NO. 21-11249

In the United States Court of Appeals For the Fifth Circuit

JOSEPH WOODRUFF; ERICA JOBE; MANDEE KATZ; SCOTT BABJAK,

Plaintiffs - Appellants,

v.

CARIS MPI, INCORPORATED; CARIS LIFE SCIENCES, INCORPORATED,

Defendants - Appellees.

Appeal from the United States District Court for the Northern District of Texas, Dallas Division, Jane J. Boyle, United States District Judge, No. 3:21-CV-2993-B

APPELLEES' RESPONSE BRIEF

Kim Rives Miers (TX 24041482)
LITTLER MENDELSON, P.C.
100 Congress Avenue, Suite 1400
Austin, Texas 78701
Telephone: 512.982.7250
Facsimile: 512.982.7248
kmiers@littler.com

David Jordan (TX 24032603)
LITTLER MENDELSON, P.C.
1301 McKinney Street, Suite 1900
Houston, Texas 77010
Telephone: 713.951.9400
Facsimile: 713.951.9212
djordan@littler.com

Sherry L. Travers (TX 00793097)
M. Scott McDonald (TX 13555505)
Mark A. Flores (TX 24076385)
LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, TX 75201-2931
Telephone: 214.880.8100
Facsimile: 214.880.0181
stravers@littler.com
smcdonald@littler.com
markflores@littler.com

ATTORNEYS FOR DEFENDANTS-APPELLEES

NO. 21-11249

In the United States Court of Appeals
For the Fifth Circuit

JOSEPH WOODRUFF; ERICA JOBE; MANDEE KATZ; SCOTT BABJAK,

Plaintiffs - Appellants,

v.

CARIS MPI, INCORPORATED; CARIS LIFE SCIENCES, INCORPORATED,

Defendants - Appellees.

Appeal from the United States District Court for the Northern District of Texas, Dallas Division, Jane J. Boyle, United States District Judge, No. 3:21-CV-2993-B

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. 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.

Plaintiffs-Appellants	**Counsel for Plaintiff-Appellant**
Joseph Woodruff, Erica Jobe, Mandee Katz, and Scott Babjak	Joseph Leo Lanza, Charles M.R. Vethan, Jens Sandberg

Defendants-Appellees	**Counsel for Defendants-Appellees**
Caris MPI, Incorporated, Caris Life Sciences, Incorporated	Sherry L. Travers, Kim Rives Miers, David Jordan Scott M. McDonald Mark A. Flores

Caris is a privately-held company and no publicly held corporation owns more than 10% of its stock.

/s/ Sherry L. Travers
Attorney of record for Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 of the Federal Rules of Appellate Procedure, counsel for Appellee states that oral argument is not required as the facts and legal arguments are straight-forward and do not require further explanation.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

JURISDICTIONAL STATEMENT

The Northern District of Texas maintains subject-matter jurisdiction over the underlying action pursuant to 28 U.S.C. § 1331. Appellant seeks an appeal from the denial of an injunction in the Northern District of Texas. This Court, therefore, has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

I. STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion in denying the Appellants' application for an injunction that sought to prevent Caris from terminating the Appellants' employment with Caris, given the Appellants' inability to show irreparable harm?

2. Should the District Court's denial of injunctive relief be affirmed on other grounds because Appellants cannot establish any of the other elements necessary to obtain injunctive relief?

II. STATEMENT OF THE CASE

Defendants-Appellees Caris MPI, Incorporated and Caris Life Sciences, Incorporated (collectively "Caris") are molecular science companies that develop technologies meant for providing precise and personalized treatment for cancer patients. ROA.351. As a result, Caris employees often work with patients who have later-stage/higher risk cancer making these patients among the most vulnerable to complications associated with COVID-19. *Id.* To protect the vulnerable population it services, as well as protect against an outbreak amongst physicians and its own employees, Caris implemented a policy on September 17, 2021 that required Caris employees who cannot work exclusively from home to receive a COVID-19 vaccine on or before December 1, 2021, unless the Caris employees provided a valid medical or religious basis for an exemption from Caris's COVID-19 vaccination policy. ROA.373-74. If Caris employees did not comply with this mandatory vaccination policy, absent an exemption, Caris would terminate their employment. *Cf.* ROA.373.

Plaintiffs-Appellants Joseph Woodruff, Erica Jobe, Mandee Katz, and Scott Babjak (collectively, the "Former Caris Employees") worked for Caris. Jobe, Katz and Babjak regularly worked in clinical settings with later-stage/higher risk cancer patients as well as their physicians and medical staff. ROA.374. Katz provided field-based support to clinical staff, which required him to work closely with

customers, client service partners, molecular oncology specialists, and regional business directors in order to provide on-site customer support in clinical and hospital settings. ROA.375-76. Babjak held a Regional Business Director position requiring him to work with team members in close quarters, visit cancer centers with vulnerable patients, and work with physicians in a supporting role. ROA.375. Woodruff worked as a Customer Support Manager requiring him to appear in-person at the call center to manage the day-to-day activities of approximately thirty-eight (38) Customer Support Representatives. ROA.376. Jobe held a senior sales position that required interaction with medical oncologists, pathologists, surgical oncologists and gynecologic oncologists in both the clinical and laboratory settings in hospitals and interventional radiology suites. ROA.375

The Former Caris Employees filed Plaintiffs' Verified Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunctive Relief and Brief in Support ("Application") on November 30, 2021 seeking an injunction against the implementation of Caris's COVID-19 vaccination policy. ROA.24-345. The Former Caris Employees sought the following injunctive relief:

> 61. Specifically, Plaintiffs request that Defendant and its agents be enjoined from:
>
> a. Requiring its employees to get vaccinated;
>
> b. Terminating any employee's employment by reason of the employee's refusal to get a COVID-19 vaccination;

c. Retaliating against any employee by reasons of the employee's refusal to get a COVID-19 vaccination; and
d. Taking any other steps to enforce its COVID-19 vaccination policy.

ROA.44-45. ("Injunctive Relief"). The Application made a passing reference to the idea of reinstatement but the request was not considered as there was no factual predicate in the Application. *Id.*

Caris filed its Opposition to Plaintiffs' Application for Temporary Restraining Order on December 1, 2021 with Appendix in Support of Opposition to Plaintiffs' Application for Temporary Restraining Order. ROA.346-86. In support of its opposition, Caris filed the declaration of Wendy Greer, Vice President Human Resources, who stated that "many of Caris's institutional healthcare clients have required Caris employees be vaccinated in order to provide on-site services to the client." ROA.373-74, at ¶ 4; *see also* ROA.379 (requiring Caris ensure its employees providing services to the University of Texas Southwestern Medical Center be fully vaccinated or provide documentation of an appropriate exemption). Caris also noted it would evaluate all requests for exemptions by determining "if the job the employee is hired to perform can be performed with the accommodation requested–assuming some actual accommodation to address Caris's concern is presented by the employee." ROA.374.

On December 1, 2021, the Northern District of Texas ("District Court") held a hearing regarding the Former Caris Employees' Application. *See* ROA.414-36. District Court Judge Jane Boyle ultimately ruled:

> While this Court is sympathetic to the difficulty of Plaintiffs' decision, it remains unconvinced that Plaintiffs' alleged harms associated with complying with Caris's vaccination requirement—be they religious or medical in nature—are imminent and non-speculative when Plaintiffs can avoid these purported harms by remaining unvaccinated, even if it means they sustain **the reparable harm** of losing their employment.

ROA.403 (emphasis added); *see also* ROA.430.

The Order Denying Application expressly referenced paragraph 61 of the Application in its statement of the specific injunctive relief requested by Appellants. ROA.398. It did not address any request for injunctive relief pertaining to the reinstatement of employment for those terminated under Appellees' mandatory COVID-19 vaccine policy. ROA.398. Following the Order Denying Application, Appellees terminated the Former Caris Employees for failing to comply with Caris' COVID-19 vaccine policy. *See Woodruff v. Caris MPI, Inc*. No. 21-11249, Appellees' Motion to Dismiss, Ex. A (Affidavit of W. Greer) ("Affidavit").[1] The Former Caris Employees filed a Notice of Appeal of Order Denying Preliminary Injunction on December 10, 2021. ROA.405-06.

[1] Caris attached the Affidavit of Wendy Greer to Appellees' Motion to Dismiss Appeal of Woodruff, Jobe, Katz and Babjak Due to Lack of Standing, filed concurrently with this motion, which seeks dismissal of this action as the relief sought by the Former Caris Employees is no longer available given their current employment status.

III. SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion when it refused to grant the Former Caris Employees injunctive relief. As explained in detail below, this Court should affirm the decision of the District Court that the prospective termination of the employment of the Former Caris Employees did not constitute irreparable harm (and nothing in the *per curiam* decision in *Sambrano v. United Airlines, Inc.* (Sambrano III), No. 21-11159, 2022 WL 486610 (5th Cir. Feb. 17, 2022) (per curiam), changes this fact). Moreover, the District Court should affirm the denial of the injunctive relief on the following alternative bases:

- The Former Caris Employees could not show a likelihood of success on the merits of the underlying action for the following reasons:
    - The Former Caris Employees did not exhaust their administrative remedies; and
    - Caris cannot grant the Former Caris Employees' requested accommodation to continue to work unvaccinated without creating an undue hardship on Caris's operations given the Former Caris Employees' interaction with highly vulnerable cancer patients and Caris's business partners' requirements that Caris employees receive the COVID-19 vaccine;
- The public interest in protecting immunocompromised cancer patients and preventing the spread of COVID-19 weighs against the issuance of the Injunctive Relief; and
- The balancing of the individual and personal harm of losing their employment incurred by the Former Caris Employees against the

> significant health interest in protecting highly vulnerable cancer patients from severe illness and/or death as well as Caris's business interest in maintaining a healthy workforce and partnerships with medical facilities that require Caris employees receive the vaccine militates against the issuance of the requested Injunctive Relief.[2]

This assumes, of course, that the Former Caris Employees still have standing to pursue an appeal of the Injunctive Relief meant to prevent their termination as Caris has already terminated their employment. *See Woodruff v. Caris MPI, Inc*. No. 21-11249, Appellees' Motion to Dismiss. The District Court properly denied the Injunctive Relief and this Court should affirm the decision of the District Court.

IV. ARGUMENT

A. Standard of Review

The Former Caris Employees cannot meet the high bar necessary to reverse the District Court's denial of the Application. "[A]n order granting or denying a preliminary injunction will be reversed only upon a showing that the district court abused its discretion." *Lakedreams v. Taylor*, 932 F.2d 1103, 1107 (5th Cir. 1991)

[2] While the District Court issued a very narrow decision in denying the relief based on the lack of irreparable harm, this Court can "affirm on any basis that is apparent in the record." *McMillan v. Director, Texas Dep't of Criminal Justice*, 540 F. App'x 358 (5th Cir. Sept. 25, 2013) (affirming the denial of injunctive relief based on a Texas Department of Justice grievance as the plaintiff had failed to exhaust the administrative remedies necessary to bring suit despite the district court's refusal to deny the injunctive relief on that basis) (citing *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992)). This record clearly shows, as a matter of law, that the Former Caris Employees could not meet the standard necessary for this Court to issue an injunction and this Court may affirm on the following bases as well.

(citing *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir.1989)). "[A] district court's findings of fact are subject to a clearly-erroneous standard of review, while conclusions of law are subject to broad review and will be reversed if incorrect." In re *Deepwater Horizon*, 732 F.3d 326, 332 (5th Cir. 2013) (citation omitted). This standard of review grants much leeway to the district court as "[o]nly under 'extraordinary circumstances' will [the appellate court] reverse the denial of a preliminary injunction." *Anderson v. Jackson*, 556 F.3d 351, 356–57 (5th Cir. 2009) (citing *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir.1989)). This case does not present the requisite extraordinary circumstances necessary to reverse the District Court's denial of the preliminary injunction to prevent Caris from terminating the employment of the Former Caris Employees.

B. The Former Caris Employees lack standing and their appeal is moot.

Before this Court may consider any further arguments, it must first determine whether the Former Caris Employees' appeal is moot and/or whether the Former Caris Employees have standing to pursue injunctive relief preventing the termination of their employment. As stated in its Motion to Dismiss Appeal of Woodruff, Jobe, Katz and Babjak Due to Lack of Standing, restated in full and incorporated by reference here, this Court has found "it 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) (citations

omitted). Moreover, a plaintiff must show that "it is *likely,* as opposed to merely *speculative*, that the injury will be redressed by a favorable decision" to maintain standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). This appeal is moot and the Former Caris Employees lack the standing necessary to pursue this appeal.

The Former Caris Employees sought Injunctive Relief that would prevent the termination of their employment. ROA.44-45. Because the Former Caris Employees are no longer employed by Caris, the District Court can no longer grant the Injunctive Relief requested. The appeal of this decision is no longer justiciable, therefore, as it is now moot and the Former Caris Employees no longer have standing.

C. The District Court did not abuse its discretion in finding the termination of employment does not constitute irreparable harm.

Regardless, the District Court's conclusion that it could not issue the requested Injunctive Relief because the Former Caris Employees failed to show irreparable harm was well supported by both the record and judicial precedent. To demonstrate irreparable harm, the Former Caris Employees must show the alleged harm "cannot be remedied by an award of monetary relief." *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017); *see also e.g., Hopkins v. Cornerstone Am*., No. 4:05-CV-332-Y, 2006 WL 8453061, at *3 (N.D. Tex. Feb. 6, 2006) (citing *Aldrich v. Skillern & Sons, Inc.*, 493 F. Supp. 1073, 1075 (N.D. Tex. 1980) (FLSA case); *Hunt*

v. Bankers Trust Co., 646 F. Supp. 59, 64 (N.D. Tex. 1986) (citation omitted) (foreclosure) (Sanders, J.); *Holt v. Continental Grp., Inc.*, 708 F.2d 87, 90-91 (5th Cir. 1983) (Title VII case). The termination of the employment of the Former Caris Employees, therefore, does not constitute irreparable harm as the Former Caris Employees may seek monetary damages for back pay, front pay, compensatory damages, and other monetary relief for their alleged injuries. *See* 42 U.S.C. § 2000e-5; 42 U.S.C. § 1981a(b)(3).

Indeed, when considering similar cases regarding COVID-19 vaccination requirements, courts across the country have recognized that the mere loss of employment does not constitute irreparable harm. *See e.g., Together Emps. v. Mass Gen. Brigham Inc.,* 19 F.4th 1, 8 (1st Cir. 2021) ("When litigants seek to enjoin termination of employment, money damages ordinarily provide an appropriate remedy."); *Dr. A. v. Hochul*, --- F.Supp.3d ----, No. 1:21-cv-1099, 2022 WL 548260, at *6–7 (N.D.N.Y Feb, 23, 2022) (finding that employees failed to show irreparable harm if they were terminated or suspended for failing to receive the COVID-19 vaccine); *O'Hailpin v. Hawaiian Airlines, Inc*., --- F.Supp.3d ----, No. 22-00007-JAO-KJM, 2022 WL 314155, at *5 (D. Haw. Feb. 2, 2022) (appeal pending) ("[B]ecause these harms are common to loss of employment cases and are not extraordinary, or are reparable, injunctive relief is unwarranted."); *Beckerich v. St. Elizabeth Med. Ctr.,* ---. F. Supp. 3d ----, No. 21-105-DLB-EBA, 2021 WL 4398027,

at *6-7 (E.D. Ky. 2021) (stating that loss of employment due to failure to comply with COVID-19 vaccine policy was "not considered an irreparable injury" because wrongful termination claims exist for the very reason to recover "monetary damages to compensate their loss of employment"); *Bauer v. Summey*, --- F. Supp. 3d ----, Nos. 2:21-cv-02952-DCN, 2:21-cv-03137-DCN, 2:21-cv-03178-DCN, 2:21-cv-03192-DCN, 2021 WL 4900922, at *18 (D.S.C. Oct. 21, 2021) (finding that economic harm from loss of employment due to COVID-19 vaccination mandate was not irreparable); *Mass. Corr. Officers Fed. Union v. Baker,* --- F. Supp. 3d ----, No. 21-11599-TSH, 2021 WL 4822154, at *7 (D. Mass. Oct. 15, 2021) (same); *Valdez v. Grisham*, --- F. Supp. 3d ----, No. 21: cv-783 MV/JHR, 2021 WL 4145746, at *12 (D.N.M. Sept. 13, 2021) (holding that being terminated or prevented from working as nurse based on COVID-19 vaccination mandate does not constitute irreparable harm) (appeal pending); *Norris v. Stanley*, --- F. Supp. 3d ----, No. 1:21-cv-756, 2021 WL 3891615, at *3 (W.D. Mich. Aug. 31, 2021) (finding that plaintiff-employee failed to show irreparable injury would result if defendant-employer terminated her employment for failure to comply with COVID-19 vaccination mandate); *Johnson v. Brown*, --- F. Supp. 3d ----, No. 3:21-cv-1494-SI, 2021 WL 4846060, at *20-22 (D. Or. Oct. 18, 2021) (finding no irreparable harm associated with threat of termination noting concerns regarding benefits, finding a new job and paying bills are "routine" and "compensable by money damages"); *Barrington v.*

United Airlines, Inc., --- F.Supp.3d ---, No. 21-cv-2602-RMR-STV, 2021 WL 4840855, at *7 (D. Colo. Oct. 14, 2021) (holding that "were Plaintiff to prevail on her claim she would be entitled to reinstatement, back pay, back benefits, and reimbursement of other proven economic damages. . . . It thus seems that Plaintiff cannot establish that she will suffer irreparable harm if her request is not granted."). Thus, the overwhelming weight of persuasive authority supports a finding in concert with existing Fifth Circuit precedent, specifically that the Former Caris Employees cannot show the termination of their employment pursuant to a COVID-19 vaccination policy amounts to irreparable injury as required to obtain a injunctive relief.

The Former Caris Employees' reliance on the *per curiam* opinion in *Sambrano v. United Airlines, Inc.* (Sambrano III), No. 21-11159, 2022 WL 486610 (5th Cir. Feb. 17, 2022) (per curiam) is both misleading and misguided given the easily distinguishable facts at issue. In Sambrano III, this Court considered a vaccination policy set forth by United Airlines that required employees to receive the COVID-19 vaccine by a set deadline under threat of being placed on an *indefinite* unpaid leave with a suspension of company-paid benefits. *Id.* at *2 (noting the unpaid leave would continue until such time as the threat from COVID-19

subsided).[3] This Court held in an unpublished *per curiam* opinion that this approach put United Airlines employees to a "coercive choice" which "impose[d] a distinct and irreparable harm beyond lost pay, benefits, seniority, and other tangible and remediable losses." *Id*. at *9. Thus, this Court held, "when an employee is subjected to *ongoing coercion* because of a protected characteristic, the irreparable harm factor of the preliminary injunction analysis is satisfied." *Id.* (emphasis in original).

The dispositive issue in Sambrano III, therefore, focused on the requirement in the United Airlines policy that unvaccinated employees be placed on an indefinite unpaid employment status whereby the unpaid employee could only return to a paid employee status by obtaining the COVID-19 vaccination. *Id.* ("Plaintiffs are not merely seeking to prevent or undo the placement on unpaid leave itself, but are also challenging the ongoing coercion of being forced to choose either to contravene their religious conviction or to lose pay indefinitely."). In making this narrow holding, the Court made clear "[i]f plaintiffs here merely alleged that a past action by the employer caused and will continue to cause economic harms, our precedent likely

[3] Notably, the facts of the case at bar involve significantly different populations and interests. Caris's COVID-19 vaccination policy seeks to protect patients vulnerable to severe illness and death as a result of COVID-19 as well as prevent an outbreak inside of Caris's business operations. ROA.373, at ¶ 3. The life-saving impact that the implementation of the COVID-19 vaccination policy by Caris could have far outweighs any of the Former Caris Employees' personal interest in exercising their religious beliefs—an interest that could result in the death of innocent high risk cancer patients. *See* infra Part III.F-G.

would not allow us to conclude that they have demonstrated irreparable harm." *Id.* at *9. Despite the Former Caris Employees' best attempt to hide this key distinction by not citing to it at all in their brief, this Court has made clear that the threat of immediate termination for failure to comply with the Caris COVID-19 vaccination policy and/or the ultimate termination of the Former Caris Employees cannot constitute the irreparable harm necessary to obtain injunctive relief.

Indeed, courts routinely approve the threat of and ultimate termination of employees who refuse or cannot abide by certain health and safety standards in cases based on an alleged religious belief or disability. *See, e.g., Holmes v. General Dynamics Mission Sys., Inc.*, 835 F. App'x 688 (4th Cir. 2020) (holding termination of diabetic who could not meet safety requirement of working in steel-toed shoes did not violate ADA); *Yarberry v. Gregg Appliances, Inc.*, 625 F. App'x 729, 741 (6th Cir. 2015) (holding safety violation, in part, provided adequate grounds for termination despite alleged disability); *Robinson v. Children's Hosp. Boston*, No. 14-10263-DJC, 2016 WL 1337255 (D. Mass Apr. 5, 2016) (holding termination of health care employee's refusal to obtain flu vaccine based on religious objections did not constitute religious discrimination); *Kalso v. New York City Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998) (holding termination of Sikh car inspector who refused to wear a hard hat based on Sikh religious requirement that required the wearing of a turban did not constitute religious discrimination). Moreover, Caris

answered any questions as to the existence of any "ongoing coercion" resulting from Caris's COVID-19 vaccination policy when it terminated the Former Caris Employees for violating Caris's COVID-19 vaccine policy upon the Former Caris Employees' violation of the same. *See* Affidavit, at ¶¶ 3-4. There is no other alleged injury caused by Caris other than the terminations.

The holding in the 2-1 *per curiam* opinion in *Sambrano III* is likewise questionable for the reasons articulated by the Honorable Jerry E. Smith's thorough dissent. *See Sambrano III,* 2022 WL 486610 at *10-37 (Smith, J., dissenting). As previously stated, Title VII and the Americans with Disabilities Act provide significant remedies including, but not limited to, back pay, reinstatement, compensatory damages, punitive damages and attorney's fees and costs. 42 U.S.C. § 2000e-5; 42 U.S.C. § 1981a(b)(3). "The mere 'possibility' of those sweeping remedies 'weighs heavily against a claim of irreparable harm." Sambrano III, 2022 WL 486610 at *18 (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). As stated in Circuit Judge Smith's dissent:

> Finding irreparable harm would contravene decades of settled precedent. The indefinite loss of income is not irreparable injury. Nor is reputational harm. Nor are costs incurred in the absence of a stay. Nor is losing one's health insurance or home. Nor is reassignment. Nor is the appointment of another person to a position the plaintiff would have occupied but for the employer's unlawful discrimination.

Sambrano III, 2022 WL 486610 at *18 (citing *Murray*, 415 U.S. at 89, 90; *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989); *Morgan v. Fletcher*, 518 F.2d 236,

238-40 (5th Cir. 1975); *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975)) (internal citations and quotations omitted). The Former Caris Employees failed to show any irreparable harm associated with the termination of their employment.

The Former Caris Employees' attempt to create irreparable harm by claiming a deprivation of constitutional rights equally rings hollow. The alleged deprivation of constitutional rights, despite the significance of the alleged injury, cannot influence the analysis of whether the Former Caris Employees would suffer irreparable harm and what that harm entailed. *See White*, 862 F.2d at 1212 ("[I]rreparable harm must be proven separately and convincingly. The burden of proof is not reduced by . . . the egregiousness of the alleged wrong upon which the underlying claim is based."). *Cf.* Sambrano III, 2022 WL 486610 at *19-24 (Smith, J. dissenting). The Former Caris Employees did not meet their burden to show any constitutional rights were violated and, thus, the District Court correctly focused its attention on the actual harm suffered by the Former Caris Employees—specifically the loss of their employment and not some alleged constitutional injury.

Indeed, adopting the Former Caris Employees' reasoning, influenced heavily by Sambrano III, would provide employees in this Circuit the opportunity to use harms that "feel like" constitutional injuries, like scheduling work over a religious holiday or requiring protective helmets that would require the removal of religious headgear, as a means to obtain injunctive relief against private employers pursuant

to Title VII and the ADA, statutes that have nothing to do with ensuring private employers maintain the constitutional rights of their employees. *See* Sambrano III, 2022 WL 486610 at *24-25 (Smith, J. dissenting) (noting constitutional harm is special as it is inflicted by the government and Title VII does not seek to enforce constitutional protections). The Former Caris Employees' argument that they suffered constitutional harms resulting in irreparable harms cannot survive given the clear purpose of the statutes under which they bring this litigation and the actual harms suffered by the named defendants.

Additionally, the existence of any right of a private litigant to bring such an injunction under Title VII or the ADA likewise remains in doubt as noted in Circuit Judge Smith's dissent. Any insinuation by the Former Caris Employees that their claim is saved by the holding in *Drew v. Liberty Mut. Ins. Co.*, 480 F.2d 69 (5th Cir. 1973), rings hollow as this outdated holding no longer controls whether courts may invent extraordinary relief to further a cause of action when the statutory scheme does not provide for that same remedy—a power that the Supreme Court of the United States has since said courts no longer have. *Alexander v. Sandoval*, 532 U.S. 275, 286-87, 290 (2001); Sambrano III, 2022 WL 486610 at *14 (Smith, J., dissenting). The Supreme Court made clear "[t]he judicial role is limited to 'interpret[ing] the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Sambrano III,

2022 WL 486610, at *14 (Smith, J., dissenting) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). Thus, "[b]y creating only 'one method' of enforcement, the [Supreme Court] explained 'Congress intended to preclude others" forbidding the creation of any other court invented remedies outside of the statutory scheme. *Id.* (citation omitted) Title VII and the ADA provide the EEOC, and the EEOC alone, the right to bring an action for temporary or preliminary injunctive relief. 42 U.S.C. § 2000e-5(f)(2). Thus, the existence of this private right and private remedy manifests in the EEOC alone and the District Court cannot imply the existence of the same to any individual that initiates a legal proceeding pursuant to this statute as a matter of law. *See* Sambrano III, 2022 WL 486610 at *13-15 (Smith, J., dissenting).

The Former Caris Employees have not cited to any case law in any jurisdiction that supports their position that the threat of termination of employment and subsequent termination of employment constitutes irreparable harm under the ADA or Title VII. Indeed, the Former Caris Employees have deliberately omitted the Fifth Circuit's express statement in the *per curiam* opinion in Sambrano III that the Former Caris Employees could not show irreparable harm absent an "ongoing coercion," such as being placed on an indefinite unpaid leave. Sambrano III, 2022 WL 486610, at *9. This Court should refuse the Former Caris Employees' invitation to make law that would allow any employee under an alleged threat of wrongful

termination to seek injunctive relief to prevent the termination and affirm the District Court's denial of the preliminary injunction.

D. The *per curiam* decision in Sambrano III does not constitute an intervening change of law.

Of course, the Former Caris Employees' reliance on Sambrano III likewise fails as the unpublished *per curiam* opinion has no precedential value. "It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision absent an intervening change of law, such as by statutory amendment, or the Supreme Court, or our *en banc* court." In re *Bonvillian Marine Serv., Inc.*, 19 4th 787, 792 (5th Cir. 2021) (quoting *Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008)).

As cited above, longstanding Fifth Circuit precedent has held the threat of termination cannot constitute irreparable harm. *See supra* Part V.C; *see also* Sambrano III, 2022 WL 486610, at *23-25 (Smith, J., dissenting). A *per curiam* unpublished decision falls well short of an *en banc* decision necessary to overturn this well-established principle in the Fifth Circuit. The Former Caris Employees' reliance on Sambrano III provides little to no support, therefore, for the Former Caris Employees' position given its limited application and limited impact on the current state of the law.

The dissent in Sambrano III went so far as to say that "the majority declares that its unsigned writing will apply to these parties only." *Id.* at *10 (Smith, J.,

dissenting). As stated here:

> The majority . . . assures that "[t]his case is rather unique among Title VII cases," that "[v]ery few employment suits involve such harms,", that "such independent harms are rare," that "plaintiffs can ... rarely[ ] establish [such] irreparable harm," that "this is one of the 'extraordinary cases,'" and that "such cases are extraordinary and rare[.]" Hence, the scenario goes, today's decision is "one and done."

Id. at *36 (internal citations omitted). Indeed, the *per curiam* opinion expressly held "[p]ursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4." *Id.* at n.*. As seen in Fifth Circuit Rule 47.5.4, this Court should not rely on the *per curiam* opinion in Sambrano III "*except under the doctrine of res judicata, collateral estoppel, or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like).*" 5th Cir. L.R. 47.5.4 (emphasis in original). None of these limited circumstances apply in this case.

The law in the Fifth Circuit remains that the threat of termination cannot constitute irreparable harm necessary to obtain injunctive relief and Sambrano III does not constitute an intervening change of this longstanding precedent.

E. The District Court's ruling should also be affirmed on other grounds.

Even if this Court determines that the Former Caris Employees established irreparable harm, they cannot, as a matter of law, meet the burden to show a

likelihood of success on the merits as required to obtain injunctive relief. Specifically, the Former Caris Employees cannot overcome their failure to exhaust their administrative remedies prior to bringing this suit. The Former Caris Employees also cannot succeed given that the requested accommodations would impose an undue hardship on Caris negating the Former Caris Employees' Title VII and ADA claims as a matter of law. This Court, therefore, should affirm the denial of the Injunctive Relief.

1. The Former Caris Employees' failure to exhaust administrative remedies remains fatal.

The Former Caris Employees do not dispute or deny that Title VII and the ADA require administrative exhaustion, which requires the filing of a charge of discrimination with the EEOC and obtaining a notice of right to sue. 42 U.S.C. § 2000e-5; *Price v. Choctaw Glove & Safety Co., Inc.*, 459 F.3d 595, 598 (5th Cir. 2006). Rather, the Former Caris Employees argue that, because they filed a charge of discrimination with the EEOC which is currently pending, they are permitted to seek injunctive relief as they await a decision from the EEOC. Appellants' Revised Brief, p. 18, *Woodruff v. Caris MPI, Inc*. No. 21-11249 (5th Cir. Mar. 15, 2022).

Longstanding Fifth Circuit precedent, however, does not provide for the exception carved out in the *per curiam* unpublished opinion as the exhaustion requirement is "a mainstay of proper enforcement of Title VII remedies." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 272 (5th Cir. 2008). Specifically, the Court's

holding in *Drew v. Liberty Mut. Ins. Co*, 480 F.2d 69 (5th Cir. 1973), does not control and does not provide the exception on which the Former Caris Employees rely to forego this requirement. *See* Sambrano III, 2022 WL 486610, at *26-28 (Smith, J., dissenting) (discussing exhaustion of remedies requirement as established under prior Fifth Circuit precedent). Rather, the Supreme Court expressly held Title VII's charge-filing requirement is mandatory. *Ft. Bend Cnty., Texas v. Davis*, 139 S.Ct. 1943, 1952 (2019). The Supreme Court has likewise held "mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, foreclosing judicial discretion" to create exceptions. *Ross v. Blake*, 578 U.S. 632, 639 (2016) (considering the exhaustion requirement in the Prison Litigation Reform Act). Thus, the Supreme Court's holdings make clear that courts may not create exceptions to exhaustion requirements set forth by statute, such as those seen in Title VII and the ADA. Accordingly, the Former Caris Employees fail to demonstrate a right to injunctive relief as they have failed to exhaust administrative remedies for their Title VII and ADA claims.

2. The Former Caris Employees' demanded accommodation creates an undue hardship.

The Former Caris Employees' requested accommodation to continue working unvaccinated in their public facing jobs, which for three of them includes frequent interactions with later-stage, higher risk cancer patients, will also result in undue hardship on Caris as a matter of law precluding the issuance of the Injunctive Relief.

Title VII and the ADA entitle the Former Caris Employees to an accommodation *only if* said accommodation does not impose an undue hardship on Caris. 42 U.S.C. § 2000e(j); 42 U.S.C. § 12112. "Undue hardship" includes anything that causes more than a *de minimis* impact on Caris' business, as well as an action that requires significant difficulty or expense, when considered in the light of the nature and costs of the accommodation needed. *See Antoine v. First Student, Inc.*, 713 F.3d 824, 839 (5th Cir. 2013); *Fiest v. Louisiana*, 730 F.3d 450, 452 (5th Cir. 2013).

The Former Caris Employees' requested accommodation imposes an undue hardship on Caris that directly threatens and impacts the health and safety of Caris's other employees and the patients with whom Caris services. Because the Former Caris Employees' unvaccinated nature and presence exposes others to heightened COVID-19 risks, Title VII and the ADA permit Caris the ability to deny the Former Caris Employees' unreasonable accommodation in order to shield and protect other vulnerable populations as well as Caris's own vaccinated employees. *See Johnson v. Brown*, No. 3:21-CV-1494-SI, 2021 WL 4846060, at *7–8 (D. Or. Oct. 18, 2021) (denying injunction against COVID-19 vaccine policy because "[t]he increases in cases and hospitalizations are mostly due to the unvaccinated" and "[t]he most effective tool against hospitalization and serious illness from COVID-19 is vaccination"); *Barrington v. United Airlines, Inc.*, --- F.Supp.3d ----, No. 21-cv-2602-RMR-STV, 2021 WL 4840855, at *4–5 (D. Colo. Oct. 14, 2021) (holding that

Plaintiff's requested accommodation in lieu of taking the COVID-19 vaccine would constitute undue hardship for United Airlines.); *EEOC v. Kelly Servs., Inc.*, 598 F.3d 1022, 1033 n.9 (8th Cir. 2010) ("[S]afety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business. Caris has determined that vaccination is an essential component in its COVID-19 health and safety protocols.); *Robinson v. Children's Hosp. Boston*, No. 14-10263-DJC, 2016 WL 1337255, at * 8 (D. Mass. April 5, 2016) ("Undue hardship can also exist if the proposed accommodation would "either cause or increase safety risks or the risk of legal liability for the employer."); *EEOC v. Oak-Rite Mfg. Corp.*, No. IP 99-1962-C H/G, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001) ("Title VII does not require employers to test their safety policies on employees to determine the minimum level of protection needed to avoid injury."). Given the undue hardship that the requested accommodation would have on Caris and its customers, this Court should find, as a matter of law, that the Former Caris Employees could not meet their burden to show a substantial likelihood of success on the merits and affirm the denial of the Application.

F. The public interest in protecting immunocompromised cancer patients and preventing the spread of COVID-19 strongly militates against an injunction restricting Caris' vaccination policy.

Caris implemented its COVID-19 vaccination policy to protect vulnerable patients and their physicians from contracting COVID-19 from Caris employees as

well as to prevent outbreaks amongst its own workforce—a policy which certainly militates against the granting of this injunction. Being an equitable remedy, an injunction may not issue should it not be in the public interest. *Winter v. Nat'l Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Considering the health issues at stake, the public interest is paramount.

Three of the Former Caris Employees "regularly work in clinical settings around physicians, medical staff and late stage/higher-risk cancer patients." ROA.374. No one can legitimately dispute the significant public interest in maintaining the safety of this vulnerable population. Moreover, "[t]he CDC has consistently instructed that vaccines can reduce the risk of spreading the COVID-19 virus." *Barrington v. United Airlines, Inc.*, --- F. Supp. 3d ----, No. 21-cv-2602-RMR-STV, 2021 WL 4840855, at *8 (D. Colo. Oct. 14, 2021). The Supreme Court has also recognized in settings involving doctors and other medical provisions that taking "steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm." *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam).

Other courts across the country have also recognized that COVID-19

vaccination mandates meant to protect the public weigh against the issuance of an injunction against them. *See e.g., Reese v. Tyson Foods, Inc.*, No. 3:21-05087-CV-RK, 2021 WL 5625411, at *8 (W.D. Mo. Nov. 30, 2021) ("The Court finds Defendant's cited authorities are persuasive and agrees that the public interest favors private measures like Defendant's COVID-19 vaccination policy that advance the goal of protecting the health and safety of its employees and others with whom they interact."); *Beckerich v. St. Elizabeth Med. Ctr.*, --- F. Supp. 3d ----, No. 21-105-DLB-EBA, 2021 WL 4398027, at *7 (E.D. Ky. Sept. 24, 2021) ("No matter any individual stance on COVID-19, every person, including the parties in this case, can agree that ending the COVID-19 pandemic is in our collective best interest–and in the public's best interest, as well, for purposes of balancing equities."). Thus, the public interest in maintaining Caris's COVID-19 vaccination policy weighs heavily against the issuance of the injunction sought by the Former Caris Employees preventing the Former Caris Employees from obtaining the same.

G. The balancing of the harms likewise militates against granting the Former Caris Employees' requested injunction.

Finally, the District Court's balancing of the harms in considering the requested relief of the Former Caris Employees prevents the issuance of the requested Injunctive Relief. "[A] court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 542

(1987). As discussed in the preceding section, protection of the higher risk and vulnerable cancer patients who benefit from Caris's technologies remains the primary motivator for Caris's COVID-19 vaccination policy. *See* supra Part III.E. Moreover, health institutions have required Caris to ensure its employees have received the COVID-19 vaccine in order to continue to work inside these various hospitals and laboratories as a further means to protect these individuals. *See e.g.,* ROA.373-74; ROA.379. Providing the injunctive relief requested by the Former Caris Employees would not only directly impact innocent higher-risk cancer patients dependent on the treatments and technologies developed by Caris but likewise put a significant strain on Caris's business relationships with business partners who require contractors inside their buildings receive the COVID-19 vaccine. Certainly federal law, including Title VII and the ADA, would not preclude Caris from taking action to protect the safety and wellbeing of its employees as well as higher risk and highly vulnerable cancer patients. *Bryant v. Compass Grp. USA*, 413 F.3d 471, 478 (5th Cir. 2005) ("Employment discrimination laws are 'not intended to be a vehicle for judicial second-guessing of business decision, nor . . . to transform the courts into personnel managers."). Caris's interest in its COVID-19 vaccination policy is a key strategic and business decision meant to protect not only its business interests but also the highly vulnerable population to whom it provides services.

Conversely, the Former Caris Employees allege personal non-life threatening

injuries for which they may seek monetary damages as previously discussed. *See* supra Part III.C. Allowing the Former Caris Employees the choice to abide by Caris's vaccination policy could put a significantly large number of high risk vulnerable cancer patients depending on Caris's technologies in a life-threatening situation. The potential monetary harm incurred by the Former Caris Employees pales in comparison to the irreparable threat of severe illness and potential death faced by cancer patients to whom Caris services. Highly vulnerable cancer patients who benefit from Caris's technologies, Caris's employees and Caris itself would suffer extreme hardship should the Former Caris Employees receive the sought after Injunctive Relief. Balanced against the personal harm of the Former Caris Employees that can be addressed via monetary remedies, the balancing of the harms weighs in favor of the denial of the requested Injunctive Relief.

V. CONCLUSION

The District Court properly denied the Application for Injunctive Relief requested by Appellants and this Court should affirm the District Court's denial of the Injunctive Relief and award Caris any other relief to which it may be justly entitled.

Respectfully submitted,

/s/ Sherry L. Travers

Sherry L. Travers (TX 00793097)
M. Scott McDonald (TX 13555505)
Mark A. Flores (TX 24076385)
LITTLER MENDELSON, P.C.
2001 Ross Avenue, Suite 1500
Dallas, Texas 75201-2931
Telephone: 214.880.8100
Facsimile: 241.880.0181
stravers@littler.com
smcdonald@littler.com
markflores@littler.com

Kim Rives Miers (TX 24041482)
LITTLER MENDELSON, P.C.
100 Congress Avenue, Suite 1400
Austin, Texas 78701
Telephone: 512.982.7250
Facsimile: 512.982.7248
kmiers@littler.com

David Jordan (TX 24032603)
LITTLER MENDELSON, P.C.
1301 McKinney Street, Suite 1900
Houston, Texas 77010
Telephone: 713.951.9400
Facsimile: 713.951.9212
djordan@littler.com

ATTORNEYS FOR DEFENDANTS-APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit through the appellate CM/ECF system resulting in electronic service on the following attorneys of record:

Joseph Leo Lanza
jlanza@vethanlaw.com
Fountainhead Tower
8200 IH-10 West, Suite 320
San Antonio, TX 78230

Charles M.R. Vethan
cvethan@vethanlaw.com
Jens Sandberg
jsanderg@vethanlaw.com
Two Memorial City Plaza
820 Gessner, Suite 1510
Houston, Texas

Attorneys for Plaintiffs-Appellants

/s/ Sherry L. Travers
Sherry L. Travers

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Federal Rules of Appellate Procedure Rule 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rules of Appellate Procedure Rule 32(f), this document contains 6531 words.

2. This document complies with the typeface requirements of Federal Rules of Appellate Procedure Rule 32(a)(5) and the type-style requirements of Federal Rules of Appellate Procedure Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: April 13, 2022

/s/ Sherry L. Travers
Sherry Travers

4857-3731-0998.13 / 091759-1021