

No. 21-11159

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

# In the United States Court of Appeals for the Fifth Circuit

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DAVID SAMBRANO, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; DAVID CASTILLO, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; KIMBERLY HAMILTON, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; DEBRA JENNEFER THAL JONAS, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; GENISE KINCANNON, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; SETH TURNBOUGH, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellants,*

v.

UNITED AIRLINES, INCORPORATED,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Northern District of Texas, Fort Worth Division  
No. 4:21-cv-01074-P

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## **PLAINTIFFS-APPELLANTS' MOTION FOR IMMEDIATE ISSUANCE OF MANDATE AND INCORPORATED MEMORANDUM OF LAW**

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## CERTIFICATE OF INTERESTED PERSONS

No. 21-11159

*David Sambrano, individually and on behalf of all others  
similarly situated, et al. v. United Airlines*

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

Plaintiffs-Appellants: David Sambrano, Genise Kincannon,  
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Other interested  
entity:

Airline Employees 4 Health Freedom

/s/ Gene C. Schaerr  
Gene C. Schaerr

*Counsel of Record for  
Plaintiffs-Appellants*

This Court recently concluded that United Airlines is causing Appellants irreparable harm. Op. at 6–7. In fact, Appellants “are being subjected to *ongoing* coercion based on their religious beliefs,” which “is harmful in and of itself and cannot be remedied after the fact.” *Id.* (emphasis added). This “ongoing coercion” has been growing every day over the three months since the district court denied Appellants’ motion for preliminary injunction. Accordingly, the Court should direct the Clerk to issue the mandate immediately to ensure that United cannot continue causing irreparable harm.

Although the mandate typically issues seven days after the time to file a petition for rehearing expires, or seven days after such a petition is denied, “[t]he Court may shorten ... the time by order.” Fed. R. App. P. 41(b). In light of the exceptional circumstances here—where United is attempting to coerce its employees to forsake their religious beliefs and health, *see* Op. at 19 n.14—immediate issuance is imperative.

1. Appellants brought this action in September 2021 alleging that United violated Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act when it imposed its COVID-19 vaccine mandate without reasonably accommodating those employees who have religious or medical reasons for declining to get vaccinated. ROA.28–57. The very next day, Appellants moved for a preliminary injunction and temporary restraining order, explaining that an

injunction was needed because they faced the “impossible choice” of either taking the vaccine—thereby betraying their religious beliefs or their health—or losing their jobs. ROA.86; ROA.404.

After a lengthy hearing, the district court denied the preliminary injunction, rejecting Appellants’ theory that the impossible choice they faced was imposing irreparable harm on those United employees who, because of United’s policy, remained on indefinite unpaid leave. ROA.3268–70. But in doing so, the district court invited this Court’s guidance. ROA.3409–10. Appellants immediately appealed, and sought an injunction pending appeal, which a motions panel of this Court, over dissent, denied. *See Sambrano v. United Airlines, Inc.*, 19 F.4th 839 (5th Cir. 2021).

2. The motions panel expedited the appeal, and oral argument was held on January 3, 2022, two weeks after many United employees received their last paychecks. On February 17, 2022, a panel of this Court agreed with Appellants that United was irreparably harming its employees by failing to provide reasonable accommodations—forcing them to “an impossible choice for plaintiffs who want to remain faithful but must put food on the table.” Op. 18–19. That coercive choice, the Court explained “enlisted employees and their families in the project of reforming employees’ religious commitments.” *Id.* at 20. Being put to that choice

“imposes a distinct and irreparable harm beyond lost pay, benefits, seniority, and other tangible and remediable losses.” *Id.*

3. Here, the urgency underlying Appellants’ claims has only increased. Every day that the mandate does not issue is another day that Appellants are subjected to the coercive choice between their faith and their livelihood. The mandate is not set to issue until March 11, 2022, three weeks from now and nearly three months since many “accommodated” United employees received their last paycheck.

There is no reason to wait until then to issue the mandate. Appellants do not intend to petition for rehearing. And while United has suggested it will seek *en banc* rehearing, there is no reason to believe such a petition would be successful here, as Judge Smith explained in his dissenting opinion. Op. at 78 n.95 (Smith, J., dissenting).

To prevent United from continuing to “actively coerc[e its] employees to abandon their convictions” for even a day longer, *id.* at 19, Appellants respectfully request that this Court grant the motion and direct the Clerk to issue the mandate immediately to remove any possible argument that the district court is unable to enter immediate injunctive relief.

February 21, 2022

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Respectfully submitted,

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*Counsel for Plaintiffs-Appellants*

**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on February 21, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Gene C. Schaerr  
Gene C. Schaerr



### **CERTIFICATE OF CONFERENCE**

I hereby certify that on February 21, 2022, counsel for Appellants conferred by e-mail with counsel for United Airlines about the foregoing motion. United Airlines opposes the relief requested in this motion.

/s/ Gene C. Schaerr  
Gene C. Schaerr

### **CERTIFICATE OF COMPLIANCE**

The foregoing motion complies with the type volume limitation of Fed. R. App. P. 27(d)(2) because it contains 639 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Additionally, I certify that (1) any required redactions have been made in compliance with 5th Cir. R. 25.2.13; and (2) the document has been scanned with the most recent version of Microsoft Defender virus detector and is free of viruses.

/s/ Gene C. Schaerr  
Gene C. Schaerr

Dated: February 21, 2022