

No. 21-11159

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

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

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

Plaintiffs-Appellants,

v.

UNITED AIRLINES, INCORPORATED,

Defendant-Appellee.

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

**PLAINTIFFS-APPELLANTS' OPPOSED MOTION FOR LEAVE TO FILE
RESPONSE TO APPELLEE'S SUPPLEMENTAL BRIEF**

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

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

Gene C. Schaerr
Counsel of Record
Mark R. Paoletta
Brian J. Field
Joshua J. Prince
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

CERTIFICATE OF INTERESTED PERSONS

No. 21-11159

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

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

Plaintiffs-Appellants: David Sambrano, Genise Kincannon,
Kimberly Hamilton, Seth Turnbough,
David Castillo, Debra Jennefer Thal Jonas

Counsel for

Plaintiffs-Appellants: SCHAERR | JAFFE LLP
Gene C. Schaerr (gschaerr@schaerr-jaffe.com)
Mark R. Paoletta (mpaoletta@schaerr-jaffe.com)
Brian J. Field (bfield@schaerr-jaffe.com)
Kenneth A. Klukowski (kklukowski@schaerr-jaffe.com)
Joshua J. Prince (jprince@schaerr-jaffe.com)
Annika M. Boone (aboone@schaerr-jaffe.com)

S|L LAW PLLC

John C. Sullivan (john.sullivan@the-sl-lawfirm.com)

STEWART WIEGAND & OWENS PC

Robert C. Wiegand (bob.wiegand@swolegal.com)

Melissa J. Swindle (melissa.swindle@swolegal.com)

Defendant-Appellee: United Airlines, Inc.

Counsel for JONES DAY

Defendant-Appellee: Donald J. Munro (dmunro@jonesday.com)
Alexander V. Maugeri (amaugeri@jonesday.com)
Hashim M. Mooppan (hmmooppan@jonesday.com)
Jordan M. Matthews (jmatthews@jonesday.com)

KELLY HART & HALLMAN LLP

Russell D. Cawyer (Russell.cawyer@kellyhart.com)

Other interested
entity:

Airline Employees 4 Health Freedom

/s/ Gene C. Schaerr

Gene C. Schaerr

*Counsel of Record for
Plaintiffs-Appellant*

Plaintiffs respectfully request leave to file a response to the supplemental brief that United Airlines recently filed. In that response, United publicly accused Plaintiffs of making “false” statements (at 3 n.1), “misleading” the Court (at 6), and presenting “incorrect” portrayals of facts (Nau Decl. ¶ 3). It is imperative that Plaintiffs have an opportunity to respond to those public statements.

As Plaintiffs’ accompanying response demonstrates, Plaintiffs accurately and fully described the ways in which United’s recent travel restrictions have harmed them. United’s response, which accuses Plaintiffs of misleading the Court, relied entirely on United’s distortion of the facts.

Accordingly, a short response clarifying the record is important to ensure that United’s public attacks on Plaintiffs are not left unanswered. Indeed, such a response is particularly warranted here, as United’s actions before this Court are part of its concerted effort to silence dissent and coerce Plaintiffs into forgoing their beliefs. The message is clear: United is willing to publicly call its employees’ character into question if those employees’ religious beliefs or health prevent them from receiving the COVID-19 vaccine.

April 20, 2022

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

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

Respectfully submitted,

/s/ Gene C. Schaerr
Gene C. Schaerr
Counsel of Record
Mark R. Paoletta
Brian J. Field
Joshua J. Prince
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on April 20, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Gene C. Schaerr
Gene C. Schaerr

CERTIFICATE OF CONFERENCE

I hereby certify that on April 20, 2022, counsel for Appellants conferred by e-mail with counsel for United Airlines about the foregoing motion, and United opposes the relief requested in this motion.

/s/ Gene C. Schaerr
Gene C. Schaerr

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type volume limitation of Fed. R. App. P. 27(d)(2) because it contains 178 words.

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

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

/s/ Gene C. Schaerr
Gene C. Schaerr

Dated: April 20, 2022

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KELLY HART & HALLMAN LLP

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Other interested
entity:

Airline Employees 4 Health Freedom

/s/ Gene C. Schaerr

Gene C. Schaerr

*Counsel of Record for
Plaintiffs-Appellants*

In its recent supplemental brief, United Airlines misstated the facts and publicly accused the Plaintiffs of misleading the Court. Plaintiffs file this supplemental response to ensure the record is clear, as Plaintiffs' statements were accurate. Indeed, United's recent arbitrary travel restrictions pose serious hurdles to Plaintiffs' ability to return to their jobs. Instead of allowing Plaintiffs to do that, as United represented to this Court it was doing, United is continuing to hold compensation over Plaintiffs' heads in order to coerce them to violate their beliefs. The Court should thus remand this matter to the district court quickly to allow Plaintiffs to obtain relief from this irreparable injury. And, as demonstrated below, United's efforts to publicly discredit Plaintiffs Sambrano and Kincannon are wrong three times over.

1. For instance, Plaintiff Kincannon accurately described the various ways that United's travel restrictions "effectively prohibit[] [her] from being able to return to work." Pls.' Supp. Br. at 3 (quoting Kincannon Decl. ¶ 6). Specifically, Kincannon stated that, for "nearly 20 years, [she] has flown international trips, which are 'more lucrative[.]'" *Id.* (quoting Kincannon Decl. ¶ 9). But, under United's new restrictions, Kincannon is forced to accept less pay and a more demanding schedule than she enjoyed before. *See* Kincannon Decl. ¶ 10.

In response, United accuses Kincannon of presenting a "misleading factual portrayal[.]" United Br. at 6. According to United, Kincannon misled the Court

because “more than 75% of [Kincannon’s] trips in 2021 were to Hawaii[.]” *Id.* But that is of no moment, as United conspicuously fails to address the previous *20 years* of Kincannon’s history flying for United. *See id.* Rather, United deceptively relies only on Kincannon’s flight activity during 2021, when the COVID-19 pandemic severely limited international travel for everyone.

However, as the accompanying supplemental Kincannon declaration explains, since late-2018, Kincannon “flew to Taipei almost every month.” Supp. Kincannon Decl. ¶ 7. And, when she “was not flying to Taipei, [Kincannon] was generally either on vacation or flying other international flights to Auckland, Japan, Seoul, or Paris.” *Id.* United knew these facts when it filed its supplemental brief. But United decided not to present the full story. Instead, United mounted a false and retaliatory public attack on a long-time employee who has objected to United’s failure to comply with Title VII of the Civil Rights Act of 1964. And, as Kincannon explains, this public attack has only increased the coercive effects of United’s actions with respect to her religious beliefs. *Id.* ¶ 10.

2. The same is true for Sambrano. As Sambrano explained, he flew international flights as a 787 Captain, including to many countries now included on United’s restricted list. Pls.’ Supp. Br. at 4 (citing Sambrano Decl. ¶¶ 5, 8). But United’s arbitrary restrictions have prevented him from returning to his previous

position, which costs him income and negatively affects his ability to enjoy the seniority he has earned. Sambrano Decl. ¶¶ 11–12.

In response, United also accuses Sambrano of “misleading” the Court. United Br. at 6. Relying again on limited flight activity from 2021, United states that “all of [Sambrano’s] trips in 2021 were either to domestic states or foreign countries to which he can still travel, with the exception of only two trips to Japan and one trip to South Africa.” *Id.*

But, as the accompanying supplemental Sambrano declaration confirms, Sambrano has frequently flown international flights over the past several years to South Africa, Japan, Lima, Paris, Barcelona, London, Brussels, and many other countries. Supp. Sambrano Decl. ¶ 5. And, while several of those countries may not currently be included on United’s restricted list, United has threatened that it may add countries at any time to its arbitrary restriction list. *See* Sambrano Decl., Ex. C.

Thus, as Sambrano explains, it is difficult to bid for the lucrative international flights he used to fly because, if he receives a flight to a country that is currently included on United’s list—or is arbitrarily added to that list—he will be forced off the flight. *See* Supp. Sambrano Decl. ¶ 4. Accordingly, as Sambrano previously demonstrated, United’s actions effectively prevent him from returning to his

previous position. And these actions increase the coercive pressure Sambrano experiences from United with respect to his religious beliefs. *See id.* ¶ 9.

Here again, United knew these facts when it decided to publicly call Sambrano’s character into question.¹ But United decided not to let those facts get in the way of its efforts to silence any dissent.

3. Finally, as Plaintiffs forecasted (at 4), United argued that it is only applying flight restrictions that are imposed by the various countries to which United flies. *See United Br.* at 7–9. But the chart on which United relies—which is entirely devoid of any supporting authority—does not support United’s arguments. *See Decl. of S. Nau* at 8–10 (attached as Ex. A to United’s Br.).

Rather, United’s unsupported chart is riddled with errors. First, in many places, the chart does not come close to supporting United’s argument that the identified countries impose restrictions that would “render it practically impossible” for Sambrano or Kincannon to fly to those countries. *United Br.* at 8. For instance, United states that many countries would require Sambrano and Kincannon to take a COVID-19 test before or upon arrival (e.g., Australia, Bonaire, French Polynesia, Japan, South Africa). *See Nau Decl.* at 8–10. But, as Plaintiffs have demonstrated

¹ United is equally misguided when it criticizes Sambrano’s statement that flying on the 787 is more prestigious than flying on the 777. While United states (*Nau Decl.* ¶ 9) that the 777 is more desirable, Sambrano explains that more senior pilots actually fly the 787, *see Supp. Sambrano Decl.* ¶ 7.

repeatedly throughout this litigation, testing would not impose any burden on United—especially since Plaintiffs have repeatedly stated that they are willing to provide United with test results. *See, e.g.*, Sambrano Decl. ¶ 9.

Second, United’s chart is even more obviously deficient when it relies only on an “*anticipated* vaccine requirement” for Singapore. Nau Decl. at 10 (emphasis added). In other words, United *admits* that Sambrano and Kincannon could fly to Singapore, but United simply will not allow them to do so.

Elsewhere still, United is simply wrong in its representation of the law in various countries. For instance, United states that St. Maarten and Turks & Caicos require proof of vaccination for entry. *See id.* at 10. Yet, the government of St. Maarten states on its website that “[a]ll airline ... crew must be able to demonstrate proof of full vaccination *or* in case not fully vaccinated, *either* an acceptable proof of recovery or a valid negative COVID-19 test result[.]”² And Turks & Caicos states that “[c]rew members of ... commercial aircraft arriving for work and expected to remain for less than 24 hours” are “exempt[] from requiring a COVID-19 vaccine.”³ Here again, it is United that is misrepresenting the facts.

² *Travel Reqs. (Effective Apr. 1, 2022)*, St. Maarten, available at <https://stmaartenehas.com/travel-requirements/> (emphasis added).

³ *Turks & Caicos Coronavirus (COVID-19) Update*, Turks & Caicos (updated Mar. 28, 2022), available at <https://www.visittci.com/travel-info/turks-and-caicos-coronavirus-covid-19>.

* * *

In sum, there remains a clear factual dispute about United's continued efforts to coerce its employees into abandoning their beliefs and health. It is imperative that the Court remand this matter quickly to allow the district court to resolve those disputes. But the Court should ensure that the district court has the benefit of the panel opinion. Indeed, United's overt efforts to silence Plaintiffs should give the Court serious pause when considering United's request to be excused from the panel's opinion that found it to be engaged in a protracted effort to punish those who had religious or medical reasons for not receiving the COVID-19 vaccine. United's supplemental brief is simply more of the same. Accordingly, the Court should deny United's motion to vacate the panel opinion.

April 20, 2022

John C. Sullivan
S|L LAW PLLC
610 Uptown Boulevard, Suite 2000
Cedar Hill, TX 75104
Telephone: (469) 523-1351
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Respectfully submitted,

/s/ Gene C. Schaerr
Gene C. Schaerr
Counsel of Record
Mark R. Paoletta
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/s/ Gene C. Schaerr
Gene C. Schaerr

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The foregoing Supplemental Brief complies with the type volume limitation of Fed. R. App. P. 27(d)(2) because it contains 1,312 words.

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

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

/s/ Gene C. Schaerr
Gene C. Schaerr

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Plaintiffs-Appellants,

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UNITED AIRLINES, INCORPORATED,

Defendant-Appellee.

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No. 4:21-cv-01074-P

Supplemental Declaration of Genise Kincannon

I, Genise Kincannon, declare as follows:

1. As I stated in my April 6, 2022 Declaration, United Airlines recently announced that I and other employees would be permitted to return to work after being forced into an extended period of unpaid leave. Kincannon Decl. ¶ 2. But, as I explained in that Declaration, United subsequently announced that it would prohibit me from flying to more than 30 countries. *Id.* ¶¶ 5–6.

2. I further explained that United’s restrictions imposed a serious impediment to my ability to return to work. United was stripping me of the ability to return to my previous job and income, as United would not allow me to fly the routes I used to fly, which included lucrative routes I would otherwise be able to fly due to my seniority. *Id.* ¶¶ 6–8.

3. Moreover, I explained, United’s actions prevent me from flying on international routes I frequently flew previously. Indeed, as I stated, “[f]or nearly 20 years, I have flown international trips[,]” which “are more lucrative with greater pay, better schedules, and better quality of life on the road.” *Id.* ¶ 9.

4. In its April 13, 2022 supplemental reply, United publicly accused me of providing this Court a “misleading factual portrayal” of my previous work, because, according to United, “more than 75% of [my] trips in 2021 were to Hawaii[.]”

5. United’s statement is distorted and highly misleading. United limited its statement about my travel to flights in 2021, when much of the world’s international travel was constrained due to the COVID-19 pandemic. Yet, as I stated in my previous Declaration, I primarily flew international routes *for the past 20 years* of my career with United—including regular flights to Taiwan. *Id.* ¶ 11.

6. United is notably silent about my flight activity before 2021, and it fails to offer any support for its accusation that my statement was “misleading.”

7. Instead, a review of my travel logs since late-2018 shows that I flew to Taipei almost every month. And, for those months when I was not flying to Taipei, I was generally either on vacation or flying other international flights to Auckland, Japan, Seoul, or Paris.


8. United is aware of these facts, as it has full access to my flight history. Yet, United chose to accuse me of misleading this Court by relying on a purposefully narrow view of my flight history.

9. As explained here, my previous statement was accurate, and United's attempt to criticize me publicly is merely the next step in its campaign to silence me.

10. It is unfathomable that United would continue to state that I am not feeling the coercive effects of its actions. *See* United Supp. Reply at 6. By stripping me of income for months, United put me under serious financial pressure that made me consider forgoing my beliefs. And then, calling me back to work only to impose unreasonable and arbitrary restrictions on my ability to work furthered that coercion. Now, after United has publicly accused me of making false statements, I am forced to consider whether it will ever be possible to return to a non-discriminatory and non-retaliatory work environment at United.

11. I declare, under penalty of perjury, that the foregoing is true and accurate.

Date

DocuSigned by:

086C75473B89421...

Genise Kincannon

Certificate Of Completion

Envelope Id: E1ECF41AAF9D4B58B1DB189E1E7ECFAC Status: Completed
 Subject: Please DocuSign: Supp. Kincannon Decl..pdf
 Source Envelope:
 Document Pages: 3 Signatures: 1 Envelope Originator:
 Certificate Pages: 4 Initials: 0 Brian Field
 AutoNav: Enabled
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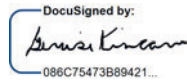
Record Tracking

Status: Original Holder: Brian Field Location: DocuSign
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Signer Events

Genise Kincannon
 Security Level: Email, Account Authentication (None)

Signature



Signature Adoption: Drawn on Device
 Signed by link sent to
 Using IP Address:
 Signed using mobile

Timestamp

Sent: 4/20/2022 5:01:26 AM
 Viewed: 4/20/2022 5:02:20 AM
 Signed: 4/20/2022 5:02:49 AM

Electronic Record and Signature Disclosure:
 Accepted: 4/20/2022 5:02:20 AM
 ID: fd3cc8ac-ec92-41f7-9124-3ae747ad9597

| In Person Signer Events | Signature | Timestamp |
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| Editor Delivery Events | Status | Timestamp |
| Agent Delivery Events | Status | Timestamp |
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| Notary Events | Signature | Timestamp |
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| Completed | Security Checked | 4/20/2022 5:02:49 AM |

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1. As I stated in my April 7, 2022 Declaration, United Airlines recently announced that I and other employees would be permitted to return to work after being forced into an extended period of unpaid leave. Sambrano Decl. ¶ 2. But, as I explained in that Declaration, United subsequently announced that it would prohibit me from flying to more than 30 countries. *Id.* ¶ 7.

2. I further explained that United's restrictions effectively prevent me from returning to my previous position. *See id.* ¶ 8. Indeed, I explained that before I was placed on unpaid leave, I regularly flew international flights, including flights to countries currently on United's restricted list. *See id.*

3. In its April 13, 2022 supplemental reply, United publicly accused me of providing this Court a "misleading factual portrayal" of my previous work, because, according to United, "all of [my] trips in 2021 were either to domestic states or foreign countries to which [I] can still travel, with the exception of only two trips to Japan and one trip to South Africa."

4. United is using significantly distorted facts to give the impression that my previous statements were misleading. United acknowledges that I regularly flew to "foreign countries" in 2021. And while some of those may not currently be on United's restricted list, United states that its restricted list is "subject to change." Sambrano Decl., Ex. C. As I explained in my previous declaration, that presents a serious obstacle to my ability to return to my previous position. If I am awarded a trip that includes a destination that is currently included in or added to the restriction list, I will be forced off that flight. *See Sambrano Decl.* ¶ 11.

5. And, of course, United's statement about my previous flight activity conspicuously relies only on flights from 2021, when international travel

was severely constrained due to the COVID-19 pandemic. United ignores my international flights before 2021, including flights to Lima, Paris, Barcelona, London, Brussels, Madrid, and in 2021 to Tel Aviv, Frankfurt, Dublin, London, Paris, and Amsterdam.

6. I also stated in my previous declaration that I had lost seniority during the time when United placed me on extended unpaid leave. *See id.* ¶ 5. Here again, United accuses me of misstating the facts, incorrectly suggesting that my seniority remains unchanged. While it is true that my overall seniority number remains unchanged, I lost seniority *within my base*—Newark International Airport.

7. And, as I explained, had I remained on the 787, my seniority at Newark was on the line where I risked reserve schedules. *See id.* ¶ 5. Accordingly, I moved to the B777, where I had better seniority. *See id.* ¶ 6. Here again, United accuses me of misstating the facts, suggesting that “most pilots consider flying the B777 to be an upward career move because the B777 is larger than the B787[.]” The facts, however, suggest otherwise. As United stated, I am “one of United’s most senior pilots.” Yet, I am much more senior on the B777 than on the B787. In other words, there are more senior pilots who wish to fly the B787. For example, using the most current

base roster in EWR, on the B777 I am at 35.8% of all B777 captains, while on the B787 I would be 65.7% of all B787 captains.

8. United is aware of these all these facts. Yet it chose to distort facts to accuse me of misleading this Court.

9. This is just the next instance of United trying to silence me, which only increases the coercive effects of United's actions. United prevented me from receiving any income for months. United then called me back to work, only to impose serious and arbitrary restrictions. And now, United has publicly accused me of making false statements. While I remain steadfast in my beliefs, United's actions have caused me to think hard about those beliefs and about my decision. I am not sure I will ever be able to return to a non-discriminatory and non-retaliatory work environment at United.

10. I declare, under penalty of perjury, that the foregoing is true and

accurate.

4/20/2022

Date



David Sambrano