No. 21-11159

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
No. 4:21-cv-01074 (Pittman, J.)

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CERTIFICATE OF INTERESTED PERSONS

No. 21-11159, David Sambrano et al. v. United Airlines, Incorporated

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, Incorporated** ("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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STATEMENT REGARDING ORAL ARGUMENT

This Court has scheduled oral argument for January 3, 2022.

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INTRODUCTION

United Airlines has generally required its employees to be vaccinated against COVID-19, but it has provided a range of accommodations to nearly 2,500 employees with religious or medical objections. This appeal involves five United employees who filed suit under Title VII and the ADA, seeking to challenge the reasonableness of temporary unpaid leave as an accommodation on behalf of a putative nationwide class. But no class has been certified, and United has actually accommodated three of the five plaintiffs (and other employees in the same types of jobs) with masking-and-testing requirements that permit them to work with pay in their ordinary roles or substitute positions. Only the two plaintiffs who work in flight crews have been offered temporary unpaid leave as their principal accommodation, due to the particular working conditions for pilots and flight attendants.

Plaintiffs rushed into court even though the accommodations were still being developed and the EEOC administrative process has not been exhausted. They claim that federal law authorizes judicial second-guessing of United's business judgment about how to balance employees' religious and medical concerns with the safety of United's workers and customers as well as the effective functioning of its operations. They seek the extraordinary remedy of a preliminary injunction prohibiting use of temporary unpaid leave as an accommodation before the EEOC process is exhausted and the district court ultimately adjudicates their claims on the merits.

The district court, however, "conclude[d] that Plaintiffs have not 'clearly carried' their burden to show irreparable harm will occur absent a preliminary injunction." ROA.3275. It thus denied relief "without ruling on the likelihood of success." ROA.3275. This Court should affirm that order, for two reasons.

First, Judge Pittman did not abuse his discretion in concluding that plaintiffs failed to show a likelihood of irreparable injury. Indeed, he was correct, as Judges Stewart and Haynes concluded in denying an injunction pending appeal, over Judge Ho's dissent, "for the reasons stated in [his opinions]." *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2021 WL 5881819, at *1 (5th Cir. Dec. 13, 2021) (per curiam).

It is black-letter employment law that neither the direct financial effects of lost salary nor the indirect practical consequences are irreparable injury. That rule reflects two fundamental principles: adequate remedies will be available if plaintiffs prevail at final judgment, and any remedial gaps that might exist do not warrant the drastic relief of a preliminary injunction. Even Judge Ho's dissent acknowledged the general rule that "the loss of a paycheck … is no[t] irreparable injury." *Id.* at *2. Although the back half of plaintiffs' brief asserts various (speculative) effects related to personal finances and workplace seniority for those placed on temporary unpaid leave, those are typical types of harms claimed in employment disputes that courts routinely address through permanent relief. Plaintiffs thus have not shown that this is an exceptional case based on the *tangible* consequences of temporary unpaid leave.

Plaintiffs instead primarily contend that irreparable injury exists due to the *intangible* consequences some face from the so-called "impossible choice" between refusing the vaccine in order to follow one's religious conscience or accepting it in order to keep one's paycheck. But the choice between preserving one's faith or one's livelihood *while litigation is pending* exists in *every* Title VII case involving religious practice (or belief), such as alleged failures to accommodate Sabbath worship. Treating that choice as irreparable harm per se would thus be irreconcilable with this Court's precedent holding that "irreparable harm must be proven separately and convincingly" under Title VII, regardless of the "nature of the underlying claim." *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989). It would also create a square conflict with decisions in two other circuits rejecting irreparable injury for Title VII religion claims against COVID-19 vaccination policies—decisions that the Supreme Court declined to disturb. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 291, 294-95 (2d Cir. 2021) (per curiam), *injunctive relief denied*, *Dr. A v. Hochul*, No. 21A145, 2021 WL 5873126 (U.S. Dec. 13, 2021); *Together Employees v. Mass Gen. Brigham Inc.*, 19 F.4th 1, 2-3, 7-8 (1st Cir. 2021), *injunctive relief denied*, No. 21A175 (U.S. Nov. 29, 2021) (Breyer, J., in chambers).

Despite the ubiquity of the "impossible choice" in Title VII religion cases, plaintiffs have not cited *any* case ever adopting that irreparable-injury theory. Instead, they rely almost exclusively on *BST Holdings, LLC v. OSHA*, 17 F.4th 604,

618 (5th Cir. 2021), where a motion panel held that employees were irreparably injured by a vaccine requirement imposed by the federal government. Because that case involved a challenge to a federal regulatory mandate, however, the employees' irreparable injury was explicitly based on a special rule for "the loss of constitutional freedoms." *Id.* Moreover, for the same reason, those employees could not recover lost pay even if they ultimately prevailed at final judgment, and their options to find alternative employment would have been significantly constrained given the federal mandate's broad application to many employers. *None* of those factors are present in this private employment dispute under Title VII.

In any event, plaintiffs have grossly exaggerated the difficulty of the choice they face on this record. As noted above, three of them (Castillo, Hamilton, and Jonas) have not been placed on unpaid leave *at all*. ROA.3502-03. As for the other two: Kincannon testified that, "[n]o matter the cost, … I will never take this vaccine," ROA.4011; and Sambrano has an annual salary of $350,000 and his most concrete concerns are paying for his children's college education and otherwise maintaining his lifestyle, ROA.3641, 3991. There is thus simply no record basis to find that *any plaintiff* before this Court faces "a crisis of conscience" or a "Hobson's choice[]" between "holding true to their religious commitments and feeding and housing their children." *Sambrano*, 2021 WL 5581819, at *2 (Ho, J., dissenting).

Plaintiffs' lack of irreparable injury stands in stark contrast to the irremediable harm to United if a preliminary injunction were granted but later vacated on the merits. United would need either to undermine the safety and effectiveness of its operations by allowing unvaccinated flight-crew members to return to work or instead to incur the costs of paid leave. Plaintiffs denigrate these concerns as misguided and pretextual, but the district court made no factual findings on these issues and United's position is amply supported in the evidentiary record.

Second, at a minimum, the preliminary-injunction denial should be affirmed because plaintiffs have not exhausted the EEOC administrative process. The statutory text plainly provides that only the EEOC, not employees, may seek interim relief while a charge is pending. Plaintiffs invoke a 50-year-old case that asserted equitable power to disregard the statutory mandate, but that decision has been abrogated by later Supreme Court precedent and is factually inapposite regardless.

In sum, whether or not employees have a substantive right to externalize the costs of their religion- or disability-based objections to vaccination onto their employers, co-workers, and customers—the underlying merits dispute in this case—they certainly have no procedural right to do so *before* a district court has adjudicated their claims or the EEOC process has even been exhausted. To United's knowledge, no federal court, during the COVID-19 pandemic or otherwise, has granted such an injunction. Judge Pittman did not abuse his discretion in declining to do so here.

STATEMENT OF ISSUES

1. Whether the district court abused its discretion in holding that plaintiffs failed to establish irreparable injury supporting a preliminary injunction.

2. Alternatively, whether the preliminary-injunction denial can be affirmed because plaintiffs have failed to exhaust the EEOC administrative process.

STATEMENT OF THE CASE

A. United Provides A Reasonable Set Of Accommodations, Including But Not Limited To Temporary Unpaid Leave, For Employees With Religious Or Medical Objections To COVID-19 Vaccination

1. In August 2021, responding to the Delta variant's explosive growth, United adopted a policy requiring U.S.-based employees entering its facilities to be vaccinated for COVID-19 by late September. ROA.1051-54. United explained it would accommodate employees who objected to such vaccination for religious reasons or medical reasons. ROA.1053-54.

To ensure consistency of treatment and screen out employees who had other bases for objecting to COVID-19 vaccination, United required employees to provide substantiation of their claimed religious or medical objections. ROA.3738-43. United's CEO likewise told employees that they could be "putting [their] job[s] on the line" if they "all the sudden decided [they're] really religious"—*i.e.*, if they asserted *pretextual* objections to avoid getting vaccinated based on alternative motives. ROA.3277, 4282. Plaintiffs have mischaracterized United's reasonable response as reflecting bias and skepticism towards granting accommodations

(Br. 8-10), but that accusation is belied by the total number of accommodations actually granted. After establishing an accommodation process and reviewing requests plus any further substantiation it sought, United granted accommodations to nearly 2,500 employees—amounting to approximately 82% of religious requests and 63% of medical requests. ROA.1059, 3734-38. That likewise refutes plaintiffs' offensive insinuation that United merely wishes to "market[]" a 100% vaccination rate (Br. 8, 22), especially given the reasonableness of the various accommodations that United has offered.

2. In designing accommodations, United considered "the safety of [its] employees, both vaccinated and unvaccinated"; "the job responsibilities that were in play"; and the constraints imposed by applicable "collective-bargaining agreements" (CBAs) and "law[s]." ROA.3744-45. Although plaintiffs have portrayed unpaid leave as the primary accommodation offered (Br. 1, 5-6, 21-22), that depiction is contradicted by the varied types of accommodations actually provided. As detailed below, United has provided unvaccinated employees in different categories of jobs with different accommodations given different levels of health-and-safety risks as well as different operational and financial complications.

a. United initially offered remote work to certain employees in non-customer-facing, non-operational roles whose job duties permitted such work. ROA.1518, 3745-46, 3754. In early September, United provisionally offered to

place other employees on unpaid personal leave or unpaid medical leave (subject to the ordinary terms associated with each leave) after the vaccination requirement was scheduled to take effect near the end of the month. But at that time, which was weeks *before* this suit was filed (*contra* Pltfs. Br. 10-11), United explained that these were only *temporary* accommodations that could be quickly adopted—consistent with the CBAs' restrictions on unilateral job changes—pending United's assessment of feasible alternatives. ROA.1062-64, 1517-18, 3624-25, 3748-50.[1]

By mid-October, United offered employees with non-customer-facing operational roles the accommodation of working pursuant to a masking-and-testing protocol. ROA.3502, 3750-51. These employees work in "an environment that is almost exclusively United employees, where [United has] greater control," including through "more of a supervisor/managerial presence [to] monitor the accommodation." ROA.3745-46. Such control is important given the need, for example, to ensure compliance with masking requirements. ROA.3795-97. Here, two of the five plaintiffs on appeal, Hamilton and Castillo, have non-customer-facing operational roles, as a station operations representative and an aircraft mechanic, respectively. ROA.3606-07, 3657-58. Before the preliminary-injunction hearing, United made clear that Hamilton would be provided the masking-and-testing accommodation.

[1] The date when any unpaid leave would need to commence was eventually pushed back to mid-November due to the pendency of the preliminary-injunction proceedings. ROA.3265-67.

ROA.1520, 3750. And while Castillo was initially denied a religious accommodation due to his failure to apply by the deadline under United's process, ROA.3658-60, United nevertheless granted him the masking-and-testing accommodation after the preliminary-injunction denial (in light of the peculiar circumstances that he had testified caused him to miss the deadline), ROA.3502.

Also by mid-October, United devised an accommodation for some customer-facing employees. Namely, it offered customer-service representatives—initially in six locations and later for all but nine such employees—a non-customer-facing position providing virtual "Agent on Demand" service, with masking and testing. ROA.3502, 3747. Here, a third plaintiff, Jonas, falls in this job category. ROA.4006. Before the preliminary-injunction hearing, and again after the preliminary-injunction denial, United made clear that Jonas would be provided this accommodation while it was in effect (once she was hopefully able to return to work after recovering from a COVID-19 infection). ROA.1520, 3747, 3503.

Plaintiffs note (Br. 11-12) that the "Agent on Demand" accommodation must end 59 days after it begins due to the CBA. ROA.2686-87. But they cite no evidence before the preliminary-injunction denial that United intended to place employees on unpaid leave once that accommodation expired, although it was "a possible scenario." ROA.3758. In fact, they fail to mention that United has developed a similar accommodation, after the preliminary-injunction denial, permitting Jonas and others

in her position to work on pre-clearing travelers to Hawaii until (at least) May 2022. ROA.3503. Although plaintiffs similarly object (Br. 12) that the remote-work and masking-and-testing accommodations for non-customer-facing employees are not "permanent," they provide no basis for their speculation that United would terminate those accommodations while the vaccination requirement is in effect. Accordingly, three of the five plaintiffs here—Castillo, Hamilton, and Jonas—have not been placed on unpaid leave, and United has no intent of placing them on unpaid leave so long as they comply with the masking-and-testing accommodations that United can offer them.

b. United faces a greater challenge accommodating pilots and flight attendants. The two remaining plaintiffs fall within this category, as Sambrano is a pilot and Kincannon is a flight attendant. ROA.3628, 3674-75. Plaintiffs have claimed (Br. 16) that employees can be safely accommodated with regular screening for COVID-19 symptoms or periodic testing for COVID-19 infections or antibodies, and that such accommodations would have little to no cost for United. But the evidentiary record—developed during the two-day hearing by United's two expert witnesses and four fact witnesses, ROA.3564-65—refutes those claims, especially for flight crew.

Starting with safety, the scientific consensus is that the alternative accommodations proposed by plaintiffs' expert—whose credibility and reliability in

advancing such minority views has been questioned by another court in related litigation[2]—are much less effective than vaccination in preventing employees from catching COVID-19, suffering hospitalization or death, and transmitting the virus to others.[3] That problem is exacerbated in the less controlled environment for a traveling flight crew. Among other things, although plaintiffs emphasize (Br. 7) that the air-filtration systems on planes make them extremely safe for masked passengers while in the cabin, plaintiffs disregard the evidence that the pilot and co-pilot sit in close proximity in a cockpit where their responsibilities can make masking hazardous, and that the flight crew are in close contact with each other outside of the plane while traveling from, to, and within airports during legs of a trip.[4]

Accepting plaintiffs' alternative measures would thus risk harming United's other employees and customers, who would be exposed to an increased threat of infection and the psychological toll from that threat.[5] United itself would risk further harm, as it would be exposed to an increased threat of employee illness resulting in increases in scheduling delays and healthcare expenditures as well as the operational challenges posed by vaccinated employees objecting to working alongside

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[2] *R.K. v. Lee*, No. 21-725, 2021 WL 4942871, at *5-7 (M.D. Tenn. Oct. 22, 2021).

[3] ROA.3912-25; *see* ROA.1385-96, 1400-11, 1426-40, 1493-1506.

[4] ROA.3713-15, 3745-46, 3793-3800, 3807-15, 3825-26, 3829-33, 3839-42, 3844-45, 3852-54.

[5] ROA.3798-99, 3804-05, 3833-35, 3849-57.

unvaccinated employees.[6] Plaintiffs suggest (Br. 6-7) that these safety concerns are pretextual merely because United permits certain other unvaccinated persons to fly on its planes, but they again ignore the testimony as to why such persons are not similarly situated to United's domestic employees. For example, United has been limited by foreign laws in its ability to require (rather than incentivize) vaccination for its international employees, and United's passengers have less close contact with its employees than the flight-crew members have among themselves, especially outside of the plane.[7]

Turning to costs, alternative testing regimes also would be burdensome for United to adopt. For example, CBAs and federal regulations governing pilots and flight attendants impose strict restrictions on when flight crew can be required to perform work-related functions and when they must be resting between duty periods.[8] Likewise, CBAs and wage laws may hinder United's ability to require employees to conduct testing off-duty without paying compensation, which would be significant over time and in the aggregate.[9] More generally, administering or monitoring testing would require a substantial expenditure by United of time and money, including because self-administered test results can be unreliable, state laws

[6] ROA.2101-02, 3686-88, 3832-33, 3835-36.

[7] ROA.3729, 3852-54.

[8] ROA.1655-59, 2095-96, 2099-2103, 2823-26, 3751-52, 3800-02, 3811-15, 3833-34.

[9] ROA.1654-56, 2097-99, 3801-03.

may require providing some employees with cash reimbursement, and the remaining employees might seek insurance reimbursement.[10]

Given all this, United has primarily accommodated flight-crew members with temporary unpaid leave. ROA.1517, 3745-46. Before the preliminary-injunction denial, they were also offered the option of pursuing temporary employment elsewhere while remaining on leave, ROA.1518, and even after the preliminary-injunction denial, they were offered the further option of preferential rights to any available non-customer-facing jobs, ROA.3503, 3510, 3513. (Plaintiffs neglect to mention (Br. 10-11) these additional aspects of the accommodation afforded to flight-crew members.) United also explained, before the preliminary-injunction denial, that flight-crew members on unpaid leave can return to work once the pandemic "meaningfully recedes" as defined by an objective CDC benchmark—*i.e.*, as soon as the 7-day rolling average of COVID-19 cases in the country is below 10,000. ROA.1517, 3181-82, 3745-47.

B. Plaintiffs Seek An Extraordinary Preliminary Injunction That Would Prevent United From Placing Any Of Them On Unpaid Leave Even Before Administrative Exhaustion And Final Adjudication Of Their Claims

1. On September 21, plaintiffs, United employees with religious and/or medical objections to COVID-19 vaccination, filed suit under Title VII of the Civil

[10] ROA.2099, 3752-54, 3768-69, 3787-88, 3800-06.

Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. ROA.28. Despite the fact that United was still in the process of designing feasible accommodations, pp. 7-8, *supra*, plaintiffs claimed, for a purported nationwide class, that United had failed to reasonably accommodate them and had retaliated against them. ROA.28-29. Although plaintiffs had not exhausted the EEOC administrative process, they sought preliminary injunctive relief pending completion of that process. ROA.52.

2. United moved for partial dismissal for lack of personal jurisdiction with respect to three plaintiffs and any putative absent class members whose claims against United were not connected to Texas. ROA.477. On November 8, the district court granted the motion in part and denied it part. ROA.3249.

Judge Pittman denied the motion as unripe with respect to the putative members of the uncertified class, ROA.3260-62, and denied the motion on the merits as to Sambrano and Kincannon because they reside in Texas, notwithstanding that they are not employed by United there, ROA.3257-59. But Judge Pittman granted the motion as to a sixth plaintiff, Turnbough, because he neither was employed by United in Texas nor even resided there. ROA.3259. Judge Pittman thus expressly declined to consider Turnbough's claims in the preliminary-injunction ruling. ROA.3264. Plaintiffs have expressly abandoned their appeal of Turnbough's dismissal, Br. 12 n.4, and could not properly appeal that interlocutory order anyway,

Seahorse Boat & Barge Corp. v. Jacksonville Shipyards, Inc., 617 F.2d 396, 397 (5th Cir. 1980) (per curiam); *Escobar v. Montee*, 895 F.3d 387, 391-93 (5th Cir. 2018). Accordingly, Turnbough's claims are not before this Court, despite plaintiffs' improper continued reliance on his asserted injuries, Br. 2, 47 (citing ROA.3703-04).

3. Later on November 8, the district court denied a preliminary injunction, after having held the evidentiary hearing on October 13-14. ROA.3266-67. Judge Pittman held that plaintiffs did "not clearly carry their burden to show they would suffer imminent, irreparable harm absent a preliminary injunction." ROA.3263; *see* ROA.3268-75. Based on that holding, the court explained that it "need not address" the merits. ROA.3275. Although Judge Pittman nevertheless made some observations in that regard, ROA.3275-77, he emphasized that he was doing so "without ruling on the likelihood of success," ROA.3275.

Rather than seeking immediate appellate relief, plaintiffs sought reconsideration on November 11. ROA.3278. The district court denied the motion on November 19, holding that plaintiffs were improperly "attempt[ing] to relitigate" decided issues. ROA.3407. Judge Pittman explained that he had "spent seven-and-a-half pages of analysis considering each specific irreparable-harm theory," and "each theory fell short" under "binding precedent" and material "evidence." ROA.3407; *see* ROA.3407-09. He also rejected plaintiffs' "improper" attempts "to introduce new evidence" in affidavits proffered with their reply brief. ROA.3408.

On November 23, plaintiffs sought an injunction pending appeal, which the district court immediately denied. ROA.3419, 3444-45. Yet plaintiffs waited eight days, until December 1, to file an "emergency" motion in this Court seeking relief by December 15. Expressly agreeing with the district court's reasoning, Judges Stewart and Haynes denied an injunction pending appeal, over Judge Ho's dissent, but expedited the appeal. *Sambrano*, 2021 WL 5881819, at *1.

SUMMARY OF ARGUMENT

I. The district court did not abuse its discretion in denying the preliminary injunction for lack of irreparable injury. The general rule under Title VII and the ADA is that the broad remedial scheme available if an employee ultimately prevails in challenging an employer's denial of pay is adequate to foreclose the extraordinary remedy of restoring the employee to the payroll pending final judgment.

Plaintiffs principally argue that a special exception should be recognized when employees face an "impossible choice" between adhering to their religious convictions or ensuring continued receipt of a paycheck. But that choice is faced by *every* Title VII plaintiff challenging an employer's failure to accommodate, or threat to discriminate against, a religious practice or belief. Yet plaintiffs have neither cited a single Title VII case ever accepting that theory nor provided any limiting principle that would prevent their purported exception from swallowing the general rule. Indeed, accepting their argument would be directly contrary to this Court's precedent

emphasizing the need for Title VII plaintiffs to demonstrate irreparable injury independent of the nature of their merits claims, and it would create a circuit split with recent decisions from the First and Second Circuits rejecting irreparable injury in Title VII religion challenges to COVID-19 vaccination policies.

Plaintiffs separately argue for an exception on the ground that temporary unpaid leave will have extraordinary effects on them due to their personal financial circumstances and United's seniority system. But the various distinctions they try to draw are all legally illusory. It is commonplace for employees to suffer the types of collateral consequences from lost pay and inadequate savings that plaintiffs allege. And it is also commonplace for courts to use their broad "make whole" equitable relief to remedy lost seniority, both prospectively and retroactively. Moreover, plaintiffs' asserted injuries have insufficient factual basis in the record, because they largely rest on vague generalities and hypothetical speculation rather than the types of actual and imminent injuries for which preliminary injunctions are reserved.

Finally, these points are underscored by focusing on the five plaintiffs individually. Three of them (Castillo, Hamilton, and Jonas) have not been placed on unpaid leave at all, and thus they lack both the injuries and claims asserted. As for the other two, neither Kincannon nor Sambrano has ever even suggested that being placed on unpaid leave may cause them to accept vaccination in violation of their religious beliefs. To the contrary, Kincannon testified that she would never

accept the vaccine, and Sambrano is a well-paid pilot whose desire to maintain his lifestyle hardly reflects a crisis of conscience that demands interim relief pending litigation. In stark contrast to the significant and unrecoverable operational and financial costs to United if a preliminary injunction were granted but later vacated, these employees' asserted harms are ordinary, speculative, and remediable.

II. In the alternative, the preliminary-injunction denial can be affirmed because plaintiffs have not exhausted the EEOC administrative process. Title VII and the ADA clearly prohibit employees from bringing a civil action before the EEOC issues a right-to-sue notice, and the statutes expressly authorize only the EEOC to seek interim relief. Plaintiffs have insisted that they can seek a preliminary injunction "to maintain the status quo" pending administrative exhaustion, but they have not even tried to reconcile that position with the statutory text.

Instead, they have relied entirely on a 50-year-old precedent of this Court that asserted the equitable power to create an implied right for employees to seek a preliminary injunction despite an express statutory exhaustion requirement. But the Supreme Court has since repudiated that mode of analysis, and this Court has thus recognized that similar precedents have been effectively overruled. Regardless, the case is also factually inapposite, because this Court reversed the dismissal there only after the EEOC had both obtained interim relief in its own suit and granted the employee her right to-sue notice—neither of which has happened here.

STANDARD OF REVIEW

This Court reviews a district court's denial of a preliminary injunction only for abuse of discretion, with any underlying factual findings reviewed for clear error and legal conclusions reviewed de novo. *Big Tyme Invs., LLC v. Edwards*, 985 F.3d 456, 463 (5th Cir. 2021). A preliminary injunction is "an extraordinary remedy," and plaintiffs must "clearly carr[y] the burden of persuasion on all four [of these] requirements": "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Id.* at 463-64. Accordingly, when plaintiffs "*cannot* show" the requisite likelihood of irreparable injury, "there is no need for the court to address the other requirements for a preliminary injunction." *See id.* at 464.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF IRREPARABLE INJURY THAT WARRANTS A PRELIMINARY INJUNCTION IN THIS EMPLOYMENT DISPUTE

Judge Pittman followed black-letter law. Employees alleging adverse actions in violation of federal employment statutes generally do not suffer irreparable injury warranting the extraordinary relief of a preliminary injunction before the lawfulness of the challenged action is finally adjudicated. Courts have repeatedly reaffirmed this settled rule in denying preliminary injunctions against COVID-19 employment policies, and plaintiffs do not cite a single contrary case in this or any other employment context. Instead, they ask for an unprecedented exception based on a mischaracterization of both the law and the facts. In denying that request, the district court did not abuse its discretion and in fact was entirely correct. ROA.3268-75, 3407-09. The motion-panel majority so held, *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2021 WL 5881819, at *1 (5th Cir. Dec. 13, 2021) (per curiam) (denying injunction pending appeal "for the reasons stated in the district court's [opinions]"), and the merits panel should hold likewise.

A. Employees Challenging Loss Of Pay Under Title VII Or The ADA Generally Cannot Demonstrate Irreparable Injury Warranting Extraordinary Interim Relief Given The Comprehensive Remedial Scheme Available If They Ultimately Succeed On The Merits

Irreparable injury does not exist where there is an "adequate remedy at law," *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011), and even "[t]he possibility that

adequate compensatory or other corrective relief will be available … weighs heavily against" such injury, *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012). Nor can the asserted injury be "speculative" rather than imminent, *Janvey*, 647 F.3d at 600, because the mere "possibility of irreparable harm is inconsistent with [the] characterization of injunctive relief as an extraordinary remedy," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Likewise, where an asserted injury is "ubiquitous" in litigation, it "cannot serve as the basis for the issuance of a preliminary injunction," *Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.*, 622 F.3d 36, 42 (1st Cir. 2010), which is an "extraordinary and drastic remedy, not to be granted routinely," *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989); *accord Eli Lilly & Co. v. Am. Cyanamid Co.*, 82 F.3d 1568, 1578 (Fed. Cir. 1996) (rejecting irreparable-injury theory of "lost opportunity" to fund research using profits that would have been earned absent alleged patent infringement, because "[s]uch a rule would convert the 'extraordinary' relief of a preliminary injunction into a standard remedy").

Given these principles, the general rule is that employees cannot obtain preliminary "injunctions against discharge in routine termination [or unpaid leave] cases," because "[i]t is practically universal jurisprudence in labor [and employment] relations in this country that there is an adequate remedy" through "after the fact" relief like "reinstatement and back pay." *Garcia v. United States*, 680 F.2d 29, 31-

32 (5th Cir. 1982). Title VII and the ADA, in particular, broadly authorize "make whole" equitable relief, including "back-pay" and "retroactive seniority." *Claiborne v. Illinois Cent. R.R.*, 583 F.2d 143, 149 (5th Cir. 1978); *see* 42 U.S.C. §§ 2000e-5(g), 12117(a); *see also id.* § 1981a (authorizing additional monetary damages). Moreover, in cases where "prompt judicial action is necessary to carry out the purposes of [these statutes]," Congress has expressly empowered the EEOC, but not employees, to seek a preliminary injunction pending exhaustion of the administrative process. 42 U.S.C. § 2000e-5(f)(2); *see* Part II, *infra*.

Accordingly, the Supreme Court has held that neither the direct "loss of income" and benefits for a discharged employee nor the indirect consequences flowing from things like "an insufficiency of savings" can "support a finding of irreparable injury, however severely they may affect a particular individual." *Sampson v. Murray*, 415 U.S. 61, 91-92 & n.68 (1974). Even if such consequences may not be fully compensable, that is "the normal situation" in employment disputes, *id.* at 92 n.68, and cannot justify the "extraordinary and drastic" remedy of forcing an employer to put employees back on the payroll before the lawfulness of the challenged action is finally adjudicated, *White*, 862 F.2d at 1211. Although the Court reserved a possible exception for a "genuinely extraordinary situation," it expressly rejected such treatment for "external factors common to most discharged employees." *Sampson*, 415 U.S. at 92 n.68.

This Court has held likewise. In a leading case, it reversed an irreparable-harm finding even when a discharged employee's lost "salary represent[ed] 45% of her family's income," "probably lead[ing] to foreclosure of her home," and "the loss of medical insurance benefits" also imperiled her mental health in "her current overwrought condition." *Morgan v. Fletcher*, 518 F.2d 236, 238, 240 (5th Cir. 1975); *see White*, 862 F.2d at 1211-13 (citing additional cases); *Allied Pilots Ass'n v. American Airlines, Inc.*, 898 F.2d 462, 466 (5th Cir. 1990) ("irreparable injury is no more threatened … than in any other minor [union grievance] involving discharge or discipline of an employee").

Indeed, the general rule against preliminary injunctions to prevent lost pay in employment cases has been expressly applied by two other courts of appeals in the specific context of Title VII religious-accommodation claims against COVID-19 vaccination employment policies. When employees challenged a state vaccine mandate for healthcare facilities on the ground that it would prevent their employers from accommodating their religious objections and thereby result in loss of employment, the Second Circuit held that a preliminary injunction was not warranted given the lack of irreparable injury. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 291, 294-95 (2nd Cir. 2021) (per curiam). Invoking *Sampson* and its progeny, the court emphasized that "[i]t is well settled … that adverse employment consequences are not the type of harm that usually warrants injunctive relief because

economic harm resulting from employment actions is typically compensable with money damages." *Id.* at 294. The First Circuit held likewise in denying an injunction pending appeal when employees had been terminated by a private hospital. *Together Employees v. Mass Gen. Brigham Inc.*, 19 F.4th 1, 2-3, 7-8 (1st Cir. 2021); *accord Jane Doe 1 v. Northshore Univ. Healthsystem*, No. 21-5683, 2021 WL 5578790, at *6-8 (N.D. Ill. Nov. 30, 2021), *injunction pending appeal denied*, No. 21-3242 (7th Cir. Dec. 13, 2021), *appeal dismissed* (Dec. 16, 2021).

Notably, the Supreme Court denied applications for injunctive relief in both cases, with no Justice dissenting as to these particular holdings. *Dr. A v. Hochul*, No. 21A145, 2021 WL 5873126 (U.S. Dec. 13, 2021); *Together Employees v. Mass Gen. Brigham Inc.*, No. 21A175 (U.S. Nov. 29, 2021) (Breyer, J., in chambers). Similarly, even though Judge Ho dissented from the denial of the injunction pending appeal in this case, he acknowledged the general rule that "[i]n a garden variety case of unlawful termination, … there is no irreparable injury and thus no injunctive relief" because "the loss of a paycheck … can be remedied by an award of monetary damages." *Sambrano*, 2021 WL 5881819, at *2.

B. There Are No Extraordinary Circumstances Here That Warrant Giving Plaintiffs A Special Exception From The General Rule

Plaintiffs make two separate arguments for why they have unique irreparable injuries distinguishing them from the typical employee facing loss of pay: (1) they primarily contend that the psychological consequences of having to choose between

their paychecks and their religious beliefs impose an immediate and irreversible burden on their religious exercise, Br. 23-34; and (2) they alternatively contend that the material consequences of temporary unpaid leave cannot be fully redressed at final judgment in their particular circumstances, Br. 34-47. Taken on their own terms, these purported distinctions are illusory as a legal matter. And even setting that aside, they also have no factual basis in the evidentiary record. That is especially so because three of the five plaintiffs on appeal have not been placed on unpaid leave at all, and the other two cannot plausibly establish either theory of irreparable injury given their personal circumstances. Plaintiffs thus have not come close to showing that Judge Pittman abused his discretion in denying the extraordinary remedy of a preliminary injunction in an employment dispute.

1. An employee's objection to the adequacy of religious accommodation is not irreparable injury per se just because the employee must choose between a paycheck and a religious belief during the pendency of litigation

Plaintiffs principally argue that, even if the tangible consequences of temporary unpaid leave can be remedied at final judgment, they will still suffer irremediable intangible harm from the psychological consequences of the choice they face while litigation is pending. In particular, they contend that "forcing them to choose between their jobs and their beliefs" is an "impossible choice" that *itself* constitutes irreparable injury. Br. 23, 29; *see Sambrano*, 2021 WL 5881819, at *2 (Ho, J., dissenting) (urging that this "Hobson's choice[]" is an "irreparable injury"

because it "presents a crisis of conscience" and thereby is a "burden on religion"). In a Title VII employment case, that theory is contrary to all precedent and devoid of any limiting principle.

a. Federal courts have consistently rejected the "impossible choice" theory in the context of Title VII challenges to COVID-19 vaccination policies. For example, the Second Circuit in *We the Patriots* found no irreparable harm despite recognizing that the employees there "undoubtedly face[d] a difficult choice if their employers deny religious accommodations—whether to be vaccinated despite their religious beliefs or whether to risk termination of their jobs." 17 F.4th at 294-95; *see also Northshore Univ.*, 2021 WL 5578790, at *6-8 (agreeing with the district courts here and in other cases that the "impossible choice" theory lacks merit). Similarly, the First Circuit in *Together Employees* emphasized that "[t]he fact that an employee may be psychologically troubled by an adverse job action does not usually constitute irreparable injury warranting injunctive relief." 19 F.4th at 8. To be sure, the employees there could not "point to an 'impossible choice'" because "they ha[d] already made their choices." *Id.*; *see id.* at 6 (noting that all but one had either resigned or been terminated). If anything, though, that just underscores the folly of plaintiffs' theory that a "choice" itself can somehow be deemed an irreparable injury—on their upside-down view, their injury is irreparable solely because, as relevant here, United has been *more accommodating* than the employer

in *Together Employees*. Properly refraining from terminating plaintiffs, United has given them the *ongoing option* of unpaid leave (and more), yet plaintiffs try to leverage this accommodation to transform an otherwise-remediable financial harm into a purportedly irreparable psychological harm.

Moreover, the "impossible choice" theory of irreparable injury would apply in *every* Title VII religion case. Whenever an employer allegedly fails to reasonably accommodate an employee's religious practices or beliefs, or even discriminates against an employee on that basis, the employee is faced with a choice. While litigation is pending, the employee must either deviate from his religion in order to preserve (or try to restore) his job status, or else maintain the faith but accept the adverse employment consequences unless and until he prevails at final judgment and receives permanent remedies. Take, for example, the Supreme Court's seminal Title VII religious-accommodation case, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). There, an employee sought an accommodation to avoid working on his Sabbath, but the employer declined to grant one and fired the employee for refusing to work his assigned shift; the employee then exhausted administrative remedies with the EEOC and sought a permanent injunction after a bench trial. *Id.* at 69. Compared to here, that employee undoubtedly faced a much greater financial burden and quite possibly faced a much greater dilemma about whether to choose

his job or his day of rest. On plaintiffs' theory, therefore, irreparable injury would have existed in *Hardison* and similarly in every other Title VII religion case.

Recognizing that this position is untenable, plaintiffs try (Br. 29) to distinguish "the mine-run employment dispute" on the puzzling ground that accepting the vaccine "will have permanent (and potentially eternal) consequences," but that an employee forced, for example, "to work on the Sabbath" for years while litigation is pending can at least resume his day of rest if and when he ultimately prevails. Even setting aside the factual problem that *none* of the plaintiffs here has actually alleged that they will (or even may) take the vaccine in violation of their religious beliefs, pp. 43-45, *infra*, there is a more fundamental legal problem with this purported limiting principle. Whether a (potentially lengthy) period of breaking one's Sabbath has less "permanent" or "eternal" "consequences" than taking a vaccine one believes unduly connected to aborted fetal stem cells is an *inherently theological* question—and "civil courts," of course, are constitutionally forbidden from trying "to resolve ecclesiastical questions." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

Thus, if this Court holds that simply being faced with the "impossible choice" to take the vaccine to avoid lost pay is itself irreparable, there will be no avoiding the flood of cases arguing that it is likewise irreparable to be faced with the equally "impossible choice" to break the Sabbath, or to wear a headscarf, or to violate any

of the myriad practices or beliefs that give rise to Title VII religion claims. Indeed, the same would go for countless other Title VII cases where employees face an "impossible choice" between enduring race- or sex-based discriminatory working conditions and leaving their jobs.

Accordingly, plaintiffs' theory is irreconcilable with this Court's precedent in *White*. There, after reaffirming that "[a] preliminary injunction [is] an extraordinary and drastic remedy, not to be granted routinely," the Court rejected "plaintiff's argument … that irreparable harm need not be established independently in a Title VII case in order for an injunction to issue." 862 F.2d at 1211. Instead, Judge Smith's opinion emphasized, "irreparable harm must be proven separately and convincingly" under Title VII, regardless of the "nature of the underlying claim." *Id.* at 1212. None of those precepts can be squared with plaintiffs' view here that irreparable injury is satisfied based solely on the "impossible choice" faced by *every* employee bringing a Title VII religion claim.

b. Tellingly, despite advancing a theory that would mean the irreparable-injury requirement is satisfied in every Title VII religion case, plaintiffs cite *no* case accepting the theory.

i. Plaintiffs rely repeatedly and almost entirely on *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021), where a motion panel held that employees were irreparably injured by a vaccine requirement imposed by the federal

government on many employers. Br. 1, 21, 24, 30, 34; *accord Sambrano*, 2021 WL 5881819, at *3 (Ho, J., dissenting). But that holding expressly rested on the special treatment courts sometimes afford to "the loss of constitutional freedoms." *BST Holdings*, 17 F.4th at 618. The motion panel did not conclude that putting religious employees to a "choice between their job(s) and their jab(s)" is *always* irreparable because of the psychological toll placed on their consciences; in fact, some employees there objected to vaccination on *non-religious* grounds. *Id.* at 618 & n.21. The panel instead held that, because the particular choice at issue "substantially burden[ed] the liberty interests" of all objecting employees given that it was imposed by the government, that burden triggered the principle that "the loss of constitutional freedoms for even minimal periods of time … unquestionably constitutes irreparable injury." *Id.* at 618 (quotation marks omitted); *accord Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam).

As courts have consistently recognized, that principle is plainly inapplicable to a private employer's alleged violation of Title VII's *statutory* protections for religious employees. *Together Employees*, 19 F.4th at 8; *We The Patriots*, 17 F.4th at 294; *Northshore Univ.*, 2021 WL 5578790, at *7 (citing cases). Judge Pittman thus correctly "decline[d] to elevate statutory protections from private-company-discrimination to the level of constitutional protections from government encroachment." ROA.3270. Plaintiffs have not identified any case holding that the

temporary deprivation of asserted statutory freedoms is irreparable injury per se. To the contrary, this Court in *White* insisted that employees invoking Title VII must independently prove irreparable injury. 862 F.2d at 1211-12.

ii. Plaintiffs try to muddy this fundamental distinction by asserting that Title VII's religious provisions have "roots in the First Amendment" and "protect the same rights in private employment as the Constitution protects" in public employment. Br. 25; *accord Sambrano*, 2021 WL 5581819, at *3-4 (Ho, J., dissenting). That is wrong thrice over.

First, Title VII's application to private employers like United has its roots solely in Congress's power to regulate interstate commerce. 42 U.S.C. § 2000e(b), (g)-(h). Because the Free Exercise Clause does not, of course, apply to such employers at all, Title VII's application to them plainly would exceed the scope of Congress's power to enforce the Clause even if the two were otherwise coterminous as to the conduct prohibited. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250-52 (1964). From a constitutional perspective, Title VII thus protects interstate commerce rather than religious exercise, and there is no authority for the proposition that temporary deprivations of commercial rights are per se irreparable.

Second, Title VII's religious-accommodation requirement far exceeds what the Free Exercise Clause requires even for public employers. Under Title VII, employers must go beyond "mere neutrality with regard to religious practices" and

"give[] them favored treatment," as employers are "affirmatively obligat[ed]" to prove a reasonable accommodation absent undue hardship. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). By contrast, the Free Exercise Clause does not require public employers to provide religious employees with special "exemption[s]" from "neutral, generally applicable" policies like United's vaccination requirement. *Employment Division v. Smith*, 494 U.S. 872, 880-81 (1990). Thus, while plaintiffs invoke a pre-*Smith* court of appeals case from the 1970s comparing Title VII to the Free Exercise Clause (Br. 25), binding Supreme Court precedent today holds that the Clause provides no authority for Congress to require exemptions from nondiscriminatory rules of even public employers, much less private employers. *City of Boerne v. Flores*, 521 U.S. 507, 512-14, 529-36 (1997); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021).

Third, at a minimum, Title VII's religious protections are no more closely tied to the Free Exercise Clause than the statute's protections against racial and sexual discrimination are tied to the Equal Protection Clause. *See Heart of Atlanta*, 379 U.S. at 245-46, 249. Indeed, plaintiffs appear to acknowledge (Br. 25) that their theory applies to *any* "statutory anti-discrimination … rights." But it is well established that temporary deprivations of Title VII rights are not deemed irreparable per se, including even when an employee must choose whether to endure race- or sex-based discriminatory working conditions while litigation is pending. Once more,

"irreparable harm must be proven separately and convincingly" under Title VII, regardless of the "nature of the underlying claim." *White*, 862 F.2d at 1212. If this Court invents a new irreparable-injury exception for religious claims, there will be no principled distinction to stop that from swallowing the ordinary Title VII rule.

iii. Given all that, it is unsurprising that plaintiffs fail to identify a single case subjecting a Title VII religion claim to the special irreparable-harm rule applicable to temporary deprivations of constitutional rights. As with *BST Holdings*, the few other cases plaintiffs cite are distinguishable in one or more critical respects.

Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996), did not involve either Title VII or lost pay. Rather, it involved a claim against a state prison for keeping an inmate locked in his cell continuously, except "for one ten-minute shower per week," because he refused to submit to certain medical screening for religious reasons. *Id.* at 471. The Second Circuit held, unsurprisingly, that *prolonged confinement* due to religious exercise (and the resulting *non-monetary* harms) constituted irreparable injury. *Id.* at 482. That holding in no way suggests that the quintessential monetary harm of temporary unpaid leave due to religious exercise is irreparable, notwithstanding Title VII's broad remedial scheme.

Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001), *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003), and *Murphy v. Zoning Commission*, 148 F. Supp. 2d 173 (D. Conn. 2001), also did not

involve Title VII or lost pay, and they did not even involve a "choice." Rather, they involved *government bans* on religious exercise—legally prohibiting certain pastoral visits, *Kikimura*, 242 F.3d at 963, sacramental drug use, *O Centro*, 342 F.3d at 1187, and prayer group locations, *Murphy*, 148 F. Supp. 2d at 179-81. Here, by contrast, the two plaintiffs offered unpaid leave may lawfully follow their religion and then seek monetary and equitable relief against United, which is precisely what they are doing. pp. 43-45, *infra*.

Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444 (7th Cir. 2013), did not involve irreparable injury. Rather, it involved a Title VII religious-accommodation claim that was litigated at summary judgment after the employee had been fired for adhering to his religious practice despite the employer's refusal to accommodate it. *Id.* at 447. Thus, regardless of the extent to which, as a substantive matter, "Title VII aim[s] to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices," *id.* at 456, the case proves United's point. As a procedural matter, employees still have to face the choice of whether to sacrifice their jobs *while litigation is pending*—unless and until *the EEOC* determines that "prompt judicial action is necessary to carry out the purposes of" the statute, 42 U.S.C. § 2000e-5(f)(2), which that agency evidently has not so determined here.

iv. In all events, *BST Holdings* is distinguishable on additional grounds. Most importantly, the employees there lacked an adequate remedy at final judgment,

because, in stark contrast to Title VII's broad remedial scheme, there was no mechanism to recover lost pay if they were terminated for refusing to be vaccinated and the federal mandate was ultimately invalidated. No statute authorized backpay or other monetary relief in that context, either from their employers (who would themselves not be acting unlawfully in complying with a mandate that exceeded the federal government's powers) or from the federal government (which has not waived sovereign immunity for such damages). Moreover, the choice between a "job" and a "jab" is qualitatively different when imposed by federal regulation on a broad range of employers, because that reduces an employee's ability, which plaintiffs still possess, to find alternative employment that does not require vaccination.

Accordingly, while it is true that irreparable injury turns on the plaintiff's harms rather than the defendant's status, *Sambrano*, 2021 WL 5881819, at *3 (Ho, J., dissenting), that observation misunderstands the nature of the identified injury in *BST Holdings*. Because the case involved a challenge to a regulatory mandate imposed by the federal government, *the employees' injuries* were critically different from plaintiffs' injuries here: (1) those employees invoked the special rule for constitutional harms; (2) they could not recover lost pay even at final judgment; and (3) their options to find alternative employment were significantly constrained.

* * *

In sum, plaintiffs here can maintain their religious beliefs by accepting the accommodations United offered or seeking alternative employment. Neither choice imposes irreparable injury under settled precedent given the comprehensive remedial scheme Title VII provides. Any holding otherwise would find no support in *BST Holdings*, would contradict this Court's precedents in *White* and similar cases, and would create a circuit split with *Together Employees* and *We The Patriots* (both of which the Supreme Court declined to disturb). This Court should reject plaintiffs' radical "impossible choice" theory of irreparable injury.

2. The material consequences of temporary lost pay for United's employees are no less capable of being remedied at final judgment than the analogous harms of all other employees suing under Title VII or the ADA

Plaintiffs make various fallback arguments that the tangible effects of temporary unpaid leave on United's employees are uniquely incapable of being redressed even if they ultimately succeed on the merits. But none of the collateral consequences they identify remove them from the category of "garden variety case[s]" of removal from work where the availability of monetary and equitable relief means "no irreparable injury and thus no [preliminary] injunctive relief." *Sambrano*, 2021 WL 5881819, at *2 (Ho, J., dissenting). At a minimum, Judge Pittman did not commit a reversible abuse of discretion in this regard.

a. The district court correctly rejected plaintiffs' reliance on "the secondary effects of lost income—loss of housing, health care, possible loss of education and employment opportunities, and psychological harm." ROA.3272; *see* Br. 45-47. As Judge Pittman observed, although "[a] loss of income, even temporary, can quickly ripple out to touch nearly every aspect of people['s] lives, … the case law is clear that hardships stemming from loss of income are remediable" rather than irreparable. ROA.3273-74.

Plaintiffs try (Br. 48) to fit their collateral harms within *Sampson*'s potential exception for "genuinely extraordinary" situations. But this Court in *Morgan* reversed an irreparable-injury finding even though a discharged employee's home probably would be foreclosed and her mental health imperiled by the loss of insurance benefits, as none of those unfortunate results went beyond the "normal" and "common" effects of "insufficiency of savings" that the Supreme Court anticipated in *Sampson*. p. 22, *supra*. Simply put, plaintiffs' asserted consequential harms are not even different in degree, much less kind, from what binding precedent has already rejected.

Nor can plaintiffs evade this precedent by invoking (Br. 46) *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), as that case is inapposite. *Burlington* was a case about when harm is sufficiently *significant* to constitute actionable retaliation on the merits, not when harm is sufficiently

irreparable for purposes of interim remedies. *Id.* at 56-57. Accordingly, the specific passage cited by plaintiffs speculated about the hypothetical availability of permanent injunctive relief against future retaliatory suspensions, but it never suggested, let alone held, that an initial suspension itself warrants *preliminary* injunctive relief. *Id.* at 72.

b. The district court also correctly rejected plaintiffs' objection that "they would not accrue seniority while on unpaid leave." ROA.3270; *see* Br. 41-45. As Judge Pittman explained, courts have "broad discretion" under Title VII and the ADA to provide equitable "make whole" relief, which "*includes the granting of remedial seniority*." ROA.3271; *see* p. 22, *supra*. In nevertheless insisting that restoration of seniority is unavailable here—contrary to their own interests if they were to prevail on the merits—plaintiffs make a factual error and a legal error.

Factually, plaintiffs mischaracterize the testimony of a United witness. They emphasize the irrelevant point that he testified United could not "unilaterally" restore seniority. ROA.3748. But when he was then asked whether United could do so "if the Judge were to order" it, he testified that, while "not being an expert in labor relations, … while [United] would, of course, need to follow a Federal order, we'd probably be grieved by the unions for violating our [CBAs]." ROA.3748-49. And as plaintiffs are well aware, the Supreme Court has rejected as "meritless" a "union's contention that retroactive seniority contrary to the collective-bargaining agreement

should not be awarded" under Section 2000e-5(g). *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399 (1982).

Legally, plaintiffs misconstrue *Moseley v. Goodyear Tire & Rubber Co.*, 612 F.2d 187 (5th Cir. 1980). That case itself reaffirmed that make-whole relief "includes the granting of remedial seniority." *Id.* at 191. Although it recognized limits on when restored seniority can be used to retroactively displace incumbent employees in existing jobs, *see id.* at 191-92, *Moseley* confirms that remedial seniority would undoubtedly "ensure that [plaintiffs] are able to make *future* bids with their seniority level intact," as they appear to acknowledge, Br. 37.

c. The district court likewise correctly rejected plaintiffs' fixation on *retroactive* seniority and purported "lost bidding opportunities while on unpaid leave." ROA.3407; *see* Br. 34-40. The availability of "make whole" equitable relief not only addresses concerns about lost seniority going forward, but lost bidding opportunities in the past. ROA.3271, 3408. That is so for several reasons.

First, plaintiffs overread the limits in *Moseley* on "displa[cing] or 'bump[ing]' a permanent employee working a regular assignment." 612 F.2d at 191. Although the Court suggested that incumbent employees generally should not be displaced from "their jobs" and should "receive the same hourly wage," it also recognized that such employees may well "suffer disadvantages by the restructuring of a seniority system" to redress harms to discrimination victims, including losing opportunities

to bid for particular assignments or "schedules" that may be "preferable" depending on an employee's personal circumstances. *Id.* at 190-92. Here, plaintiffs' alleged "lost bidding opportunities" concerning things like the "job locations, flight routes, or schedules" (Br. 35) are not of the type where "bumping" of incumbents is foreclosed under the line *Moseley* drew. *Cf. Walsdorf v. Bd. of Comm'rs*, 857 F.2d 1047, 1054 & n.2 (5th Cir. 1988) (flagging that, although this Court is "properly hesitant" to displace incumbents, it has "not foreclose[d] the possibility …, under appropriate circumstances," of granting such relief).

Moreover, even where displacement of incumbents is inappropriate, "victims of employment discrimination are to be given a preference for future vacancies," *Moseley*, 612 F.3d at 191, and potentially also "front pay" for the lost job in the interim, *Walsdorf*, 857 F.3d at 1054, *not* a preliminary injunction. Those remedies provide an "adequate remedy" defeating irreparable injury, *Janvey*, 647 F.3d at 600, especially because otherwise preliminary injunctions would be "granted routinely" in employment disputes in unionized workplaces, *contra White*, 862 F.2d at 1211; p. 21, *supra*. At a minimum, Judge Pittman did not abuse his discretion in recognizing that, notwithstanding *Moseley*, his "'broad discretion' to craft relief" (ROA.3271) provided sufficient "possibility [of] adequate … corrective relief" to deny a preliminary injunction, *Dennis Melancon*, 703 F.3d at 279.

Second, the "lost bidding opportunity" theory is also entirely "speculative." *Janvey*, 647 F.3d at 600. Although plaintiffs' brief and the testimony cited therein is replete with *hypothetical* opportunities that might be lost, *e.g.*, Br. 36 (citing ROA.3639-41 (Sambrano)), plaintiffs have not identified (1) any actual, imminent opportunity, for which they (2) will be unable to bid while on temporary unpaid leave, (3) also unable to "bump" the incumbent once they return to work and their seniority is restored, and (4) cannot at least receive redress through preferential future bidding and front pay.

The two most concrete examples of "lost" opportunities plaintiffs give are an international purser position for flight attendants that Kincannon would like to apply for, and bonus payments that Jonas could receive for signing up United credit card applicants while working in the United Club, especially during the holiday season. Br. 38-39 (citing ROA.3383, 3389-90). But they neglect to inform this Court that the district court rejected as "improper" the affidavits belatedly raising these examples for the first time as part of plaintiffs' reply brief in support of their motion to reconsider. ROA.3408. Moreover, at the preliminary-injunction hearing, Kincannon initially conceded that an order "restor[ing] [her] seniority … would address [her] issue," ROA.3689, and did not identify any non-hypothetical "lost opportunities" when her counsel tried to rehabilitate her testimony, ROA.3690. Likewise, wholly apart from United's conduct, Jonas has so far been unable to return

to work in light of her COVID-19 infection. ROA.3503, 3733. All this shows why the mere "possibility of irreparable harm is inconsistent with [the] characterization of injunctive relief as an extraordinary remedy." *Winter*, 555 U.S. at 22.

Third, in all events, the requested preliminary injunction would not likely redress the purported injury of "lost bidding opportunities." As Judge Pittman explained, "[p]laintiffs failed to offer evidence that they could bid on jobs while on paid leave that they would be unable to bid upon while on unpaid leave." ROA.3409. Plaintiffs completely ignore this dispositive factual finding.

d. Finally, the district court correctly rejected plaintiffs' theory that flight-crew members have "perishable skills" that would "deteriorate" while on leave and thus require "additional training" and flight time to replenish once they return to work. ROA.3274; *see* Br. 47-48. As Judge Pittman found, "this deterioration of skills is too speculative," because it would occur over "several months, not days," and also can be "mitigate[d]" through activities like "simulated flights." ROA.3274; *see* ROA.3722. Moreover, as he further reasoned, the "skill-deterioration argument sweeps too broad" because "nearly every skilled professional in employment discrimination cases could make the same claim to obtain [preliminary] injunctive relief." ROA.3274.

Plaintiffs fail to respond to any of this reasoning. They nevertheless double-down on the theory by emphasizing (Br. 47) that lost time cannot be recovered before

retirement. Even setting aside that they rely primarily on testimony from Turnbough despite his dismissal from the suit, ROA.3703-04, their argument makes no sense here. Sambrano is seven years short of his intended retirement at age 65. ROA.3989. It is absurd for plaintiffs to argue that he faces an imminent irreparable injury from the hopelessly speculative effect that unpaid leave of *uncertain duration* may have on his ability to achieve his professional goals in the years to come.

3. Focusing on each plaintiff individually underscores the failure of any of them to show irreparable injury

a. As a threshold matter, three plaintiffs—Castillo, Hamilton, and Jonas—are not flight-crew members and thus are not being placed on unpaid leave at all. Each instead has been provided a masking-and-testing accommodation in either their ordinary position or a substitute role. pp. 8-9, *supra*. Their brief does not forthrightly acknowledge, but never actually disputes, this critical fact. Thus, they face neither any "impossible choice" nor any collateral consequence of lost pay, and they are suffering *no* actual or imminent harm (and have *no* merits claim). They do suggest that their masking-and-testing accommodations may be prematurely rescinded (Br. 12), but such speculation is neither factually substantiated nor legally sufficient for a preliminary injunction. pp. 9-10, 21, *supra*.

As for Sambrano and Kincannon, neither one of them—nor any of the other plaintiffs, for that matter—actually testified that temporary loss of pay has created "a crisis of conscience" that is causing them to "wrestle with self-doubt" about their

religious refusal to be vaccinated. *Sambrano*, 2021 WL 5881819, at *3 (Ho, J., dissenting). In fact, Kincannon testified the exact opposite: "[n]o matter the cost, though, I will never take this vaccine." ROA.4011; *see* ROA.3691-92 (further testifying that she will "stay as long as [she] can, but [then] will have to find a job that doesn't require the vaccine," even though "there's not much out there that I know of"). The *only* specific employee plaintiffs ever identify who allegedly agreed to the vaccine because of dissatisfaction with the accommodation United offered is *non-plaintiff* David Lockwood, Br. 15, 24, and plaintiffs ignore Judge Pittman's express finding that it is "mere speculation" whether any other employees (let alone plaintiffs themselves) "may follow Mr. Lockwood's lead," ROA.3269.[11]

Sambrano and Kincannon's evident decision *not* to follow Lockwood's purported lead makes sense given their personal circumstances. Sambrano, a pilot for more than 30 years, has an annual salary of $350,000, and the most concrete consequence of temporary lost pay he identified was "hav[ing] to make difficult choices regarding the college education of three children." ROA.3991; *see* ROA.3641 (vaguely referencing hypothetical effects on his "lifestyle"); Br. 46 (citing the same things). Likewise, Kincannon's husband makes $85,000 annually, and her testimony contains no more than vague assertions that temporary loss of her

[11] In fact, Lockwood himself received the vaccine *before* United announced what types of accommodations would be offered, as he withdrew his request for religious accommodation after being asked to substantiate it. ROA.1517, 4014.

additional income "would cause immediate consequences in our lives—affecting transportation, housing, and other daily financial decisions." ROA.4011; *accord* ROA.3681; Br. 45-46 (citing nothing about Kincannon at all). Tellingly, neither one has accepted United's alternative accommodation to apply for temporary non-customer-facing roles, ROA.3503, as would be expected if they were worried about "feeding and housing their children," *Sambrano*, 2021 WL 5881819, at *2 (Ho, J., dissenting). As plaintiffs themselves have admitted, "extended periods of leave without pay may be manageable for some," ROA.3424, and Sambrano and Kincannon appear to fit the bill of those sufficiently "financially secure," Br. 32. Likewise, neither Sambrano nor Kincannon properly identified any non-speculative and unremediable harms related to their seniority or skills. pp. 41-43, *supra*.

All the foregoing applies *a fortiori* to the putative absent class members. Plaintiffs did not and could not provide evidence of the individual mental state, personal financial circumstances, or professional opportunities of all absent class members in this uncertified putative class action. That alone forecloses a finding of class-wide irreparable injury. (And so does the fact that it would be improper to consider class-wide relief when a class is not yet certified, *see Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996); *Northshore Univ.*, 2021 WL 5578790, at *11; *cf. Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020), and is not likely to be certified given the myriad individual differences among the putative

class members, pp. 7-10, *supra*; *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-52, 360-63 (2011).)

In sum, this Court should focus on the record rather than on rhetoric. And doing so makes clear that plaintiffs cannot plausibly demonstrate that Judge Pittman abused his discretion in finding they had not established irreparable injury.

b. Finally, the lack of true irreparable injury to plaintiffs is highlighted by the significant and irremediable harms that United would suffer if a preliminary injunction were to be granted but later vacated on the merits. If United allows unvaccinated flight-crew members to return to work subject only to various testing requirements, it will undermine its operations' safety and effectiveness. pp. 10-13, *supra*. Otherwise, it will have to incur the expense of paid leave. ROA.3163 (multi-million-dollar monthly expenses for paid leave while the preliminary-injunction motion was litigated). Unlike with plaintiffs' asserted harms, there would be no way for United to recover any of those costs from plaintiffs or anyone else.

Plaintiffs have suggested (Br. 22) that this Court need not concern itself with harm to United because United's safety concerns are purportedly misguided and pretextual. And for similar reasons, Judges Ho and Pittman have suggested that plaintiffs have a strong case on the merits. *Sambrano*, 2021 WL 5881819, at *1 (dissenting op.); ROA.3275-77. But this Court should not credit those suggestions. After all, Judge Pittman *expressly declined* to make any factual findings or legal

conclusions as to whether plaintiffs have the requisite likelihood of success on the merits. ROA.3275. And the robust record that United developed at the evidentiary hearing—which plaintiffs largely ignore—tells a very different story.

For example, plaintiffs accuse United (Br. 8-10) of being biased against accommodations and those who seek them, allegedly because that would interfere with a marketing plan to maximize compliance with the vaccine requirement. But that accusation cannot be squared with the total number and varying types of accommodations that United has provided, or with the credible testimony of how those accommodations were developed in light of safety and operational considerations. pp. 7-8, 10-12, *supra*. Plaintiffs have also emphasized (Br. 7) United's statements to the public that masked passengers in the cabin are extremely safe, but that overlooks important differences for the working conditions of traveling flight-crew members both on and off the plane. p. 11, *supra*. And plaintiffs likewise insinuate (Br. 6-7) that United is hypocritical about safety because it allows some other unvaccinated individuals to fly, but that disregards reasons why those persons are not materially comparable to United's domestic employees. p. 12, *supra*. Judges Pittman and Ho did not address any of these important facts.

More fundamentally, neither Title VII nor the ADA imposes a strict-scrutiny-like narrow-tailoring requirement on the business judgment of private companies. As set out more fully in United's earlier brief opposing an injunction pending appeal,

Doc. 00516125521, at 24-29, United only needs to provide a "reasonable" accommodation or to demonstrate that plaintiffs' alternative accommodations would impose an "undue hardship," and the governing legal standards provide United considerable flexibility in making that showing on the factual record below. *See, e.g.*, *Tagore v. United States*, 735 F.3d 324, 329-30 (5th Cir. 2013) ("undue hardship" under Title VII requires only "more than 'de minimis' costs"); *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 481-82 (5th Cir. 2016) ("[t]ime off, whether paid or unpaid, can be a reasonable accommodation" depending on the context). More importantly for present purposes, that factual record clearly demonstrates that, compared to plaintiffs' remediable, speculative, and commonplace harms, "the balance of equities and consideration of the overall public interest in this [employment dispute] tip strongly in favor of [United]." *Winter*, 555 U.S. at 26; *see We The Patriots*, 17 F.4th at 295-96.

II. THE PRELIMINARY-INJUNCTION DENIAL CAN BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PLAINTIFFS HAVE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

In any event, plaintiffs are not entitled to any relief at this time because they have not exhausted the EEOC administrative process. Given that failure to exhaust under Title VII and the ADA is "not jurisdictional," *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019), this Court should affirm the preliminary-injunction denial for lack of irreparable injury because that issue will otherwise persist. But if this

Court has any doubts on that issue, failure to exhaust is "mandatory if timely raised," *id.*—as it was here, ROA.421, 431-33—and so the Court could affirm the preliminary-injunction denial on this "purely legal" alternative ground, *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 706 (5th Cir. 2017).

A. An employee "must exhaust administrative remedies" by both "fil[ing] a timely charge with the EEOC and then receiv[ing] a notice of the right to sue." *Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 337 (5th Cir. 2021). In particular, Title VII provides: (1) that an employee must file a charge of discrimination, 42 U.S.C. § 2000e-5(b); (2) that the EEOC must investigate the charge and, depending on whether it determines there is reasonable cause, either dismiss the charge or attempt to end the challenged practice "by informal methods of conference, conciliation, and persuasion," *id.*; (3) that the EEOC must notify the charging employee within 180 days of the charge's filing if the EEOC has not dismissed the charge as unfounded, conciliated the dispute, or filed its own civil action, *id.* § 2000e-5(f)(1); and (4) that "after the giving of such notice[,] a civil action may be brought" by the charging employee, *id.* The ADA incorporates these requirements. *Id.* § 12117(a). In short, employees must "submit information to the EEOC and … wait a specified period before commencing a civil action," and this "precondition to suit" is "mandatory" when timely raised, even if not "jurisdictional." *Fort Bend*, 139 S. Ct. at 1851.

Here, because the plaintiffs filed EEOC charges in mid-September, the EEOC need not issue right-to-sue notices until mid-March, and plaintiffs have not provided any evidence that they have received such notices. *See* ROA.3623, 3650, 3665, 3683-84, 4008. Plaintiffs nevertheless have claimed that they may seek a preliminary injunction "to preserve the status quo" pending EEOC action. ROA.52.

That claim has no basis in statutory text. *First*, "a civil action may be brought" *only* "after the giving of [a right-to-sue] notice," 42 U.S.C. § 2000e-5(f)(1), and that "precondition to suit" applies no less to preliminary-injunction motions requested after the improper filing of a civil complaint, *Fort Bend*, 139 S. Ct. at 1851. *Second*, Congress specifically addressed the right to seek preliminary injunctions pending EEOC exhaustion and vested that power only in the EEOC, not the charging employee. The statute authorizes "the Commission … [to] bring an action for appropriate temporary or preliminary relief pending final disposition of [a] charge" if "the Commission concludes … that prompt judicial action is necessary to carry out the purposes of" these statutes. 42 U.S.C. § 2000e-5(f)(2). Because Congress authorized either the EEOC or an employee to bring a civil action, but authorized *only* the EEOC to seek pre-exhaustion relief *if it* deems necessary, Congress clearly *denied* authorization to the employee to disregard the statutory exhaustion requirement when the EEOC chooses not to seek pre-exhaustion relief. *Alexander*

v. Sandoval, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

B. Plaintiffs' sole response below was to invoke *Drew v. Liberty Mutual Insurance Co.*, 480 F.2d 69 (5th Cir. 1973). *Drew* held that the employee there had an implied right to ask a court "to fashion an equitable remedy" preserving the status quo pending EEOC action. *Id.* at 73. The court's implied equitable analysis ignored that the express statutory exhaustion requirement for employees encompasses suits for interim relief, and it discounted that the express statutory authorization for interim relief while a charge is pending is limited to the EEOC. *See id.* at 72-76. In so holding, the court relied (*id.* at 73, 75) on cases like *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which likewise applied a purpose-over-text approach to questions concerning the right of private parties to sue to enforce federal law. The 50-year-old *Drew* decision, however, is no longer good law and is factually distinguishable anyway.

First, "when the Supreme Court … implicitly[] overrules [Fifth Circuit] precedent[], [this Court] ha[s] the authority *and obligation* to declare and implement th[e] change in the law." *Stokes v. Southwest Airlines*, 887 F.3d 199, 204 (5th Cir. 2018). Here, *Drew*'s invocation of an implied right in equity to disregard an express statutory exhaustion requirement has been abrogated twice over: (1) it contravenes *Ross v. Blake*, 578 U.S. 632 (2016), which held that "mandatory exhaustion

statutes … establish mandatory exhaustion regimes, foreclosing judicial discretion," *id.* at 639; and (2) it exemplifies "the understanding of private causes of action that held sway 40 years ago" under *Borak*, but that the Supreme Court has "abandoned" and "not returned to … since," *Sandoval*, 532 U.S. at 287; *see id.* at 287-88 (reaffirming that "private rights of action" must now be assessed by determining "Congress's intent" as reflected by the statute's "text and structure").

Accordingly, the *Stokes* panel held that "*Sandoval* 'unequivocally' abrogated" circuit precedent that, like *Drew*, had invented a right to sue based on the "*ancien regime*" under *Little Hunting Park*. *Stokes*, 887 F.3d at 204. Indeed, declaring that *Drew* has already been overruled follows *a fortiori* from *Stokes*. That case confirmed the overruling of the precedent at issue even though the applicable statute "d[id] not expressly *prohibit*" private suit. *Id.* Here, Title VII *does* expressly prohibit employees from suing for interim relief pending agency exhaustion.

Second, *Drew* at least should be limited to its peculiar facts to minimize the tension with intervening legal precedent. Regardless of *Drew*'s broader reasoning, its precise holding, given the circumstances presented, was that the employee's suit should not have been dismissed *after* the EEOC had itself obtained pre-exhaustion relief *and* issued the employee's right-to-sue notice. 480 F.2d at 71-72. *Drew*'s later-repudiated reasoning should not be extended here, where the EEOC has chosen *neither* to seek such relief *nor* to issue plaintiffs' notices.

CONCLUSION

This Court should affirm the denial of the preliminary injunction.

December 27, 2021

Respectfully submitted,

s/Hashim M. Mooppan

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CERTIFICATE OF SERVICE

I certify that on December 27, 2021, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: December 27, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-face, type-style, and type-volume requirements of Federal Rule of Appellate Procedure 32(a)(5)-(a)(6), (a)(7)(B) and 5th Cir. Rule 32.1-32.2. Excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 5th Cir. R. 32.2, the brief contains 12,145 words and has been prepared using Microsoft Word in Times New Roman 14-point font.

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No. 21-11159 Sambrano v. United Airlines
USDC No. 4:21-CV-1074

Dear Mr. Mooppan,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 1 day of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

Due to the appeal being expedited, please overnight the paper copies of your brief.

Sincerely,

LYLE W. CAYCE, Clerk

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