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
No. 4:21-cv-01074 (Pittman, J.)

MOTION TO VACATE PANEL OPINION
AND DISMISS APPEAL AS MOOT

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CERTIFICATE OF INTERESTED PERSONS

No. 21-11159, David Sambrano et al. v. United Airlines, Incorporated

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

1. Defendant - Appellee **United Airlines, Incorporated** ("United") is a wholly owned subsidiary of **United Airlines Holdings, Inc.**, which has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

2. Plaintiffs - Appellants **David Sambrano**, **David Castillo**, **Kimberly Hamilton**, **Debra Jennefer Thal Jonas**, **Genise Kincannon**, and **Seth Turnbough**.

3. **Airline Employees 4 Health Freedom** is an interested entity in this case.

4. The following law firms and counsel have participated in the case:

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Dated: March 10, 2022

/s/ Hashim M. Mooppan
Hashim M. Mooppan
Counsel for Defendant-Appellee

United Airlines moves to vacate the panel opinion and dismiss the appeal as moot. Plaintiffs have appealed the denial of a preliminary injunction seeking to prohibit United from placing two of them on unpaid leave as a religious accommodation from the company's COVID-19 vaccination requirement. Due to substantial changes in the scope and severity of the pandemic as well as the guidance of public-health authorities, United has announced that all employees who were placed on temporary unpaid leave as an accommodation will be returned to their previous jobs.

In light of these changed circumstances, plaintiffs' preliminary-injunction motion is moot, and this Court should vacate the panel opinion and dismiss the appeal. That course of action is especially appropriate given the substantial debate over the panel opinion, as demonstrated in Judge Smith's forceful dissent and United's pending petition for rehearing en banc. If, however, the Court concludes that the appeal remains live, then rehearing en banc would remain warranted for the reasons outlined in United's petition. United has contacted plaintiffs' counsel, who stated that this motion is opposed.

FACTS

United has consistently explained that accommodated customer-facing employees on temporary unpaid leave would be returned to the workforce once the pandemic "meaningfully recede[d]," as measured by public-health statistics. ROA.3176–77, 3181–82 (explaining that "[g]iven the dynamic nature of the COVID-19 pandemic, [United] will review the[] metrics every 30 days and take into account any additional guidance from the Centers for Disease Control (CDC) or state and local public health authorities"); *see also* Panel Op. 4 (explaining that unpaid leave was only until "the pandemic 'meaningfully recedes'"); *id.* at 26 (Smith J., dissenting) (same).

On March 10, 2022, as a result of materially changed conditions related to COVID-19, and new guidance from public-health authorities, United informed its workforce that circumstances now permit this return to work.[1] As described in the attached declaration and announcement, all employees currently on unpaid leave—including plaintiffs Sambrano and Kincannon—will be allowed to return to their regular roles with their usual pay and benefits. Ex. A, Decl. of Kirk Limacher; Ex.

[1] Employees will begin returning on March 28, 2022. United is giving employees advance notice of the return to work to give them time to arrange their affairs and prepare for the return. That is especially important for employees on unpaid leave who requested and were approved for outside employment, and will need to provide notice to their alternate employer. Ex. A, Decl. of Kirk Limacher, ¶ 4.

A-1, United Announcement. Likewise, employees currently receiving an alternative accommodation that involved working in a different job (or for a different employer) can return to their regular roles at United with their usual pay and benefits. Ex. A, ¶ 4.

This change in policy is the result of materially reduced rates of COVID-19 incidence, high levels of vaccination, and the reduced severity of the Omicron variant (which is much less likely to result in hospitalization or death than earlier variants). Ex. A, ¶ 6; Ex. A-1; ROA.1051–54. As measured by the CDC, the 7-day moving average of COVID-19 case counts has sharply declined, by over 95%, since January 15, 2022.[2] Ex. A, ¶ 6; Ex. A-1. These levels are the lowest since the summer of 2021. Hospitalizations also have sharply declined since mid-January. Ex. A, ¶ 6; Ex. A-1. Recently, guidance from public-health and governmental authorities about COVID-19 precautions has also changed. The federal mask mandate on transportation networks is set to expire on March 18, 2022, reflecting a determination that it is now safe (for both vaccinated and unvaccinated individuals) inside airports, airplanes and related spaces. Ex. A, ¶ 7. Many cities and states are lifting COVID-19 restrictions, and the CDC has announced that Americans in most

[2] *See* CDC, COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#trends_dailycases (last visited Mar. 10, 2022).

areas of the country, regardless of vaccination status, can forgo masks in indoor settings. Ex. A, ¶ 7.

ARGUMENT

United's announcement that it will return the plaintiffs to their regular jobs is a material change in circumstances. In light of that change, plaintiffs' appeal of the preliminary-injunction denial is now moot, and this Court should vacate the panel opinion and dismiss the appeal—thereby obviating the need for the full Court to decide whether to grant en banc review of the questions that divided the panel.

A. The Appeal Is Moot Because Plaintiffs' Ability To Return To Work Eliminates Any Basis Or Need To Grant A Preliminary Injunction.

Plaintiffs sought a preliminary injunction that would end "indefinite leave [for] any employee who has a religious or medical basis for seeking an accommodation." ROA.103, 3263; Panel Op. 2, 22. But plaintiffs Sambrano and Kincannon are now entitled to return to their respective pilot and flight attendant jobs with their full pay and benefits. Their appeal of the preliminary-injunction denial has thus become moot, because they have already received relief from their asserted injury, and so there is no preliminary injunction that the district court could enter to provide them with any effectual relief. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed" (quoting *Mills v. Green*, 159 U.S. 651, 653

(1895)). Indeed, this Court has observed that it is "beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined." *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1998).

Nor does the "voluntary cessation" exception to mootness apply here. This is not a situation where United has acted to "stave off litigation." *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co*., 704 F.3d 413, 425 (5th Cir. 2013) (declining to apply voluntary cessation exception). United vigorously has defended the lawfulness of its policy in the district court and on appeal, including by continuing to press its en banc petition. Rather, United's policy change is a response to the rapidly changing landscape of the COVID-19 pandemic, as confirmed by public-health authorities. Accordingly, it is "'absolutely clear' that the allegedly unlawful activity [*i.e.*, United's unpaid leave policy] cannot *reasonably be expected* to recur," *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 94–95 (2013) (emphasis added), for two related reasons.

First, United's change in accommodation policy is based on new realities about the COVID-19 virus, including case counts that recently have dropped by over 95% and the less dangerous Omicron variant. Ex. A, ¶ 6; Ex. A-1. It takes place at a moment when other private businesses—as well as government entities at the state, local, and national level—are lifting COVID-19 precautions, including the currently

scheduled end of the federal mask mandate in airports and airplanes. Ex. A, ¶ 7; Ex. A-1

Second, the opposite conclusion—that employees might be placed back on unpaid leave—depends on unwarranted speculation about the future of the pandemic. *See, e.g.*, *Winokur v. Bell Fed. Sav. & Loan Ass'n*, 560 F.2d 271, 275 (7th Cir. 1977) ("[A] suggestion that defendants might resume the earlier practices is much too speculative and unlikely to support a live controversy."). As plaintiffs themselves have said, the pandemic is entering a new "endemic" phase, which means that it is unlikely to cause the sort of disruptions we have seen in the past. *See* D. Ct. Dkt. 135 at 3 (stating that it has become "more clear since the [October 2021] evidentiary hearing" on the preliminary injunction that, "as government officials have confirmed," COVID-19 "will be endemic in the United States").[3]

In any event, even if not moot as an Article III matter—the issue addressed by the voluntary-cessation doctrine, *Already, LLC*, 568 U.S. at 90–96—circumstances have changed in a way that fundamentally undermines the premise for the panel's

[3] Nor is the "capable of repetition, yet evading review" exception to mootness applicable here. That exception applies only to time-limited actions that are of a duration that is "always so short" that it cannot "'be fully litigated'" before the action ceases. *Spencer v. Kemna*, 523 U.S. 1, 17–18 (1998). Unlike the EEOC-exhaustion question decided by the panel, the question whether plaintiffs have an imminent irreparable injury is not of that character. It could have and would have persisted for full appellate review, including en banc and certiorari review, but for the happenstance of the evolution of the COVID-19 pandemic.

opinion. The issue presented on appeal and decided by the district court was whether there is any *imminent* irreparable injury warranting a preliminary injunction. ROA.3268; Panel Op. 1, 19 n.14. This Court no longer has any need to decide whether plaintiffs face irreparable harm from "ongoing coercion" due to unpaid leave, because regardless, any such harm is no longer imminent and that alone is sufficient basis to deny a preliminary injunction. It thus makes sense to recognize "[t]he lack of need for a determination by this court" given that "the facts and circumstances have changed substantially since the [preliminary injunction] order [considered] by the trial court." *In re Gulf Aerospace Corp.*, 449 F.2d 733, 734 (5th Cir. 1971); *see also Meltzer v. Bd. of Pub. Instruction of Orange Cnty*, 548 F.2d 559, 567-68 (5th Cir. 1977) (recognizing that, regardless of whether voluntary cessation of challenged conduct had "mooted" a preliminary-injunction request, "the imminenc[e] of harm from the recurrence of the practices complained of [was] not sufficient to warrant the issuance of injunctive relief"), *rev'd in part on other grounds*, 577 F.2d 311, 312 (5th Cir. 1978) (en banc); *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 774 (2d Cir. 1984) ("[I]njunctive relief is wholly unnecessary in view of Teledyne's rectification of the design that led to its non-compliance and the absence of any likelihood of repetition."). Accordingly, because the issue that plaintiffs appealed is now moot, this Court can and should dismiss the appeal and vacate the order below on those grounds alone. *See United States v.*

Munsingwear, Inc., 340 U.S. 36, 39 (1950).

B. The Panel's Opinion Should Be Vacated Because The Appeal Is Moot And En Banc Review Otherwise Would Be Warranted.

As the mandate has not issued and en banc consideration is pending, the panel should exercise its equitable discretion to vacate its February 17 opinion in its order dismissing the appeal. "[W]hen the mandate has not issued the court may amend its decision to make the decision conform to the facts of the case." Wright & Miller, Fed. Prac. & Proc. § 3938 (3d ed. Apr. 2021 update). In such cases, the "decision whether or not to vacate a previously issued decision is within [the court's] discretion based on equity." *Humphreys v. DEA*, 105 F.3d 112, 114 (3d Cir. 1996); *cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (adopting a more rigorous standard for vacatur of the judgment of a *lower court* where the party seeking appellate review caused intervening mootness).

This Court and the Supreme Court have not hesitated to use this equitable discretion before their decisions are final to vacate an opinion when intervening events led to mootness. *See, e.g.*, *Smith v. Texaco, Inc.*, 281 F.3d 477, 478 (5th Cir. 2002) (per curiam) (panel issued its opinion; the court requested a response to a petition for rehearing en banc; the case settled before resolution of that vote; and the panel withdrew its opinion and judgment); *United States v. Miller*, 685 F.2d 123, 124 (5th Cir. Unit B 1982) (per curiam) (vacating panel opinion where, "[b]efore issuance of the mandate in the instant case, the parties have brought to the attention

of the court facts which render the case moot"); *United States v. Caraway*, 483 F.2d 215 (5th Cir. 1973) (en banc) (per curiam) (en banc court vacated a panel opinion after the government dismissed an underlying indictment, which occurred before the issuance of the mandate and before the determination of the court to hear the case en banc); *Stewart v. S. Ry. Co.*, 315 U.S. 784 (1942) (Supreme Court vacated its judgment when case became moot while a petition for rehearing was pending).

Equity likewise favors vacatur here. First, the opinion was divided, with a panel member expressly inviting en banc review, yet intervening mootness would deny the full Court the opportunity to grant such review. Second, the panel majority elected to make the opinion unpublished, suggesting an intention to give the opinion no precedential impact beyond the immediate parties. While ordinarily the "value of precedent might counsel against vacatur, that [concern] is not implicated" where, as here, an unpublished decision "would be taken off the books." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 470 (5th Cir. 2020) (en banc). Moreover, vacating the opinion will prevent the possibility that litigants or district courts will rely on the per curiam opinion despite its unpublished status.

Indeed, even if the *Munsingwear* framework for vacatur of lower-court judgments applied to this question—as opposed to the panel's broader equitable judgment for vacatur of its own opinions—vacatur would still be warranted. Under *Munsingwear*, "[v]acatur is in order when mootness occurs through happenstance"

and generally is *not* appropriate when due to the "'unilateral action of the party'" seeking vacatur. *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 71–72 (1997). Here, mootness is not fairly attributable to United's unilateral action but rather to the "happenstance" of changing pandemic conditions and public-health guidance. And regardless, the Supreme Court recently has recognized that, even when the party challenging the opinion is the party that caused the mootness, vacatur may still be appropriate if the party acted in light of important changed circumstances. *See, e.g.*, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (vacating injunction under *Munsingwear* after a new administration changed policy concerning Migrant Protection Protocols); *Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (vacating injunction under *Munsingwear* after a new administration changed policy concerning construction of physical barrier on border).

Here, just as the Supreme Court recognized in those cases that the government should be allowed to change policies, United should be allowed to change its policy in light of new pandemic conditions and public-health guidance. This reflects that the decision whether to vacate, ultimately, is an exercise of equitable discretion, *Bonner Mall P'ship*, 513 U.S. at 25, that "turns on 'the conditions and circumstances of the particular case,'" *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam).

In sum, under any framework, the panel opinion should be vacated and the appeal dismissed. The irreparable-injury question that was the basis of the

preliminary-injunction denial is moot, and it thus need no longer be decided by this Court, which would obviate the need for the full Court to grant en banc review of the divided panel decision on that question.

CONCLUSION

This Court should vacate the panel opinion and dismiss the appeal as moot. If the Court disagrees, however, then en banc review remains warranted for the reasons United has given.

March 10, 2022

Respectfully submitted,

/s/ Hashim M. Mooppan

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CERTIFICATE OF SERVICE

I certify that on March 10, 2022, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: March 10, 2022

/s/ Hashim M. Mooppan
Hashim M. Mooppan
Counsel for Defendant-Appellee

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 27(d)(2)(A). Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the motion contains 2,512 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

Dated: March 10, 2022

/s/ Hashim M. Mooppan
Hashim M. Mooppan
Counsel for Defendant-Appellee

EXHIBIT A

No. 21-11159

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Plaintiffs-Appellants

v.

UNITED AIRLINES, INCORPORATED,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Texas
No. 4:21-cv-01074 (Pittman, J.)

DECLARATION OF KIRK LIMACHER

I, Kirk Limacher, declare as follows:

1. I currently serve as the Vice President of Human Resource Services for United Airlines, Inc. ("United"). I have held this position since October 2016.

2. United's Reasonable Accommodation Policy ("RAP") concerning the COVID-19 vaccine was designed by me and my leadership team.

3. On March 10, 2022, responding to materially changed COVID-19 conditions and new guidance from public-health authorities including the Centers

for Disease Control and Prevention ("CDC"), United announced publicly and to its employees that circumstances now permit a full return to work for COVID-19 RAP employees. Specifically, all employees currently on unpaid leave, including Captain David Sambrano and Ms. Genise Kincannon and other pilots and flight attendants receiving this accommodation will be allowed to return to their regular jobs at United with their usual pay and benefits. Employees currently receiving an alternative accommodation that involved working in a different job (at United or another employer) also can return to their regular jobs at United with their usual pay and benefits.

4. United is giving employees advance notice of the return to work to give them time to arrange their affairs and prepare for the return. That is especially important for employees on unpaid leave who requested and were approved for outside employment, and will need to provide notice to their alternate employer. Employees will begin returning on March 28, 2022.

5. For those employees offered the accommodation of temporary unpaid leave, United's position always has been that the leave would end once the pandemic "meaningfully recedes." After consultation with outside experts, on October 25, 2021, United defined "meaningfully recedes" based on COVID-19 community transmission rates and nationwide daily case counts published by the CDC. In that announcement, United explained that in light of the dynamic nature of the

COVID-19 pandemic, it would review these metrics every 30 days and take into account additional CDC and state and local public health authority guidance, and revise these metrics accordingly.

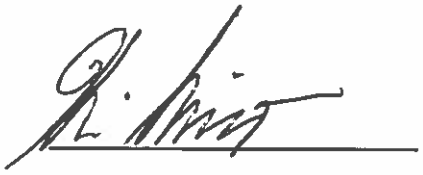
6. Four months later, the nation experienced the less severe Omicron variant. According to the CDC, as of March 8, 2022, the 7-day moving case average has declined from over 800,000 to approximately 38,000—a decrease of over 95%. These levels are the lowest since the summer 2021 and are approaching those from the earliest days of the pandemic in 2020. The CDC reports that hospitalizations also have sharply declined since their peaks in mid-January 2022.

7. The response from governments and public health authorities has changed markedly as well. The CDC recently announced that Americans in most areas of the country, regardless of vaccination status, can forgo a mask in indoor settings. The federal mask mandate on transportation networks is set to expire on March 18, 2022, reflecting a determination that it is now safe for vaccinated and unvaccinated individuals inside airports, airplanes and related spaces. United's determination that a return to work can now occur is based on these and other changes in conditions, and reflect that, as public health and government officials have recognized, the pandemic is now entering an "endemic" stage.

8. A true and correct copy of the notification United employees received announcing the return to work is attached as Exhibit A-1.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 10, 2022.



Kirk Limacher

EXHIBIT A-1

United Team:

United has been recognized as the industry leader on safety throughout the pandemic – among our many "firsts" were mask requirements for employees, customer testing and contact tracing, and maximizing HEPA filtration systems during boarding and deplaning, just to name a few.

But of all these efforts, the one that remains the most effective at protecting our employees and customers is our successful employee vaccination policy. Since November – a time that included the record-breaking Omicron surge – our vaccinated employees were remarkably safe compared to our employees who were on an approved request for reasonable accommodation (RAP), as well as compared to the general population.

Sadly, like the rest of the country, we have lost unvaccinated colleagues during this time including a heartbreaking five out of the 2,200 employees with a vaccine-related RAP. All loss of life is tragic but at United, our vaccinated employees have been significantly less likely to lose their lives to COVID.

Our vaccine policy is also an example of how we've been guided by **core4**. We prioritized safety and used science and data to inform our decision-making. Now, as the Omicron surge shows clear signs of receding and as we've seen how high the protection remains for those of you who are vaccinated, we're using that same commitment to safety and science to ensure our policies reflect the broader shift to the endemic stage of the pandemic.

In addition to the remarkable level of protection we've seen in our own United data for vaccinated employees, the daily average of COVID cases has dropped more than 90 percent and related hospitalizations have declined more than two-thirds from their January 2022 peak. In fact, we're seeing new case reports reaching their lowest levels since last summer. And while mask requirements remain in place on board our aircraft and in our airports, many cities and states are lifting COVID restrictions and the CDC recently relaxed its mask guidelines.

These changes suggest that the pandemic is beginning to meaningfully recede. As a result, **we're confident we can safely begin the process of returning our RAP employees to their jobs.**

We expect COVID case counts, hospitalizations and deaths to continue to decline nationally over the next few weeks and, accordingly, **we plan to welcome back those employees who have been out on an approved RAP to their normal positions starting on Monday, March 28.**

Those with an approved RAP will receive an email later today with specific instructions and a more precise timeline for a return to active status - or modifications to their existing RAP if they are currently performing non-customer facing work activities.

Of course, if another variant emerges or the COVID trends suddenly reverse course, we will reevaluate the appropriate safety protocols at that time.

Finally, I hope you will join me in getting a booster when it's your time, consistent with CDC guidance. It's the best way to reduce the risks associated with COVID. You can visit Flying Together to find vaccine and booster shot locations near you and booster shots remain available to United employees and family members 18 years old and older at our onsite clinics at EWR, IAH and ORD. When you get a booster, please make sure to add it to your vaccine record in My Info.

I truly appreciate what each of you has done to persevere through the pandemic and thank you for what you do every day to take care of our customers and each other.

Kirk Limacher
Vice President, Human Resources