No. 21-11159

Case argued January 3, 2022; decided February 17, 2022

In the 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

APPELLANTS' OPPOSITION TO THE PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

No. 21-11159
David Sambrano, individually and on behalf of all others similarly situated, et al. v. United Airlines

The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of 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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Interlocutory orders like the one at issue here, which "decide[] nothing on the merits," and instead "answer[] only the irreparable-injury question asked by the district court," *Sambrano v. United Airlines*, 2022 WL 486610, *1 n.1 (5th Cir. Feb. 17, 2022) (per curiam), are ill-suited for en banc rehearing. Here, if the district court concludes on remand that Appellants have established the other preliminary injunction factors and issues a preliminary injunction, this Court will have an opportunity then to consider the irreparable injury holding alongside the district court's resolution of the other preliminary injunction factors. But en banc rehearing now is premature. Additionally, en banc review is inappropriate because the panel decision follows multiple decisions from this Court, is consistent with decisions from other Circuits, and is fully supported by the factual record. Accordingly, the Court should deny United's petition for en banc rehearing.

ARGUMENT

I. United Fails To Satisfy The "Rigid" Requirements For Rehearing En Banc As To The Issue Of Irreparable Injury.

In this Court, "[c]ounsel are reminded" that a petition for rehearing en banc must "meet[] the rigid standards of [Federal Rule of Appellate Procedure] 35(a)." 5th Cir. R. 35.1. Under that "rigid" rule, rehearing is only permitted in two narrow circumstances: (1) when necessary to "secure or maintain uniformity of the court's decisions;" or (2) when "the proceeding involves a question of exceptional

importance." Fed. R. App. P. 35(a). United does not come close to satisfying either "rigid" standard, and thus the Court should deny United's petition.

A. Rehearing is inappropriate because the panel's interlocutory decision does not "involve[] a question of exceptional importance."

Starting with the second of the two possibilities, this Court should deny the petition because the panel decision is interlocutory, having addressed only one part of Appellants' preliminary injunction motion. If left untouched, the case will be remanded to the district court to consider the remaining preliminary injunction factors. And once that process is complete, this Court will undoubtedly have an opportunity, if it wishes, to consider the entire question of Appellants' entitlement to preliminary injunctive relief. But at this interim stage, the panel's decision hardly "involves a question of exceptional importance," *id.*, and rehearing en banc is inappropriate.

Contrary to United's repeated suggestions, the panel decision did not change the status of this case or the relationship between the parties, and it did not provide Appellants with any relief. In fact, there is no guarantee that the decision will *ever* contravene United's interests. Its unpaid leave policy remains in place, several Appellants remain on unpaid leave, and the panel decision changes none of that.

Instead, the decision only addressed Appellants' irreparable harm, expressly stating that "the better course is to allow the district court to consider the other [preliminary injunction] factors in the first instance." *Sambrano*, 2022 WL 486610,

at *9 n.17. As the panel explained, given the "limited scope of this interlocutory appeal," it would not be appropriate to address issues beyond irreparable harm. *Id.* And the panel opinion's "limited scope" makes rehearing inappropriate as well. This Court, after all, is a "court of review, not first view." *Cruson v. Jackson Nat'l Life Ins.*, 954 F.3d 240, 249 n.7 (5th Cir. 2020).

In fact, this appears to be the one thing on which the entire panel agreed. No judge on the panel sought to have the Court's opinion published. To be sure, as United notes (at 3), Judge Smith chastised the majority for not publishing its decision. But United has no answer for the fact that, if Judge Smith thought the decision was important and worthy of publication, he had the ability to have it published. *See* 5th Cir. R. 47.5.2. But he did not do so. Instead, "all three of [the judges on the panel] agree[d]" that the decision should not be published. *Sambrano*, 2022 WL 486610, *1 n.1. And the reason is "quite simple: [the] decision is interlocutory, decides nothing on the merits, and answers only the irreparable-injury question asked by the district court." *Id.* For the same reasons that the decision was not worthy of publication, it is not worthy of en banc review at this stage.

It is thus unsurprising that United could not identify a single case where this Court has undertaken en banc review of such a narrow, unpublished, interlocutory decision. United identifies just two cases where this Court granted rehearing en banc of *any* unpublished decisions—*United States v. Herrold*, 883 F.3d 517, 520-21 (5th

Cir. 2018) (en banc), *vacated*, 139 S. Ct. 2712 (2019); *Williams v. Hampton*, 797 F.3d 276, 279 (5th Cir. 2015) (en banc). But those cases differ substantially from this case. Neither involved an interlocutory decision, much less a decision on a single preliminary injunction factor. Rather, both decisions addressed final judgments. *Herrold*, 883 F.3d at 520-21 (reviewing en banc the reaffirmance, in an unpublished opinion, of a criminal defendant's sentencing despite the fact that the Supreme Court had vacated and remanded the sentence once before); *Williams*, 797 F.3d at 278-79 (reviewing a panel's unpublished decision affirming the denial of a correction officer's motion for judgment as a matter of law following a jury verdict in a § 1983 case). The fact that United could only identify two inapposite examples speaks volumes. And, just as the panel did not consider this interlocutory decision sufficiently important to publish, the en banc court should reject United's request to conclude that the decision is of such "exceptional importance" as to warrant en banc review.

B. Rehearing is also inappropriate because the panel's decision does not conflict with other decisions from this or other Circuits.

The panel decision also aligns with the only other pertinent decisions from this Circuit, and thus rehearing is not "necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1).

Most notably, the panel decision follows this Court's decision in *BST Holdings v. OSHA*, 17 F.4th 604 (5th Cir. 2021). In that case, this Court held that

individuals are irreparably harmed when forced to choose between "their job(s) and their jab(s)." *Id.* at 618. That is precisely what the panel concluded here: United irreparably harms its employees by forcing the "impossible choice" on "plaintiffs who want to remain faithful but must put food on the table." *Sambrano*, 2022 WL 486610, *9. As the panel continued, "United is actively coercing [such] employees to abandon their convictions." *Id.* There is no daylight between *BST* and the panel decision, and thus no need for the en banc court to rehear this case to "secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1).

But even if there were concern that those cases were outliers, that concern was allayed just last week when this Court again reached the same conclusion in *Navy Seals 1-26 v. Biden*, 2022 WL 594375 (5th Cir. Feb. 28, 2022) (per curiam). In that case, this Court addressed a government vaccine mandate and held that, "[b]y pitting their consciences against their livelihoods, the vaccine requirements … crush Plaintiffs' free exercise of religion"—thereby causing irreparable harm. *Id.* *9.

Thus, the law of this circuit is now clear: when a private or public employer imposes a coercive choice on its employees between "their job(s) and their jab(s)," *BST Holdings*, 17 F.4th at 618, their "beliefs and their benefits," *Sambrano*, 2022 WL 486610, *8, or "their consciences [and] their livelihoods," *Navy Seals*, 2022 WL 594375, *9, the person is irreparably harmed by that compelled choice. The panel's

decision aligns with those decisions, contradicts no other Fifth Circuit decisions, and thus rehearing en banc is inappropriate.

United ignores these facts when it attempts to manufacture an intra-Circuit split. For instance, United incorrectly argues (at 1) that rehearing is necessary because of a conflict between the panel decision, and "an earlier published opinion [of the motions panel] that approved the district court's rejection of the 'coercion' theory." But United overlooks the well-settled rule that a "motions panel order is not binding on the later merits panel." *Daves v. Dall. Cnty.*, 984 F.3d 381, 413 (5th Cir. 2020) (quotation marks omitted). United also overlooks the reason for that rule, namely, that an interim motions panel lacks the benefit of full briefing and oral argument. *AMA Disc. v. Seneca Specialty Ins. Co.*, 697 F. App'x 354, 355 (5th Cir. 2017) (per curiam) ("The decisions of motions panels of this court ... are themselves interlocutory and can be reversed by an oral argument panel, like this one, which has the benefit of full briefing and a completed record."). The existence of this longstanding rule renders the supposed conflict between the motions panel and the merits panel illusory and irrelevant.

The same is true of United's attempt (at 11) to characterize the panel's decision as out of step with decisions from other circuits. No circuit decision that we or United have found has rejected the idea that being put to a coercive choice of violating religious beliefs or being put on unwanted unpaid leave imposes

irreparable harm. As the panel explained (at *9 n.15), neither the First nor the Second Circuit squarely addressed the kind of coercive, impossible choice at issue here. Unlike the Appellants here, the plaintiffs in *Together Employees v. Mass General Brigham, Inc.* had *already* quit or been terminated by the time they alleged a choice between their jobs and a vaccine. 19 F.4th 1, 8 (1st Cir. 2021). And *We the Patriots USA v. Hochul* did not address the coercive choice alleged here as *irreparable harm*, but only considered this kind of "difficult choice" in the context of deciding how to balance the equities. 17 F.4th 266, 294-95 (2d Cir. 2021) (per curiam). Because both cases are inapposite, neither supports United's argument for en banc review.

Accordingly, there is no conflict within this Circuit or with any other, and the Court should deny United's petition.

C. Rehearing is also inappropriate because the panel's well-reasoned decision is supported by the facts and the law.

Rehearing en banc is also inappropriate because the panel decision on irreparable injury is well-reasoned and fully supported by the record and applicable law.

1. At the outset, the panel correctly looked (at *8) to the harm faced by the Appellants—not the identity of the defendant—when it found irreparable harm. In so doing, the panel emphasized that, at least for determining irreparable harm, the defendant's status—whether governmental or private—is irrelevant. To be sure, that

status is relevant when deciding whether the plaintiff has a likelihood of success on the merits. But, for the party whose religious beliefs are being "crush[ed]," or for those who are being coerced into violating their beliefs, it makes no difference whether the party doing the crushing or coercing is the government or a multinational corporation like United. *Navy Seals*, 2022 WL 594375, *9. For that reason, the panel correctly agreed with Judge Ho that "the answer to [the irreparable harm] question depends simply on the effect of the defendant's action on the plaintiffs," and not who the defendant is. *Sambrano*, 2022 WL 486610, *8. To reverse the panel's finding of irreparable harm by focusing on United's legal status instead of the harm it has inflicted on its employees would be the very departure from settled law of which United accuses the panel.

2. Similarly, the panel's decision that the loss of *statutory* religious rights can be irreparable is correct and not worthy of rehearing. Indeed, in so holding, the panel relied (at *8) upon this Court's decision in *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012). United attempts (at 10) to distinguish *Opulent Life*'s finding of irreparable harm for alleged violations of the Religious Land Use and Institutionalized Persons Act by arguing that the decision involved a zoning ordinance prohibiting worship services, whereas United's policy does not prohibit Appellants' religious activity. But that misunderstands the law. United need not *prohibit* religious activity to burden it. *See, e.g.*, *Cavin v. Michigan Dep't of Corrs.*,

927 F.3d 455, 458 (6th Cir. 2019) (religious beliefs can be harmed even if they are not prohibited). And there can be no serious debate that United is burdening Appellants' ability to engage in their religious activity—namely, living out their beliefs. Indeed, as the panel correctly found, United is "actively coercing employees to abandon their convictions," and the harm from being put to that "coercive choice" cannot be remedied by damages after the fact. *Sambrano*, 2022 WL 486610, *9.

Moreover, United is mistaken when it attempts (at 10) to dismiss *Opulent Life* because it did not involve a Title VII claim. The relevant question is the *nature* of the right, not the *source* of the right. As this Court has held, 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). And this Court's decision in *Opulent Life* confirms that a violation of *either* constitutional or statutory rights to religious freedom constitutes irreparable harm. *Sambrano*, 2022 WL 486610, *8 (discussing *Opulent Life*). Accordingly, the conclusion that non-constitutional violations of Title VII can impose irreparable harm just like non-constitutional violations of RLUIPA is correct and not worthy of en banc review.

3. Further, the panel correctly concluded (at *9) that there was nothing speculative about this harm. United's argument to the contrary (at 12-13) fails to understand the harm it is causing Appellants.

Indeed, the panel found (at *9) that, even now, Appellants are being "continually subjected to a coercive choice." United's suggestion (at 13) that the panel's decision turned in any meaningful way on "speculation about possible future conduct" only underscores its "misunderstand[ing of] the entire nature of religious conviction at its most foundational level." *Sambrano v. United Airlines*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting). The harm was being put to the coercive choice, which Appellants feel daily.

In fact, United has been holding Appellants to the coercive choice for months now. And throughout each step of this case, United has downplayed the harm it is imposing. For example, although Captain Sambrano is currently on *unpaid* leave, United tells this Court (at 12) that he cannot experience any coercion because of his previous salary. That argument disregards his testimony that United's actions cause his family to make "difficult choices" for his children. ROA.3991. United does not explain how that current difficult choice is insufficiently immediate.

As for Ms. Kincannon, United's argument (at 12) that she cannot be coerced because she insists that she has made up her mind that she will not get the vaccine borders on risible. The daily pressure to provide for one's family by its very nature causes daily reevaluation of such convictions. Thus, as the panel rightly concluded, the irreparable injury is the "ongoing coercion of being forced to choose either to contravene their religious convictions or to lose pay indefinitely." *Sambrano*, 2022

WL 486610, *9. That harm is not speculative. The record leaves no doubt as to its reality.

4. But even if the panel had misapplied the facts in the record, en banc rehearing would still be inappropriate. As this Court's internal operating procedures recognize, "alleged errors ... in the application of correct precedent to the facts of the case are generally ... not for rehearing en banc." 5th Cir. I.O.P. 35-4. United concedes (at 8-9) that the panel recognized the correct precedent—*White v. Carlucci*, 862 F.2d 1209 (5th Cir. 1989). United merely disagrees with the panel's application of that standard and with the panel's application of *White*'s "explicit[]" recognition that irreparable harms can be separate and apart from their underlying claims. *Sambrano*, 2022 WL 486610, *7.

While no other plaintiff in another case may have "alleged precisely the sort of exogenous and irreparable harm that cases like ... *White* envisioned," *id.*, that should not be held against Appellants, and it is no basis for rehearing. Rather, that is likely a function of the fact that no company has ever done what United did here to its employees of faith: rely on safety concerns as a pretext for imposing company-wide indefinite and unwanted unpaid leave on all employees seeking a religious accommodation, and doing so to coerce them into violating their rights. *See* ROA.3277. The panel's fact-based application of *White* is correct and not worthy of en banc review.

* * *

In sum, the Court should deny United's Petition because it seeks en banc review of an interlocutory order that has not resulted in any relief or otherwise altered the relationship between the parties. The panel decision also comports fully with other decisions in this Circuit and others, and thus rehearing is unnecessary to cure any conflicts. And finally, rehearing is unnecessary because the panel decision was correct and amply supported by the record and applicable law.

II. The Panel Applied Settled Fifth Circuit Case Law Permitting Preliminary Injunctive Relief Before A Party Completes The Administrative Exhaustion Process.

In its final critique of the panel decision—divorced from this Court's standards for en banc review—United argues (at 14-16) that rehearing is necessary because the panel relied on outdated Fifth Circuit case law allowing preliminary injunctive relief before administrative exhaustion. That argument likewise fails.

For nearly fifty years, it has been the rule in this Circuit that 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." *Drew v. Liberty Mut.*, 480 F.2d 69, 72 (5th Cir. 1973). This rule "preserve[s] the court's ability to later order meaningful relief." *Id.* at 74.

In its Petition, United fails to identify a single decision from this Court over the previous fifty years calling that holding into question. Rather, the most United

can muster is a single judge who questioned *Drew* in a dissent. And yet, United nonetheless asks the en banc Court to overrule *Drew*. There is no reason to do so—*Drew*'s holding is squarely supported by the text of Title VII, several other Circuits apply similar rules, and none of the cases United cites calls *Drew* into question. Accordingly, the Court should deny United's invitation to revisit *Drew*.

First, Title VII's plain text and history support *Drew*. Before 1972, "the sole right to enforce Title VII in the courts was given to the person aggrieved[,]" including seeking preliminary injunctive relief. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 882-86 (2d Cir. 1981). 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 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 (noting that Congress's silence should not be interpreted as "impliedly destroy[ing] an existing right of action"). Accordingly, United is mistaken when it argues (at 15-16) that *Drew* finds no

support in Title VII, and thus the Court should not accept United's invitation to overrule *Drew*.

Second, other Circuits apply similar rules. For instance, in the Second Circuit, 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*, 676 F.2d at 884. The First Circuit has held likewise. *Bailey v. Delta Air Lines*, 722 F.2d 942, 944 (1st Cir. 1983). The Court should not grant en banc review to reverse *Drew*, as that would create a conflict between this Circuit and several others.

Third, United is wrong to suggest that Supreme Court decisions have called *Drew* into question. As the panel correctly concluded (at *5-6), neither *Ross v. Blake*, 578 U.S. 632 (2016), nor *Alexander v. Sandoval*, 532 U.S. 275 (2001), undermines *Drew*. For instance, *Sandoval* could not have undermined *Drew* because it dealt with an entirely distinct question—whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI. 532 U.S. at 293. As the panel correctly concluded (at *4-5), Title VII expressly provides such a cause of action here, and thus *Sandoval*'s discussion of Title VI is entirely inapplicable.

The same is true of *Ross*, which addressed a § 1983 claim for damages and the mandatory exhaustion regime of the Prison Litigation Reform Act ("PLRA"). 578 U.S at 635-37. *Ross*'s holding that there is no "special circumstances" exception

to the PLRA's exhaustion requirement is immaterial here. *Drew* did not create an exception to Title VII's exhaustion requirement—it merely allows for a preliminary injunction *while* the administrative exhaustion process continues. *Sambrano*, 2022 WL 486610, *5.

United's argument asks this Court to read *Ross* and *Sandoval* far beyond their text. But, as the panel correctly noted, this Court's "rule of orderliness" precludes United's argument. *Id.* *6. There is no dispute that this Court has never repudiated *Drew*. And, "for a Supreme Court decision to change our Circuit's law, it must be more than merely illuminating with respect to the case before [the court] and must unequivocally overrule prior precedent." *In re Bonvillian Marine Serv.*, 19 F.4th 787, 792 (5th Cir. 2021) (cleaned up); *see also United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018) (Smith, J.) ("[F]or a Supreme Court decision to override a Fifth Circuit case, the decision must 'unequivocally' overrule prior precedent" (cleaned up)). Because neither *Ross* nor *Sandoval* directly touched on the issues in *Drew*, the panel was bound to apply it, and United has given no reason why the en banc court should revisit and overrule a 50-year-old precedent, especially given the interlocutory posture of this case.

CONCLUSION

The panel correctly concluded that, on the record before it, United is irreparably harming its employees. That decision is amply supported by the record

and this Circuit's case law, and en banc review is therefore inappropriate. Moreover, en banc review is particularly inappropriate here, given the interlocutory nature of the panel's decision. Accordingly, the Court should deny United's petition for en banc review.

March 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on March 7, 2022, I electronically filed the foregoing motion 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 motion complies with the type volume limitation of Fed. R. App. P. 35(b)(2) because it contains 3,727 words.

This motion 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 in 14-point Times New Roman font.

Additionally, I certify that (1) any required redactions have been made in compliance with 5th Cir. R. 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: March 7, 2022