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

REPLY 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
H. Christopher Bartolomucci
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 30, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

United Airlines has responded to Appellants' opening brief by misstating facts, misreading cases, and ignoring controlling precedent to argue that it may continue violating Appellants' civil rights, no matter the harm. Meanwhile, the reason United made the business judgment to coerce employees into violating their religious and health-related beliefs has become increasingly clear—United believes such coercion gives it a competitive advantage over other airlines.

In exercising its business judgment, though, United has violated civil rights law and, in so doing, is causing irreparable injury: Appellants must decide whether their beliefs are worth effectively losing their jobs, and, as this Court held in *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021), that choice is itself an irreparable injury. Indeed, as Judge Ho recently noted in this case, "this is the most horrifying of Hobson's choices[,] [a]nd it is a quintessentially irreparable injury[.]" *Sambrano v. United Airlines*, 19 F.4th 839, 841 (5th Cir. 2021) (Ho, J., dissenting). And without preliminary injunctive relief, a court has no effective mechanism to hold a private company accountable for such coercion.

Moreover, United is irreparably injuring Appellants by preventing them from submitting bids for significant job opportunities, stripping

them of their seniority, and imposing other harms on Appellants' personal and professional lives. Here again, monetary damages are no answer for these unquantifiable losses. As these harms are compounding daily, immediate preliminary injunctive relief is necessary.

This is particularly true given that the merits so clearly favor Appellants. The district court recognized United's "calloused approach to its employees' deeply personal concerns with injecting a foreign substance into their bodies." ROA.3276. Based on the record, the court emphasized that "United's actions may be viewed as merely pretextual." ROA.3277. Accordingly, the court concluded that Appellants' legal claims "appear compelling and convincing[.]" ROA.3275.

United attempts to distract from these conclusions (at 5-7, 12), repeatedly attributing them to Appellants rather than the district court. And United ignores that the district court reached these conclusions after a multi-day hearing where it heard from Appellants' and United's witnesses. Given the clear merits of Appellants' claims, and given the district court's legal errors in assessing irreparably injury—the only subject of this appeal—the Court should reverse the district court's determination that Appellants are suffering no irreparable harm.

ARGUMENT

The Court should reverse the district court's order because United has imposed and still imposes on Appellants four distinct types of irreparable injury. And United's alternative argument that Appellants cannot obtain preliminary injunctive relief because the administrative process is not yet complete runs headlong into this Court's settled precedent.

I. United Irreparably Injures Appellants by Forcing Them to Choose Between Their Jobs and Their Beliefs.

United doesn't deny that Appellants face two responsibilities: to provide for their families and to follow their beliefs. And Title VII's religious-accommodation requirement exists so that Appellants are not forced to choose between these responsibilities—it "aim[s] 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). United also doesn't deny that it is forcing that choice on Appellants—they must either sacrifice their current jobs or their own beliefs. Whichever they choose, they lose. That is why this Court recently held that forcing employees to make that choice is itself an

irreparable injury. *BST*, 17 F.4th at 618; *accord Sambrano*, 19 F.4th at 841-42 (Ho, J., dissenting).

United rejoins repeatedly (at 21-22, 24) that any injuries may be compensated through monetary damages. But this underscores what Judge Ho correctly identified as United's "misunderstand[ing of] the entire nature of religious conviction at its most foundational level." *Id.* While indefinite unpaid leave may be remedied through monetary damages in certain circumstances, such damages are no answer for the irreparable harm caused by forcing on Appellants the *choice* between their "job(s) and their jab(s)." *BST*, 17 F.4th at 618. United resists this conclusion with four misguided arguments.

1. United argues (at 34-35) that *BST* is inapplicable because its holding is subject to several limitations. But United mischaracterizes *BST* and fails to identify any support for the proposed limitations.

In *BST*, this Court held that the federal government's vaccine mandate for employers "threatens to substantially burden the liberty interests" and, separately, the "free religious exercise," of the petitioners there. 17 F.4th at 618 & n.21. It does so by putting "reluctant individual recipients … to a choice between their job(s) and their jab(s)." *Id.* at 618.

That is equally true here—Appellants' beliefs preclude them from receiving a COVID-19 vaccine. ROA.3993, 4003, 4010. And, for most employees who requested accommodations, United is forcing them to choose between receiving a vaccine or being placed on indefinite unpaid leave—either immediately or imminently. As Judge Ho noted, this threat of months (or years) without income forces Appellants into a "crisis of conscience." *Sambrano*, 19 F.4th at 842 (Ho, J., dissenting).

United belittles this crisis, despite acknowledging that its accommodations for many employees are temporary (at 9) and that those already on unpaid leave are likely to remain on unpaid leave for months or years (ROA.110, 121). According to United (at 4), holding a severe loss of income over Appellants' heads to coerce behavior does not create a crisis of conscience because Appellant Kincannon stated that she "will never take this vaccine," and because Appellant Sambrano is paid too much money to suffer any moral quandaries. For the other Appellants, United merely assumes (*id.*) that they face no moral dilemma because United has provided them with temporary accommodations, ignoring that those temporary accommodations will end shortly

(ROA.3758:10-12), thereby forcing the same internal conflict on those Appellants.[1]

United's argument underscores its misunderstanding of its employees' religious beliefs, which should come as no surprise given CEO Scott Kirby's open hostility toward employees of faith. ROA.745. Again, as Judge Ho noted, any suggestion that "the earthly reward of monetary damages" could resolve these concerns reflects a profound

[1] United repeatedly attempts (at 6-16) to distract from the undisputed fact that it has placed many employees on indefinite unpaid leave due to their religious beliefs or health. Many employees—those who are "customer-facing"—are already on indefinite unpaid leave, which may last up to 6 years. ROA.121, 603. For others, United acknowledges (at 8-9) that it has provided temporary accommodations such as "masking and testing." But it does not deny that those employees will be placed on indefinite unpaid leave when the temporary accommodations conclude. ROA.3758:20-23; ROA.3758:10-12 ("No accommodation is permanent."). In any event, the accommodations United has offered to some non-customer-facing employees only confirms that United could, if it wanted to, provide reasonable accommodations to *all* its employees with religious or medical reasons for not receiving a COVID-19 vaccine.

Additionally, the Court may disregard United's related discussion (at 7) of the number of purportedly "accommodated" employees. United denied many requests for arbitrary reasons, ROA.3659:22-24, and then put everyone else to the test by offering an "accommodation" of indefinite unpaid leave. The fact that United began accommodating some workgroups in the midst of litigation, *cf.* United Br. 8, does not negate the unreasonable accommodations it initially promised and is now continuing to enforce.

"misunderstand[ing]" of "the entire nature of religious conviction at its most foundational level." *Sambrano*, 19 F.4th at 842 (Ho, J., dissenting).

For example, Ms. Kincannon may be determined to hold fast to her beliefs, but United nonetheless forces her to "question[] whether [her] faith has hurt [her] family, and whether living up to [her] commitments was worth sacrificing the interests of [her] loved ones." *Id.* The same is true for Mr. Sambrano: His income does not diminish the fact that United is forcing him to "wrestle with [the same] self-doubt," *id.*, as he faces the prospect of curtailing his children's educational options, ROA.3991. Such spiritual and emotional struggles are precisely why *BST* held that forcing employees to a choice between "their job(s) and their jab(s)" *ipso facto* causes irreparable injury. 17 F.4th at 618.

United nevertheless argues (at 35) that *BST* only applies to cases where there is "no mechanism to recover lost pay if [petitioners] were terminated for refusing to be vaccinated and the federal mandate was ultimately invalidated." But United does not identify anything in *BST* supporting that argument; it merely hypothesizes that the *BST* Court *intended* such a limitation. Had the *BST* Court wished to limit its holding, however, it could have done so with ease: "A denial of the

petitioners' proposed stay," the *BST* court could have said, "would do them irreparable harm *because they will be unable to obtain monetary damages later*." 17 F.4th at 618 (italicized text added). But that is not what *BST* held; it held that denying the proposed stay would cause irreparable harm solely because the challenged mandate and the forced choice between "jobs and jabs" "substantially burden[s] the liberty interests of reluctant individual recipients[.]" 17 F.4th at 618. So too here.

United also supposes (at 35) that the *BST* Court meant to limit its holding to challenges to "federal regulation on a broad range of employers[.]" According to United, such cases present unique irreparable harms because the mandates allegedly "reduce[] an employee's ability … to find alternative employment that does not require vaccination." *Id.* But *BST* did not draw any such line.

In any event, the record confirms that Appellants *would* struggle to find equivalent employment. In the commercial airline industry, jobs are not fungible. "Seniority is everything" (ROA.4167) in an airline, and Appellants would sacrifice their seniority to join another airline. Thus, if *BST* silently limited its holding to cases where an employee will

struggle to find equivalent employment, that limitation is equally applicable here.

Rather than read a host of limitations into *BST*, the Court need only apply *BST*'s clear holding: Forcing an employee to choose between her current job and her religious beliefs causes irreparable injury.

2. United also argues (at 31-34) that Appellants are not irreparably injured by this impossible choice because Title VII does not provide the same protections as the First Amendment. Here again, United misunderstands the law and Appellants' arguments. No one disputes that there are differences between Title VII and the First Amendment.[2] But those differences do not immunize a private employer like United from a claim of irreparable injury when it coerces an employee to abandon her beliefs. As Judge Ho put it, whether the coercion "comes from D.C. or the C-Suite[,]" *Sambrano*, 19 F.4th at 842 (Ho, J., dissenting), it causes irreparable injury when it forces a choice between "jobs and jabs."

[2] United's statement (at 32) that Appellants rely only on "a pre-*Smith* court of appeals case from the 1970s comparing Title VII to the Free Exercise clause" overlooks additional authority Appellants cited (at 25) that post-dates *Smith*.

Recasting Title VII as protecting only "commercial rights" (at 31), United ignores this Court's recognition that Title VII was "intended to protect the same rights in private employment as the Constitution protects." *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116-17 (5th Cir. 1972). While Congress may have relied on its authority under the Commerce Clause to enact Title VII, that does not alter the fact that Title VII's protection of an employee's religious exercise is grounded in the First Amendment's protection of religious exercise.

Multiple courts—including this Court—have recognized as much. While United quotes (at 31) the statement in *Riley* that Title VII "protect[s] the same rights in private employment as the Constitution protects," United wrongly attributes that quotation to Appellants. It was *this* Court, however, that identified the connection between Title VII and the First Amendment—a connection United tellingly ignores when it fails to address *Riley*. The Seventh Circuit similarly held: "Title VII aimed to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices." *Adeyeye*, 721 F.3d at 456.

Moreover, if, as these decisions held, Title VII exists to protect free exercise "rights in private employment" and to allow employees to

"observe their religious practices," United's actions "substantially burden" those "liberty interests" in the same way that the federal government burdened employees' liberty interests when it forced them to choose between "their job(s) and their jab(s)." *BST*, 17 F.4th at 618. The harm is caused by limiting an individual's ability to follow his or her faith without interference or coercion. As Judge Ho pointed out, the "identity of the defendant" is irrelevant. *Sambrano*, 19 F.4th at 841-42 (Ho, J., dissenting). And the source of the right is at best a metaphysical difference, not a practical one.

United unconvincingly argues (at 32-33) that this cannot be the law because it would reach too broadly, suggesting that the same conclusion would have to apply to Title VII's other provisions regarding race and sex discrimination. But neither *BST* nor Appellants contend that deprivation of *any and all* Title VII rights is "irreparable per se[.]" United Br. 32. Rather, as *BST* held, forcing an employee to choose between income and religious beliefs—in this limited context of receiving a vaccine that cannot be undone—causes irreparable injury. 17 F.4th at 618.

Rejecting the notion that violating statutory rights can cause irreparable injury, United misreads precedent from across the Circuits. As Appellants explained (at 27), the Second Circuit has held that deprivations of certain statutory rights may create irreparable injury. And in *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996), the Second Circuit rejected the same argument United makes—that there is no irreparable harm because "plaintiff's free exercise claim is statutory rather than constitutional." Similarly, in *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001), the Tenth Circuit reversed a district court decision that the plaintiff "had not satisfied the irreparable injury prong of the preliminary injunction analysis" because the available relief "would not adequately compensate" the plaintiff for the statutory "violations of his religious rights." *Id.*

United asks the Court to ignore these holdings by fixating again on monetary damages. According to United (at 33), these decisions are irrelevant because they "did not involve Title VII and lost pay[.]" United again fails to grasp the harm at issue: The harm here is not only the indefinite unpaid leave, for which backpay may be a remedy in some circumstances; the harm is forcing someone to *choose* between their jobs

and their beliefs. United still has no answer for that harm, which *BST* held is irreparable.

3. United also resists *BST* (at 27-28) because, in United's mind, it would mean irreparable injury is present in every Title VII religious discrimination case. That misapprehends the unique circumstances underlying *BST* and this case: Unlike the typical Title VII reasonable accommodation case, where an employee must choose between quitting or accepting certain work conditions that violate her faith (*e.g.*, work schedules or uniform requirements), this case presents an irreversible choice with significant consequences. As Appellants demonstrated (at 29-30), if an employee acquiesces to United's demands for a vaccination, the decision cannot be undone. Appellants' Br. 29.[3] The permanence of that decision creates the impossible choice and provides a

[3] United's attempt (at 28) to reject this limitation as an "inherently theological question" finds no support in the authority United cites. *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969), discussed how the First Amendment limits the role of courts in resolving church property disputes. That is irrelevant here. Whether the individual will wrestle with her decision for months, years, or a lifetime, there is no theological question about the fact that a vaccine cannot be removed or that such a permanent decision is distinguishable from religion-based decisions that can be changed later.

limiting principle that United overlooks. *BST*'s rule will not cause irreparable injury to be found in every Title VII religious discrimination case. It established a rule for cases like this one.

4. Finally, United argues (at 26-28) that Appellants do not face an impossible choice between their beliefs and their jobs because two other Circuits—facing different mandates, different facts, and different claims—rejected a similar argument. Putting aside the unseemliness of asking this Court to ignore one of its own decisions in favor of decisions from other circuits, this argument is implausible because it misreads those cases.

Take *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021). United suggests (at 26) that the Second Circuit rejected the impossible choice approach adopted in *BST*. But the section United quotes addresses public interest, not irreparable harm. And the portion of the sentence United fails to quote concludes that the choice facing plaintiffs did not outweigh the "State's interest in maintaining the safety within healthcare facilities during the pandemic." *Id.* at 295. Thus, the Second Circuit rejected the claim of irreparable injury from the loss of First Amendment injuries only *after* determining that the plaintiffs

"failed to demonstrate a likelihood of success on their First Amendment … claims." *Id.* at 294-95. *We the Patriots* is thus inapposite because the district court here has strongly suggested (ROA.3275) that Appellants *have* demonstrated a likelihood of success on the merits.

As for *Together Employees v. Mass General Brigham Inc.*, 19 F.4th 1 (1st Cir. 2021), United effectively concedes (at 26) its inapplicability: The First Circuit expressly found that "appellants cannot point to an 'impossible choice' as a special factor" because each had "already made their choice[]" when they either resigned or were terminated. *Id.* at 8. Not so here. The impossible choice remains very much alive.[4]

In short, given that a panel of this Court has already found irreparable injury to result from the choice between "jobs or jabs," this Court should reject United's invitation to adopt the conclusions of readily distinguishable, out-of-circuit cases.

[4] To be sure, United is correct that the district court in *Doe 1 v. NorthShore University HealthSystem*, 2021 WL 5578790 (N.D. Ill. Nov. 30, 2021), rejected *BST*'s impossible-choice approach. But it did so by citing the same flawed reasoning of the district court here, and did not address *BST* by anything other than name. *Id.* at *2.

* * *

Like the district court, United has failed to identify any binding precedent showing that the impossible choice facing Appellants is not an irreparable injury. In contrast, Appellants have identified binding authority—*BST*—holding that forcing that choice *is* an irreparable harm. This Court should therefore reverse the district court's holding that Appellants are suffering no irreparable injury.

II. United Irreparably Injures Appellants by Depriving Them of Bidding Opportunities.

United also has no persuasive response to Appellants' showing that United is depriving them of bidding opportunities while on unpaid leave, and that such a deprivation is the quintessential irreparable injury.

It is undisputed that nearly every aspect of Appellants' jobs is dictated by a bidding system. This system determines what plane a pilot flies, whether an employee will be home for a holiday, whether an employee will have weekends off, whether a mechanic works inside or outside, whether a gate agent works in a more desirable gate, whether a United Club Representative works in a location where she is more likely to earn bonuses for credit card applications. Appellants' Br. 34-40 (citing record).

Nor is there any serious debate that these bidding opportunities are lost while Appellants are on unpaid leave. *Id.* In fact, United has never suggested that Appellants may place bids while on unpaid leave.

United responds by fixating again (at 40) on backpay and front pay. But that puts the cart before the horse. United has not addressed the impossibility of disentangling every bid that occurred while Appellants were on unpaid leave and identifying every lost job opportunity—every lost holiday schedule, job location, or route. And contrary to United (at 40), the losses here are greater than simply missing out on one job for which a court may provide backpay and front pay. Rather, each Appellant will likely have lost scores of job opportunities while on unpaid leave. ROA.3640:11-41:25, 4167-68. And a preliminary injunction is precisely the remedy for such unquantifiable harms. *See Emerald City Mgmt. v. Kahn*, 624 F. App'x 223, 225 (5th Cir. 2015) (per curiam).

United is similarly mistaken when it mischaracterizes (at 41) these losses as "hypothetical." In the record below, Appellants detailed each aspect of their jobs that are dictated by bidding, and Appellants testified—as did Appellants' expert—that these opportunities will be lost as a result of their unpaid leave. ROA.3640:11-41:25, 4167-68.

Characterizing these harms as hypothetical blinks reality. The record demonstrates that nearly all aspects of Appellants' jobs are dictated by a bidding system (ROA.3617:17-25), that Appellants cannot place bids while on unpaid leave (ROA.3618:14-19), and that these losses are permanent (ROA.3748:19-49:7). Further, the record details current opportunities Appellants are missing. ROA.3389-90.[5] The only thing "hypothetical" or "speculative" is how United could quantify and remedy those losses later.

Finally, United is mistaken when it argues (at 42) that "the requested preliminary injunction would not likely redress the purported injury of 'lost bidding opportunities.'" United contends (*id.*) that Appellants have not shown that "they could bid on jobs while on *paid* leave[.]" But this argument assumes without evidence (*id.*) that a preliminary injunction would result in Appellants being placed on paid

[5] Contrary to United's suggestion (at 41), the district court did not "reject" this evidence; it opted to "not consider [the declarations] in resolving" Appellants' motion for reconsideration. ROA.3408. The district court did not strike the declarations, and United offers no authority showing that these declarations are not part of the record. Appellants properly submitted the declarations to the district court to identify factual developments that occurred during briefing. ROA.3397-3402.

leave, rather than restored to their pre-existing jobs. United also assumes without evidence (*id.*) that Appellants could not be permitted to bid on job opportunities even if they are on leave. The only concrete evidence in the record shows that Appellants are missing bidding opportunities and that those losses are permanent and unquantifiable. *See supra* 17-18 (citing record). Accordingly, the district court erred as a matter of law in concluding that this did not demonstrate irreparable harm.

III. United Irreparably Injures Appellants by Depriving Them of Seniority.

Nor does United have a viable response to Appellants' showing that they are also losing their seniority positions as a result of unpaid leave. The record clearly establishes that those employees still working will "pass[] [Appellants] in seniority" and "will forever be senior to them[.]" ROA.4168. And this loss is no small matter. As the record shows, seniority affects "everything." ROA.4167. A more senior United employee is less likely to be furloughed. *Id.*; *see also* ROA.3638:11-18. And during furloughs, more senior employees are recalled first. ROA.3638:19-20. Or, when a base of operations is closed, seniority determines which employees from that base are "accommodated

somewhere else," and which lose their jobs. ROA.3638:24-39:5. Further, as discussed, seniority determines an employee's position for all job-related bidding opportunities. These future harms cannot be quantified and are thus irreparable. *Emerald City*, 624 F. App'x at 225.

Indeed, United's own witness—Kirk Limacher—testified that 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. And that is the only evidence in the record regarding United's ability to place Appellants in their seniority positions upon return.

The district court was thus mistaken when it held that, under *Moseley v. Goodyear Tire & Rubber Co.*, 612 F.2d 187 (5th Cir. 1980), it could retroactively place Appellants in their relative seniority positions, ROA.3271. Rather, as Appellants showed (at 43-45), this Court held in *Moseley* that "remedial seniority may *not* be used to displace or 'bump' a permanent employee working a regular assignment." 612 F.2d at 191 (emphasis added). That is precisely why Mr. Limacher testified that any attempt to retroactively reinstate Appellants to their seniority positions would be subject to immediate litigation. ROA.3748:19-22.

In *Moseley*, retroactive reinstatement was feasible only because there were equivalent jobs available for all employees—such 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." 612 F.2d at 192. Here, by contrast, the record confirms that in this industry, bumped employees cannot simply work in another similar position. They would necessarily be bumped to less lucrative and less senior roles. ROA.3617:17-25, 3638:1-40:23, 3680:3-17. Thus, rather than supporting the district court's conclusion, *Moseley* cuts against it.

United nevertheless claims (at 39) that, despite recognizing "limits on when restored seniority can be used," *Moseley* "confirms that remedial seniority would undoubtedly ensure that [plaintiffs] are able to make *future* bids with their seniority level intact[.]" (quotation marks omitted; alteration in original). But the ability to make *future* bids is irrelevant to the harm resulting from bids that United does not allow while the "accommodated" employee is on unpaid leave. *See supra* Part II. And the ability to make future bids is similarly irrelevant to the other benefits lost as a result of an employee's loss of relative seniority. *See supra* 19-20.

United's argument thus reconfirms that lost seniority imposes irreparable harm.

In short, it is impossible to identify and quantify all the ways Appellants will be harmed in the future by the loss of their relative seniority positions. The only thing that is clear from the record is that Appellants are and will be irreparably harmed by lost seniority. ROA.4167-68.

IV. United Imposes a Host of Other Irreparable Injuries.

United also has no answer to the many other irreparable injuries—impending homelessness, foregone medical treatment, lost education opportunities, and more—that Appellants are suffering absent a preliminary injunction. Appellants' Br. 45-48. These harms originate from lost income and benefits, but they reach beyond the prototypical harms in employment disputes for which monetary damages are sufficient. *Id.*

For instance, there is no way to compensate Appellant Hamilton for the impact of lost cancer treatment due to threatened unpaid leave, ROA.3994, Appellant Sambrano for lost education opportunities, ROA.3991, Appellant Jonas for her husband's lost medical treatment

once she is placed on unpaid leave, ROA.4007, or Appellant Castillo for the homelessness he will face once placed on unpaid leave, ROA.4003. And there is no way to compensate Appellants for the lost skills they suffer while on indefinite unpaid leave. ROA.4166-67. As these injuries "cannot be undone through monetary remedies," they are irreparable. *Dennis Melancon v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012).

1. United's principal response (at 21) is to dismiss these harms as "ubiquitous" in employment litigation. To be sure, employment litigation will always involve claims of damages, and often "there is an adequate remedy through after the fact relief like reinstatement and back pay." *Id.* (quotation marks and citation omitted). But, as the Supreme Court has noted, "cases may [also] 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 v. Murray*, 415 U.S. 61, 92 n.68 (1974).

As Judge Ho rightly concluded, this is just such a case: "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." *Sambrano*, 19 F.4th at 842 (Ho, J., dissenting).

United has no answer, other than its bald statement (at 22) that this case does not rise to the level of irreparable harm that the *Sampson* Court contemplated. But here again, United's *ipse dixit* is insufficient.

Rather, Courts have applied *Sampson* to grant preliminary injunctive relief in similar cases. For example, in *Howe v. City of Akron*, 723 F.3d 651 (6th Cir. 2013), the Sixth Circuit held that *Sampson*'s irreparable harm holding "appeared … confine[d] … to cases involving 'discharge of probationary employees.'" *Id.* at 662 (quoting *Sampson*, 415 U.S. at 91-92 & n.68). The Sixth Circuit concluded that delayed promotions may constitute irreparable harm, particularly for employees who have worked to gain seniority in their positions. *Id.*[6]

[6] *See also Keyer v. Civil Service Comm'n of City of New York*, 397 F. Supp. 1362 (E.D.N.Y. 1975) (applying *Sampson* to find irreparable harm because plaintiffs were "qualified for employment in a fairly limited and specialized field," with "relatively limited" opportunities for employment); *Truck Drivers v. Almarc Mfg.*, 553 F. Supp. 1170, 1173-74 (N.D. Ill. 1982) (recognizing *Sampson*'s limitation and holding that potential foreclosure and "serious difficult[y] in sustaining the needs of everyday life" were irreparable injury).

2. United is also wrong to suggest (at 34-35) that the downstream harms Appellants face without an injunction are merely financial. As Appellants demonstrated (at 46-47), in *Burlington N. & Santa Fe Railway Co. v. White*, 548 U.S. 53, 72 (2006), the Supreme Court emphasized that courts can issue an injunction in Title VII cases "even if [an] employer later provided backpay." And that conclusion was necessary because "an indefinite suspension without pay"—precisely what Appellants face—"could well act as a deterrent" to those who would otherwise seek to vindicate their rights. *Id.* at 73. And for that reason, without the possibility of an injunction, the company would escape accountability for its illegal actions.

United attempts to evade *Burlington* (at 37-38) by suggesting that it only addressed the availability of *permanent* injunctions against future retaliation. But the only difference between permanent and preliminary injunctions is that a permanent injunction requires a showing of "actual success on the merits rather than a mere likelihood of success." *Dresser-Rand Co. v. Virtual Automation*, 361 F.3d 831, 847 (5th Cir. 2004). Whether seeking a permanent or preliminary injunction, a plaintiff must "plead and prove an irreparable injury for which no adequate remedy at

law exists." *Id.* United's attempts to distinguish *Burlington* can succeed only by ignoring that the standard for irreparable injury is "essentially the same" for permanent and preliminary injunctions. *Id.* And, because *Burlington* controls, United's reliance on cases that predate it by several decades must fail.

But they also fail on their own terms. Take, for example, the "leading case" on which United relies (at 23), *Morgan v. Fletcher*, 518 F.2d 236 (5th Cir. 1975). There, this Court expressly recognized that irreparable injury is "incapable of precise definition" and will "depend on the circumstances surrounding each case." *Id.* at 239. And this Court expressly addressed the fact that the federal employee there was "entitled to the benefits of the Back Pay Act." *Id.* at 240. Moreover, the harms she faced from her lost insurance were "conjectural only." *Id.* Not so here. As Appellants showed (at 14-15), they face impending homelessness, lost medical care, and lost education opportunities. Those are not conjectural. And to add injury to injury, United has stripped "accommodated" employees of health insurance in the midst of the COVID-19 pandemic. ROA.3620:20-25, 3691:10-15. *Morgan* is thus inapposite.

Any reliance on *White v. Carlucci*, 862 F.2d 1209 (5th Cir. 1989), is similarly misguided. In that case, the plaintiff made no "fact-specific argument" about irreparable harm because he made the "untenable assertion that the nature of his claim eliminate[d] the need for such a showing." *Id.* at 1213. The Court's discussion of irreparable harm was therefore confined to those unique circumstances—where an appellant argued he did not need to show irreparable harm. In contrast, Appellants have focused extensively on the irreparable harms they face every day.

United's reliance (at 23) on *Allied Pilots Association v. American Airlines,* 898 F.2d 462 (5th Cir. 1990), fares no better. That case involved a "minor dispute subject to compulsory arbitration under the RLA" where the injunction was lifted not because of the lack of irreparable injury, but instead because "the federal courts [lacked] jurisdiction over the ... dispute." *Id.* at 465-66. United does not explain the relevance of a case standing for the unremarkable proposition that courts lacking jurisdiction cannot issue injunctions.

3. United's attempt (at 46-47) to diminish these harms, and to focus instead on the purported harms it would face from an injunction, is similarly unpersuasive. The district court received evidence in a

multi-day hearing and concluded that United's reliance on safety arguments "may be viewed as merely pretextual" given the evidence showing that, even without vaccination, United's employees and customers face a very small risk of COVID-19 infections.[7] ROA.3277. There is no reason to disturb that conclusion now.

Moreover, United's argument on this point is irrelevant: Appellants ask this Court to issue a narrow decision—holding that the district court erred when it concluded they had not suffered irreparable injury. The remaining preliminary injunction factors—including balance of harm—may be addressed on remand. Accordingly, the Court need not address United's arguments (at 45-47) about its alleged burden or the availability of class-wide relief. Those issues are not now before this Court.

---

[7] Indeed, pretext is clear from United's decision not to mandate vaccination for foreign crew members. London-based crew not subject to a vaccine mandate regularly work alongside domestic crew on international flights originating or ending in the United States. While United contends (at 12) that its compliance with "foreign laws" does not undermine the company's safety arguments, this fact only underscores United's hypocrisy. If United is willing to allow unvaccinated international crew to intermingle with domestic crew (for whatever reason), there is no reason why unvaccinated domestic crew should not be able to do likewise, subject to the same mitigation measures in place for all crew members.

V. Appellants May Obtain Preliminary Injunctive Relief During the Administrative Exhaustion Process.

In a final act of desperation, United asks the Court (at 48-52) to ignore its own precedent and conclude that Appellants may not obtain preliminary injunctive relief until the administrative process before the Equal Employment Opportunity Commission ("EEOC") is complete. But this Court has squarely held that preliminary injunctive relief *is* available in this circumstance, and United's attempts to question that holding are misguided.

1. Specifically, in *Drew v. Liberty Mutual Insurance*, 480 F.2d 69, 71-72 (5th Cir. 1973), this Court held that Title VII permits preliminary injunctive relief to preserve the status quo while the administrative process continues.[8] In such cases, an "individual employee may bring her own suit to maintain the status quo pending the action of the [EEOC] on the basic charge of discrimination." *Id.* at 72.[9]

---

[8] Courts have also applied this to ADA claims. ROA.85.

[9] In fact, that is precisely the role of a preliminary injunction. And this Court should not credit United's narrative (at 8) that Appellants needlessly brought this litigation while United was working to identify appropriate accommodations. The problem was entirely United's doing. By choosing an arbitrary deadline without any reasonable accommodations in place, United sought to use unpaid leave as leverage to force vaccinations. Preliminary injunctive relief exists to ensure that

The Second Circuit agrees. Where, as here, "the court eventually will have jurisdiction of the substantive claim and an administrative tribunal has preliminary jurisdiction, the court has incidental equity jurisdiction to grant temporary relief to preserve the status quo[.]" *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 884 (2d Cir. 1981). The First Circuit has also held that an employee may obtain preliminary injunctive relief during the EEOC process. *Bailey v. Delta Air Lines*, 722 F.2d 942, 944 (1st Cir. 1983).

This conclusion is consistent with the history of Title VII. *Sheehan*, 676 F.2d at 881. Before 1972, "the sole right to enforce Title VII in the courts was given to the person aggrieved[,]" including seeking preliminary injunctive relief. *Id.* at 882-86. In 1972, Congress amended Title VII to "explicitly authorize[] the EEOC to 'bring an action for appropriate temporary or preliminary relief' at any time[.]" *Id.* at 881 (quoting 42 U.S.C. §2000e-5(f)(2)). While Congress did not add a "comparable provision with respect to individuals," there was no need for it: "[R]eading the statute as a whole, and having due regard for

---

the status quo is preserved and here, to ensure that United is accountable for the injuries it is causing.

Congress's intent in enacting Title VII ..., court[s] [are] entitled to use [their] inherent equity power to award temporary injunctive relief, in appropriate circumstances, in order to maintain the status quo prior to the EEOC's issuance of a right to sue letter." *Id.*; *see also Drew*, 480 F.2d at 74 (Congress's silence should not be interpreted as "impliedly destroy[ing] an existing right of action").

2. United nevertheless asks this Court (at 50) to infer that, by granting the EEOC power to seek a preliminary injunction, Congress intended to strip "the charging employee" of the ability to obtain a preliminary injunction. But "there is simply no evidence, let alone the overwhelming evidence needed to establish repeal by implication" here. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001). The Court should reject United's invitation to read such an implicit repeal into Congress's silence.

United's reliance (at 50) on *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), is equally misplaced. There the Supreme Court merely held that Title VII's exhaustion requirement is not jurisdictional. *Id.* at 1846. That holding neither implicates nor abrogates *Drew*'s holding that preliminary injunctive relief is available before EEOC exhaustion. In

fact, contrary to United's characterization (at 50), *Fort Bend* did not address preliminary injunctive relief at all.

Finally, United asks this Court (at 51) to conclude that *Drew* was incorrectly decided. But "under the rule of orderliness, only our full court can overturn another panel's decision." *Gruver v. La. Bd. of Supervisors for La. State Univ. Agr. & Mech. Coll.*, 959 F.3d 178, 181 (5th Cir. 2020) (citation omitted). So *Drew*, which remains good law, controls, and Appellants may obtain preliminary injunctive relief.

CONCLUSION

By forcing Appellants to choose between their beliefs and their jobs, United is substantially burdening Appellants' ability to exercise their beliefs. This Court has already held that forcing this choice on an employee is itself an irreparable harm and the Court should do so again here. Similarly, United is causing Appellants irreparable harm each day it prevents them from accruing seniority and from submitting bids for various job opportunities. Finally, United is causing substantial irreparable harms in Appellants' personal and professional lives. And, without a preliminary injunction, there will be no effective mechanism to hold United accountable for is unlawful coercive actions.

The district court thus erred in concluding that Appellants are suffering no irreparable harm, and this Court should reverse the district court's decision on that point.

December 30, 2021

Respectfully submitted,

/s/ Gene C. Schaerr
Gene C. Schaerr
Counsel of Record
Mark R. Paoletta
H. Christopher Bartolomucci
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 30, 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 6,390 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 30, 2021

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 30, 2021

Mr. Gene C. Schaerr
Schaerr Jaffe, L.L.P.
1717 K Street, N.W.
Suite 900
Washington, DC 20006

No. 21-11159 Sambrano v. United Airlines
USDC No. 4:21-CV-1074

Dear Mr. Schaerr,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 1 day of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

Due to the appeal being expedited, please overnight the paper copies of your brief.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk
504-310-7675

cc:
Mr. H. Christopher Bartolomucci
Mr. Russell Daniel Cawyer
Mr. Brian Field
Mr. Alexander Virgil Maugeri
Mr. Hashim M. Mooppan
Mr. Donald James Munro
Mr. Mark R. Paoletta
Mr. Joshua James Prince
Mr. Esteban Shardonofsky
Mr. John Clay Sullivan
Mr. Robert C. Wiegand