# UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 21-20311

**JENNIFER BRIDGES, BOB NEVENS, MARIA TREVINO, RICARDO ZELANTE, LATRICIA BLANK, ET AL.,**

*Plaintiffs-Appellants*

v.

**THE METHODIST HOSPITAL, DOING BUSINESS AS HOUSTON METHODIST; METHODIST HEALTH CENTERS, DOING BUSINESS AS HOUSTON METHODIST THE WOODLANDS HOSPITAL,**

*Defendants-Appellees*

On Appeal from the United States District Court for the Southern District of Texas, No. 4:21-CV-01774

## REPLY BRIEF OF APPELLANTS

Jared R. Woodfill
WOODFILL LAW FIRM, P.C.
3 Riverway, Suite 750
Houston, Texas 77056
Tel: (713) 751-3080
Fax: (713) 751-3058
jwoodfill@woodfilllaw.com

Jillian L. Schumacher
DANIELS & TREDENNICK PLLC
6363 Woodway Drive, Suite 700
Houston, Texas 77057
Tel: (713) 917-0024
Fax: (713) 917-0026
jillian@dtlawyers.com

*Counsel for Appellants*

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## I. SUMMARY OF ARGUMENT

Appellees misrepresent Texas law and the effect of Executive Order GA-40. Governor Abbott issued Executive Order GA-40 pursuant to an emergency disaster declaration. Texas law provides Governor Abbott with the authority to suspend statutes (such as Texas Health and Safety Code section 224.002) that conflict with executive orders issued pursuant to an emergency disaster declaration. *See* TEX. GOVT. CODE § 418.016. Texas law also provides Executive Orders issued pursuant to an emergency disaster declaration with the "force and effect of law." TEX. GOVT. CODE § 418.012. Because Executive Order GA-40 already has the "force and effect of law" the Legislature's failure to either terminate the emergency disaster declaration or pass new legislation supplanting Executive GA-40 blesses Executive Order GA-40.

## II. ARGUMENT

### A. This case is about the people of Texas.

Both parties agree on one thing. Methodist does not think this is a case about people. To Methodist, it is a case about business judgment. Methodist contends employees suffer no real harm because they can simply choose to work elsewhere. This Court has recognized the fallacy of Methodist's logic. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (noting that plaintiffs suffered irreparable harm in being "coerced into a choice between 'the job(s) and their jab(s)."; *Sambrano v. United Airlines, Inc.*, 19 4th 839, 840–41 (5th Cir. 2021) (Ho, J., dissenting). Even more importantly, the people of Texas disagree. The laws passed by the officials they elected to guide them through emergencies matter.

Texas law requires employers to respect Appellants' decisions of personal conscience regarding whether to receive COVID vaccines. This case, brimming with arguments and questions regarding state law, is a case about whether Methodist will respect the laws of the people of Texas.

### B. Appellants preserved error in the district court.

Appellees contend Appellants did not raise their appellate arguments in the district court. *Brief of Appellees*, at 36–38. While both parties have cited new law and authority related to this important, evolving, issue, Appellants sufficiently preserved their arguments in the district court.

In Plaintiffs' Amended Complaint, Appellants pleaded as count one, wrongful discharge, and as count two, violation of at-will employment doctrine public policy exception. ROA.283–84. There is no federal at-will employment doctrine or federal public policy exceptions to a federal at-will employment doctrine. However, as Appellants explained, Appellees' violation of federal law, including forcing employees to take a vaccine authorized only for emergency use (an authorization that required vaccination be voluntary) violates Texas public policy and is an exception to the at-will employment doctrine. *See* ROA.284–85 & ROA.323. Liberally construed in Appellants' favor, the complaint pleads sufficient facts to support a reasonable inference Appellees are liable for violating Texas public policy. *See EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 467 (5th Cir. 2006).

In their response to Appellees' motion to dismiss, Appellants detailed many of the same facts that they have recited in their appellate brief regarding mandatory vaccines. Further, Appellants explicitly referenced state law, citing the public policy exception created by *Sabine Pilot*. *See* ROA.323. Putting the district court and Appellees on clear notice regarding Appellants' argument that this case creates a new public policy exception, Appellants stated "Defendants fail to acknowledge the stark novelty of the instant case. Again, this is a case of first impression." ROA.322.

After discussing that public policy exception, Appellants discussed the impact of mandating a vaccine through a process that runs afoul of federal laws and regulations, including 45 C.F.R.46.116. Acknowledging the novelty of the case, Appellants stated "the current facts and evidence fall under the spirit of *Sabine Pilot*." ROA.323–24. The point of the argument is that there is a public policy exception to the at-will employment. The exception does not exist under *Sabine Pilot* (as Appellants stated in the district court, this is a case of first impression), but it falls under its spirit. Appellants present this same argument on appeal.

As Appellee's authority demonstrates, a party "does not waive an argument based on a decision of law unavailable during trial court proceedings if the litigant has properly raised a sufficiently similar issue." *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 256 (5th Cir. 2013); *Brief of Appellees*, at 38. Both parties cite to new precedent, regulations, or executive orders that did not exist at the time the district court dismissed Appellants' complaint. *See, e.g.*, *Brief of Appellees*, at 23, 26, 29, 37, 52, 56, 62. Even if Appellants developed their argument as the political branches had time to reduce public policy to law, the supporting authorities merely bolster the arguments Appellants made in the district court.

In this new context, this case of first impression, there is a public policy exception to at-will employment, in the spirit of the exception created in *Sabine Pilot*, when an employer terminates an employee for failing to take an EUA-

authorized medical treatment in contravention of the scope of the EUA authorization. The district court rejected this argument below.

### C. Texas courts create exceptions to at-will employment to uphold state law.

Appellees argue Appellants are overly optimistic in their reading of Texas law, primarily based on cases holding that in areas where the Legislature had rejected a particular policy (explicitly or implicitly), Texas courts refused to create one. This case is different because Texas law embraces the public policy exception Appellants rely on and prohibits the termination policy enacted by Appellants. Executive Order GA-40, which has the "force and effect of law," prohibits Appellees from compelling Appellants to take any COVID-19 vaccine. *See* TEX. GOVT. CODE § 418.012; Executive Order GA-40, issued October 11, 2021.

The at-will employment doctrine is a judicially-created doctrine subject to exceptions. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). Texas courts have not addressed a situation like this one. But the situation is in the spirit of *Sabine Pilot* where the courts did make an exception to vindicate the state's public policy interest in having its laws upheld. *See id.* The same interest applies here. The state has a public policy interest in having its law upheld.

This case is radically different from the ones cited by Appellees in which the Supreme Court refused to create exceptions to at-will employment in situations in which the law of Texas differed from the proposed public policy exception. In

*Austin v. Health Trust, Inc.*, for example, the Supreme Court of Texas noted that over the eight years prior to the case, the Legislature carefully had considered a variety of similar measures and enacted a series of narrow statutes (not covering the Petitioner) covering the same subject the Petitioner argued should be a common-law exception to at-will employment. *See* 967 S.W.2d 400, 401 (Tex. 1998). The Supreme Court of Texas further noted in *Austin* that "the Legislature has enacted specific statutes to address the retaliation that [the Petitioner] alleges she suffered in the present case." *Id.* at 402.

The *Teal Trading* case is similar. In *Teal Trading*, the petitioner asked for a common-law exception to declare an easement void. *Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Assoc.*, 593 S.W.3d 324, 327 (Tex. 2020). The Supreme Court of Texas noted, "the legislature has spoken extensively about restrictive covenants, both upholding their enforcement and setting limits." *Id.* at 339.

Unlike in *Teal Trading*, by allowing Executive Order GA-40 to stand, the Legislature has set a limit. Employers may not terminate employees for failure to take a COVID-19 vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons. *See* Executive Order GA-40, issued October 11, 2021. Because a public policy exception to at-will employment vindicates the state's public policy interest in its law, state courts likely would create a public

policy exception to at-will employment in this case. *See Sabine Pilot Serv., Inc.*, 687 S.W.2d at 735.

**D. Texas law prohibits Appellees' vaccination policy.**

Appellees argue at length that Texas law requires them to implement a policy ensuring their employees are vaccinated from COVID-19. *See, e.g.*, *Brief of Appellees*, at 45–47. This argument is wrong. First, Executive Order GA-40 prohibits Appellee's policy and properly suspends any conflicting statute. Second, section 224.002 of the Texas Health and Safety Code does not require vaccination programs for vaccines that have not been approved by the FDA, and Appellees terminated Appellants for failing to take EUA vaccines.

**1. Executive Order GA-40 prohibits Appellees' vaccine policy.**

Executive Order GA-40 provides, "COVID-19 vaccines are strongly encouraged for those eligible to receive one but must always be voluntary for Texans." GA-40. GA-40 states:

> No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19. I hereby suspend all relevant statutes to the extent necessary to enforce this prohibition.

Executive Order GA-40, issued October 11, 2021.

Governor Abbott issued GA-40 pursuant to a disaster proclamation. *See id.* GA-40 supersedes "any other relevant statutes, to the extent necessary to ensure

that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order." *Id.* While ordinarily, an executive order may not conflict with a statute, the Legislature authorized the governor to suspend statutes when addressing a state of disaster. TEX. GOVT. CODE § 418.016. The Legislature tasked the governor with responsibility for meeting "dangers to the state and people presented by disasters." *Id.* § 418.011.

In section 418.012, the Legislature enacted a statute stating, "the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law." *Id.* § 418.012. Texas Government Code section 418.016 explicitly allows the governor to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster. *Id.* § 418.016.

Because Governor Abbott issued Executive Order GA-40 pursuant to a disaster proclamation, the Executive Order has the force and effect of law and properly suspends section 224.002 of the Texas Health and Safety Code. *See* Executive Order GA-40, issued October 11, 2021. Accordingly, not only is Appellee not required to mandate vaccination against COVID-19, but Appellee is also barred from doing so under Texas law.

**2. Section 224.002 does not require a vaccine policy for EUA vaccines against COVID-19.**

To be clear, even if section 224.002 of Texas Health and Safety Code were in effect, it would not require Appellees to implement a policy mandating their employees take vaccines that had not been fully authorized by the FDA.[1] Section 224.002 requires health care facilities to "develop and implement a policy to protect its patients from vaccine preventable diseases." TEX. HEALTH & SAFETY CODE § 224.002(a). Among other items, the policy must consider and specify vaccines covered "based on the level of risk the individual presents to patients by the individual's routine and direct exposure to patients." *Id.* § 224.002(b)(2).

The statute defines "vaccine preventable diseases" as "the diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention." TEX. HEALTH & SAFETY CODE § 224.001(4). The Advisory Committee's 2021 Recommended Adult Immunization Schedule does not include the COVID-19 vaccine on the table of vaccines that always should be recommended, but includes the vaccine in the Notes section, which discusses "special situations." CDC, *Recommended Adult Immunization Schedule for ages 19 years or older, United States, 2021*, *available*

[1] Any argument section 224.002 of the Texas Health and Safety Code mandates COVID-19 vaccines is based on facts that should be resolved in favor of the Plaintiffs at the motion-to-dismiss stage of litigation.

*at*: https://www.cdc.gov/vaccines/schedules/hcp/imz/adult.html. The guidance specifically states the CDC recommends the vaccine "within the scope of the Emergency Use Authorization or Biologics License Application for the particular vaccine." *Id.* The Emergency Use Authorization requires individuals to consent to COVID-19 vaccines. Accordingly, section 224.002(a) of Texas Health and Safety Code does not require hospitals to mandate vaccines for their employees.

**3. Executive Order GA-40 is Texas law.**

Texas public policy prohibits terminating employees for refusing to take a COVID-19 vaccine.[2] Executive Order GA-40 prohibits employers from compelling employees to take a vaccine for "any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19." *See* Executive Order GA-40, issued October 11, 2021. Appellees' policy violates this broad prohibition. *See* ROA.51, ROA.67. While the policy

[2] The federal regulations cited by Appellees do not apply to this case because they were issued after the vaccines at issue became FDA-approved and Appellants were terminated for refusing to take vaccines that had not been approved by the FDA and were granted only Emergency Use Authorization. Further, federal guidance has recognized Texas has different laws. For example, the Centers for Medicare and Medicaid Services stated its final guidance regarding vaccine mandates does not apply to Texas. *See* CENTERS FOR MEDICARE & MEDICAID SERVICES, *Guidance for the Interim Final Rule – Medicare and Medicaid Programs, Omnibus COVID-19 Health Care Staff Vaccination*, (Jan. 14, 2022), *available at* https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/guidance-interim-final-rule-medicare-and-medicaid-programs-omnibus-covid-19-health-care-staff-1.

contains an exemption process for individuals with medical conditions or sincerely held religious beliefs, these exemptions are insufficient to comply with GA-40. *Compare* ROA.51 & ROA.67 *with* Executive Order GA-40, issued October 11, 2021. For example, Appellees' policy does not meet the requirements of Executive Order GA-40 because it does not allow an exemption for prior recovery from COVID-19 or another medical reason that is not a medical condition. *Compare id.* Appellants, such as Plaintiff Jennifer Bridges, contended she contracted COVID-19 as a result of treating infected patients and thus had obtained natural immunity. *See* ROA.603. Executive Order GA-40 explicitly states an employer cannot compel an employee who has recovered from COVID-19 to take a vaccine. *See* Executive Order GA-40, issued October 11, 2021. Additionally, objecting to a vaccine for "any reason of personal conscience" is broader than Appellees' exemption for sincerely held religious beliefs. *Compare id.* Even if Appellees have a sufficient exemption process for the exemptions listed in their mandate, Appellees' mandate conflicts with the requirements of Executive Order GA-40.

Section 418.014(c) gives the Legislature the power to "terminate a state of disaster at any time." TEX. GOVT. CODE § 418.014(c). Thus, the Legislature did not approve of Executive Order GA-40, the Legislature could have terminated the state of disaster and the legal effect of Executive Order GA-40. *See id.* But the Legislature did not. By failing to act to terminate the effect of Executive Order

GA-40 or pass a bill that changed the scope of Executive Order GA-40, Executive Order GA-40 is the law in Texas. Because Executive Order GA-40 "the force and effect of law," the Legislature has essentially blessed Executive Order GA-40 as Texas law. *See* TEX. GOVT. CODE § 418.012.

Appellees harp on the fact that the Legislature did not pass a proposed bill that could have addressed (or even broadened) the scope of Executive Order GA-40, but unless the Legislature wanted to provide Texans with additional protections, beyond those provided by Executive Order GA-40, there was no need for the Legislature to enact a bill covering the same scope as Executive Order GA-40 because Executive Order GA-40 already has the same force and effect as Texas statutes. *See id.* Because Executive Order GA-40 has the same force and effect as Texas statutes means it should be treated the same way as Texas statutes in ascertaining Texas public polic**y.**

## III. CONCLUSION

Texas has a strong public policy against terminating employment based on an employee's objection to receiving a EUA-authorized-COVID-19 vaccine. Because of Texas's strong public policy, Texas courts likely would create an exception to the at-will employment doctrine to bar employers from terminating employees who object to vaccination, especially employees who objected to vaccines that were

not FDA approved. Based on Texas's strong public policy, Appellants have stated aclaim for relief against Appellees. *Sabine Pilot*, 687 S.W.2d at 735.

## PRAYER

Appellants respectfully request this Court reverse the district court's order dismissing Appellants' claims against Appellees. Appellants pray for any and all further relief to which they are justly entitled.

Respectfully submitted,

By: */s/ Jared Ryker Woodfill*
Jared R. Woodfill
State Bar No. 00788715 Federal Bar No. 17069 WOODFILL LAW FIRM, P.C.
3 Riverway, Suite 750
Houston, Texas 77056
Tel: (713) 751-3080
Fax: (713) 751-3058
woodfillservice@gmail.com (service)
jwoodfill@woodfilllaw.com (non-service)

Jillian L. Schumacher
State Bar. No. 24090375
DANIELS & TREDENNICK, PLLC
6363 Woodway, Ste. 700
Houston, TX 77057
Telephone: (713) 917-0024
Facsimile: (713) 917-0026
jillian@dtlawyers.com

*Counsel for Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2022, I electronically filed the foregoing with the U.S. Court of Appeals for the Fifth Circuit's ECF/CM system, and counsel for the Defendants-Appellees was served using the court's electronic Notice of Docket Activity pursuant to 5th Cir. R. 25.2.5, as well as by electronic mail to counsel below:

Constance Hankins Pfeiffer
YETTER COLEMAN, L.L.P.
811 Main Street, Suite 4100
Houston, TX 77002
Phone: 713-632-8000
Fax: 713-632-8002
Email: cpfeiffer@yettercoleman.com

Daniel F. Patton
Michael W. Twomey
SCOTT PATTON, P.C.
5301 Katy Freeway, Suite 201
Houston, TX 77007
Phone: 281-377-3311
Fax: 281-377-3267
Email: dpatton@scottpattonlaw.com
Email: mtwomey@scottpattonlaw.com

*/s/ Jared Ryker Woodfill*
Jared R. Woodfill

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 2,741 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

The undersigned counsel further certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the typestyle requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word for Microsoft 365, in 14-point Times New Roman font.

*/s/ Jared Ryker Woodfill*
Jared R. Woodfill