UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DAVID SAMBRANO, individually and on behalf of all others similarly situated, *et al.*,

Plaintiffs,

v.

UNITED AIRLINES, INC.,

Defendant.

Civil Action No.: 4:21-01074-P

NOTICE OF APPEAL

Pursuant to 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure, notice is hereby given that Plaintiffs, David Sambrano, David Castillo, Kimberly Hamilton, Debra Jennefer Thal Jonas, Genise Kincannon, Alyse Medlin, Jarrad Rains, and Charles Burk, on their own behalf and on behalf of all others similarly situated, hereby appeal to the U.S. Court of Appeals for the Fifth Circuit from that portion of the Court's December 18, 2023 Opinion & Order, which granted in part Defendant's Renewed Motion for Partial Dismissal of Plaintiffs' Second Amended Complaint, ECF No. 231, and from the Court's June 21, 2024 Opinion & Order, which denied Plaintiffs' motion for reconsideration of the December 18, 2023 Opinion & Order, *see* ECF No. 263. Copies of each such Opinion & Order are attached to this notice of appeal.

Dated: July 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 18, 2024, I filed the foregoing document with the clerk of court for the United States District Court, Northern District of Texas. I hereby certify that I have served the document on all counsel and/or pro se parties of record by a manner authorized by Federal Rule of Civil Procedure 5(b)(2) (ECF System).

/s/ Brian J. Field
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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DAVID SAMBRANO, ET AL.,

Plaintiffs,

v. **No. 4:21-cv-1074-P**

UNITED AIRLINES, INC.,

Defendant.

OPINION & ORDER

Before the Court is United's Renewed Motion for Partial Dismissal of Plaintiffs' Second Amended Complaint and Motion to Transfer Venue. ECF Nos. 209, 216. Having considered the Motions, the Court finds that United's Motion to Dismiss should be and is hereby **GRANTED in part**. United's Motion to Transfer Venue is **DENIED**.

BACKGROUND

Plaintiffs are employed by United in a range of different roles and bring claims arising from United's COVID-19 vaccine mandate policy. On August 6, 2021, United announced that it would require all employees to get a COVID-19 vaccine. To that end, United mandated that employees be vaccinated by September 27, 2021. United employees could request an exemption from the mandate for religious or medical reasons, but not both. Ms. Hamilton, Ms. Kincannon, Ms. Medlin, and Mr. Burk requested religious exemptions; Ms. Jonas and Mr. Rains requested medical exemptions; and Mr. Sambrano and Mr. Castillo requested both religious and medical exemptions, but only Mr. Sambrano's religious exemption and Mr. Castillo's medical exemption were accepted.

In November 2021, United placed unvaccinated employees who received accommodations on indefinite unpaid leave. Some remained on unpaid leave until March 28, 2022; others were permitted to return to

work provided they wear a mask and submit regular COVID-19 test results. Plaintiffs sued on September 21, 2021, alleging employment discrimination and retaliation on behalf of themselves and other similarly situated employees. Plaintiffs say United violated the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII") by refusing to provide reasonable medical and religious accommodations and by retaliating against them for engaging in a protected activity (i.e., requesting an exemption). After two years, an appeal to the Fifth Circuit, and hundreds of filings, United filed the instant Motion to Dismiss in September 2023.

LEGAL STANDARD

Rule 12(b)(6) allows a defendant to move to dismiss an action if the plaintiff fails to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). In evaluating a Rule 12(b)(6) motion, the court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *See Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 899 (5th Cir. 2019) (quoting *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986)). "Further, 'all questions of fact and any ambiguities in the controlling substantive law must be resolved in the plaintiff's favor.'" *Id.* (quoting *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001)). However, courts are not bound to accept as true legal conclusions couched as factual allegations. *See In re Ondova Ltd.*, 914 F.3d 990, 993 (5th Cir. 2019) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The well-pleaded facts must permit the court to infer more than the mere possibility of misconduct. *See Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). That is, the complaint must allege enough facts to move the claim across the line from conceivable to plausible. *See Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Determining whether the plausibility standard has been met is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (quoting *Iqbal*, 556 U.S. at 663–64).

ANALYSIS

United asserts six arguments in its Motion to Dismiss. *First*, United argues the Court should dismiss three Plaintiffs' Title VII failure-to-accommodate claims, arguing (1) Hamilton and Castillo have not sufficiently alleged that they suffered an adverse employment action, (2) United's accommodation for Hamilton, Castillo, and Jonas was reasonable as a matter of law, and (3) Hamilton, Castillo, and Jonas should be estopped from arguing the accommodation was unreasonable. *Second*, United argues Jonas and Rains's ADA claims should be dismissed because they have not shown they have a disability within the meaning of the ADA. *Third*, United argues all Plaintiffs' retaliation claims under Title VII and the ADA should be dismissed because (1) they did not engage in a protected activity by seeking an accommodation, and (2) United's accommodations were not retaliatory. *Fourth*, United argues (1) Medlin, Rains, and Castillo's claims are time-barred in full or in part, (2) All Plaintiffs' retaliation claims are beyond the scope of their EEOC charge, and (3) Jonas's Title VII claim is beyond the scope of her EEOC charge. *Fifth*, United asks the Court to dismiss all Plaintiffs' standalone "interactive process" claims. *Sixth*, United argues all Plaintiffs' request for a permanent injunction should be dismissed as moot. The Court addresses each argument in turn.

The Court agrees with United that (1) Hamilton and Castillo have not suffered an adverse employment action, (2) United did not retaliate against Plaintiffs for seeking an accommodation, (3) Medlin, Rains, and Castillo's claims are time-barred in full or in part, and (4) Jonas's Title VII claim is beyond the scope of her EEOC charge.

A. Title VII Failure-to-Accommodate Claims

First, United argues that the Court should dismiss Hamilton, Castillo, and Jonas's Title VII failure-to-accommodate claims. United advances three arguments: (1) Hamilton and Castillo failed to adequately allege a materially adverse—or more than *de minimis*—employment action to state a prima facie claim; (2) even if all three Plaintiffs state prima facie claims, masking and testing is a reasonable accommodation as a matter of law; and (3) all three Plaintiffs should be

estopped from arguing that United's masking and testing protocol is unreasonable because they began this litigation by asking for a masking and testing option instead of indefinite unpaid leave.

1. Castillo and Hamilton do not allege more than a *de minimis* adverse employment action.

United argues that Hamilton and Castillo failed to allege an adverse employment action under Title VII that is either "material" or "more than *de minimis*." ECF No. 209 at 9. United argues that an adverse employment action must be "material," while Plaintiffs argue that it need only be more than *de minimis*. *See* ECF Nos. 209 at 9; 213 at 7. As the Parties endorse different standards, the Court starts by clarifying which applies.

In the Fifth Circuit, courts "analyze[] a Title VII claim for a failure to accommodate religious observances under a burden-shifting framework akin to the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), burden-shifting framework." *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014). "The employee must first establish a prima facie case of religious discrimination." *Id.* (citing *Antoine v. First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013)). "If she does, the burden shifts to the defendant to demonstrate either that it reasonably accommodated the employee, or that it was unable to reasonably accommodate the employee's needs without undue hardship." *See id.* (citations omitted). To establish a prima facie case of religious discrimination under Title VII, the plaintiff must present evidence that "(1) she held a bona fide religious belief, (2) her belief conflicted with a requirement of her employment, (3) her employer was informed of her belief, and (4) she suffered an adverse employment action for failing to comply with the conflicting employment requirement." *Id.* (citation omitted).

As to the fourth element of the prima facie case, the Fifth Circuit in *Hamilton v. Dall. Cnty.* explained that a plaintiff plausibly alleges Title VII discrimination by showing discrimination in hiring, firing, compensation, or the "terms, conditions, or privileges" of her employment. 79 F.4th 494, 502 (5th Cir. 2023) (citing 42 U.S.C. § 2000e-2(a)(1)). A plaintiff need not show an "ultimate employment decision."

Id. *Hamilton* left "for another day the precise level of minimum workplace harm a plaintiff must allege on top of showing discrimination in one's terms, conditions, or privileges of employment." *Id.* at 505 (internal quotations omitted). But *Hamilton* made clear that "Title VII [] does not permit liability for de minimis workplace trifles." *Id.* at 505.

Hamilton involved a sex-discrimination claim brought by female detention service officers against the Dallas County Sheriff's Department. *See id.* at 497. The department gave its detention service officers two days off each week, and used a sex-based policy to determine which two days an officer could pick. *See id.* Only men could select full weekends off—women could not. *See id.* The Complaint alleged that this sex-based system discriminated against the officers in the "terms, conditions, or privileges of employment." *Id.* at 504. The department argued that the plaintiffs had not suffered an actionable "adverse employment action" for purposes of a Title VII claim. *See id.* The department argued that to prove an adverse employment action, a plaintiff should be required to show—in addition to discrimination with respect to the "terms, conditions, or privileges of employment"—a "*materially adverse* employment action," a "*tangible* employment action," or an "*objective material* harm." *Id.* (emphasis added). Ultimately, the Fifth Circuit held that "whatever standard we might apply," whether it be a "*de minimis*" standard or a "materiality" standard, "it is eminently clear that the Officers' allegations would satisfy it at the pleading stage." *Id.* at 505. As the Fifth Circuit noted: "It's that simple. At the pleading stage, these allegations are sufficient to state a claim under Title VII." *Id.* Thus, the Fifth Circuit left district courts with little guidance as to the minimum workplace harm a plaintiff must show to state a prima facie discrimination claim.

The Fifth Circuit clarified the *Hamilton* standard in *Harrison v. Brookhaven Sch. Dist.*, explaining that:

> Title VII does not permit liability for *de minimis* workplace trifles. Thus, Harrison must allege not only an adverse action, but something more than a *de minimis* harm borne of that action. This is often referred to as the "materiality" half of the analysis . . . . To "discriminate" reasonably sweeps in some form of an adversity and a materiality threshold. It prevents the undefined

> word "discrimination" from commanding judges to supervise the minutiae of personnel management. It ensures that a discrimination claim involves a meaningful difference in the terms of employment and one that injures the affected employee . . . . But we take these innovations to be shorthand for the operative words in the statute and otherwise to incorporate a *de minimis* exception to Title VII. *But de minimis means de minimis*, and shorthand characterizations of laws should not stray.

82 F.4th 427, 431–32 (5th Cir. 2023) (cleaned up) (internal citations and quotations omitted). In other words, the "*de minimis*" and "materiality" standards are one and the same. Materiality is a shorthand characterization of the well-established *de minimis* standard, which "has roots that stretch to ancient soil." *Id.* at 423. And thus, courts must give the *de minimis* standard its familiar meaning—"*de minimis non curat lex* (the law does not take account of trifles)." *Id.* Accordingly, a plaintiff alleges an adverse employment action if she alleges more than *de minimis* discrimination in the terms, conditions, or privileges of employment.

Harrison paints a clear picture of the *de minimis* standard in action. In *Harrison*, plaintiff LaRenda Harrison, a black female educator and school administrator, sued the school district for promising and then refusing to pay for her to attend a training program for prospective superintendents. *Id.* at 428. The only element of her claim at issue was whether she suffered an adverse employment action. *Id.* at 429. The court held that Harrison "alleges more than a *de minimis* injury inflicted on her by the School District's adverse action: the personal expenditure of approximately $2,000." *Id.* at 432. The Court explained that this "is not a *de minimis* out-of-pocket injury, particularly when that expense was originally promised to be paid by someone else." *Id.* Thus, the court concluded that "Harrison's injury clears the *de minimis* threshold." *Id.*

Having clarified the applicable standard, the Court must now ask if Hamilton and Castillo suffered more than a *de minimis* adverse employment action. Hamilton and Castillo allege that the masking and testing protocol "altered the conditions and terms of [their] employment." ECF No. 213 at 7–8. Specifically, they allege they were required to "provide regular COVID-19 test results," their workstations

were sprayed with Lysol "making it hard for [them] to breathe," they were "needlessly banished to eat outdoors," and they were required to "wear an N-95 respirator" as opposed to a KN-95 or cloth mask. ECF No. 156 at 27, 29. These, just as any personnel-management decisions, may have altered Hamilton and Castillo's terms, conditions, and privileges of employment. But unlike the $2,000 out-of-pocket expenditure in *Harrison* or the inability to take weekends off in *Hamilton*, the requirement to eat in designated areas, wear an FDA-approved mask at work, and submit COVID-19 test results do not clear the *de minimis* threshold.

To be sure, an injury need not be an "economically adverse employment action[]" to satisfy the *de minimis* threshold. *Harrison*, 82 F.4th at 430. But the *de minimis* standard prevents judges from supervising the "minutiae of personnel management." *Id.* at 431. The COVID-19 pandemic was a once in a century event, unprecedented in the modern era. If the *de minimis* standard excludes any workplace harm, surely it prevents judges from supervising a company's decisions regarding how employees' workspaces are sanitized, where employees take lunch, how often they submit COVID-19 test results, and the type of masks they wear. Employers across the country imposed these requirements in response to the COVID-19 pandemic, and trial courts should not be in the business of scrutinizing these details of personnel management in such extraordinary circumstances. *De minimis non curat lex*. The law does not take account of trifles.

Undoubtedly, *Hamilton* broadened the scope of Title VII from the previous "ultimate employment decision" test. *See Hamilton*, 79 F.4th at 497. In this regard, *Hamilton* brought the Fifth Circuit in line with Title VII's text and the approach taken by other circuits. *See id.* at 497, 504 n.62. And this Court will not expand the *Hamilton* standard into the sphere of these workplace trifles, absent clear direction from the Fifth Circuit. If such claims are allowed to survive at this stage, district courts would become "super-personnel departments." *Eyob v. Mitsubishi Caterpillar Forklift Am., Inc.*, 745 F. App'x 209, 214 (5th Cir. 2018) (citing *Riser v. Target Corp.*, 458 F.3d 817, 821 (8th Cir. 2006)). The Court is disinclined to so broaden the judiciary's role here.

Plaintiffs also argue United's initial decision to terminate Castillo and put Hamilton on unpaid leave constituted more than *de minimis* adverse employment actions, even though these decisions were never carried out. The Court disagrees. Hamilton and Castillo were never terminated or placed on unpaid leave. They never changed jobs or lost any pay, benefits, or opportunities. Thus, their "terms, conditions, or privileges" of employment were unaffected by United's unrealized decisions. Plaintiffs argue that these were "ultimate employment decisions," borrowing a phrase from the Fifth Circuit's pre-*Hamilton* standard. *See* ECF No. 213 at 7 ("The fact that this lawsuit forced United to walk back portions of its universal unpaid-leave plan does not erase United's previous ultimate decisions, which harmed Plaintiffs."). Setting aside the question of whether an unrealized decision would have passed the Fifth Circuit's prior test, the Court must apply the *Hamilton* test—the test that tethers the Court's analysis to the text of Title VII, asking whether a plaintiff has pled discrimination in "hiring, firing, compensation, or the 'terms, conditions, or privileges'" of employment. *Hamilton*, 79 F.4th at 497. Hamilton and Castillo were not fired, their compensation was not changed, and United's unpaid leave policy did not affect these Plaintiffs' terms, conditions, or privileges of employment. Plaintiffs nonetheless cling to the Fifth Circuit's outdated test because an ultimate employment "decision" was made, just not carried out. This argument is unavailing.

On the other hand, other employees who were actually placed on indefinite unpaid leave clearly suffered more than a *de minimis* adverse employment action—being deprived of their livelihood until such time as United saw fit for them to return to work. The same could be said for employees who lost responsibilities or were forced to change jobs. United does not argue—nor could it successfully—that these Plaintiffs do not satisfy the *de minimis* threshold. But Hamilton and Castillo, who were never terminated or placed on unpaid leave, do not clear this hurdle. The Court finds that Hamilton and Castillo have not established an essential element of their prima facie case because they were not subject to more than a *de minimis* adverse employment action. Accordingly,

Hamilton and Castillo's failure-to-accommodate claims are **DISMISSED with prejudice**.

2. The Court declines to prematurely assess whether United's masking and testing protocol is a reasonable accommodation.

Next, United argues that the Court should dismiss Hamilton, Castillo, and Jonas's failure-to-accommodate claims because masking and testing is a reasonable accommodation as a matter of law. The Court disagrees. "Whether an accommodation is reasonable is a question of fact." *Antoine*, 713 F.3d at 830–31 (citing *Turpen v. Mo.-Kan.-Tex. R.R. Co.,* 736 F.2d 1022, 1026 (5th Cir.1984)) ("We must uphold the district court's factual determinations on the interlocking issues of 'reasonable accommodation' and 'undue hardship' unless they appear clearly erroneous.")); *see also EEOC v. Universal Mfg. Corp.,* 914 F.2d 71, 73 (5th Cir. 1990) ("We need not embark on a long discussion of what is or is not 'reasonable' accommodation. Ordinarily, questions of reasonableness are best left to the fact finder."). Thus, whether an accommodation is reasonable is a fact-specific inquiry best left to the factfinder. Accordingly, the Court declines to dismiss Hamilton, Castillo, Jonas's failure-to-accommodate claim at the motion to dismiss stage.

3. Plaintiffs are not estopped from arguing United's masking and testing protocol is unreasonable.

Finally, United argues that Hamilton, Castillo, and Jonas should be estopped from arguing that United's masking and testing protocol was an unreasonable accommodation. Specifically, United believes the doctrine of judicial estoppel and "commonsense equitable principles" preclude these Plaintiffs from arguing the protocol was unreasonable because they "started out in this litigation by *demanding* masking and testing as an accommodation." *See* ECF No. 209 at 15 (citing ECF No. 6 at 19). This argument has certain intuitive merit, as Hamilton, Castillo, and Jonas, in initially seeking a temporary restraining order, argued "there are a host of reasonable accommodations that are not unduly burdensome, including: mask wearing . . . or periodic COVID-19 testing." ECF No. 6 at 19. The Court nevertheless remains unpersuaded.

The doctrine of judicial estoppel is equitable in nature and can be invoked by a court to prevent a party from asserting a position

inconsistent with a position they asserted in a prior proceeding. *See Reed v. City of Arlington,* 650 F.3d 571, 573–74 (5th Cir. 2011) (en banc). In determining whether to apply judicial estoppel, courts primarily look for the presence of the following criteria: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Id.* at 574 (citations omitted). Judicial estoppel "is not governed by inflexible prerequisites or an exhaustive formula for determining its applicability, and numerous considerations may inform the doctrine's application in specific factual contexts." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012) (internal citations omitted) (cleaned up). But "[t]he presence of one or more of these elements does not mandate the invocation of judicial estoppel." *U.S. ex rel. Long v. GSDMIdea City, LLC*, 798 F.3d 265, 272 (5th Cir. 2015) ("Because judicial estoppel is equitable in nature, trial courts are not *required* to apply it in every instance that they determine its elements have been met."). Rather, courts should determine if applying judicial estoppel is appropriate "in light of the specific facts of each case and the doctrine's purpose of 'protect[ing] the integrity of the judicial process.'" *Id.* at 272.

Focusing on the first criterion, Plaintiffs persuasively argue that the "[t]he issue here is not masking and testing in the abstract," but the specific masking and testing protocol United adopted. ECF No. 213 at 6. Hamilton, Castillo, and Jonas do not assert a "plainly inconsistent" position by later objecting to the specific protocol implemented by United. *See generally Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (applying estoppel because the plaintiff first argued that one defendant was the manufacturer of the product at issue and then later argued a different defendant was the manufacturer); *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-cr-240-G, 2007 WL 1308383, at *1 (N.D. Tex. May 4, 2007) (Fish, J.) (applying estoppel because the government first argued that documents were in its possession and then later argued that the documents were not in its possession). Accordingly, the Court declines to exercise its equitable

discretion to estop these plaintiffs from arguing United's specific masking and testing protocol was unreasonable.

B. ADA Failure-To-Accommodate Claims

Second, United argues that the Court should dismiss Jonas and Rains's failure-to-accommodate claim under the ADA because they have failed to sufficiently allege that they have a disability. To prevail on an ADA failure-to-accommodate claim, a plaintiff must show: (1) the plaintiff is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations. *See Milteer v. Navarro Cnty., Tex.*, 652 F. Supp. 3d 754, 762 (N.D. Tex. 2023) (citing *Feist v. La., Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 452 (5th Cir. 2013)).

The ADA defines a "disability" as (a) a physical or mental impairment that substantially limits one or more major life activities, (b) a record of such an impairment, or (c) being regarded as having such an impairment. *Id.* at 762 (citing 42 U.S.C. § 12102(1)). The ADA Amendments Act of 2008 requires the Court to interpret the term "substantially limits" as broadly as possible. *Id.* (citing 42 U.S.C. § 12102(4)(A)–(B)). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A).

Here, Jonas and Rains allege that they have disabilities within the meaning of the ADA. Jonas alleges that she has a "severe allergy disability." ECF No. 156 at 30. Jonas "cannot take medicines such as penicillin and has severe reactions to foods such as eggs and materials such as wool." *Id.* She must "tak[e] allergy medications each day and constantly carry[] a rescue inhaler and epi-pen with her in case she comes into contact with an environmental trigger." *Id.* Rains alleges that he has a "hereditary heart disease as well as heart stents and a repaired aorta" and a "history of allergic reactions—including anaphylaxis." *Id.* at 34–35.

At this stage, the Court must accept all well-pleaded facts as true, view them in the light most favorable to Plaintiffs, and resolve all questions of fact and ambiguities in the substantive law in Plaintiffs' favor. *See Inclusive Cmtys. Project*, 920 F.3d at 899. Assuming Jonas and Rains's allegations are true, the Court may infer that these "severe allergies" substantially limit a major life activity. In Jonas's case, carrying an epi-pen implies that an encounter with an allergen carries a risk of life-threatening allergic reactions (most commonly anaphylaxis). During such an episode, it can be inferred that eating, speaking, breathing, thinking, communicating, or working may be substantially limited. These are all major life activities. *See* 42 U.S.C. § 12102(2)(A). Likewise, Rains's allegation that he has a history of anaphylaxis similarly implies that these major life activities would be limited during an anaphylactic episode. Thus, resolving all questions of fact in Plaintiffs' favor, the Court concludes that Jonas and Rains have sufficiently pleaded disabilities within the meaning of the ADA—at least at the motion to dismiss stage.

C. Title VII and ADA Retaliation Claims

Third, United argues that the Court should dismiss all Plaintiffs' retaliation claims. Specifically, United advances two arguments: (1) all Plaintiffs have failed to show they engaged in a protected activity by seeking an accommodation, and (2) all Plaintiffs have failed to show that United retaliated against them for seeking an accommodation.

1. Plaintiffs engaged in a protected activity by seeking medical and religious accommodations.

Title VII and the ADA prohibit retaliation against an individual for engaging in a protected activity. *See* 42 U.S.C. §§ 2000e-3(a), 12203(a). In the Fifth Circuit, the court "applies the same analysis to ADA and Title VII retaliation claims." *Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999). To state a Title VII retaliation claim, the plaintiff must allege facts that tend to establish: "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action." *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002)

(cleaned up). An employee has engaged in a protected activity when she has (1) "'opposed any practice made an unlawful employment practice' by Title VII" (the opposition clause) or (2) "'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing' under Title VII" (the participation clause). *Douglas v. DynMcDermott Petrol. Operations Co.*, 144 F.3d 364, 372 (5th Cir. 1998) (citing 42 U.S.C. § 2000e–3(a)).

Here, Plaintiffs base their retaliation claims on the theory that they "engaged in protected activity when they requested (or tried to request) religious [or medical] accommodations from United's vaccine mandate." *See* ECF No. 156 at 43, 45–46. United disagrees, arguing that Plaintiffs' accommodation requests were not protected activities. *See* ECF No. 209 at 15. Specifically, United argues that Plaintiffs did not "oppose" any unlawful employment practice by requesting an accommodation. *See id.*

In the context of the ADA, requesting a medical accommodation is a protected activity that satisfies the first element of a retaliation claim. *See Jenkins v. Cleco Power, LLC*, 487 F.3d 309, 317 (5th Cir. 2007) (holding an employee claiming retaliation for requesting reasonable accommodations established a prima facie case of retaliation under the ADA); *see also Tabatchnik v. Cont'l Airlines*, 262 Fed. App'x. 674, 676 (5th Cir. 2008) (per curiam) ("It is undisputed that making a request for a reasonable accommodation under the ADA may constitute engaging in a protected activity."); *Cooper v. AT&T Corp./Lucent Tech.*, No. SA97-CA-0628-OG, 1998 WL 1784223, at *7 (W.D. Tex. Oct. 22, 1998) (Mathy, M.J.), *report and recommendation adopted sub nom.*, 1998 WL 1978660 (W.D. Tex. Dec. 8, 1998) (Garcia, J.) ("[A]lthough a person making [an accommodation] request might not literally 'oppose' discrimination or 'participate' in the administrative or judicial complaint process, she is protected against retaliation for making the request.").

Likewise, under Title VII, at least one court in the Fifth Circuit has held that a request for religious accommodation constitutes a protected activity. *See EEOC v. U.S. Steel Tubular Prod., Inc.*, No. 4:14-cv-02747, 2016 WL 11795815, at *16 (S.D. Tex. Aug. 4, 2016) (Harmon, J.). Indeed,

this is the EEOC's view. The EEOC's Compliance Manual states: "[p]rotected oppositional conduct includes actions such as . . . requesting reasonable accommodation for disability or religion." EEOC Compl. Man. § II-A(2)(e) (Aug. 2016); *see also Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (explaining that the EEOC's compliance manual "reflect[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

Other courts that have considered this issue have adopted the EEOC's view. *See, e.g.*, *Lewis v. N.Y.C. Transit Auth.*, 12 F. Supp. 3d 418, 449 (E.D.N.Y. 2014) (Townes, J.) (holding Muslim employee's refusal to remove khimar and request for religious accommodation were protected activities); *Jenkins v. N.Y.C. Transit Auth.*, 646 F. Supp. 2d 464, 473 (S.D.N.Y. 2009) (Koeltl, J.) (holding Pentecostal bus driver's refusal to wear uniform and request for religious accommodation were protected activities); *Williams v. Wal–Mart Assocs. Inc.*, 2:12–CV–03821–AKK, 2013 WL 979103, at *3 (N.D. Ala. Mar. 8, 2013) (Kallon, J.) ("[R]equesting a religious accommodation and refusing to work due to First Amendment religious exercise was [a] 'protected activity.'").

For the moment, resolving any ambiguities in the controlling law in Plaintiffs' favor, the Court assumes that Plaintiffs' requests for medical and religious accommodations constituted protected activities for purposes of their retaliation claims.

2. United's accommodations were not retaliatory.

But United next argues that even if Plaintiffs' accommodation requests were protected activities, Plaintiffs have failed to show that United retaliated against them for seeking accommodations. *See* ECF No. 209 at 13. The Court agrees.

As previously discussed, to state a Title VII retaliation claim, a plaintiff must allege facts that tend to establish: "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action." *Gee*, 289 F.3d at 345 (cleaned up). In the retaliation context, an adverse employment action is one that might dissuade a reasonable worker from engaging in a protected activity,

such as "making or supporting a charge of discrimination," or in this case, requesting a reasonable accommodation. *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012) (cleaned up); *see also Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011) ("Title VII's antiretaliation provision prohibits an employer from discriminating against any of his employees for engaging in protected conduct."); *supra* Part (C)(1) (assuming requesting a reasonable medical or religious accommodation is protected conduct). This analysis is the same under both Title VII and the ADA. *See Seaman*, 179 F.3d at 301. To sustain a retaliation claim, a plaintiff must point to "actions that would have been materially adverse to a reasonable employee." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006). Thus, the question is whether employees were treated materially worse than if they had not sought the accommodation at all, such that they would be deterred from seeking an accommodation. *See id.*

Here, assuming Plaintiffs engaged in a protected activity, Plaintiffs still fail to satisfy the second element of a retaliation claim—they did not suffer an adverse employment action. Plaintiffs argue that United "retaliated against them by imposing unreasonable and unlawful accommodations." ECF No. 213 at 12. Specifically, Plaintiffs argue that the looming possibility of being placed on indefinite unpaid leave was itself an adverse employment action because the accommodation would have dissuaded reasonable workers from seeking it in the first place. *See id.* at 13. But it is undisputed that unvaccinated employees who did not seek an accommodation were terminated for failing to comply with United's vaccine mandate. *See* ECF Nos. 209 at 14; 156 at 2. Thus, the question is whether United's indefinite unpaid leave policy would have dissuaded a reasonable worker from seeking an accommodation, given that failure get vaccinated or seek an accommodation would result in termination. No reasonable worker would be deterred by United's unpaid leave policy from seeking an accommodation if they knew the alternative was termination. Between these two choices, reasonable employees would (and did) seek an accommodation to avoid termination.

To be sure, the choice between termination and indefinite unpaid leave left many employees with no good options. But this is best

remedied by Plaintiffs' failure-to-accommodate claims. If the Court accepted Plaintiffs' position that United "retaliated against them by imposing unreasonable and unlawful accommodations," any arguably unreasonable accommodation could be said to "dissuade" workers from seeking it. ECF No. 213 at 12. Every failure-to-accommodate claim would also be a retaliation claim. The Court cannot allow the broad anti-retaliation provisions of Title VII and the ADA to swallow up the separate mandate that an employer reasonably accommodate its employees.

The interpretive cannon *lex specialis* dictates that if two legal provisions govern the same factual situation, the specific provision overrides the general. *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails."). Title VII and the ADA must be interpreted so that every word serves a purpose. Even if these statutes' broad anti-retaliation provisions covered Plaintiffs' allegation that United's unpaid leave policy was unreasonable, Plaintiffs' allegations are best governed by the statutes' mandate to reasonably accommodate. This is a separate cause of action with separate elements, each of which Plaintiff must prove to recover. To hold otherwise would erode the difference between a failure-to-accommodate claim and a retaliation claim.

But even if Plaintiffs could show they suffered an adverse employment action, Plaintiffs still fail to satisfy the third element of their retaliation claim. Plaintiffs cannot show a causal connection between the protected activity (seeking an accommodation) and the adverse employment action (United's unpaid leave policy). United's unpaid leave policy preceded Plaintiffs' request for an accommodation, so their request for an accommodation could not have "caused" the unpaid leave policy to be instituted in retaliation for Plaintiffs engaging in a protected activity. *Cf. Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *32 (5th Cir. Feb. 17, 2022) (Smith, J., dissenting); *see also Gee*, 289 F.3d at 345 (requiring "a causal connection . . . between the protected activity and the adverse employment action"). United created a system to accommodate its employees, and employees

participated in that system by requesting and receiving accommodations. The question of whether those accommodations were reasonable is a separate issue.

Each of these insufficiencies arise from Plaintiffs' attempt to fit a square peg into a round hole. This theory tasks the Court with articulating why exactly a square peg does not fit into a round hole. Ultimately, the answer is simple: Plaintiffs cry retaliation for United's supposed failure to reasonably accommodate. In so doing, Plaintiffs blur the line between these two causes of action, asking the Court to erode the difference between these claims. The Court declines to do so. Accordingly, Plaintiffs' retaliation claims under Title VII and the ADA are **DISMISSED with prejudice**.

D. Time-Barred Claims

Fourth, United argues that the Court should dismiss several claims as time-barred and beyond the scope of Plaintiffs' EEOC charges. *See* ECF No. 209 at 23–27. Specifically, United argues (1) Plaintiffs Medlin, Rains, and Castillo's claims are time-barred in full or in part under the applicable statute of limitations, (2) all Plaintiffs' retaliation claims are beyond the scope of their respective EEOC charges, and (3) Plaintiff Jonas's Title VII claim is beyond the scope of her EEOC charge. *See id.*

After reviewing United's Motion and Plaintiffs' Response, the Court requested supplemental briefing on the timeliness of Medlin, Rains, and Castillo's EEOC charges, giving Plaintiffs an opportunity to demonstrate that they exhausted their administrative remedies. *See* ECF No. 224.

1. Medlin, Rains, and Castillo's claims are time-barred.

Under Title VII, plaintiffs must exhaust their administrative remedies by filing a discrimination charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred." *See* 42 U.S.C. § 2000e-5(e)(1). The same is true for ADA claims. *See id.* § 12117(a). "Failure to exhaust is not a procedural 'gotcha' issue. It is a mainstay of proper enforcement of Title VII remedies." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 272 (5th Cir. 2008). Consequently,

courts must dismiss any claims where plaintiffs fail to show administrative exhaustion. *See id.*

When using the EEOC's Public Portal to file a discrimination charge, the agency requires users to go through a multi-step process that includes: (1) submitting an online inquiry, (2) scheduling an interview with an EEOC representative, (3) participating in the interview, (4) allowing the representative to assist in charge preparation, and (5) editing and signing the formal "Form 5" charging document that is sent to the employer. *See Filing a Charge of Discrimination With the EEOC*, EEOC, https://www.eeoc.gov/filing-charge-discrimination (last visited Dec. 15, 2023).

United argues that Castillo did not file a charge with the EEOC within 300 days of the alleged unlawful employment action. *See* ECF No. 209 at 25. Indeed, Castillo filed formal (Form 5) charges on September 19, 2022—more than 300 days after the alleged unlawful employment action. *Id.*; *see also* ECF No. 156 at 5, 26–27. Castillo argues that his pre-charge filings are sufficient to constitute a charge. *See* ECF No. 227 at 4–6. Similarly, Rains and Medlin filed formal charges on November 3, 2022, but at least some of the alleged unlawful employment actions occurred more than 300 days before that date. *See* ECF No. 209 at 24–26. Like Castillo, Rains and Medlin argue that their online inquiry forms—filed by Rains in December 2021 and by Medlin in March 2022—are sufficient to constitute a charge. *See* ECF No. 227 at 6–9. Accordingly, the Court must determine whether Medlin, Rains, and Castillo's pre-charge filings were sufficient to constitute a charge.

The Supreme Court has clarified that any filing can deemed a "charge" if it can be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008). This is an objective standard based on a review of the filing. *See id.* The Fifth Circuit has held that preliminary filings may be deemed a charge under *Holowecki* if the preliminary filings specifically asked the EEOC to take remedial action. In *EEOC v. Vantage Energy Servs., Inc.*, the Fifth Circuit found an

intake questionnaire with "sparse content" constituted a charge when the employee checked a box stating: "I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above." 954 F.3d 749, 755 (5th Cir. 2020). The court reasoned that checking this box "satisfies *Holowecki*'s additional request-to-act condition" because it "constitutes a clear manifestation of [plaintiff's] intent for the EEOC [to] take remedial action." *Id.*

But the online inquiry forms at issue here are an even more preliminary filing than the intake questionnaire at issue in *Vantage*. Online inquiry forms have no option to check a box requesting remedial action. *See Freeland v. Coors of Austin, L.P.*, No. A-14-CA-443-SS, 2015 WL 4744362, at *5, 8 (W.D. Tex. Aug. 10, 2015) (Sparks, J.). And courts have held that initial forms cannot constitute a charge where they "lack[] the request to act demanded by *Holowecki*." *Id.* at *7. As the court explained in *Freeland*:

> A review of the case law in this circuit applying *Holowecki* demonstrates courts analyzing intake questionnaires and any accompanying documents consistently identify a specific statement indicating a request to act when they deem a particular filing a charge . . . . In cases where there is an absence of any statement indicating a request for remedial action, courts in this circuit have held the intake questionnaire is not a charge and dismissed the plaintiff's claims.

Id. at *8 (collecting cases). Indeed, most courts in this circuit (including this Court) require that the filing contain a "specific request for EEOC action" to constitute a charge under *Holowecki*.[1] Accordingly, Medlin,

[1]*See, e.g.*, *Perkins v. Starbucks Corp.*, No. 4:21-CV-4189, 2022 WL 17069145, at *5 (S.D. Tex. Nov. 17, 2022) (Hanks, J.) ("[T]he inclusion of or reference to supporting documentation, without an explicit request for the EEOC to take remedial action, does not make a filing a charge."); *Angelina v. Univ. of Miss. Med. Ctr.*, No. 3:14-CV-789-DPJ-FKB, 2015 WL 417846, at *3 (S.D. Miss. Jan. 30, 2015) (Jordan, J.) ("Nowhere in her submission does Angelina request any action or otherwise 'activate [the EEOC's] machinery and remedial processes.'")); *Nadesan v. Tex. Oncology PA*, No. 2:10-CV-239-J, 2011 WL 147570, at *5 (N.D. Tex. Jan. 18, 2011) (Robinson, J.) ("Nothing in Nadesan's Intake Questionnaire or attached supplement qualifies as a request that the EEOC take action."); *Asongwe v. Washington Mut. Card Servs. & subsidiaries*, No. 3:09-CV-0668, 2009 WL 2337558, at *3 (N.D. Tex. July 29, 2009) (Fish, J.) ("[T]he intake questionnaire completed by Asongwe states the name of the charged party and [it] alleges discrimination, but it fails to contain a request for remedial action."); *Evenson v. Sprint/United Mgmt. Co.*, No. 3:08-CV-0759-D, 2008 WL 4107524, at *7

Rains, and Castillo's inquiry forms are charges only if the forms asked the EEOC to take remedial action.

Medlin—Medlin's claims stem from allegations that (1) United initially denied her religious accommodation "several weeks" after her August/September 2021 request, and (2) her March 9, 2022 discharge was unlawful. *See* ECF No. 156 at 37–38. Medlin submitted her online inquiry form on March 12, 2022, and included her contact information, general information about United, the reason for her dispute, and the reason she believed she was terminated. *See* ECF No. 228-8 at 183. Medlin's inquiry form did not contain any statement that "must be reasonably construed as a request for the agency to take remedial action." *Holowecki*, 552 U.S. at 402. Medlin filed her EEOC charge on November 3, 2022. *See* ECF No. 228-8 at 178. Thus, her charge included all discrete acts that occurred after January 7, 2022—300 days before November 3, 2022. Accordingly, Medlin's EEOC charge was timely with respect to her allegation that she was unlawfully terminated on March 9, 2022. (which United does not dispute). Medlin has failed to show that her EEOC charge was timely with respect to United's alleged failure to reasonably accommodate—based on its denial of her August/September 2021 accommodation request.

Despite making no specific request for remedial action, Medlin argues that her online inquiry form should constitute a charge under *Holowecki* for purposes of both her failure to accommodate claim and her alleged unlawful termination. *See* ECF No. 227 at 12. This argument could apply to Rains and Castillo as well, so the Court will address it in full. Medlin argues that "[w]hen an employee reaches out to the EEOC indicating they have been fired for a religious belief, that is a sure indication that they want remedial action—there is no need for talismanic words such as 'please sue my employer.'" *Id.* This argument misses the point addressed in *Holowecki*.

In *Holowecki*, the Supreme Court attempted to define a "charge" in a way that allows the EEOC to "fulfill its distinct statutory function of

(N.D. Tex. Aug. 21, 2008) (Fitzwater, J.) (interpreting *Holowecki* as requiring a "specific request for EEOC action" for a filing to constitute a charge).

enforcing antidiscrimination laws and disseminating information about those laws to the public." 552 U.S. at 400–01; *see also* 42 U.S.C. § 2000e-4(g)(3) (noting that the EEOC shall have the power to "furnish to persons subject to this title such technical assistance as they may request"). Educating the public is "a critical part of the EEOC's mission; and it accounts for a substantial part of the agency's work." *Holowecki*, 552 U.S. at 401. If any communication that loosely alleged discrimination was considered a charge, countless individuals would unknowingly create a "charge" by taking their questions to the EEOC. *See id.* Thus, the Supreme Court devised a test to effect congress's dual-purpose for the EEOC and put in place a "mechanism to separate information requests from enforcement requests." *Id.*

This mechanism involves a two-step inquiry in considering whether a pre-charge filing constitutes a charge: (1) the filing must allege facts that describe the employer and the alleged unlawful employment practice, and (2) the filing must be reasonably construed as a request for the agency to take remedial action, based on an objective review of the terms of the filing. *See id.* at 402. As the Court noted in *Holowecki*, without the second element of the inquiry, any pre-charge filing could be construed as a charge—thereby undermining the dual-purpose of the EEOC. *See id.* at 401–02. The Court further explained:

> If an individual knows that reporting only minimal information to the agency will mandate the agency to notify her employer, she may be discouraged from consulting the agency or wait until her employment situation has become so untenable that conciliation efforts would be futile. The result would be contrary to Congress' expressed desire that the EEOC act as an information provider and try to settle employment disputes through informal means.

Id. at 401. The Supreme Court adopted the *Holowecki* test to hedge against this risk and support the EEOC's dual purposes.

The Court now turns to Medlin's argument that "[w]hen an employee reaches out to the EEOC indicating they have been fired for a religious belief, that is a sure indication that they want remedial action." *See* ECF No. 227 at 10. Not so. When *Holowecki* was decided in 2008, of about "175,000 inquiries the agency receives each year, it dockets around

76,000 of these as charges." *Holowecki*, 552 U.S. at 401. Plaintiffs ask this Court to hold that every employee who contacts the EEOC impliedly requests remedial action by virtue of their allegation of discrimination. Such a holding would contravene both *Holowecki* and Congress' intended dual-purpose of the EEOC. Instead, Plaintiffs must show, based on an objective review of their filings, that they asked the EEOC take remedial action. In the Fifth Circuit, this is evidenced by a specific statement requesting remedial action. Medlin's online inquiry form contains no such statement and thus cannot constitute a charge for purposes of United's alleged failure to reasonably accommodate.

But Medlin's formal November 3, 2022 charge was timely filed with respect to her alleged unlawful termination on March 9, 2022. And Medlin argues that even if her online inquiry form is not deemed a charge under *Holowecki*, her formal November 3, 2022 charge should encompass United's denial of her accommodation request. *See* ECF No. 227 at 10 n.5. Medlin argues that United's denial of her accommodation request was "the first step in a continuous process, culminating in her termination." *Id.* Thus, as Medlin sees things, United's denial of her request was not a discrete act of discrimination, but rather one part of a series of discriminatory acts leading to and including her March 9, 2022 termination. *Id.*

Under the continuing violation doctrine, plaintiffs do not have to show all alleged discriminatory conduct occurred within the actionable period if they demonstrate a series of related discriminatory acts, one or more of which fall in the limitations period. *See Felton v. Polles,* 315 F.3d 470, 487 (5th Cir. 2002). Discrete discriminatory acts, however, are not actionable if time-barred, even when they are related to acts complained of in timely filed charges. *See Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002). Some discrete acts are easy to identify, including "failure to promote, denial of transfer, or refusal to hire." *Id.* at 114. Similarly, an employer's "failure to provide accommodations" is a discrete act that does not qualify under the continuing violation doctrine. *See Henson v. Bell Helicopter Textron, Inc.*, 128 F. App'x 387, 391 (5th Cir. 2005). Accordingly, United's denial of Medlin's accommodation request was not a continuing violation, it was a discrete

act. Even though Medlin did not require an accommodation until she returned to work—she was on maternity leave when she requested an accommodation—United's denial of her request occurred well before the 300-day window of her EEOC charge. Accordingly, Medlin's failure-to-accommodate claim is time-barred and must be **DISMISSED**. Insofar as she argues that her termination constituted retaliation for her engaging in a protected activity, her retaliation claim is not time barred, but it fails for other reasons. *See supra* Part (C)(2).

Rains—Rains's claims stem from allegations that (1) on September 8, 2021, he was not allowed to request a religious accommodation and (2) he received an inadequate accommodation in November 2021 after his medical exemption request was granted. *See* ECF No. 156 at 34–36. Rains submitted an online inquiry form to the EEOC on December 14, 2021, in which he provided his contact information, the reason for his dispute, and factual allegations about the alleged unlawful employment practice that occurred. *See* ECF No. 228-7 at 4. Rains's online inquiry form contains no specific statement requesting remedial action. *See id.* He did not ask the EEOC to take any action until he filed his charge on November 3, 2022—338 days after the last alleged unlawful act—nor did any pre-charge filing contain a statement that "must be reasonably construed as a request for the agency to take remedial action." *See Holowecki*, 552 U.S. at 402. Thus, Rains's pre-charge filings do not constitute a charge under *Holowecki*.

Rains argues that (1) his Texas Workforce Commission ("TWC") complaint requested remedial action and thus constitutes a charge under *Holowecki*, and (2) even if it does not, his EEOC charge is timely because it was filed within 300 days of an "ongoing violation." *See* ECF No. 227 at 9.

With respect to Rains's first argument, Rains filed a complaint with the TWC on September 21, 2021, in which he stated: "I hope through my pl[ight] and that of many others that are now suffering from these unconstitutional mandates[,] that to whom it may concern there may be a path to assist us legally and help us return to our jobs quickly and without [any undue delay]." ECF No. 224-8 at 5. This statement may be

a specific request for remedial action that would constitute a charge under *Holowecki*. However, this statement was filed with the TWC, not the EEOC, and the TWC declined to file a charge on his behalf because he had not yet been placed on unpaid leave. *See* ECF No. 227 at 4–5. After being placed on unpaid leave, Rains reached out to the TWC, but was "unable to obtain help from the TWC" and subsequently submitted a separate online inquiry form with the EEOC on December 14, 2021. His EEOC form did not contain a similar request for remedial action. *See* ECF Nos. 227 at 5; 228-7 at 2–5. Thus, none of Rains's pre-charge filings with the EEOC contained a statement that can be reasonably construed as a request for remedial action. Nor can his TWC complaint satisfy the requirements of a pre-charge filing with the EEOC. His separate, unsuccessful complaint with the TWC was not a request for remedial action with the EEOC, and thus does not satisfy *Holowecki*.

Next, Plaintiffs argue that Rains's formal November 3, 2022 charge was timely because United engaged in an "ongoing violation" throughout the period that Rains received an inadequate accommodation. But as discussed above, an employer's "failure to provide accommodations" are discrete acts [that] do not qualify under the continuing violation exception." *Henson*, 128 F. App'x at 391. Accordingly, United's alleged failure to accommodate Rains was not a continuing violation and his November 3, 2022 EEOC charge was not timely filed. Rains's claims must be **DISMISSED**.

Castillo—Castillo's claims stem from allegations that (1) United initially determined in September 2021 that his accommodation request was untimely, and (2) his October 2021 masking and testing accommodation was unreasonable. *See* ECF No. 156 at 26–27. Castillo first submitted an online inquiry to the EEOC on September 20, 2021, but his initial inquiry was closed by the EEOC and a second file was opened with a submission date of October 18, 2021. *See* ECF No. 227 at 2–4. Castillo is unable to produce the online inquiry he submitted on either September 20, 2021 or October 18, 2021, and nothing in the administrative record or in Castillo's written testimony indicates that Castillo made a specific request for remedial action in any pre-charge filings. Castillo's charge was filed on September 19, 2022—323 days

after October 31, 2021. *See* ECF No. 228-8 at 21. Accordingly, the record does not show that Castillo timely filed any materials that can be deemed a charge under *Holowecki*.

Castillo argues that his charge should be considered timely because (1) the EEOC prepared a charge for him to sign in April 2022, and (2) the EEOC's administrative record referred to his pre-charge filings as charges. *See* ECF No. 227 at 9. It is true that the EEOC prepared a charge for Castillo to sign on April 12, 2022 (within the 300-day window). *See* ECF No. 228-8 at 10. Castillo alleges he never received that message and the EEOC closed Castillo's inquiry on June 10, 2022. *See* ECF No. 227 at 3. Castillo's counsel contacted the EEOC in September 2022 and Castillo eventually signed and submitted a formal charge on September 19, 2022. *See id.* at 3. Castillo reasons that because the EEOC prepared a charge based on his pre-charge filings, the EEOC must have interpreted his pre-charge filings as a request for remedial action. Consequently, Castillo argues his unproduced online inquiry form should constitute a charge under *Holowecki*. *See id.*

A pre-charge filing, even if unsworn or unsigned, may constitute a charge if it satisfies *Holowecki*'s request-to-act condition. *See Vantage Energy Servs.*, 954 F.3d at 755. But "the EEOC's characterization of [a pre-charge filing] is not dispositive. What constitutes a charge is determined by objective criteria. *See id.* (citing *Holowecki*, 552 U.S. at 404 ("It would be illogical and impractical to make the definition of charge dependent upon a condition subsequent over which the parties have no control.")). The fact that the EEOC prepared a charge for Castillo to sign based on his pre-charge filings is not dispositive, as the definition of a charge cannot depend on the EEOC's treatment of an online inquiry. Rather, the test is whether an employee's pre-charge filings contained a statement satisfying *Holowecki*'s request-to-act condition. It did in *Vantage*, but it does not here. *See id.* at 752 (holding employee's pre-charge intake questionnaire satisfied the request-to-act condition when he "check[ed] a box stating that he wanted 'to file a charge of discrimination' and 'authoriz[ing] the EEOC to look into the discrimination.'"). Castillo's online inquiry contained no such box, nor

can Castillo point to any statement in a timely-filed pre-charge document that asked the EEOC to take remedial action.

For the same reason, Castillo's second argument fails. The EEOC record indicates an agent "viewed *charge* details," referring to Castillo's online inquiry form. ECF No. 227 at 8. Castillo argues the EEOC's treatment of his inquiry as a charge is sufficient to satisfy *Holowecki*. *See id.* But again, the EEOC's treatment of a document as a charge is not dispositive—the only question is whether, based on an objective inquiry, the filing requested remedial action. Here, in the absence of such a request, the Court will not treat Castillo's pre-charge filing as a charge under *Holowecki*. Accordingly, Castillo's claims must be **DISMISSED**.

Plaintiffs finally argue that their delay can be attributed to the EEOC, which constitutes a basis for equitable tolling. *See* ECF No. 213 at 19. But the Court applies equitable tolling "when an employee seeks information from the EEOC, and the organization gives the individual incorrect information that leads the individual to file an untimely charge." *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 881 (5th Cir. 2003). Here, Plaintiffs have not alleged that the EEOC gave them incorrect information that led them to file an untimely charge. Accordingly, equitable tolling does not apply.

2. Plaintiffs' retaliation claims are not beyond the scope of their EEOC charges.

United also asks the Court to dismiss all Plaintiffs' retaliation claims as beyond the scope of their EEOC charges. *See* ECF No. 209 at 20. "[T]he claims an employee can bring in a lawsuit are limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Madaki v. Am. Airlines, Inc.*, No. 4:21-CV-0760-P, 2022 WL 227163, at *2 (N.D. Tex. Jan. 25, 2022) (Pittman, J.) (quoting *Pacheco v. Mineta*, 448 F.3d 783, 789 (5th Cir. 2006)). But an employee is not required to check the box for retaliation on her EEOC charge to pursue a retaliation claim. *See Gregory v. Ga. Dep't of Hum. Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004). Provided that "[t]he facts alleged in her EEOC charge could have reasonably been extended to

encompass a claim" for retaliation, an employee may pursue such a claim. *Id.* Thus, whether a claim is beyond the scope of an employee's EEOC charge depends on whether the claim arises from facts alleged in the charge. Here, as discussed in Part (C)(2), Plaintiffs' retaliation claims stem from the same factual allegations as their failure-to-accommodate claims. Plaintiffs, in essence, argue that United retaliated against them by failing to reasonably accommodate them. While these allegations don't support a retaliation claim, it cannot be said that the claim falls beyond the scope of Plaintiff's respective EEOC charges.

3. Jonas's Title VII claims are beyond the scope of her EEOC charge.

Finally, United asks the Court to dismiss Jonas's Title VII claims as beyond the scope of her EEOC charge, which relates solely to disability discrimination. ECF No. 209 at 27; *see* ECF No. 210 at 15. The Court is not constrained to the four corners of an EEOC charge when determining the charge's scope. *See Fellows v. Univ. Restaurants, Inc.*, 701 F.2d 447, 448 (5th Cir. 1983) (looking beyond initial EEOC charge to entire resulting investigation); *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 443 (5th Cir. 2017) (quoting *Pacheco*, 448 F.3d at 789) ("To balance [conflicting] considerations, 'this court interprets what is properly embraced in review of a Title VII claim somewhat broadly, not solely by the scope of the administrative charge itself.'"); *Pacheco*, 448 F.3d at 789 ("We engage in fact-intensive analysis of the statement given by the plaintiff in the administrative charge, and look slightly beyond its four corners, to its substance rather than its label."). But here, the facts alleged in Jonas's EEOC charge could not have reasonably been extended to encompass her Title VII claim for religious discrimination.

Plaintiffs' Second Amended Complaint makes only a passing mention of Jonas's religious objection to receiving the COVID-19 vaccine. *See* ECF No. 156 at 31 ("Ms. Jonas also wanted to submit a request for religious accommodation but was unable to do so because Help Hub permitted an employee to request only one type of accommodation."). Jonas's EEOC charge, on the other hand, does not discuss religious discrimination at all:

> I began my employment on or about September, 1984. My current position is United Club Representative. On or about August 6, 2021, I was notified by my employer that it would be requiring all employees to be fully vaccinated against Covid-19 by September 27, 2021. I am an individual with an impairment which substantially limits one or more major life activities. My doctor has recommended that I not take a COVID-19 vaccination because of my disability. My employer requires me to get a COVID-19 vaccination as a requirement of my job. During my employment, I requested a reasonable accommodation to Respondents Covid-19 vaccination mandate due to my disability. My request for accommodation was approved. However, Respondent requires that I submit to testing twice weekly and wear a KN95 mask. The same is not required of vaccinated co-workers. I am also assigned to work in a small, closed office. I believe I have been discriminated against because of my disability, in violation of the Americans with Disabilities Act of 1990, as amended. I believe that my employer discriminated against others because of their disability in violation of the Americans with Disabilities Act of 1990, as amended.

ECF No. 210 at 15. Even construing Jonas's charge liberally, the Court finds no facts to support a charge of religious discrimination. Thus, the facts in Jonas's EEOC charge could not have reasonably been extended to encompass her Title VII claim for religious discrimination.

Plaintiffs did not respond to United's argument that Jonas's Title VII claims are beyond the scope of her EEOC charge. Having considered the evidence of record, the Court finds that Jonas's Title VII religious discrimination claim is beyond the scope of her EEOC charge and must be **DISMISSED**.

E. Interactive Process Claims

Fifth, United argues that the Court should dismiss Plaintiffs' "interactive process" claims because neither the ADA nor Title VII "contain[] a stand-alone requirement to follow an 'interactive process,' let alone imposes liability for failure to do so." ECF No. 209 at 21. Plaintiffs, on the other hand, say that "as Plaintiffs have repeatedly explained, they have not asserted such a claim. Rather, the lack of an interactive process goes to the unreasonableness of United's accommodations." ECF No. 213 at 21 (citing *Guerra v. United Parcel*

Serv., Inc., 250 F.3d 739, 2001 WL 274296, at *3 (5th Cir. 2001) ("When an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA.")). Thus, Plaintiffs assert that "there is no standalone interactive-process claim to dismiss here." *Id.* United's Reply did not address this issue further. *See* ECF No. 215. Accordingly, the Court agrees with Plaintiffs' assertion that there is no standalone interactive-process claim to dismiss.

F. Request for Permanent Injunction

Sixth, United argues that the Court should dismiss Plaintiffs' request for a permanent injunction for two reasons: (1) the request is moot since the contested vaccine policy is no longer in effect, and (2) the Court should decline to exercise its equitable discretion to grant injunctive relief. *See* ECF No. 209 at 22–25.

The doctrine of mootness is a jurisdictional matter. *See Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 345 (5th Cir. 2017). "A claim is moot when a case or controversy no longer exists between the parties." *Id.* Mootness "can arise in one of two ways: First, a controversy can become moot when the issues presented are no longer live. A controversy can also become moot when the parties lack a legally cognizable interest in the outcome." *Chevron U.S.A. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993) (internal citations and quotation marks omitted).

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The doctrine of voluntary cessation evaluates the risk that a defendant is engaging in "litigation posturing" to avoid judicial review. *See Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018); *Aladdin's Castle*, 455 U.S. at 289 n.10. Thus, when a defendant's voluntary cessation moots a plaintiff's claim, the defendant bears the "heavy burden" to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs., Inc.*, 528 U.S. 167, 189 (2000). "A controversy may remain to be settled in such

circumstances," namely "a dispute over the legality of the challenged practices." *United States v. W. T. Grant Co.*, 345 U.S. 629, 631 (1953). Because "[t]he defendant is free to return to his old ways" once the litigation is ended, public interest weighs in favor of "having the legality of the practices settled." *Id.*

Here, United voluntarily ended the vaccine mandate that Plaintiffs challenge, triggering the voluntary cessation doctrine. United has not satisfied its "heavy burden" of showing it is "absolutely clear" that the challenged conduct could not reasonably be expected to recur. United argues that the decision to lift the vaccine mandate was not solely the result of United's decision-making, but also a result of a change in the underlying factual circumstances—the decline of the "delta variant surge in 2021." ECF No. 209 at 23. United argues that another COVID-19 surge or a new pandemic is unlikely, and thus, United is unlikely to reimpose its vaccine mandate. *See id.* But United falls short of showing it is "absolutely clear" that United would not impose a vaccine mandate in the future. Accordingly, there is an interest in having the legality of United's vaccine mandate settled.

In the alternative, United invites the Court to decline to exercise its equitable discretion because "the facts and circumstances have changed substantially." ECF No. 209. But because there is an interest in having the legality of United's vaccine mandate settled, the Court declines this invitation.

G. United's Motion to Transfer Venue

Finally, in addition to United's Motion to Dismiss, United has filed a Motion to Transfer Venue. ECF No. 216. Pursuant to 28 U.S.C. § 1404, United seeks to transfer this case to the Northern District of Illinois. *See id.* at 1. Section 1404 provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). District courts have "broad discretion in deciding whether to order a transfer." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc). In assessing a motion to transfer under § 1404(a), courts must weigh various non-exhaustive private and

public interest factors, none of which is given dispositive weight.[2] *Id.* at at 315 (citations omitted).

The Court finds that United's delay in bringing this Motion and the accompanying practical problems that would result from a transfer at this time weigh strongly against transfer. Among other things, transferring the case at this stage would result in increased costs and a substantial delay in the expeditious resolution of Plaintiffs' claims. Further, this Court is already painfully familiar with the complexities of this case, which again weighs against transfer. Public interest factors do not save United's Motion. The Northern District of Illinois, like this Court, has a highly congested docket, a substantial part of United's actions occurred in this District, and this Court is deeply familiar with the controlling law that governs this case.

The Court would have gladly entertained this Motion two years ago when this litigation commenced, but United's Motion comes after years of litigation and hundreds of case filings.[3]

Accordingly, United's Motion to Transfer Venue is **DENIED**.

CONCLUSION

For the reasons outlined above, United's Motion to Dismiss (ECF No. 209) is **GRANTED in part**. United's Motion to Transfer Venue (ECF No. 216) is **DENIED**.

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[2]The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Volkswagen of Am.*, 545 F.3d at 315. The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Id.*

[3] This case is now one of the oldest active civil cases on the Court's docket, yet the progress towards resolving it has seemed painfully slow. President Biden stated that the Covid 19 pandemic was "over" in the fall of 2022. *See* 60 Minutes (@60Minutes), X (Sept. 18, 2022, 7:09 PM), https://tinyurl.com/2s35maau. The time has come to resolve this lawsuit and move on. Transferring this case to a new court would only delay matters further. The Court is confident that this matter will be tried or otherwise disposed of in 2024.

All Plaintiffs' retaliation claims under Title VII and the ADA are **DISMISSED with prejudice** because United's unpaid leave accommodation was not retaliatory. Castillo's failure-to-accommodate claim is **DISMISSED with prejudice** as time-barred and for failure to satisfy his prima facie discrimination case. Hamilton's failure-to-accommodate claim is likewise **DISMISSED with prejudice** for failure to satisfy her prima facie discrimination case. Medlin's failure-to-accommodate claim is **DISMISSED with prejudice** as time-barred. Rains's failure-to-accommodate claims under Title VII and the ADA are **DISMISSED with prejudice** as time-barred. Jonas's Title VII failure-to-accommodate claim is **DISMISSED with prejudice** as beyond the scope of her EEOC charge. And Medlin's failure-to-accommodate claim is **DISMISSED with prejudice** as time-barred.

SO ORDERED on this **18th day of December 2023.**

Mark T. Pittman
UNITED STATED DISTRICT JUDGE

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DAVID SAMBRANO, ET AL.,

Plaintiffs,

v. **No. 4:21-cv-1074-P**

UNITED AIRLINES, INC.,

Defendant.

OPINION & ORDER

Before the Court is Plaintiffs' Motion for Class Certification and Appointment of Counsel. ECF No. 238. Having considered the Motion, briefs, and applicable law, the Court finds the Motion should be and is hereby **GRANTED in part** and **DENIED in part.** Additionally, Plaintiffs' Motion for Reconsideration (ECF No. 241) is **DENIED.**

BACKGROUND

Plaintiffs' claims arise from United's COVID-19 vaccine mandate. On August 6, 2021, United announced that all U.S.-based employees must get vaccinated by September 27, 2021. United employees could request an accommodation for religious or medical reasons.

In November 2021, United put some unvaccinated flight crew employees who received accommodations on indefinite unpaid leave. All employees on unpaid leave had the option to apply for alternative positions, which varied widely in terms of location, pay, and required qualifications. Some applied; others didn't. Other accommodated employees were never put on unpaid leave but were instead required to wear masks and regularly submit COVID-19 test results. United ultimately allowed all employees on unpaid leave to return to work in March 2022. According to United's records, 5,885 employees submitted accommodation requests, 4,070 employees were granted an accommodation, 2,211 were put on unpaid leave, and 1,078 were required to mask and test.

Plaintiffs sued on September 21, 2021, alleging employment discrimination and retaliation on behalf of themselves and other similarly situated employees. Plaintiffs say United violated the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII") by refusing to provide reasonable medical and religious accommodations. After two years, an appeal to the Fifth Circuit, and hundreds of filings, Plaintiffs filed the instant Motion for Class Certification and Appointment of Counsel. Plaintiffs ask the Court to certify the following classes:

1. Rule 23(b)(2) Class: "All individuals who submitted a request for a reasonable accommodation from United's COVID-19 vaccine mandate due to a sincerely held religious belief or medical disability and then faced the choice of: abandoning their religious beliefs or medical needs (i.e., get vaccinated); accepting indefinite leave; or being fired or otherwise separated."
2. Rule 23(b)(3) Masking-and-Testing Subclass: "[A]ll employees United deemed non-customer-facing who received an accommodation due to a sincerely held religious belief or medical disability and were subject to the purposely punitive masking-and-testing accommodation."
3. Rule 23(b)(3) Unpaid Leave Subclass: "[A]ll employees United deemed customer facing who received an accommodation due to a sincerely held religious belief or medical disability and who were put on unpaid leave."

ECF No. 238 at 23–24 (cleaned up).

LEGAL STANDARD

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). Federal Rule of Civil Procedure 23 controls whether this limited exception applies. A party seeking class certification thus "bear[s] the burden of proof to establish that the proposed class satisfies the requirements of Rule 23." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). A plaintiff "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, and so on." *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 545–46 (5th Cir. 2020) (internal quotations omitted).

Given the extraordinary nature of class actions, Rule 23 requires a "rigorous analysis." *Id.* Rule 23 requires courts "to probe behind the pleadings before coming to rest on the certification question." *Wal-Mart*, 564 U.S. at 350–51. The Court must "understand the claims, defenses, relevant facts, and applicable substantive law to make a meaningful determination. If some of the determinations cannot be made without a look at the facts, then the judge must undertake that investigation." *Chavez*, 957 F.3d at 546. The Court must then "detail with specificity" the reasons for its conclusions, "explain and apply the substantive law governing the plaintiffs' claims to the relevant facts and defenses," and "articulat[e] why the issues are [or are not] fit for class wide resolution." *Id.* This is not a rubber-stamp procedure. *See Greathouse v. Cap. Plus Fin., LLC*, No. 4:22-CV-0686-P, 2023 WL 5746927, at *3 (N.D. Tex. Sept. 6, 2023) (Pittman, J.). "[T]he district court maintains great discretion in certifying and managing a class action." *See Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citing *Montelongo v. Meese,* 803 F.2d 1341, 1351 (5th Cir. 1986)).

This arduous process exists because "certification can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit." *Id.* And further, after certifying a class, any judgment binds absent class members forever. *See Richardson v. Wells*

Fargo Bank, N.A., 839 F.3d 442, 454 (5th Cir. 2016). Thus, the "existence of a class fundamentally alters the rights of present and absent members." *Chavez*, 957 F.3d at 547.

ANALYSIS

Plaintiffs ask the Court to certify a Rule 23(b)(2) class comprised of all employees who requested an accommodation, as well as two Rule 23(b)(3) subclasses comprised of all employees put on unpaid leave (the "Unpaid Leave Subclass") and all employees who had to mask and test (the "Masking-and-Testing Subclass"). *See* ECF No. 238 at 23–24. To certify any of these classes, the Court must find the class (1) is ascertainable, (2) satisfies Rule 23(a)'s prerequisite requirements, and (3) satisfies the specific requirements of either Rule 23(b)(2) or Rule 23(b)(3).

First, the Court finds that the Rule 23(b)(2) Class: (1) satisfies the ascertainability requirement; (2) does not satisfy all Rule 23(a) prerequisite requirements; and (3) does not satisfy Rule 23(b)(2)'s specific requirements. *Second*, the Court finds that the Masking-and-Testing Subclass: (1) satisfies the ascertainability requirement; (2) does not satisfy all Rule 23(a) prerequisite requirements; and (3) does not satisfy Rule 23(b)(3)'s specific requirements. *Third*, the Court finds that the Unpaid Leave Subclass: (1) satisfies the ascertainability requirement; (2) satisfies all Rule 23(a) prerequisite requirements with respect to the Title VII claims; and (3) satisfies Rule 23(b)(3)'s specific requirements with respect to the Title VII claims. Thus, the Court will not certify the 23(b)(2) Class or the 23(b)(3) Masking-and-Testing Subclass. But the Court will certify a class of all employees United deemed "customer-facing" who received an accommodation due to a sincerely held religious belief and who were put on unpaid leave. For these reasons, the Court will **GRANT in part and DENY in part** Plaintiffs' Motion for Class Certification and Appointment of Counsel (ECF No. 238).

I. Ascertainability

The Fifth Circuit has articulated an "implicit 'ascertainability' requirement" for Rule 23 class certification. *In re Deepwater Horizon*, 739 F.3d 790, 821 (5th Cir. 2014); *see also John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."). "In order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012) (cleaned up).

Plaintiffs argue the proposed classes are ascertainable because United has the records necessary to identify each class member. *See* ECF No. 238 at 24. The Court agrees, and United does not dispute that this requirement is met. *See* ECF No. 246 at 14–31. The threshold requirement for membership in the 23(b)(2) Class is that the class member requested an accommodation. United has detailed records of employees who submitted an accommodation request. *See* ECF No. 246 at 8. United's records can also show which employees were put on unpaid leave or were subject to United's masking-and-testing protocol, relevant for the proposed 23(b)(3) subclasses. *See id.* Thus, the proposed classes are ascertainable. The Court now turns to Rule 23(a)'s prerequisite requirements.

II. Rule 23(a) Prerequisite Requirements

Rule 23(a) prescribes four prerequisites for class certification: (1) that the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) that there are questions of law or fact common to the class ("commonality"); (3) that the claims and defenses of the parties are typical of the claims or defenses of the class ("typicality"); and (4) that the representative parties will fairly and adequately protect the interests of the class ("adequacy of representation"). FED. R. CIV. P. 23(a); *see also Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 736 (5th Cir. 2023). The Court addresses each below.

A. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). To meet this standard, a plaintiff "must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981).

Plaintiffs meet this standard. Plaintiffs estimate that more than 5,000 accommodation requests were submitted and nearly 2,300 were approved. *See* ECF No. 239 at 25. Of the 2,300 employees whose accommodation requests were approved, Plaintiffs estimate that over 1,000 were put on indefinite unpaid leave and at least 800 were required to mask and test. United's records show that 5,885 accommodation requests were submitted, 4,070 employees were granted an accommodation, 2,211 were put on unpaid leave, and 1,078 were required to mask and test. *See* ECF No. 246 at 8. Thus, it's clear that the classes are sufficiently numerous—each containing hundreds or thousands of class members. *See Mullen*, 186 F.3d at 624 (a class size of 100 to 150 members "is within the range that generally satisfies the numerosity requirement"). The Court next addresses Rule 23(a)'s commonality requirement.

B. Commonality

Commonality requires "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). A common question must be "of such a nature that it is capable of classwide resolution—which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Stukenberg*, 675 F.3d at 834. This serves the ultimate purpose of the class action procedure: efficiency. If every individual plaintiff requires his or her own in-depth factual analysis, the purpose of the class action is defeated—rendering the litigation unruly and inefficient. *See id.*

Because the commonality test focuses on issues that are "central to the validity of each one of the claims," courts must analyze commonality through the lens of "the elements of the underlying cause of action."

Flecha v. Medicredit, Inc., 946 F.3d 762, 766–67 (5th Cir. 2020). The Court will discuss the proposed Rule 23(b)(2) Class, the Masking-and-Testing Subclass, and the Unpaid Leave Subclass separately.

1. Rule 23(b)(2) Class

As an initial matter, the Court notes that commonality is not, as Plaintiffs represent, a low bar. Plaintiffs argue that "the test for commonality is not demanding," and the bar is "not particularly high." *See* ECF No. 256 at 6, 9. Not so. Before the Supreme Court's decision in *Wal-Mart v. Dukes*, the Fifth Circuit had indeed held "the commonality hurdle is not particularly high." *Smith v. Texaco, Inc.*, 263 F.3d 394, 405 (5th Cir. 2001), *opinion withdrawn, cause dismissed*, 281 F.3d 477 (5th Cir. 2002) (internal citation omitted); *see also James v. City of Dall.*, 254 F.3d 551, 570 (5th Cir. 2001) ("The test for commonality is not demanding."). Pre-*Walmart*, commonality was met "where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Smith*, 263 F.3d at 405. Thus, prior Fifth Circuit caselaw held "the interests and claims of the various plaintiffs need not be identical," and "the fact that some of the Plaintiffs may have different claims, or claims that may require some individualized analysis, is not fatal to commonality." *Stukenberg*, 675 F.3d at 839–40.

But in *Wal-Mart*, the Supreme Court held all class members' claims must depend on a common issue of law or fact the determination of which "will *resolve* an issue that *is central* to the validity of each one of the [class members'] claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Accordingly, the Fifth Circuit observed in *Stukenberg* that "the *Wal-Mart* decision [] heightened the standards for establishing commonality under Rule 23(a)(2)." 675 F.3d at 839. In vacating the district court's class certification, the court in *Stukenberg* explained: "the district court relied, in large part, on this circuit's pre-*Wal-Mart* case law finding that '[t]he test for commonality is not demanding.'" *Id.* (citation omitted). The court explained that post-*Wal-Mart*, commonality can no longer be satisfied if the interests, claims, and injuries of the plaintiffs are varied. Rather, "commonality requires the plaintiff to demonstrate that the class members 'have suffered the *same injury*.'" *Id.* at 840 (emphasis

added) (citing *Wal-Mart*, 564 U.S. at 350).[1] In the present case, this is a distinction with a difference.

a. *The Rule 23(b)(2) Class members have different injuries.*

Plaintiffs' proposed Rule 23(b)(2) Class includes everyone who sought an accommodation based on a sincerely held religious belief or medical disability. *See* ECF No. 238 at 23. Plaintiffs theorize that United's unpaid leave policy forced employees to choose between "abandoning their religious beliefs or medical needs," (in other words, choosing to get vaccinated), "accepting unpaid leave" (even though many employees were never put on unpaid leave), or "being fired or otherwise separated" (if they refused the vaccine without an accommodation). *Id.* The "glue" holding these injuries together is the idea that United "operated under a general policy of discrimination through its accommodation process and the accommodations it provided to employees." *Id.* at 27. And Plaintiffs propose two primary common questions: (1) "whether United violated the law with its intentionally harsh masking-and-testing accommodation;" and (2) "whether universal unpaid leave is a lawful accommodation." *Id.*

For the first question, Plaintiffs argue that "determining [whether] United's harsh masking-and-testing accommodation was unlawful will resolve additional claims brought by a large part of the class." *Id.* If the Court applied pre-*Wal-Mart* caselaw, this question might suffice. *See*

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[1]Notably, Plaintiffs misquote a footnote parenthetical in *In re Rodriguez* for the proposition that "commonality exists even when 'Plaintiffs may have different claims, or claims that may require some individualized analysis.'" ECF No. 256 at 6 (citing *In re Rodriguez*, 695 F.3d 360, 367 n.9 (5th Cir. 2012)). Quite the opposite, the parenthetical in *Rodriguez* correctly notes:

> [C]ontrary to prior Fifth Circuit caselaw that "the fact that some of the Plaintiffs may have different claims, or claims that may require some individualized analysis, is not fatal to commonality," the Supreme Court held in *Wal–Mart v. Dukes*, that "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury."

695 F.3d 360, 367 n.9 (5th Cir. 2012) (cleaned up). In other words, *Rodriguez* observes the exact opposite proposition—post-*Wal-Mart*, commonality does not exist when plaintiffs have different claims or claims that require individualized analysis. Instead, all class members must have the *same injury*.

Stukenberg, 675 F.3d at 839–840 ("Before *Wal-Mart*, . . . the commonality test [was] met when there is at least *one issue* whose resolution will affect all or *a significant number* of the putative class members." (cleaned up) (emphasis added)). But post-*Wal-Mart*, commonality is met when an issue that is central to the validity of *each one* of the class members' claims can be resolved *in one stroke*. *See Wal-Mart*, 564 U.S. at 350. Resolution of the masking-and-testing issue does no such thing, and thus, this question is not common to the class.

For the second question, Plaintiffs argue a determination that indefinite unpaid leave was unlawful "will resolve claims across the board." ECF No. 256 at 28 ("In all, the legality of United's universal and punitive accommodations is a common question that can be resolved on a classwide basis."). The first and most obvious issue with this theory is that not all employees in the Rule 23(b)(2) Class were put on unpaid leave. Thus, any determination of legality vis-à-vis unpaid leave would only resolve "in one stroke" the claims of the Unpaid Leave Subclass, not the entire Rule 23(b)(2) Class. For instance, a determination that unpaid leave was unlawful does not further the claims of those employees who masked and tested, worked remotely, changed jobs, or decided to get vaccinated—all of whom are part of the proposed Rule 23(b)(2) Class. Because not all Plaintiffs in the Rule 23(b)(2) Class "have suffered the same injury," the proposed class does not satisfy commonality. *Stukenberg*, 675 F.3d at 840 (citing *Wal-Mart*, 564 U.S. at 350). It is not enough that Plaintiffs allege they "all suffered a violation of the same provision of law." *Wal-Mart*, 564 U.S. at 350.

But Plaintiffs don't even allege that much, as the Rule 23(b)(2) Class includes claims under both Title VII (religious discrimination) and the ADA (disability discrimination). Because the Court must analyze Plaintiffs' common question through the lens of "the elements of the underlying cause of action," *Flecha*, 946 F.3d at 766–67, the Court will briefly discuss the elements needed to prove United's unpaid leave policy was unlawful.

With regard to religious discrimination, courts analyze a Title VII claim for failure to accommodate under a burden-shifting framework akin to that in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

See Davis v. Fort Bend Cnty., 765 F.3d 480, 485 (5th Cir. 2014). "The employee must first establish a prima facie case of religious discrimination." *Id.* (citing *Antoine v. First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013)). To do so, a plaintiff must show: (1) they held bona fide religious beliefs, (2) the belief conflicted with a requirement of employment, (3) the employer was informed of the belief, and (4) they suffered an adverse employment action for failing to comply with the conflicting requirement. *See id.* If a plaintiff makes out a prima facie case, the burden shifts to the defendant to show either: (1) that it reasonably accommodated the employee; or (2) that it was unable to do so without undue hardship. *See id.*

For the moment, the Court focuses on the fourth element of the prima facie case: adverse action. The alleged adverse actions vary among the Rule 23(b)(2) Class—some were put on unpaid leave, some were required to mask and test, some changed jobs, and others decided to get vaccinated. And the lawfulness of United's unpaid leave policy cannot be determined across the proposed class without reference to a specific adverse employment action. Because the alleged adverse actions differ within the proposed class, all putative class members have not suffered the same injury and their claims cannot be productively litigated at once.[2] *Wal-Mart*, 564 U.S. at 350.

Further, even if all Rule 23(b)(2) Class members could establish a prima facie case of religious discrimination, the burden would shift to United to show that the accommodation was reasonable. *See Davis*, 765 F.3d at 485. A jury could find, for example, that United's masking and testing protocol was a reasonable accommodation, but indefinite unpaid leave was not. This further suggests the class members' claims are not conducive to class-action litigation. *See Wal-Mart*, 564 U.S. at 350.

The same is true for the ADA claims. "To prevail on an ADA failure-to-accommodate claim, a plaintiff must show that: '(1) the plaintiff is a qualified individual with a disability; (2) the disability and its

[2]The Court has already rejected Plaintiffs' contention that United's initial decision to put all unvaccinated employees on unpaid leave was itself an adverse action, as that decision was never carried out. *See* ECF No. 231 at 8.

consequential limitations were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations.'" *Milteer v. Navarro Cnty., Tex.*, 652 F. Supp. 3d 754, 762 (N.D. Tex. 2023) (Fitzwater, J.) (citing *Feist v. La., Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 452 (5th Cir. 2013)). The reasonableness of United's accommodations under the ADA cannot be determined on a class-wide basis because United did not provide the same accommodation to all class members. Nor can the factfinder determine in one stroke whether each class member had a qualifying disability within the meaning of the ADA. *See infra*, Part II(B)(3)(b). Accordingly, the lawfulness of United's accommodations under the ADA cannot be determined on a class-wide basis.

For these reasons, the Court finds Plaintiffs' proposed common questions do not generate common answers for the Rule 23(b)(2) Class. And the Court finds no other questions common to the Rule 23(b)(2) Class that would resolve an issue central to the validity of each class member's claim in one stroke.

b. *A "general policy of discrimination" does not hold together the Rule 23(b)(2) Class members' injuries.*

Plaintiffs strain to argue the above injuries can be tied together because they arise from the same accommodation policy. Borrowing language from *Wal-Mart*, "a general policy of discrimination," they argue, demonstrates commonality. ECF No. 256 at 26 (citing *Wal-Mart*, 564 U.S. at 353). But examination of *Wal-Mart* reveals that "a general policy of discrimination" cannot tie together the injuries at issue here.

In *Wal-Mart*, three named plaintiffs—who sought to certify a class of 1.5 million employees—alleged that Wal-Mart discriminated against them based on sex by refusing to hire and promote women. *See Wal-Mart*, 564 U.S. at 343. The plaintiffs alleged "the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees," and a strong and uniform corporate culture permits bias against women to, "perhaps subconsciously," infect the discretionary decision-making of each one of Wal-Mart's thousands of managers. *Id.* at 345. Thus, the plaintiffs claimed that "every woman at the company [is] the victim of one common discriminatory practice." *Id.* The plaintiffs

sought to certify a class of people across many facilities nationwide, some of whom were wrongfully denied promotions and others who were wrongfully denied jobs.

In addressing commonality, the Supreme Court explained there is a conceptual gap between (1) an individual's claim that they have been discriminated against, and (2) "the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact." *Id.* at 353. To bridge this gap, the Supreme Court theorized that "significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* In other words, if Wal-Mart had a company-wide policy of discriminating against women, then plaintiffs across the country—whether they were passed over for a promotion or turned down for a job—could point to a single, company-wide policy as the common answer to the question: "why was I disfavored?" *Id.* at 352–353.

Thus, a class can demonstrate commonality by identifying a "general policy of discrimination." *See id.* It is *not* an alternative commonality analysis, under which a court may certify a class of varied injuries. Crucially, to satisfy the commonality requirement, a plaintiff must always show "the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact." *Id.* at 353. *Wal-Mart* did not change this requirement; it simply noted an identifiable policy may serve as a common denominator that satisfies the inquiry.

Here, Plaintiffs take this to mean that general discussions of United's corporate culture, led by CEO Scott Kirby, can tie together the Rule 23(b)(2) Class's various claims and injuries. As Plaintiffs see things, United's disparate accommodation decisions "were enacted by the same officials in defendant's central office [and] they affected the class as a whole." *See* ECF No. 256 at 34 (cleaned up); *see also id.* at 26 ("[T]he 'glue' holding the claims together here is [] United's 'general

policy' of disdain for anyone who dared not march in lockstep with its vaccine mandate.").

Review of cases applying *Wal-Mart* to certify a class undermines Plaintiffs' position. In the few cases that have done so, the respective courts identified policies that were facially discriminatory or otherwise illegal in every case, as opposed to a policy that might be illegal as applied to certain individuals. Indeed, the two out-of-circuit cases on which Plaintiffs rely make this clear, as both suggest a general policy of discrimination cannot justify class certification when the proposed class members have different injuries.

First, in *Sughrim v. New York*, a group of correctional officers sought to certify a class for violations of Title VII, claiming that the prison system's accommodation policies failed to accommodate their dress and grooming needs. *Sughrim v. New York*, No. 19CV7977RASDA, 2023 WL 5713191, at *26 (S.D.N.Y. Sept. 5, 2023) (Abrams, J.). The plaintiffs alleged the New York State Department of Corrections and Community Supervision ("DOCCS") treated different religious practices differently, "granting religious accommodations for members of some faiths but denying accommodations to others." *Id.* The common questions in *Sughrim* were: (1) "whether DOCCS denied officers' applications absent a finding of undue hardship," and (2) "whether DOCCS had a practice of denying applications based on the tenets of officers' faiths." *Id.* DOCCS argued the plaintiffs did not satisfy commonality because they were members of different religions and had "'lumped' together 'Pagan, Heathen, Odinist, Asatru, Forn Sidr, and other variations of Norse Pagan religious traditions,' defeating commonality." *Id.* The court held that the fact the plaintiffs came from different religious traditions did not undermine commonality—all plaintiffs "challenge central and systemic failures of Defendants' religious accommodation policies as they affect the class as a whole." *Id.* at *24–25.

Plaintiffs ask the Court to view the Rule 23(b)(2) Class not as "a series of individualized inquiries," but as a challenge to United's central and systemic failure to reasonably accommodate its employee's religious beliefs and medical conditions. Plaintiffs cite *Sughrim* for the proposition that failure-to-accommodate claims can be certified as a

class "where, as here, the same officials in defendant's central office decided whether to grant the request," and the plaintiffs challenge "systemic failures of the defendants to comply with Title VII." *See* ECF No. 238 at 32–33. But *Sughrim* doesn't apply here. Crucially, unlike here, the plaintiffs in *Sughrim* suffered the same injury—denial of their religious accommodation requests. *Sughrim* stands for the uncontroversial proposition that a defendant's "general policy of discrimination" against multiple religions does not undermine commonality when plaintiffs from different religions suffer the same injury.

Second, in *Holmes v. Godinez*, a group of deaf and hard-of-hearing inmates brought a putative class action against the Illinois Department of Corrections ("IDOC"). 311 F.R.D. 177 (N.D. Ill. 2015). The plaintiffs sought to certify a class of deaf and hard-of-hearing inmates who require accommodations. They proposed several common questions including, among others, "whether IDOC systematically failed to provide class members with effective communication and adequate access to its programs and services" and "whether IDOC provides class members with safe and effective visual notification systems to advise them of emergencies." *Id.* at 218. *Holmes* challenged IDOC's system-wide failure to provide accommodations, and the court explained that "[t]his litigation will focus on whether IDOC's policies and procedures are illegal as applied to all hearing impaired inmates, and thus will not depend on [] intensive individualized analysis." *Id.* at 222.

Here, however, the various accommodations provided by United and the various injuries alleged make it impossible to determine in one stroke whether United's accommodation policy was illegal as to all employees. As noted, while United's unpaid leave policy may have been unlawful, its masking-and-testing protocol may not have been. Determining the legality of United's unpaid leave policy does not resolve the masking-and-testing claims, and vice versa. It is therefore impossible to determine that United's overarching policy was unlawful "as applied to all" putative class members in the Rule 23(b)(2) Class. Thus, the proposed class does not satisfy commonality. The Court turns now to the Rule 23(b)(3) Masking-and-Testing Subclass.

2. Rule 23(b)(3) Masking-and-Testing Subclass

Plaintiffs ask the Court to certify a subclass consisting of "all employees United deemed non-customer-facing who received an accommodation due to a sincerely held religious belief or medical disability and were subject to the purposely punitive masking-and-testing accommodation." ECF No. 238 at 23–24 (cleaned up). For the reasons below, the Court concludes the Masking-and-Testing Subclass does not satisfy commonality either.

This Court has already held that Plaintiffs who were required to mask and test did not suffer a more than *de minimis* adverse employment action. "Employers across the country imposed these requirements in response to the COVID-19 pandemic, and trial courts should not be in the business of scrutinizing these details of personnel management in such extraordinary circumstances." *Sambrano v. United Airlines, Inc.*, No. 4:21-CV-1074-P, 2023 WL 8721437, at *4 (N.D. Tex. Dec. 18, 2023) (Pittman, J.). But to the extent the Masking-and-Testing Subclass alleges they have suffered a more than *de minimis* adverse action, the nature of the adverse action will necessarily vary. David Castillo, for example, complains that United required "that he wear an N-95 respirator at all times while at work, eat his meals alone and outdoors, and provide regular COVID-19 test results." ECF No. 156 at 27. For Mr. Castillo, the masking requirement "limited his ability to communicate with colleagues during important maintenance activities." *Id.* In contrast, Ms. Hamilton alleges that as a result of United's masking requirement, her coworkers harassed her by "spraying Lysol into her area making it hard for her to breathe." *Id.* at 29.

Because masking and testing is not, by itself, an adverse action, whether an employee in this subclass can make out their prima facie case will depend on a fact-specific inquiry. The Supreme Court's recent ruling in *Muldrow v. City of St. Louis* underscores this point. *See* ___ U.S. ___, 144 S. Ct. 967, 974 (2024) ("To make out a Title VII discrimination claim, a[n] [employee] must show *some harm* respecting an identifiable term or condition of employment." (emphasis added)). Whether any individual employee suffered some harm as a result of United's masking-and-testing protocol depends on the facts, but

Plaintiffs' Complaint does not allege that all employees suffered the *same harm* as a result of the protocol.

Accordingly, the Rule 23(b)(3) Masking-and-Testing Subclass suffers the same deficiency as the Rule 23(b)(2) Class—all putative class members did not suffer the same injury. Some allege that masks made it difficult to communicate with coworkers, others allege they experienced harassment and difficulty breathing. But, by itself, the masking-and-testing requirement won't cut it. Thus, the Rule 23(b)(3) Masking-and-Testing Subclass cannot resolve an issue that is central to the validity of each class member's claim in one stroke, and it fails the commonality requirement accordingly.

3. Rule 23(b)(3) Unpaid Leave Subclass

Plaintiffs also ask the Court to certify a Rule 23(b)(3) subclass consisting of "all employees United deemed customer facing who received an accommodation due to a sincerely held religious belief or medical disability and who were put on unpaid leave." ECF No. 238 at 23–24 (cleaned up). Unlike the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass, all employees who were put on indefinite unpaid leave suffered the same injury. Thus, a class-wide proceeding could generate common answers for this Subclass—at least, for the Title VII claims.

For the Unpaid Leave Subclass, United argues five issues require individualized assessment, precluding commonality: (1) whether the Title VII class members' religious beliefs were sincere; (2) whether the ADA class members had a qualifying disability; (3) whether the unpaid leave accommodation was reasonable; (4) whether the class members suffered an adverse action; and (5) whether United would incur undue hardship in providing an alternative accommodation. The Court agrees on the second point. But on all others, the Court concludes that these issues do not undermine commonality.

a. *The sincerity issue does not undermine commonality.*

For class members bringing claims for religious discrimination, United argues that the sincerity of religious beliefs is an individualized inquiry that precludes class certification. The Court disagrees. As an initial matter, the sincerity of a plaintiff's religious belief is not an exacting inquiry. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (in evaluating sincerity, "[t]he Court's 'narrow function . . . is to determine' whether the plaintiffs' [asserted religious belief] reflects 'an honest conviction'"); *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 791 (5th Cir. 2012) ("[s]incerity is generally presumed or easily established" and any inquiry "must be handled with a light touch, or judicial shyness"). It's true that a person's religious beliefs are deeply individualized and personal, but "the contours of those beliefs are purely objective." *DeOtte v. Azar*, 332 F.R.D. 188, 197 (N.D. Tex. 2019) (O'Connor, J.). And the Court "need not—indeed, *may not*—delve into each individual's [] state of mind." *Id.* Courts have few occasions to conduct this part of the inquiry, as "the sincerity of a religious belief is not often challenged." *Moussazadeh*, 703 F.3d at 791. But when courts in the Fifth Circuit have analyzed sincerity, they "have looked to the words and actions" of the plaintiff. *Id.* Here, the words and actions of the Unpaid Leave Subclass evince the sincerity of their religious beliefs.

First, with regard to the employees' *words*, the putative class members sought a religious exemption in the first place. In doing so, employees were required to articulate a religious reason for not receiving the vaccine. Employees were also required to submit a letter from a third party—someone the employee knew firsthand—who would attest to the employee's sincerely held religious belief. *See* ECF No. 238 at 14. Because these employees articulated a religious reason for not receiving the vaccine and a third-party attested to the sincerity of that belief, United granted their accommodation requests. Thus, the employees' own words and the words of all attesting third parties indicate that the class members had sincere religious objections to the vaccine. *See U.S. Navy SEALs 1-26 v. Austin*, 594 F. Supp. 3d 767, 780 (N.D. Tex. 2022) (O'Connor, J.), *appeal dismissed as moot sub nom.*, *U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666 (5th Cir. 2023) ("[E]veryone

eligible for the class has submitted a religious accommodation request, and no one may submit that request without a chaplain's memorandum attesting to the applicant's sincerity. Thus, all potential class members have carried their (light) burden of demonstrating their religious beliefs are sincere.").

Second, as to the employees' *actions*, the putative class members chose to accept indefinite unpaid leave rather than get vaccinated—a difficult decision that itself evinces the sincerity of their belief. To be sure, non-religious beliefs may motivate a person to forego a vaccine and accept unpaid leave (e.g., safety concerns). But a decision to accept unpaid leave in conjunction with a professed religious objection and a third-party attestation to the sincerity of that objection—taken together—are sufficient to demonstrate sincerity. *See Moussazadeh*, 703 F.3d at 791. Additionally, because the Unpaid Leave Subclass is comprised of employees who were put on unpaid leave "due to a sincerely held religious belief," any person who opts into the class further contends that they had a sincere religious objection to the vaccine. *DeOtte*, 332 F.R.D. at 197 ("So long as those employers and individuals who opt into the proposed classes contend that the contraceptive mandate is forbidden by their sincerely held religious beliefs, the Court must accept those contentions.").

United relies heavily on the Fifth Circuit's decision in *Braidwood Management, Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023). In *Braidwood*, the plaintiffs sought to certify a class consisting of "all employers that oppose homosexual or transgender behavior for sincere religious reasons." *Id.* at 921. The employer-defendants argued that the application of Title VII to these employers would substantially burden their exercise of religion, implicating the Religious Freedom Restoration Act ("RFRA"). *See id.* To qualify for RFRA's protection, an asserted belief must be "sincere," making sincerity a salient issue in *Braidwood*.[3] The

[3]United cites *Braidwood* for the proposition that "the sincerity 'determination can be made only on a case-by-case basis and not at [a higher] level of abstraction at the class-certification stage.'" ECF No. 246 at 16. But the court applied this line of reasoning expressly to the *employer-defendants' organizations*. *See Braidwood*, 70 F.4th at 935. This issue of whether religion plays an important role in an *organization* is an entirely different and much

court held that just because "a review of religious sincerity may not be demanding does not mean it is a non-existent requirement or non-essential for Rule 23 purposes." *Braidwood*, 70 F.4th at 935. For commonality, it is not enough to say that "sincerity does not require an exacting review." *Id.*

Here, while sincerity indeed "does not require an exacting review," *see id.*, the Unpaid Leave Subclass would demonstrate sincerity even if it did. Viewing the facts of this case holistically, the words and actions of members in the Unpaid Leave Subclass demonstrate sincerity. *See Moussazadeh*, 703 F.3d at 791. Motivated by religious beliefs, they opted out of a vaccine in the middle of a life-threatening global pandemic. *See* ECF No. 156 at 32–34. They were willing to face the professional and social ramifications of seeking a contentious religious accommodation to do so. *See id.* They went through a formal process to seek such accommodations. *See id.* Their religious affiliates and/or members of the clergy attested to the sincerity of their believe. *See id.* And to put their money where their mouth was, they accepted unpaid leave to adhere to their religious convictions. *See id.* Now they seek to undergo the arduous process of litigation to vindicate those sincere beliefs. In whole and in part, these words and actions are not the words and actions of someone with insincere religious beliefs. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 216–17 (1972) (examining external behaviors in addition to assertion of sincerity to determine religious beliefs of Old Order Amish were

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more exacting inquiry than the sincerity of an employee's religious beliefs under Title VII. In the organizational context, courts analyze nine factors, including: (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up by coreligionists. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (cited in *Braidwood*, 70 F.4th at 935 n.45). This fact-intensive and highly-individualized inquiry is inapplicable to the sincerity analysis here.

sufficiently sincere to exempt them from compulsory public-school attendance laws); *U.S. v. Seeger*, 380 U.S. 163, 186 (1965) (examining external behaviors in addition to assertion of sincerity to determine non-taxonomized religious beliefs were sufficiently sincere to qualify belief-holder for conscription exemption); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (finding a religious belief was sincere despite plaintiff's inability to "articulate his belief precisely" where he explicitly stated he "quit [his job] due to his religious convictions"); *Moussazadeh*, 703 F.3d 781, 791–92 (5th Cir. 2012) (finding deviations from religious observance did not undermine asserted sincerity where sincerity was shown "though [plaintiff's] initial claims, his actions while [incarcerated], and his *continued prosecution of this suit*" (emphasis added)). Accordingly, *Braidwood* does not foreclose class certification in this case.

b. *The disability issue undermines commonality for Plaintiffs' ADA claims.*

The Court now turns to the Unpaid Leave Subclass members' ADA claims. For class members alleging disability discrimination, United argues that the existence of a qualifying disability is an individual inquiry. On this point, the Court agrees. Unlike the sincerity element of a Title VII religious discrimination claim—a light burden which is rarely challenged—parties frequently dispute whether an employee has a qualifying disability within the meaning of the ADA.

To prevail on an ADA failure-to-accommodate claim, a plaintiff must show: (1) the plaintiff is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations. *See Milteer*, 652 F. Supp. 3d at 762 (citing *Feist v. La., Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 452 (5th Cir. 2013)). For the first element, the ADA defines a "disability" as (a) a physical or mental impairment that substantially limits one or more major life activities, (b) a record of such an impairment, or (c) being regarded as having such an impairment. *Id.* at 762 (citing 42 U.S.C. § 12102(1)). Thus, the ADA "requires an individualized assessment of the impact of the impairment on an

individual's major life activities." *Mueck v. LaGrange Acquisitions, L.P.*, 75 F.4th 469, 479 (5th Cir. 2023) (emphasis added).

Because the disability element requires an individual assessment, the Court cannot resolve Plaintiffs' ADA claims in one stroke. The Unpaid Leave Subclass includes employees with an array of disabilities. Some may qualify and require accommodation under the ADA, others may not. *See* ECF No. 246 at 19. United is entitled to argue that some employees who requested accommodations do not have a qualifying disability within the meaning of the ADA, and thus, class certification for Plaintiffs' ADA claims is inappropriate. *See Chandler v. City of Dall.*, 2 F.3d 1385, 1396 (5th Cir. 1993) (determinations "of whether an individual is handicapped [are] necessarily individualized inquiries" for which "class certification and class relief [are] inappropriate").

c. *The adverse action issue does not undermine commonality.*

United also argues that whether class members suffered an adverse action is a question that cannot be resolved on a class-wide basis. The Court disagrees. Here, all class members suffered the same adverse action—indefinite unpaid leave. As this Court has already noted, indefinite unpaid leave is clearly a more than *de minimis* adverse employment action. *See* ECF No. 231 at 8. And because all employees in the proposed subclass were put on unpaid leave, they all suffered the same adverse employment action.

d. *The reasonableness issue does not undermine commonality.*

Similarly, the reasonableness of United's indefinite unpaid leave accommodation is a question that can be resolved on a class-wide basis. It's true that "whether an accommodation is reasonable is a fact-specific inquiry." ECF No. 231 at 9. However, because the accommodation in this case is the same across the proposed class, the only factual differences between individual class members are questions of damages. The commonality requirement can be satisfied "by an instance of the defendant's injurious conduct, even when the resulting injurious effects—the damages—are diverse." *In re Deepwater Horizon*, 739 F.3d at 810–11.

United raises two arguments on reasonableness. *First*, United argues the unpaid leave accommodation was not the same for each class member because some employees were able to draw on sick pay, take vacation time, or rely on other streams of income. ECF No. 246 at 23. Indeed, some employees who were put on unpaid leave may have been able to use up their accrued vacation time to offset their losses for some time, but that does not prevent class certification. If anything, these varying circumstances are likewise a question of damages. And these individual circumstances do not change the uniform nature of United's unpaid leave accommodation—employees put on unpaid leave stopped receiving their paycheck once they ran out of vacation days. The fact that every employees' financial circumstances are not identical does not undermine commonality either. United points out that employees' individual circumstances varied, including their "current financial resources," whether they have "another breadwinner in the family," or their "potential outside earning opportunities during leave." *Id.* But whether an employee's spouse also earns an income does not factor into the reasonableness of a religious accommodation.

Second, United argues that reasonableness may vary between employees because every employee on unpaid leave had the option to apply for a non-customer-facing job. United apparently argues that the reasonableness of an employee's accommodation depends on the jobs available to that employee, which "varied widely in terms of location, pay, qualifications, and the like." *Id.* at 11. The Court disagrees. The accommodation was the same across the board—all employees in the Unpaid Leave Subclass were put on unpaid leave. Having an opportunity to apply for (but no guarantee of receiving) a new job does not tether the reasonableness inquiry to the jobs an employee might have received had they applied. The common question is whether United's unpaid leave accommodation was reasonable. The fact that employees could have applied for other jobs may be relevant to the reasonableness of the unpaid leave accommodation, but the job offers they might have received are not. Such an inquiry would be irrelevant and speculative.

e. *The undue hardship issue does not undermine commonality.*

Finally, United argues that a factfinder cannot determine—without individualized inquiry—whether United would have incurred undue hardship in providing an alternative accommodation, such as masking and testing for customer-facing employees. *See Groff v. DeJoy*, 600 U.S. 447, 468 (2023) ("[U]ndue hardship is shown when a burden is substantial in the overall context of an employer's business." (quotations omitted)). United contends that variations in testing capabilities at different airports, different working conditions and risks, differences in state law, and the unavailability of reserve crews at certain airports make a class-wide analysis impossible. ECF No. 246 at 25. The Court disagrees.

As an initial matter, the Court notes that United somehow managed to require masking-and-testing for over 1,000 non-customer facing employees across the country, overcoming the supposed logistical and state law hurdles they now argue preclude class certification. *See id.* at 8. Plaintiffs say they will present testimony about the costs of testing, "which will address logistics at hub airports and non-hub airports." ECF No. 256 at 12. Plaintiffs also say they will present testimony about "the costs of employees taking tests themselves and providing results," and any state laws that may be implicated in such a policy. *Id.* Indeed, United's two-sentence point on variations in state law refers to some state laws "that could be interpreted as requiring the employer to pay for COVID-19 testing," thereby increasing the costs associated with testing for employees in those states. *See* ECF No. 77 at 6. But the question of whether United would have incurred a substantial burden by paying for some employees' COVID-19 tests is a question that can be resolved class-wide. And again, United managed to make it work for its non-customer-facing employees—apparently without incurring undue hardship.

Further, the unavailability of reserve crews at certain airports does not create individualized questions of undue hardship. United argues that masking and testing at airports without reserve crews would create an undue hardship because positive COVID-19 tests would result in cancelled flights. *See* ECF No. 246 at 25. Of course, the risk of

unexpected illness was not limited to unvaccinated employees. Employees who got the shot could also catch COVID-19 (or the flu), resulting in staffing shortages. And increasing the number of available employees (i.e., requiring employees to mask and test instead of putting everyone on unpaid leave) would *alleviate* those staffing shortages—not exacerbate them. Thus, United's argument that masking and testing could cause staffing shortages is unavailing—especially when United's solution was to prevent its customer-facing staff from working at all. Stephen Jones, *Why are so many flights being canceled?*, BUS. INSIDER (Jul. 23, 2022, 4:53 AM), https://www.businessinsider.com/airlines-labor-shortage-cancelling-flights-aviation-jobs-market-2022-6 ("Airlines have collectively canceled thousands of flights, with labor shortages often being blamed."). Accordingly, the question of whether United would have incurred a "burden [that] is substantial in the overall context of [its] business" by offering an alternative accommodation is a question that is common to the class. *See Groff*, 600 U.S. at 468.

Of United's five proposed individualized issues—sincerity, disability, reasonableness, adverse action, and undue hardship—one persuades. The Court thus finds that the Unpaid Leave Subclass' Title VII claims satisfy commonality, but the ADA claims do not.

* * *

For the above reasons, the Court concludes that the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass fail to satisfy commonality. The Rule 23(b)(3) Unpaid Leave Subclass satisfies commonality for its Title VII claims, but not its ADA claims. The Court now turns to typicality.

C. Typicality

The typicality test concerns three questions: (1) whether other members have the same or similar injury; (2) whether the action is based on conduct which is not unique to the named plaintiffs; and (3) whether other class members have been injured by the same course of conduct. *Miller v. Grand Canyon Univ., Inc.*, 540 F. Supp. 3d 625, 634–35 (N.D. Tex. 2021) (Pittman, J.) (citations omitted). In short, "class certification should not be granted if there is a danger that absent class members

will suffer if their representative is preoccupied with defenses unique to it." *Id.*; *Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 736 (5th Cir. 2023) ("[T]he critical inquiry is whether the named plaintiff's claims have the same essential characteristics as those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." (cleaned up)); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). Having considered the three typicality questions, the Court concludes that the Title VII Unpaid Leave Subclass meets the typicality requirement, but the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass do not.

First, as discussed above, all members of the Title VII Unpaid Leave Subclass suffered the same injury. The named Plaintiff, Genise Kincannon, and the other subclass members were all put on unpaid leave. This policy was uniformly applied to the entire class. *Second*, the action is based on conduct which is not unique to Ms. Kincannon. United's unpaid leave policy was the same across the board. United's uniform application of this policy means that the legal and factual questions relevant to Ms. Kincannon are the same as those relevant to the other subclass members. *Third*, for the same reason, all members of the Unpaid Leave Subclass have been injured by the same course of conduct: they requested religious exemptions from United's vaccine mandate, participated in United's accommodation process, and were all put on unpaid leave. Thus, a determination as to Ms. Kincannon's claim would necessarily resolve the claims of other putative class members. *See Braidwood*, 70 F.4th at 934 n.39. The Title VII Unpaid Leave Subclass therefore satisfies typicality.

However, the proposed Rule 23(b)(2) Class does not. The varied harms within the class do not lend themselves to any "typical" claim, and none of the named Plaintiffs' experiences are typical of the entire class. Some were put on unpaid leave, some were subject to the masking-and-testing protocol, and others decided to get vaccinated. Thus, there is no single plaintiff whose claim the Court could resolve that would in turn resolve the claims of all others. *See id.* Similarly, the Masking and

Testing Subclass does not meet the typicality requirement. Since masking and testing alone is insufficient to establish an adverse employment action, individualized inquiry is necessary to determine the nature of the harm suffered. There are no typical claims.

Thus, the Court concludes that the proposed Title VII Unpaid Leave Subclass satisfies the typicality requirement because the class representative's claims are typical of the class members' claims, arise from the same course of conduct, and are based on the same legal theories. However, the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass do not satisfy typicality.

D. Adequacy of Representation

The final Rule 23(a) prerequisite requirement for certification demands that a plaintiff show "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). "Rule 23(a)'s adequacy requirement encompasses class representatives, their counsel, and the relationship between the two." *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002) (citing *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 479 (5th Cir. 2001)). "[T]he adequacy requirement mandates an inquiry into (1) the zeal and competence of the representatives' counsel and (2) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees." *Berger*, 257 F.3d at 479 (cleaned up) (citing *Horton v. Goose Creek Indep. Sch. Dist.,* 690 F.2d 470, 484 (5th Cir. 1982)).

Here, Ms. Kincannon has demonstrated a willingness and ability to take an active role in controlling the litigation since its inception. She has participated in hearings and mediation, provided written discovery, and sat for depositions. *See* ECF No. 238 at 31. The class representative does not have conflicts of interest with other members of the class. Likewise, Plaintiffs are represented by competent counsel with extensive experience in complex litigation and class actions. *See id.* Indeed, United does not dispute that the class representatives and their counsel satisfy this requirement. *See* ECF No. 246 at 14 ("Rule 23(a) requires proof of numerosity, commonality, typicality, and adequacy of

representation. In this case, Plaintiffs stumble over two of those four elements: commonality and typicality." (citation omitted)). Accordingly, Rule 23(a)'s adequacy-of-representation requirement is satisfied.

* * *

In sum, the Court concludes that the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking and Testing Subclass do not satisfy Rule 23(a)'s requirements, but the Title VII Unpaid Leave Subclass does.

III. Rule 23(b)(2)-Specific Requirements

Although the Court has already determined the Rule 23(b)(2) Class fails the prerequisite commonality and typicality requirements, the 23(b)(2) Class fails for another, independent reason. Even if the proposed class satisfied Rule 23(a), Rule 23(b)(2) certification would still be inappropriate because Plaintiffs' request for punitive damages is not "incidental" to the requested injunctive relief.

Certification under Rule 23(b)(2) is appropriate if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2). In other words, Rule 23(b)(2) certification is appropriate when plaintiffs seek injunctive or declaratory relief, not monetary damages. But here, Plaintiffs also seek monetary relief in the form of punitive damages, backpay, and compensatory damages. *See* ECF No. 238 at 40–41.

The underlying premise of the 23(b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—"begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 413 (5th Cir. 1998). Accordingly, certification under Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." FED. R. CIV. P. 23 (advisory committee notes) (emphasis added) (quoted in *Allison*, 151 F.3d at 411). Instead, monetary relief may be obtained in a Rule 23(b)(2) class action

only if "the predominant relief sought is injunctive or declaratory." *Allison*, 151 F.3d at 411.

The Fifth Circuit has held that "monetary relief predominates in (b)(2) class actions unless it is *incidental* to requested injunctive or declaratory relief." *Allison*, 151 F.3d at 415 (emphasis added). In defining incidental damages, the Fifth Circuit explained:

> Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Id. Under this framework, the Court concludes that money damages are not incidental to the equitable relief sought by Plaintiffs.

The reasoning in *Allison* is instructive on this point. The court in *Allison* had "little trouble affirming the district court's finding that the plaintiffs' claims for compensatory and punitive damages are not sufficiently incidental" to the injunctive relief sought. *Id.* at 416. In *Allison*, the court began by addressing the plaintiffs' claims for compensatory damages, explaining: "[t]he very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy." *Id.* at 417. Thus, the court held that "compensatory damages under Title VII and 42 U.S.C. § 1981 are not incidental to class-wide injunctive or declaratory relief for discrimination." *Id.*

But Plaintiffs say they do not seek backpay and compensatory damages for the proposed Rule 23(b)(2) Class. Rather, "they seek certification of those claims under (b)(3)," apparently referring to the proposed (b)(3) subclasses. ECF No. 256 at 17. Plaintiffs do, however, seek punitive damages for the proposed (b)(2) class. *See* ECF No. 238 at 37 ("[T]he intangible harm Plaintiffs suffered from this coercive choice warrants a two-pronged remedy: (1) an injunction prohibiting United from engaging in this conduct again; and (2) a class-wide award of incidental (here, punitive) damages . . . ."). Thus, the Court must determine whether Plaintiffs' request for punitive damages is incidental to the injunctive relief sought.

In *Allison,* "the court assumed—with reservations—that punitive damages could be awarded on a classwide basis without individualized proof of injury, but emphasized that such damages would be limited to claims that an entire class or subclass was subjected to the same discriminatory act or series of acts." *Colindres v. QuitFlex Mfg.*, 235 F.R.D. 347, 377 (S.D. Tex. 2006) (Rosenthal, J.) (citing *Allison*, 151 F.3d at 417). Even assuming that punitive damages could be awarded on a class-wide basis, the court in *Allison* held that such an award was not appropriate in the case at hand because the plaintiffs did not allege that "each plaintiff was affected by these policies and practices in the same way." *See Allison*, 151 F.3d at 417. Thus, when plaintiffs ask a court to certify both equitable and punitive damages claims under Rule 23(b)(2), two questions emerge. *See Colindres*, 235 F.R.D. at 377. First, can punitive damages be assessed without proof of liability to individual class members? *See id.* Second, was each plaintiff affected by the challenged policy in the same way? *See id.*

As to the first question, *Allison*'s reasoning against a class-wide award of punitive damages applies here. The court explained that punitive damages in the Title VII context "must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs," and thus "necessarily turn on the recovery of compensatory damages." *Allison*, 151 F.3d at 417–18. "[B]eing dependent on non-incidental compensatory damages, punitive damages are also non-incidental—requiring proof of how

discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards." *Id.* at 418.

Plaintiffs here seek punitive damages for their 23(b)(2) Class, but they acknowledge that compensatory damages are non-incidental and require individualized inquiries not appropriate for (b)(2) certification. *See* ECF No. 256 at 17 ("Plaintiffs do not seek certification of their claims for backpay and compensatory damages under (b)(2), they seek certification of those claims under (b)(3), where claims for individualized damages are appropriate."). Like in *Allison*, because punitive damages must be related to the non-incidental compensatory damages awarded, punitive damages are likewise non-incidental here.[4]

As to the second question, even assuming punitive damages could be awarded on a class-wide basis in this case, Plaintiffs do not allege that "each plaintiff [in the 23(b)(2) Class] was affected by these policies and practices in the same way." *See* ECF No. 238 at 29 ("It is of no moment that some Plaintiffs did not experience United's discrimination in exactly the same way."). Mr. Burk, for example, decided to get vaccinated. Ms. Kincannon, on the other hand, was put on unpaid leave. Other class members took different jobs, and most were never actually put on unpaid leave. Thus, Plaintiffs do not—and cannot—contend that each 23(b)(2) Class member was affected by United's vaccine mandate and unpaid leave policy in the same way. Therefore, the Court finds that punitive damages are not incidental to the injunctive relief sought, rendering (b)(2) certification improper.

[4]The Court notes that Plaintiffs, in a footnote, propose that "[i]f the Court disagrees" on this point, "it should instead adopt a hybrid approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief." ECF No. 238 at 37 n.29 (quotations omitted). But "[t]he Court [in *Allison*] specifically rejected the possibility of a 'hybrid' class with injunctive relief under Rule 23(b)(2) and damages relief under Rule 23(b)(3)." *See Colindres*, 235 F.R.D. at 370 (quoting *Allison*, 151 F.3d at 419).

IV. Rule 23(b)(3)-Specific Requirements

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). As explained below, the Court concludes that the proposed Unpaid Leave Subclass satisfies both predominance and superiority, but the Masking-and-Testing Subclass does not.

A. Predominance

Factual predominance requires that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 253 (5th Cir. 2020). As with commonality and typicality, "the risk of voluminous and individualized extrinsic proof defeating predominance runs particularly high where a defendant raises substantial affirmative defenses." *Id.* at 256. The predominance requirement "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case," and is a "far more demanding" hurdle than Rule 23(a)'s commonality requirement. *Prantil v. Arkema Inc.*, 986 F.3d 570, 576–77 (5th Cir. 2021). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where *the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof*." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (cleaned up) (emphasis added). As long as individual questions will not overwhelm common ones, individualized questions will not rule out certification. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014).

Here, United argues that Plaintiffs' 23(b)(3) subclasses fail to satisfy predominance due to (1) individualized liability issues and (2) individualized damages issues. United devotes one page of its brief to the individualized liability issues that may preclude predominance. *See* ECF No. 246 at 38. To fully address potential predominance issues, the Court draws on United's commonality concerns under Rule 23(a). *See*

Prantil, 986 F.3d at 579 (explaining that courts must "respond to the defendants' legitimate protests of individualized issues that could preclude class treatment"). The Court will first discuss the elements of the Unpaid Leave Subclass's Title VII claims and their bearing on the predominance inquiry. Then, the Court will discuss United's concerns that damages cannot be calculated without individual inquiry.

1. Liability Issues

Once again, the elements of Plaintiffs' Title VII claims are: (1) the employee had a sincere religious belief, (2) the belief conflicted with a requirement of employment, (3) the employer was informed of the belief, and (4) the employee suffered an adverse employment action for failing to comply with the conflicting requirement. *See Davis*, 765 F.3d at 485. If they satisfy that showing, the burden shifts to United to demonstrate either (1) that it reasonably accommodated the employee, or (2) that it was unable to do so without undue hardship. *See id.* These questions of law are common across the Unpaid Leave Subclass.

Here, two elements of the prima facie case will clearly be satisfied using the same evidence: the class members' beliefs conflicted with United's vaccine mandate and United was informed of their beliefs. Both elements can be demonstrated class-wide based on evidence that the class members cleared United's hurdles for requesting a religious accommodation. In so doing, the class members informed United of their belief and made a prima facie showing that the belief conflicted with United's vaccine mandate.

But United's Response raises four individual-liability issues: (1) the sincerity of Plaintiffs' beliefs, (2) the reasonableness of the accommodation, (3) whether Plaintiffs suffered an adverse action, and (4) whether United would incur undue hardship in providing an alternative accommodation. Although the Court addressed each issue in its commonality analysis, the Court will now address the reasons common questions predominate with respect to each issue.

First, the words and actions of the unpaid leave class members evince a sincerely held religious belief such that Plaintiffs can make a prima facie showing with the same evidence. Each class member necessarily

(1) articulated a religious reason for not getting vaccinated, (2) submitted a third-party letter attesting to the sincerity of their religious beliefs, (3) chose to accept unpaid leave instead of get vaccinated, and (4) opted into the class. *See supra,* Part II(B)(2)(c). These words and actions are sufficient to carry the class members' light burden of demonstrating sincerity. *See U.S. Navy SEALs 1-26*, 594 F. Supp. 3d at 780. And because these words and actions are common to each class member, the same evidence will suffice for each member to make a prima facie showing on sincerity. Specifically, the class members can satisfy their burden by demonstrating that United's accommodation process required these words and actions, that they complied with that process, and that they were granted an accommodation as a result. Thus, common questions predominate with respect to the sincerity of the class members' religious beliefs.

Second, the reasonableness of the unpaid leave accommodation is a common question. All class members in the Unpaid Leave Subclass received the same accommodation—unpaid leave—and the reasonableness of that accommodation will not depend on individual inquiries. United argues the unpaid leave accommodation was not the same across the class for four reasons: (1) employees who qualified for medical leave could use paid sick leave, (2) employees who had pre-scheduled vacations during the unpaid leave period could be paid for that time, (3) some employees may have still been able to pay their bills even though they lost a paycheck, and (4) all employees had the opportunity to apply for a non-customer-facing job. *See* ECF No. 246 at 21–23. None persuade.

For the first and second points, the ability of some employees to offset the financial burden of unpaid leave using sick days or vacation days has no bearing on the reasonableness of the accommodation. Employees stopped receiving their paycheck once they ran out of vacation days, and that policy was common to the class. These considerations relate solely to damages. United's third point is even less persuasive, as the reasonableness of United's accommodation does not depend on whether an employee earned other income from investments, received financial support from family, or had "another breadwinner in the family." *Id.* at

23. The accommodation was the same across the class, and its reasonableness can be determined class-wide.

United also argues that reasonableness varied because employees had the opportunity to apply for (but no guarantee of receiving) another job at United. *Id.* at 23. Not so. All employees in the Unpaid Leave Subclass received the same accommodation—unpaid leave. And the reasonableness of that accommodation is a question common to the class. To the extent United allowed employees to apply for another job, that fact may indeed be relevant in determining the reasonableness of the accommodation. Some employees applied for but did not get offered another job, some did not apply at all, and others may have received an alternative job offer but decided not to take it. In this instance, a factfinder need not speculate about jobs an employee may have received. The reasonableness inquiry turns on whether the unpaid leave accommodation was reasonable, in light of the fact that qualified employees had the option of applying for other jobs. This accommodation was the same across the class, and thus, the issue may be determined based on generalized, class-wide proof.

Third, no individualized inquiry is necessary to determine whether the class members suffered an adverse employment action. All employees were subject to the same adverse action—they were put on indefinite unpaid leave. Accordingly, evidence that the class was put on unpaid leave—a prerequisite for membership in the class itself—will suffice for each class member to make a prima facie showing that they suffered an adverse employment action.

Fourth, common questions predominate over individual ones with respect to United's undue hardship defense. United put unvaccinated customer-facing employees on unpaid leave, and the question of whether it would have incurred undue hardship in offering a different accommodation is an issue that is susceptible to generalized, class-wide proof. Plaintiffs can present testimony about "the costs of employees taking tests themselves and providing results," and any state laws that may be implicated in such a policy. And the parties can present testimony "from employees within various work groups" explaining

whether "the alternative accommodations Plaintiffs proposed would have been feasible." ECF No. 256 at 12.

For these reasons, the proposed Rule 23(b)(3) Unpaid Leave Subclass satisfies the predominance requirement. Common questions of law and fact concerning the sincerity of religious beliefs, the reasonableness of the unpaid leave accommodation, the occurrence of adverse employment actions, and the applicability of the undue hardship defense predominate over any individualized issues. Thus, the Court finds that the Title VII Unpaid Leave Subclass meets predominance under Rule 23(b)(3). However, for the reasons stated in the Court's commonality analysis, the Masking-and-Testing Subclass and the ADA claims in the Unpaid Leave Subclass require individualized inquiry such that common questions do not predominate. The Masking-and-Testing Subclass didn't suffer the same adverse action because masking and testing is insufficient by itself. And for the ADA claims, individualized inquiry is necessary to determine whether each Plaintiff has a qualifying disability under the ADA. Thus, the Masking-and-Testing Subclass members and the Unpaid Leave Subclass's ADA members cannot satisfy their prima facie showing using the same evidence or generalized, class-wide proof. The Court now turns to damages.

2. Damages Issues

United argues that individualized damages issues preclude predominance. "Even where plaintiffs seeking class certification show that common issues predominate on questions of liability, they must also present a damages model 'establishing that damages are capable of measurement on a class-wide basis.'" *Cruson*, 954 F.3d at 258 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)). The issue of damages will defeat predominance "where the calculation of damages is not susceptible to a mathematical or formulaic calculation." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003). Having considered the damages model proposed by Plaintiffs, the Court concludes that the calculation of damages is easily susceptible to mathematical calculation for employees who were put on unpaid leave.

Plaintiffs propose a damages model that begins by averaging each employee's past earnings to determine an "average wage rate" for calculating backpay during the unpaid leave period. "It is well-established in the Fifth Circuit that the trier of fact may rely on a lost income stream calculation that is based on an average wage rate, particularly if the plaintiff has an inconsistent work history." *Nelson v. Cooper T. Smith Stevedoring Co.*, No. CIV.A. 12-2890, 2013 WL 4591362, at *1 (E.D. La. Aug. 28, 2013); *see also In re Parker Drilling Offshore USA LLC*, 323 F. App'x 330, 335 (5th Cir. 2009) (explaining that lost wages at the time of injury can be calculated by "estimating the earnings from past data when earnings data was inconsistent"); *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1050 (5th Cir. 1990) (affirming district court's determination that lost wages can be calculated based on Plaintiff's "earnings record over the previous two years"). This "average wage rate" calculation is appropriate here because, as United points out, flight crew employees do not have salaries. Their compensation is highly variable, driven by personal preferences, available flights, and other factors. *See* ECF No. 246. Courts in this circuit routinely confront this issue in calculating backpay, and the average wage rate calculation is an easily calculable and well-established method of calculating backpay in such instances.

United, however, argues that "the use of averages would, by definition, undercompensate some putative class members" and overcompensate others. *See* ECF No. 246 at 40. This argument misconstrues Plaintiffs' damages model. As applied to the Unpaid Leave Subclass, Plaintiffs seek to take the average wage rate for each individual class member, multiplied by the time each employee was on unpaid leave, to determine lost wages during the unpaid leave period. This ensures a fair and accurate measure of damages, tailored to each employee's earnings history. Though this necessarily involves some individual inquiry—insofar as it hinges on an employee's past earnings—the determination is conducive to mathematical calculation.

After calculating backpay, Plaintiffs propose a method of calculating punitive damages on a class-wide basis "by allowing the factfinder to determine an appropriate ratio of punitive to economic damages, which

can then be mechanically applied to all members of this subclass." *See* ECF No. 238 at 41. Such an approach is consistent with prior cases in this circuit, in which a ratio or multiplier has been used to assess punitive damages. *See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 323 (5th Cir. 1998) (rejecting a challenge to the use of a multiplier in determining punitive damages); *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 282 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986) (holding a punitive award shall be made "by determining the entire amount of compensatory damages awarded by trial or settlement" and determining the "ratio thereto of each individual's award").

United argues that punitive damages are not capable of class-wide proof because they require "proof of how discrimination was inflicted on each plaintiff." *See* ECF No. 246 at 42. United says this means punitive damages must be assessed on an individual basis. United is correct as applied Plaintiffs' proposed 23(b)(2) Class, which is comprised of employees who allegedly suffered a wide array of harms. But as applied to the Unpaid Leave Subclass's Title VII claims, all class members suffered the same harm—they were put on unpaid leave. Thus, punitive damages will not vary with individual circumstances, except in relation to the economic loss incurred by an individual class member. If a jury finds that United acted "with malice or with reckless indifference," *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (quoting 42 U.S.C. § 1981a(b)(1)), it can award a uniform amount of punitive damages as a remedy. Such an award will be proportional to the economic loss incurred by individual class members as a result of the unpaid leave policy. For that reason, United's uniform treatment of the Unpaid Leave Subclass makes the punitive damages calculation capable of mathematical calculation (by determining an appropriate multiplier of punitive damages to compensatory damages) should the factfinder determine such an award is appropriate. *See Cimino*, 151 F.3d at 323.

Accordingly, Plaintiffs have demonstrated that their proposed damages model for backpay and punitive damages is capable of measurement on a class-wide basis using established, mathematical methods. The use of an average wage rate to calculate backpay is well-supported by precedent and is particularly suited to situations where

employees' earnings are highly variable. Additionally, the proposed method for determining punitive damages by applying a ratio to economic damages is consistent with prior rulings in this circuit and ensures a uniform approach across the class. Therefore, the Court finds that Plaintiffs' damages model satisfies the Rule 23(b)(3) predominance inquiry with respect to damages.

B. Superiority

"Superiority" requires that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). This involves a "fact-specific analysis and will vary depending on the circumstances of any given case," *Madison v. Chalmette Refin., LLC*, 637 F.3d 551, 555 (5th Cir. 2011). Rule 23(b)(3) contemplates four considerations in determining the superiority of a class action vis-à-vis other available methods: (1) the class members' interests in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already begun by or against class members, (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (4) the likely difficulties in managing a class action.

As an initial matter, it is clear that one of the primary rationales for class treatment—judicial efficiency—is well-served here. The unpaid leave class consists of hundreds of employees who requested religious accommodations and were put on indefinite unpaid leave. For the reasons discussed above, all class members suffered the same injury, received the same accommodation, and share common questions of law and fact. Requiring courts to manage hundreds of lawsuits addressing the same questions and evidence makes little sense. Thus, in this case, certification "would promote judicial economy and avoid the wasteful, duplicative litigation which would inevitably result if these cases were tried individually." *Mullen*, 186 F.3d at 627.

United argues that the practical difficulties of managing the proposed classes undermine the judicial efficiency of class-wide resolution. If the Court were to certify Plaintiffs' proposed Rule 23(b)(2)

and both Rule 23(b)(3) subclasses, the Court would agree. The difficulty in managing a Rule 23(b)(2) class consisting of over 6,000 class members with varying injuries, accommodations, and causes of action would wholly undermine the superiority of the class action mechanism. Likewise, a 23(b)(3) class consisting of employees who were required to mask and test, each of whom suffered different harms and adverse employment actions—harassment, difficulty breathing, lonely lunches, excessive Lysol spraying—would be unmanageable and inefficient. The class members could not make out a prima facie case of religious discrimination without individualized inquiry. Contrast this with a class consisting of employees who sought religious accommodations and were put on indefinite unpaid leave. All class members suffered the same injury, were granted the same accommodation, and assert the same cause of action. The same evidence will support each class members' prima facie case of religious discrimination, and the reasonableness of the accommodation and undue hardship defense can be determined class-wide. Thus, United's arguments do not persuade when it comes to the unpaid leave Title VII class.

"The greater the number of individual issues, the less likely superiority can be established." *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). Naturally, the inverse is also true—claims with few or no individual issues lend themselves to class-wide resolution. In the preceding section, the Court discussed the common evidence relevant to each element of Plaintiffs' prima facie case. Furthermore, United's reasonableness and undue hardship defenses apply class-wide. The reasonableness of the unpaid leave accommodation does not hinge on individuals' financial circumstances or the jobs for which they were qualified—thus, such a defense will succeed or fail as to each class member on the same evidence. Similarly, United's undue hardship defense is capable of class-wide proof.

Further, the fact that many class members still work at United weighs in favor of superiority because "those potential class members still employed by [United] might be unwilling to sue individually or join a suit for fear of retaliation at their job." *Mullen*, 186 F.3d at 625. Indeed, another principal function of the class action mechanism is the

"vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). This includes cases where plaintiffs "are vulnerable to reprisals by the defendant due to a continuing economic relationship, such as employment." 2 Wm. B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 4.65 (6th ed. 2023). Many class members are still employed by United, and thus may be dissuaded from suing individually for fear of jeopardizing their employment. This is, of course, in addition to the burden and potential expense of bringing individual claims against United, who has far more time and resources to litigate such matters.

Lastly, at this point in the litigation, the Court is painfully familiar with the law, facts, and applicable defenses in this case, making this Court a desirable forum for litigating this action. Ultimately, having considered the available methods for fairly and efficiently adjudicating the controversy, the Court concludes that a class of employees who requested religious accommodations and were put on unpaid leave satisfies Rule 23(b)(3)'s superiority requirement.

* * *

In sum, the Court finds that the Plaintiffs' Motion for Class Certification should be **GRANTED in part** and **DENIED in part**. The proposed Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass do not satisfy the commonality and typicality requirements under Rule 23(a), nor do they meet the criteria under Rule 23(b). The different injuries suffered and the individual questions raised within these proposed classes preclude class-wide resolution of their claims.

However, the Court concludes that the Rule 23(b)(3) Unpaid Leave Subclass's Title VII claims meet the criteria for certification. This subclass includes all employees United deemed customer-facing who received an accommodation due to a sincerely held religious beliefs and who were put on unpaid leave. The claims of these employees satisfy the commonality and typicality requirements under Rule 23(a), share common legal and factual questions that predominate over any individual issues, and a class action is the superior method for

adjudicating their claims efficiently and fairly. Accordingly, the Court appoints Plaintiffs' counsel as class counsel with Ms. Kincannon as the named plaintiff and modifies Plaintiffs' proposed Unpaid Leave Subclass to encompass only the Title VII claims. The Court thus certifies a class consisting of all employees United deemed customer-facing who received an accommodation due to a sincerely held religious beliefs and who were put on unpaid leave. *See Braidwood*, 70 F.4th at 934. (explaining the court "may modify the classes to fit the requirements better and should not dismiss an action purely because the proposed class definition is too broad").

V. Plaintiffs' Motion for Reconsideration

Finally, Plaintiffs' Motion for Reconsideration is also before the Court. ECF No. 241. Plaintiffs ask the Court to reconsider its prior order granting in part United Motion to Dismiss. Having reviewed the Motion, the Court finds that the Motion for Reconsideration should be and is hereby **DENIED**.

CONCLUSION

For the reasons stated above, the Court finds that the Plaintiffs' Motion for Class Certification (ECF No. 238) should be **GRANTED in part** and **DENIED in part**. Additionally, the Court finds that the Motion for Reconsideration (ECF No. 241) should be and is hereby **DENIED**.

SO ORDERED on this **21st day of June 2024**.

Mark T. Pittman
UNITED STATED DISTRICT JUDGE