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.)

REPLY IN SUPPORT OF MOTION TO VACATE PANEL OPINION AND DISMISS APPEAL AS MOOT

Alexander V. Maugeri
JONES DAY
250 Vesey St.
New York, NY 10281
(212) 326-3939

Russell D. Cawyer
KELLY HART & HALLMAN LLP
201 Main St., Ste. 2500
Fort Worth, TX 76102
(817) 332-2500

Donald J. Munro
Hashim M. Mooppan
Lead Counsel
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
hmmooppan@jonesday.com

Counsel for Defendant-Appellee

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:

Defendant-Appellee	**Counsel**
United Airlines, Inc.	Donald J. Munro Hashim M. Mooppan JONES DAY 51 Louisiana Ave, N.W. Washington, D.C. 20001 (202) 879-3939 dmunro@jonesday.com hmmooppan@jonesday.com

Alexander V. Maugeri
JONES DAY
250 Vesey St.
New York, NY 10281
(212) 326-3939
amaugeri@jonesday.com

Jordan M. Matthews
JONES DAY
77 West Wacker, Suite 3500
Chicago, IL 60601
(312) 782-3939
jmatthews@jonesday.com

Russell D. Cawyer
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, TX 76102-3194
(817) 332-2500
russell.cawyer@kellyhart.com

Esteban Shardonofsky
Vanessa Nicole Rogers
SEYFARTH SHAW LLP
700 Milam Street, Suite 1400
Houston, TX 77002
(713) 225-1001
sshardonofsky@seyfarth.com
vrogers@seyfarth.com

Plaintiffs-Appellants

David Sambrano; David Castillo; Kimberly Hamilton; Debra Jennefer Thal Jonas; Genise Kincannon; Seth Turnbough

Counsel

John C. Sullivan
S|L LAW PLLC
610 Uptown Blvd., Suite 2000
Cedar Hill, TX 75104
(469) 523-1351
john.sullivan@the-sl-lawfirm.com

Robert C. Wiegand
Melissa J. Swindle
STEWART WIEGAND & OWENS PC
325 North St. Paul St., Suite 3750
Dallas, TX 75201
(469) 899-9800
bob.wiegand@swolegal.com
melissa.swindle@swolegal.com

Mark R. Paoletta
Gene C. Schaerr
Brian J. Field
Kenneth A. Klukowski
Joshua J. Prince
Annika M. Boone
SCHAERR | JAFFE LLP
1717 K Street N.W., Suite 900
Washington, D.C. 20006
(202) 787-1060
mpaoletta@schaerr-jaffe.com
gschaerr@schaerr-jaffe.com
bfield@schaerr-jaffe.com
kklukowski@schaerr-jaffe.com
jprince@schaerr-jaffe.com
aboone@schaerr-jaffe.com

Dated: March 18, 2022

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

INTRODUCTION

In opposing both dismissal of the appeal as moot and vacatur of the panel opinion, plaintiffs repeatedly emphasize that United has made a "voluntary" decision to allow unvaccinated employees on unpaid leave to return to work. But that refrain is factually misleading and legally immaterial.

Factually, plaintiffs do not and cannot dispute that there have been substantial reductions in the scope and severity of the pandemic over the past several weeks, which have caused public-health authorities, governments, and private businesses to alter their COVID-19 policies. United's decision to bring its accommodated employees back to work in response to these changed conditions was thus "voluntary" only in the sense that United had the option of either following the science or instead keeping Sambrano and Kincannon on unpaid leave despite the changed conditions merely to ensure that the company's pending en banc petition remains live. It is the height of hypocrisy for plaintiffs, who claim to be suffering irreparable injury from placement on unpaid leave, to object to United's "choice."

Legally, the fact that United's policy change was voluntary defeats neither mootness nor vacatur, especially given the nature of the choice afforded United here. Indeed, plaintiffs themselves concede that both this Court and the Supreme Court have recognized that, even when a defendant voluntarily ceases challenged conduct, (1) that can eliminate the reasonable expectation of future injury necessary for

prospective relief under Article III, or at least the imminent injury necessary for a preliminary injunction, and (2) that can justify a court's exercise of its broad discretion to vacate its own opinion and even its more limited discretion to vacate a lower-court order. To be sure, plaintiffs try to distinguish those cases on the facts and to identify other cases reaching the opposite conclusion on different facts. But none of that responds to the unique facts of this case. Because United changed policies in response to a shifting pandemic, it requires multiple levels of speculation for Sambrano and Kincannon to insist that United is not only reasonably likely to place them on temporary unpaid leave again, but will do so imminently.

In sum, this Court need not decide the irreparable-injury and failure-to-exhaust questions presented in this appeal. The resolution of those questions bitterly divided the panel, indisputably broke new ground, and at least arguably contravened multiple controlling precedents. Rather than requiring the full Court to consider the pending en banc petition in this controversial case, the panel should vacate the panel opinion and dismiss the appeal as moot, thereby leaving the questions to be answered only if and when a live controversy requires their resolution.

ARGUMENT

A. The Appeal Is Moot

As United demonstrated in its motion, even when a defendant's voluntary cessation does not moot prospective relief under Article III because there remains a reasonable expectation of recurrence, it can at least moot a *preliminary* injunction under equitable standards because there is no longer a sufficient threat of *imminent* injury. Mot. 6-7. Notably, plaintiffs' opposition concedes that this Court and others have so held. Opp. 16-17. Plaintiffs merely try to distinguish those cases on their facts, *id.*, and also to identify other cases where a threat of imminent injury remained despite a nominal cessation of the challenged conduct, *id.* at 15. All of that, however, just confirms that the critical question here is not whether United's policy change was "voluntary," but rather whether, in this particular case, there is an "imminent" threat that United will return Sambrano and Kincannon to unpaid leave.

On that critical question, plaintiffs are long on rhetoric but short on substance. Plaintiffs emphasize that United has reserved the right to resume unpaid leave *if* warranted by a resurgence of the pandemic, Opp. 9, 14, but that of course does not make a resurgence of the pandemic warranting resumption of unpaid leave *imminent*. Plaintiffs also accuse United of "erratic" action because the company relaxed its criteria for when the pandemic has sufficiently receded, Opp. 14, but United provided a reasoned explanation that this modification reflects the reduced severity

of the Omicron variant and the increased levels of vaccination, Mot. 3, neither of which plaintiffs have shown are imminently likely to regress.

Likewise, plaintiffs insinuate that United changed gears solely in order to get the panel opinion vacated and avoid a preliminary injunction on remand, Opp. 8, 12, but that makes no sense. If United were to prevail on this motion but then imminently reinstate unpaid leave for Sambrano and Kincannon post-remand, then the same threat of a preliminary injunction would immediately return. Judge Pittman would have the opportunity to reconsider his irreparable-injury ruling (which United agrees should be vacated under *Munsingwear* if the appeal is dismissed as moot) as well as to decide the other preliminary-injunction factors, followed by an inevitable appeal and potential en banc proceedings. It is simply implausible and untrue that United changed the policy with the intent to imminently resume it post-remand, just so that it could continue to urge Judge Pittman to disagree with the panel majority on irreparable injury—especially since Judge Smith's powerful dissent on the merits (Panel Op. 61-67) demonstrates why United is confident that no preliminary injunction should or would issue on remand regardless.[1]

[1] Moreover, insofar as plaintiffs intend to seek a preliminary injunction on remand *regardless of whether* United resumes unpaid leave, Opp. 8 n.1, the panel opinion would not apply even on its own terms. The majority held that plaintiffs "who remain on unpaid leave … are being subjected to ongoing coercion" that satisfies the irreparable-injury requirement, Panel Op. 6-7, and that would not be the case for plaintiffs who are back on the payroll and merely fear the speculative possibility that they may be returned to unpaid leave at some future point.

In sum, the pandemic has dramatically shifted course over the past several weeks, and United has followed suit, like so many other private businesses, governments, and public-health authorities. Sambrano and Kincannon thus face no "imminent" threat of being returned to unpaid leave, and a preliminary injunction is unwarranted on equitable grounds alone. Indeed, since it is hopelessly speculative whether the pandemic's changing trajectory will again warrant placing them on unpaid leave, the "reasonable expectation" of recurrence that Article III demands for prospective relief does not exist. For both reasons, plaintiffs' appeal of the preliminary-injunction denial is moot and should be dismissed.

B. The Panel's Opinion Should Be Vacated

Plaintiffs erroneously contend that United "concedes" that vacatur of a panel opinion is "inappropriate" when mootness is caused by the "unilateral action" of the party seeking vacatur. Opp. 3. That is wrong several times over.

First, United specifically emphasized that a panel has broader discretion to vacate *its own* opinion than a lower-court order, *including* where the party seeking vacatur caused the mootness. Mot. 8-9. Indeed, plaintiffs themselves concede that both this Court and the Supreme Court have vacated their own opinions after a "settlement," even though a settlement is the paradigmatic situation where vacatur of the lower-court "judgment under review" is not warranted due to party-created mootness. Opp. 4-5.

Second, United also demonstrated that, even under the *Munsingwear* standard for vacating lower-court orders, the Supreme Court has granted vacatur to a party that caused mootness due to a material change in circumstances. Mot. 10. Plaintiffs respond that, in those cases, the challenged action "truly *is* moot, as the new administration has reversed the policy of the previous administration, thereby confirming that there is no reasonable expectation that the prior policy could return for several years." Opp. 5-6. But that response is a non sequitur, because it does not change the fact that the Court vacated a lower-court order even though the mootness was caused by the "unilateral action" of the party seeking mootness.

Moreover, insofar as plaintiffs are suggesting that such relief was appropriate in those cases only because the mootness was particularly certain, the opposite is true. When the Supreme Court on June 21, 2021, vacated the injunction against the Migrant Protection Protocols (MPP) based on the Biden Administration's rescission of that policy, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021), there was already a pending motion in another case to enjoin the MPP rescission, *Texas v. Biden*, No. 21-cv-67, Dkt. 53 (N.D. Tex. June 8, 2021), and the rescission was enjoined less than two months later, *Texas v. Biden*, No. 21-cv-67, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021), resulting in the policy's (partial) reinstatement.

Simply put, the Supreme Court vacated the injunction against MPP, *despite* the Biden Administration's unilateral action *and* the (since-realized) prospect that

MPP would resume, because it recognized that the government should not be forced to the choice of either continuing a policy it no longer supported or being stuck with a harmful order invalidating the policy on legally erroneous grounds. So too here, United (and all other employers) should not have to operate under the shadow of the contested panel opinion simply because United made the responsible decision that pandemic conditions had sufficiently changed that Sambrano and Kincannon should be allowed to return to work. And again, this case is *a fortiori* from *Mayorkas*, because the panel has broader discretion to vacate its own opinion. If the panel nevertheless refuses to do so in this high-profile case, a future employer in similar circumstances may well choose to maintain the policy at issue, to the detriment of its employees, solely to preserve its ability to challenge the order in question.

Third, and relatedly, plaintiffs are incorrect to treat United's decision as "unilateral," Opp. 4, rather than a response to the "happenstance" of the shifting trajectory of the pandemic and public-health guidance, Mot. 9-10. They do not cite a single case denying vacatur to a party because of its reasonable response to an external event—let alone where the material change in circumstances has been recognized by countless other businesses, governments, and public-health authorities across the country. Indeed, if United had continued to keep Sambrano and Kincannon on unpaid leave in these circumstances, plaintiffs undoubtedly would have objected even more vehemently.

Finally, for all of the foregoing reasons, plaintiffs get things precisely backwards in arguing (Opp. 7-9) that equitable factors militate against vacatur of the panel opinion. Plaintiffs contend that they should retain the benefit of the panel opinion on remand in the speculative event that United were to resume unpaid leave—indeed, they apparently intend to seek a preliminary injunction regardless of whether United does so. Opp. 7-8 & n.1. And plaintiffs further contend that other litigants and courts should be able to invoke the panel opinion too, Opp. 8-9—a prospect well illustrated by the amicus brief filed by the Association of American Physicians and Surgeons. But the divided panel opinion admittedly broke new ground and at least arguably violated numerous binding precedents, making it a serious candidate for en banc review, as Judge Smith emphasized. That is precisely the sort of opinion that should be vacated when further review is prevented by intervening mootness.

This is especially so because the panel's decision not to publish the opinion means that it intended to address solely the controversy between the parties. As that controversy over the preliminary injunction no longer exists, the panel no longer needs to decide the controversial issues posed by the appeal at all. Of course, if this Court were to conclude that the appeal remains live, then en banc review of the panel opinion would remain warranted.

CONCLUSION

This Court should vacate the panel opinion and dismiss the appeal as moot.

March 18, 2022

Respectfully submitted,

/s/ Hashim M. Mooppan

Alexander V. Maugeri
JONES DAY
250 Vesey St.
New York, NY 10281
(212) 326-3939

Russell D. Cawyer
KELLY HART & HALLMAN LLP
201 Main St., Ste. 2500
Fort Worth, TX 76102
(817) 332-2500

Donald J. Munro
Hashim M. Mooppan
Lead Counsel
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
hmmooppan@jonesday.com

Counsel for Defendant-Appellee

CERTIFICATE OF SERVICE

I certify that on March 18, 2022, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: March 18, 2022

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

CERTIFICATE OF COMPLIANCE

This reply complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 27(d)(2)(C). Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the reply contains 1,919 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

Dated: March 18, 2022

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