15, 2021. For several other categories of employees, United provided temporary accommodations that are now expiring. ROA.3383. Shortly, those employees will also be placed on unpaid leave until the end of the COVID-19 pandemic, *id.*, which Government officials have stated is likely to become an "endemic," rather than ending.[1]

[1] Julie Steenhuysen, *Fauci says boosters for all key to U.S. reaching COVID-19 endemic level*, REUTERS (Nov. 16, 2021, 7:47 PM), https://tinyurl.com/2p84fbcw.

After this lawsuit was filed, United reversed course, but only for some employees, allowing them to work under strict conditions: wearing respirators; maintaining social distance; and undergoing periodic COVID-19 testing. ROA.3750. While United has not provided evidence that this temporary accommodation will last, it confirms that United can easily provide accommodations beyond indefinite unpaid leave.

To protect Appellants and others similarly situated, Appellants sought a temporary restraining order ("TRO"). ROA.66. Shortly before the TRO hearing, the parties reached an agreement that temporarily delayed United's plan to place "accommodated" employees on unpaid leave. ROA.13.

On the eve of the subsequent preliminary injunction hearing, United filed a motion to dismiss for lack of subject matter jurisdiction. ROA.16. After postponing the hearing for briefing on the motion to dismiss, 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.

After an evidentiary hearing, the district court denied the motion for a preliminary injunction, on the sole ground that Appellants' claimed injuries did not meet the court's understanding of the legal requirements for irreparable injury. ROA.3268–76. This ruling included a discussion rejecting the argument that United's actions create an "impossible choice" that violates the religious freedoms

of its employees in an irreparable manner. ROA.3268–70. The district court "decline[d] to elevate statutory protections from private-company-discrimination to the level of constitutional protections from government encroachment." ROA.3270. In the main, the district court concluded it could remedy Appellants' harms through monetary relief or retroactive seniority.[2] ROA.3268–77.

Thereafter, Appellants filed a motion for reconsideration on the preliminary injunction, showing that the district court had overlooked a key irreparable harm—the lost ability while on unpaid leave to bid for specific job opportunities that cannot be retroactively reinstated because they will have been given to other employees in the interim. ROA.3278–83. The district court denied Appellants' motion for reconsideration,ROA.3407, and Appellants filed a notice of appeal,ROA.3453. Additionally, Appellants filed a motion for an injunction pending appeal with the district court, ROA.3422–42, bringing to that court's attention this Court's just-issued decision in *BST*, and urging the district court to follow it here. Unfortunately, the district court distinguished *BST* on the ground that the party imposing a vaccine mandate there was a governmental entity. ROA.3409 n.1. On that basis, the district court denied Appellants' requested motion for an injunction pending appeal on

[2] The district court largely denied United's motion to dismiss, but granted it with respect to the claims brough by Seth Turnbough. ROA.3262.

November 23, 2021, concluding that, given its interpretation of *BST*, Plaintiffs failed to "establish . . . a substantial threat of irreparable injury[,]" ROA.3445.

In this Court, Appellants sought an injunction pending appeal or, in the alternative, an expedited appeal. *Sambrano*, 2021 WL 5881819, at *1. A motions panel denied the motion for an injunction pending appeal "for the reasons stated in the district court's . . . Orders." *Id.*

Judge Ho dissented, recognizing—as did the district court—that Appellants' claims "appear compelling and convincing at this stage." *Id.* at *1 (Ho, J., dissenting). The dissent then observed why Appellants would suffer irreparable injury absent an injunction pending appeal. *Id.* at *2-3. The dissent first noted that this is not a "garden variety" employment law case because United is using employees' livelihood as leverage to coerce the employees to abandon their beliefs. *Id.* at *2. Next, the dissent pointed out that this Court recently "recognized that irreparable injury results when employees are forced to choose between their beliefs and their benefits." *Id.* at *2 (citing *BST*, 17 F.4th at 618). While other decisions—including *BST*—involved government mandates as opposed to business-imposed mandates, the dissent recognized that "what matters is not who imposed the mandate, but that the mandate conflicts with religious conviction." *Id.* at *3. That is especially true because an inquiry into irreparable injury focuses on the plaintiff and the plaintiff's injury, not the identity of the defendant. *Id.* at *3 (citing *Doe I v. Landry*,

909 F.3d 99, 106 (5th Cir. 2018)). As the dissent eloquently put it, "[t]o hypothesize 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 fundamental level. And that is so whether the mandate comes from D.C. or the C-Suite." *Id.* at *3.

STATEMENT OF FACTS NECESSARY TO THE ARGUMENT

No additional facts are necessary to the argument of the issues.

ARGUMENT

This case presents an exceptionally important question of law regarding what constitutes irreparable harm when an employer seeks to compel an employee to abandon her religious beliefs and receive a vaccine. The lack of uniformity on this question, which is faced by courts throughout this Circuit, calls for immediate *en banc* review.

I. This Case Involves A Conflict In The Court's Jurisprudence On Irreparable Harm.

A. Under This Court's Decisions, Appellants are Suffering Irreparable Harm.

A harm is irreparable only "if it cannot be undone through monetary remedies." *Dennis Melancon*, 703 F.3d at 279 (quotation marks omitted). That standard is amply satisfied here, as no amount of money can undo the harm that Appellants have endured and will yet endure absent a preliminary injunction.

Most significantly, Appellants are harmed by the impossible choice United is forcing upon employees who requested an accommodation—the same impossible choice this Court found to create irreparable injury in *BST*. United's "accommodation" seeks to compel employees to forsake their beliefs and health. *See, e.g.,* ROA.648–49, 3276–77. Indeed, United appears to have done so because Mr. Kirby wants to boast that United is the only airline with a 100% vaccinated workforce. *See, e.g.,* ROA.3424, 3427. As Appellants have already demonstrated, the threat of a lengthy period without income has caused employees to forsake their beliefs and health. ROA.140. And as this Court recently explained in *BST*, forcing an improper choice between "job(s) and . . . jab(s)" constitutes an irreparable injury. *BST*, 17 F.4th at 618.

The motions panel dissent in this case likewise recognized the obvious: putting employees to this "most horrifying of Hobson's choices . . . is a quintessentially irreparable injury." *Sambrano*, 2021 WL 5881819, at *2 (Ho, J., dissenting). The dissent pointed out that the Supreme Court has been clear that putting people to a choice between their livelihoods and their faith is a grave burden on religious belief and practice. *Id.* at *3 (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) & *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723 (2014)); *see also Horvath v. City of Leander*, 946 F.3d 787, 799 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (noting that vaccine

mandates must take religious-based objections into account). By presenting "a crisis of conscience for many people of faith," United's policy creates a regime in which money damages cannot restore what the company has destroyed. *Sambrano*, 2021 WL 5881819, at *2.

Moreover, as Judge Ho recognized, the irreparable harm inquiry must focus on the plaintiff, not the defendant's identity or the source of the religious conflict. *Id.* at *3 (Ho, J., dissenting). The irreparable harm is the same whether the defendant is violating the First Amendment or a federal statute—it is coercing an individual to abandon religious beliefs.

Ultimately, there is no way to remedy these injuries. A vaccine certainly cannot be undone, and there is no remedy for the impossible choice United is forcing on its employees. As Judge Ho put it, "[t]he 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." *Id.* at *3. That is why "[t]o hypothesize 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 fundamental level." *Id.* Accordingly, Appellants have shown irreparable harm and that they are entitled to an injunction.

B. By Following the District Court's Erroneous Reasoning, the Motions Panel Created a Conflict.

The district court resisted the conclusion that the impossible choice faced by Appellants created irreparable harm by relying on two misguided assumptions. First, the court confused an employer's general ability to require vaccination with the situation here, where United is blatantly violating federal law in setting up the false choice. *See* ROA.3268–70. To be sure, no law *generally* prohibits an employer from imposing a vaccine mandate. But, absent undue hardship (which United has not seriously alleged or shown under any standard), Title VII and the ADA prohibit an employer from coercing employees to violate their faith or health. 42 U.S.C. § 2000e(j); *id.* § 12112(b)(5)(A).

By contrast, under the district court's logic, employees always have a choice whether to assert their religious beliefs or submit to the employer's will, *see* ROA.3269–70, and the employer is immunized from a claim of irreparable injury because employees can always "decide" to violate their beliefs. Were that correct, little would be left of Title VII or the ADA. United is forcing employees to violate their faith and health, the effects of which cannot be reversed or compensated later.

Especially with respect to vaccines—as *BST* recognized—there is simply no way to undo the forced violation of religious freedoms.

Second, the district court concluded that "[i]t is undisputed that United exempted Plaintiffs from the vaccine mandate." ROA.3269. But that conclusion conflicts with the district court's recognition elsewhere that United's "accommodation" of indefinite unpaid leave is the functional equivalent of termination. ROA.3276 (noting the "trifling pittance of indefinite unpaid leave"). On these facts, to say United is "not [denying employees] the freedom to exercise their religious beliefs" blinks reality. ROA.3269. While the district court may believe it can remedy lost wages later, in the interim those with financial limitations will be forced to abandon their religious beliefs to put food on the table.

Nor can backpay remedy that harm: As *BST* explained, being subjected to the choice between a "jab" and one's "job" constitutes irreparable injury. 17 F.4th at 618. The district court resisted applying *BST* on a motion to reconsider because there is no federal statute or regulation mandating the vaccine here as there was in that case. ROA.3409 n.1. But, as the panel dissent here recognized, the source of the vaccine mandate is irrelevant—harm is harm, whether it "comes from D.C. or the C-Suite." *Sambrano*, 2021 WL 5881819, at *3 (Ho, J., dissenting). It is likewise of no moment that *BST* addressed constitutional claims. The *BST* petitioners did not

limit their irreparable harm arguments to constitutional claims; neither was *BST*'s rationale limited to constitutional claims.

The district court's error in rejecting the irreparable nature of this harm is confirmed by the fact that Title VII has its roots in the First Amendment—prohibiting private employers from engaging in religious discrimination in the same way the government was already prohibited. *See EEOC v. Abercrombie & Fitch Stores*, 575 U.S. 768, 774–75 (2015) (holding that Title VII protects an employee's "religious practice" and "religious belief" and that Title VII gives those beliefs and practices "favored treatment"). Indeed, this Court has recognized that Title VII was "intended to protect the same rights in private employment as the Constitution protects." *Riley*, 464 F.2d at 1116. It is inconsequential whether Appellants asserted a separate First Amendment violation, for the loss of "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Roman Cath. Diocese*, 141 S. Ct. at 67. And the freedom at issue is undoubtedly such a "First Amendment freedom," albeit one that is legally grounded in a statute rather than the Constitution itself.[3]

[3] The district court likewise erred in believing that the dispute "center[ed] on United's response" to Appellants choosing not to get the vaccine. ROA.3269. This misses the entire argument, and it places the inquiry on the defendant's actions without asking the correct question of whether the plaintiff's injury can be remedied. *Sambrano*, 2021 WL 5881819, at *3 (Ho, J., dissenting).

In denying Appellants' motion for an injunction pending appeal, the motions panel explicitly adopted the "reasons" set forth by the district court previously: reasons that misapprehended the "impossible choice" *BST* confirmed is irreparable.[4] As in *BST*, the vaccine mandate here works irreparable harm by "substantially burden[ing] the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)." 17 F.4th at 618. The motions panel not only erred when it adopted the district court's "reasons," it created a conflict within this Court's jurisprudence on what constitutes irreparable harm in the vaccine mandate context. Initial *en banc* consideration is necessary to secure uniformity of the Court's decisions.

[4] The district court likewise provided no answer—even after a motion for reconsideration—for how it could remedy Appellants' lost bid opportunities. ROA.3271, 3408 (conflating seniority with bid opportunities). Once-in-a-career job opportunities open up and are then closed while Appellants are on unpaid leave and cannot bid for them. Money cannot reopen the bidding process later.

II. The Issue Presented Is Exceptionally Important.

The issue presented in this case is also exceptionally important. This Court has already seen the beginning of the litigation concerning COVID-19 vaccines, but these have been small in number compared to the flood that is coming. Indeed, litigation challenging vaccine mandates increases every week. Whether in anticipation that the federal government may command it, or just anxious to market themselves as "fully vaccinated" to customers, employers across the country and this Circuit have begun rolling out vaccine mandates over the past five months. And many employers are acting contrary to federal employment law in how they handle requests for religious or medical accommodations. This topic is thus exceptionally important. Lower courts in this Circuit need direction on whether employers will be able to continue perpetrating violations of Title VII (and the ADA) that have permanent consequences while waiting for the notoriously slow administrative process with the Equal Employment Opportunity Commission to evaluate discrimination claims.

Thousands of employees across the Circuit are currently facing—or about to face—the question presented here, and would benefit from this Court's uniform guidance. As the Supreme Court recently made clear, "even in a pandemic, the [religious freedom protected by] Constitution cannot be put away and forgotten."

Roman Cath. Diocese, 141 S. Ct. at 68. Because Title VII exists to protect those same fundamental freedoms, the exceptional importance of the issue here is clear.

III. Initial En Banc Review Will Mitigate The Irreparable Harm Being Caused Daily By United.

Adding to the exceptional importance of this case are the hundreds of United employees currently on unpaid leave for Christmas. Assuming that the panel set to hear argument here remains the same as the motions panel, requiring Appellants to wait until after a panel decision before seeking *en banc* review will unnecessarily delay these proceedings and will cause Appellants even greater harm. As noted, the motions panel denied Appellants' motion for injunction pending appeal largely because it determined Appellants had not demonstrated irreparable harm. That mirrors the district court's holding on review in this case. And thus it stands to reason that the merits panel (if the same as the motions panel) will likely reach a similar conclusion. It would thus likely be futile to require Appellants to first present this case to a merits panel that has already rendered a decision on this question. Rather, proceeding directly to *en banc* consideration of these issues is more efficient and will provide the district courts with clear direction on these important questions in a more expedited manner.

CONCLUSION

The appeal should be heard initially en banc.

December 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and Fifth Circuit Rule 25.2.5, I hereby certify that on December 17, 2021, I electronically filed the foregoing petition 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 petition complies with the type volume limitation of Fed. R. App. P. 32(b)(2)(A) and Fifth Circuit Rule 35.5 because it contains 3,867 words.

This petition also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 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 in 14-point Times New Roman font.

Additionally, I certify that (1) any required redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of Microsoft Defender virus detector and is free of viruses.

/s/ Gene C. Schaerr
Gene C. Schaerr

Dated: December 17, 2021

EXHIBIT 1

Sambrano v. United Airlines, Inc.,
No. 21-11159, 2021 WL 5881819
(5th Cir. Dec. 13, 2021) (per curiam)

United States Court of Appeals for the Fifth Circuit

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,

Plaintiffs—Appellants,

versus

UNITED AIRLINES, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CV-1074

Before STEWART, HAYNES, and HO, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellants' opposed motion for an injunction pending appeal is DENIED for the reasons stated in the district

court's Opinion & Order of November 8, 2021 and Orders of November 19, 2021 and November 23, 2021. *See, e.g.*, *Dr. A. v. Hochul*, No. 21A145, 2021 WL 5873126, 595 U.S. ___ (Dec. 13, 2021).

IT IS FURTHER ORDERED that Appellants' alternative opposed motion to expedite the appeal is GRANTED.

JAMES C. HO, *Circuit Judge*, dissenting:

United Airlines claims that it made the "business judgment" that every employee must obtain a COVID-19 vaccine, no matter what religious objections they might have. But various United employees contend that their religious views about the vaccine are in fact none of the company's business.

So the employees filed suit under Title VII of the Civil Rights Act of 1964. They sought preliminary injunctive relief to avoid indefinite unpaid suspension as the company threatened. The district court denied that relief. The employees immediately filed this appeal.

Before us today is Plaintiffs' emergency motion for an injunction pending their appeal. Federal Rule of Appellate Procedure 8(a) permits us to grant such an injunction, provided that the plaintiffs show "(1) a strong likelihood of success on the merits; (2) irreparable injury in the absence of an injunction; (3) that the balance of hardships weighs in their favor if injunctive relief is granted; and (4) that the public interest favors such relief." *Whole Woman's Health v. Jackson*, 13 F.4th 434, 441 (5th Cir. 2021).

As to likelihood of success on the merits, I agree with the district court that Plaintiffs' claims "appear compelling and convincing at this stage."

First, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of religion, 42 U.S.C. § 2000e–2(a)(1), and requires employers to make reasonable accommodations for "all aspects of" an employee's religious beliefs, absent "undue hardship on the conduct of the employer's business," 42 U.S.C. § 2000e(j). Yet United is imposing a vaccine mandate on its employees despite their sincere religious objections—despite the company's record admission that "there is virtually no chance to transmit COVID-19 on its planes" because "99% of its employees" are already vaccinated and federal regulations currently require all those on board to wear masks—and despite testimony that United currently allows

not only unvaccinated passengers but also unvaccinated flight crew from other airlines as well as their own unvaccinated foreign employees on board.[1]

Second, Title VII forbids employers from retaliating against employees who attempt to exercise their statutory rights. 42 U.S.C. § 2000e-3(a). Yet United's CEO, Scott Kirby, told employees in a company town hall meeting that "very few" religious exemptions to the vaccine mandate would be granted, and that anyone who even attempted to request one would be "putting [their] job on the line."

The district court thus concluded that "United's mandate . . . reflects an apathy, if not antipathy, for many of its employees' concerns and a dearth of toleration for those expressing diversity of thought." Through both its policy and its official statements to employees, United has demonstrated a "calloused approach to" and "apparent disdain for" people of faith.

But the district court denied preliminary injunctive relief on the ground that Plaintiffs could not demonstrate irreparable injury. On appeal, the parties likewise agree that the critical question before us today is whether Plaintiffs will suffer irreparable injury absent an injunction pending appeal.

I believe they will, so I would grant the injunction pending appeal.

I.

In a garden variety case of unlawful termination, the injury to the employee is the loss of a paycheck. That can be remedied by an award of monetary damages. So in the garden variety case, there is no irreparable injury and thus no injunctive relief. *See*, *e.g.*, *Garcia v. United States*, 680 F.2d 29, 31–32 (5th Cir. 1982) ("There is no provision in the law for injunctions

[1] Plaintiffs allege that the vaccines "were developed using aborted fetal tissue." United does not question the sincerity of Plaintiffs' religious objection in this proceeding.

against discharge in routine termination cases because the remedy by way of reinstatement and back pay is well established and is universally used.").

But this case is very different. United is not trying to fire anyone. Instead, the company is trying to make its employees obtain the COVID-19 vaccine, notwithstanding any religious objections they might have.

Forcing individuals to choose between their faith and their livelihood imposes an obvious and substantial burden on religion. Make no mistake: Vaccine mandates like the one United is attempting to impose here present a crisis of conscience for many people of faith. It forces them to choose between the two most profound obligations they will ever assume—holding true to their religious commitments and feeding and housing their children.

To many, this is the most horrifying of Hobson's choices. And it is a quintessentially irreparable injury, warranting preliminary injunctive relief.

Shortly before the first official case of COVID-19 appeared in the United States, our court decided a case involving a religious objection to another vaccine mandate. A firefighter objected to taking both the flu vaccine and the TDAP vaccine on religious grounds. The city granted his first request for a religious accommodation, but denied the second. I wrote that a vaccine mandate that does not take faith-based objections into account may substantially burden religious liberty by "forc[ing] citizens to choose between one's faith and one's livelihood." *Horvath v. City of Leander*, 946 F.3d 787, 799 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). The same underlying principles should apply here.[2]

[2] The *Horvath* panel reached a different judgment—hence my separate opinion—but only after noting that the employer there (unlike United) offered the firefighter another position (in code enforcement) with "the same salary and benefits." 946 F.3d at 792.

Indeed, just a few weeks ago, our court recognized that irreparable injury results when employees are forced to choose between their beliefs and their benefits. Our colleagues put it this way: "It is clear that a denial of the petitioners' proposed stay would do them irreparable harm," because the federal vaccine mandate "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)" (or put another way, "no jab, no job"). *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

After all, the Supreme Court has repeatedly observed that forcing people to choose between their faith and their livelihoods "puts the same kind of burden upon the free exercise of religion as would a fine." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). *See also id.* (noting the "unmistakable" "pressure . . . to forego" one's religious practice by "forc[ing] [a worker] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723 (2014) ("We doubt that the Congress . . . would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.").

II.

To be sure, the decisions cited above involve government mandates—not business-imposed mandates like the one presented here.

But to the person of faith who is forced to confront this challenge of conscience, what matters is not who imposed the mandate, but that the mandate conflicts with religious conviction.

And that's what matters when it comes to determining irreparable injury: We focus on the plaintiff—and our ability to remedy the plaintiff's

injury—not the identity of the defendant. As we've repeatedly observed, "Plaintiffs are entitled to a preliminary injunction if they show . . . a substantial threat that *they*"—meaning, the plaintiffs—"will suffer an irreparable injury if the injunction is not granted." *Doe I v. Landry*, 909 F.3d 99, 106 (5th Cir. 2018) (emphasis added).

Moreover, the Supreme Court has made clear that there are "extraordinary cases" 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 v. Murray*, 415 U.S. 61, 92 n.68 (1974).

If this dispute does not present the "extraordinary case" warranting preliminary injunctive relief that the Supreme Court had in mind in *Sampson*, I don't know what case would. As the Second Circuit once observed, it does not matter if a claim of religious interference is "statutory rather than constitutional" in nature. *Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996). Either way, "the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily." *Id.*

I agree. And I would apply that same reasoning here. Whether the interference with religious conviction comes from the public or private sector, a person of faith suffers "a harm that cannot be adequately compensated monetarily." *Id.*

It is difficult to imagine how a crisis of conscience, whether instigated by government or industry, could be remedied by an award of monetary damages. Take this case: 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.

To hypothesize 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.

Finally, as if all this weren't enough, to top it all off, United is forcing this crisis of conscience on the eve of Christmas—one of the holiest times of the year, the season when Christians cherish devoting their hearts and souls to both faith and family alike, not to choosing between the two.[3]

* * *

Title VII was "intended to protect the same rights in private employment as the Constitution protects." *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116 (5th Cir. 1972) (quotations omitted). And "[a]t 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*, 721 F.3d 444, 456 (7th Cir. 2013).

I would grant the injunction pending appeal. Accordingly, I dissent.[4]

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[3] As a result of company policy, Plaintiffs say that many employees will receive their final paychecks on December 15. Merry Christmas.

[4] Two of the employees also present claims under the Americans with Disabilities Act. But I do not address those claims here. The district court dismissed one employee's claims for lack of personal jurisdiction, because that employee neither lives nor works in Texas. And it is unclear to me whether the other employee has sufficiently alleged a covered disability. These issues can of course be decided in a future proceeding.