

No. 21-11159

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

DAVID SAMBRANO, on their own behalf and on behalf of all other similarly situated; DAVID CASTILLO, on their own behalf and on behalf of all others similarly situated; KIMBERLY HAMILTON, on their own behalf and on behalf of all others similarly situated; DEBRA JENNEFER THAL JONAS, on their own behalf and on behalf of all others similarly situated; GENISE KINCANNON, on their own behalf and on behalf of all others similarly situated; SETH TURNBOUGH, on their own behalf and on behalf of all others similarly situated,

Plaintiffs - Appellants

v.

UNITED AIRLINES, INCORPORATED,

Defendant - Appellee

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

**OPPOSITION TO 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, Inc.

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

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

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

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

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

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Dated: February 22, 2022

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

United Airlines respectfully requests that the Court deny Plaintiffs-Appellants' Motion for Immediate Issuance of Mandate ("Motion"), filed on February 21, 2022. Issuance of the mandate should await a decision on United's promptly forthcoming petition for rehearing en banc. There is no plausible basis for Plaintiffs' claim that such adherence to regular order will materially alter the underlying equities or cause any irreversible change in the status quo before the full Court is afforded the opportunity to consider en banc rehearing.

A. The "Coercion" Harm Identified By the Panel Majority Does Not Justify Expedited Issuance of the Mandate

The panel unanimously agreed that Plaintiffs cannot show irreparable harm based on potential loss of income or seniority. Slip Op. at 14-15; *id.* at 42 (Smith, J., dissenting). Rather, the only irreparable harm identified by the majority is a "coercive" choice, predicated on the notion that Captain Sambrano and Ms. Kincannon may be pressured by lack of income into foregoing their religious beliefs and getting vaccinated. *Id.* at 18-19, 21.

But there is no reason to believe that the identified harm will come to pass any time soon, and the majority does not suggest otherwise. *See* Slip Op. at 19 n.14. Neither Plaintiff has wavered on vaccination in the approximately three months following the district court's denial of the preliminary injunction. And there is no reason to believe that either of them will change course in the relatively short time it will take to decide whether to rehear this matter en banc. It is notable that Plaintiffs'

Motion does not point to any basis for finding that either Sambrano or Kincannon are on the verge of violating their religious beliefs or that they are even considering taking the COVID-19 vaccine. That is not surprising. *See id.* at 48 (Smith, J., dissenting) (noting that “Sambrano stated that his annual salary exceeds \$350,000”); *id.* at 49 (Smith, J., dissenting) (explaining that Kincannon swore, “No matter the costs” she “will never take this vaccine”). Moreover, both of those individuals—like all flight-crew employees who were granted an accommodation—have been given preferential consideration for any available non-customer facing job at United. ROA. 3503, 3510, 3513. Thus, they all have the ability—right now—to continue to earn a paycheck.¹ So even accepting the panel majority’s conclusion that there is independent harm resulting from the pressure to violate religious beliefs, there is no reason to conclude that such harm is *currently* sufficient or imminent enough to justify an expedited mandate.

B. Issuing the Mandate in Advance of United’s Forthcoming Petition Would Be Procedurally Inappropriate

Especially in light of Judge Smith’s dissent, the panel’s decision warrants consideration for en banc review. Slip Op. at 23-80. After all, if the full Court agrees with Judge Smith’s conclusion that “[t]he majority’s treatment of irreparable

¹ Beyond the fact that any and all of the accommodated pilots could accept a temporary alternative job, Captain Sambrano was offered a “special assignment”—at equal to or potentially greater than his current salary—because of his particular skills, background, and prior management roles, yet he declined. *See* Case No. 4:21-cv-01074-P (N.D. Tex.), ECF Nos. 136 at 5, 137 at 97.

harm flouts blackletter law, the record, and even the Supreme Court,” *id.* at 54, then the requirements for en banc review are satisfied, Fed. R. App. P. 35(b). Indeed, while Plaintiffs suggest otherwise, the dissent’s call for “all hands on deck” seems to invite a request for rehearing en banc, Slip Op. at 78, n.95, precisely because the decision should “not survive the scrutiny of the en banc court,” *id.* at 23.

United intends to file such a request imminently. While the Federal Rules of Appellate Procedure normally allow for 14 days to seek rehearing—which would by March 3, 2022, United commits to filing on or before Friday, February 25, 2022. Plaintiffs no doubt believe rehearing is unwarranted, but the merits panel should not try to prejudge that question before its colleagues on the full Court have had the opportunity to review the petition and any response requested.

This Court should allow that process to unfold and avoid the potential disruption that could result if it issues the mandate early. Plaintiffs have already asked the district court—without even waiting for the mandate—to reenter a temporary restraining order. *See* Case No. 4:21-cv-01074-P, ECF No. 135. If the mandate were issued and the lower court were to act prior to a vote for rehearing en banc, the full Court, if it chose to grant rehearing, would need to recall the mandate and be forced to confront whether to stay or vacate any injunction that had been granted in the interim.

In any event, while this Court has properly accommodated the expedited nature of this proceeding, it has repeatedly rejected Plaintiffs' attempts to accelerate this case to the point that United would be denied normal process or forced to incur costs it can never recover. It rejected Plaintiffs' request for an injunction pending appeal. And it rejected Plaintiffs' request to complete briefing and decision on the entire appeal in two weeks. In that same vein, the proper course at this point is to allow United until this Friday to file its petition, and then move without undue delay through whatever steps the Court deems necessary to rule on that petition.

CONCLUSION

This Court should deny Plaintiffs-Appellants' Motion for Immediate Issuance of Mandate.

February 22, 2022

Respectfully submitted,

/s/ Hashim M. Mooppa

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CERTIFICATE OF SERVICE

I certify that on February 22, 2022, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: February 22, 2022

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

CERTIFICATE OF COMPLIANCE

This opposition complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 27(d)(2)(A). Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the opposition contains 897 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

Dated: February 22, 2022

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