

No. 21-11159

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

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellants,

v.

UNITED AIRLINES, INCORPORATED,

Defendant-Appellee.

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

PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF MOTION FOR IMMEDIATE ISSUANCE OF MANDATE

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CERTIFICATE OF INTERESTED PERSONS

No. 21-11159

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

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

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Airline Employees 4 Health Freedom

/s/ Gene C. Schaerr

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As this Court recently concluded, United is irreparably harming its employees through “ongoing coercion based on their religious beliefs.” Op. at 6–7. In fact, three judges of this Court have now reached that conclusion. *See id.*; *see also Sambrano v. United Airlines*, 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting). This irreparable harm has been growing for more than three months. And if United has its way, it will continue growing for months to come. Accordingly, it is imperative that the mandate issue immediately to ensure that this ongoing irreparable harm does not last another day.

That is why Appellants recently filed a new motion for a temporary restraining order (“TRO”) and preliminary injunction with the district court. That new motion for a TRO is not before this Court, and thus nothing prevents the district court from granting that motion. But, out of an abundance of caution, and to remove any possible argument that the district court is unable to enter immediate injunctive relief, Appellants requested that the mandate issue immediately. United’s arguments opposing such relief lack merit.

For instance, United argues (at 1) that its unlawful accommodation policy is not harming anyone. Ignoring this Court’s decision, United argues that “there is no reason to believe that the identified harm will come to pass any time soon.” But, as the panel’s well-reasoned opinion explained, the harm is immediate, irreparable, and *ongoing* because, as the record on appeal shows, United offers its employees only

“two options: violate their religious convictions or lose all pay and benefits indefinitely.” Op. at 18. It is the “impossible choice for plaintiffs who want to remain faithful” but must also provide for their families that causes irreparable harm. *Id.* at 18–19. United’s argument to the contrary blinks reality and must be rejected.

United is also wrong to suggest (at 2) that its attempts to moot the case limit the irreparable harm and weigh against issuing the mandate immediately. At the outset, the record does not support this argument. *See* Op. at 6 n.5. Moreover, United’s argument finds no support in the law. It is entirely uncontroversial that the “cessation of illegal activity does not *ipso facto* justify the denial of an injunction.” *S.E.C. v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975). Indeed, a party’s “voluntary cessation of its allegedly violative religious practices does not preclude a finding of irreparable injury.” *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993) (Smith, J.). Other circuits agree. *See Boyd v. Adams*, 513 F.2d 83, 89 (7th Cir. 1975) (“The propriety of injunctive relief cannot be foreclosed by a promise to discontinue what has been an established pattern of wrongdoing.”); *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 800–01 (4th Cir. 2001) (same). Thus, it remains entirely appropriate for the district court to enter an injunction, and the Court should thus direct the Clerk to issue the mandate immediately to eliminate any concern about the district court’s ability to do so.

Finally, United is wrong to suggest (at 3) that this Court should hold the mandate because of the mere possibility that it may need or wish to recall it later. This Court has the “inherent power to recall its mandate.” *Nelson v. James*, 722 F.2d 207, 208 (5th Cir. 1984) (per curiam). But this Court should not allow United to hide behind the mandate to argue against immediate injunctive relief in the district court. If the Court ultimately calls for *en banc* review, it can recall the mandate then. But the mere *prospect* of such a recall is no basis for requiring United employees to continue suffering the irreparable harm that this Court identified.

Accordingly, as Appellants already demonstrated, the Court should direct the Clerk to issue the mandate immediately so that Appellants are not required to endure further irreparable harm.

February 23, 2022

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on February 23, 2022, I electronically filed the foregoing reply in support of motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Gene C. Schaerr
Gene C. Schaerr

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type volume limitation of Fed. R. App. P. 27(d)(2) because it contains 646 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
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Dated: February 23, 2022