

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.)

**APPELLEE'S SUPPLEMENTAL BRIEF
IN RESPONSE TO THIS COURT'S JUNE 21, 2022 ORDER**

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

United Airlines, Inc.

Counsel

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
110 N. Wacker Dr., Suite 4800
Chicago, IL 60606
(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: July 1, 2022

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

On June 21, 2022, this Court directed the parties to file supplemental briefs “regarding appellate standing and whether there remains a live controversy between the parties at this stage of the interlocutory appeal.” The position of United Airlines is that Plaintiffs’ appeal has been mooted by intervening circumstances, and thus this Court should dismiss the appeal and vacate both the district court’s order denying a preliminary injunction and the panel opinion reversing that denial. United has set forth the basis for that position in prior briefing on a motion that remains pending. *See* Doc. 516232573 (Mar. 10, 2022) (“Motion”); Doc. 516245404 (Mar. 18, 2022) (“Motion Reply”); Doc. 516281298 (Apr. 14, 2022) (“Supp. Br. Response”). In this supplemental brief, United demonstrates that circumstances over the past two months confirm its position that there is no longer a live controversy on appeal.

“Standing to appeal requires” the appellant to have “injury from the judgment of the lower court.” *DeOtte v. Nevada*, 20 F.4th 1055, 1070 (5th Cir. 2021). And when the injury from that judgment “does not persist throughout” the appeal, the appeal becomes “moot.” *Id.* As the Supreme Court has explained, “if an event occurs while a case is pending on appeal that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party, the appeal must be dismissed.” *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). That is so even “when a case became moot” on appeal “after the [panel] decision issued but before [the] disposition of a petition for rehearing.” *Clarke v. United*

States, [915 F.2d 699, 706](#) (D.C. Cir. 1990) (en banc) (citing cases from various circuits, including multiple ones from this Court).

In this appeal, Plaintiffs seek review of the district court’s denial of “a preliminary injunction ... enjoin[ing] United from placing [them] ... on unpaid leave” as an “accommodation” for their “religious or medical exemptions from United’s [COVID-19] vaccine mandate.” [ROA.3263](#); *see* Panel Op. 2. But any alleged injuries from that refusal to enjoin unpaid leave as an accommodation have become moot. United has since allowed the only two Plaintiffs still in the case who were placed on unpaid leave to return to work with pay, there is no reasonable expectation that any Plaintiff will be placed on unpaid leave in the future, and thus an appellate decision on the merits of the preliminary-injunction denial would be an advisory opinion as Plaintiffs are no longer suffering any injury from that denial.

More specifically, as previously explained, United announced on March 10, 2022 that it would return all employees accommodated with unpaid leave to their previous jobs, beginning on March 28, 2022, in light of substantial changes in the scope and severity of the pandemic as well as the guidance of public-health authorities. *See* Motion 6-8. And United now confirms that Plaintiffs Sambrano and Kincannon in fact “are currently back at work in their prior positions (i.e., captain and flight attendant, respectively) at the same pay rates (for both base pay and route-specific pay) and with the same benefits that they had prior to being placed on leave.”

Ex. A, Decl. of Kirk Limacher, ¶ 3.¹ Moreover, “[b]ased on the pandemic’s current trajectory and current public health guidance, at this time, United does not anticipate reinstating unpaid leave as an accommodation for any plaintiffs.” *Id.* ¶ 7.

These facts make clear that, regardless of the continuing dispute in district court over whether Plaintiffs are entitled to monetary relief for United’s past actions, there is no longer a live appellate controversy over the district court’s denial of a preliminary injunction against United’s future actions. This Court has stressed that it is “beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined.” *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1998). That is the situation here: because United has already allowed Sambrano and Kincannon to return to work with pay, they no longer have any injury from the district court’s refusal to enjoin United to do that very thing, and the panel’s merits decision on whether the district court erred is now an advisory opinion. Although a mootness exception sometimes applies in cases of “voluntary cessation” of challenged conduct, it does not apply here because United’s unpaid-leave accommodation policy “cannot reasonably be expected to recur.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91-92, 94-95 (2013). Unlike in cases where it was

¹ Sambrano and Kincannon are the only two Plaintiffs still in the case who were placed on unpaid leave. Panel Op. 5-6 & nn.4, 6. For completeness, though, United further confirms that Plaintiff Turnbough (who was dismissed from the case) has also been returned from unpaid leave, and that Plaintiffs Castillo, Hamilton, and Jonas were never placed on unpaid leave at all. Ex. A, ¶¶ 3-4.

reasonable to expect recurrence because the defendant halted based on an internal policy change to which it had not permanently committed, *see West Virginia v. EPA*, No. 20-1530, [2022 WL 2347278](#), at *11 (U.S. June 30, 2022), United is responding to the external circumstances of the COVID-19 pandemic, which makes it “much too speculative” to suggest that the pandemic’s trajectory will change in a way that again requires United to stop unvaccinated flight-crew members from working, *Winokur v. Bell Fed. Sav. & Loan Ass’n*, [560 F.2d 271, 275](#) (7th Cir. 1977). *See also* Motion 9-10.

At a minimum, even if the appeal is not strictly moot as a matter of Article III jurisdiction, the same result follows as a matter of equitable relief. The fact that Plaintiffs no longer face any *imminent* irreparable injury from being placed on unpaid leave is sufficient basis for this Court to conclude that a *preliminary* injunction is no longer warranted, such that appellate review of the district court’s rationale for denying relief is no longer appropriate. *See* Motion 10-11 & Motion Reply 7-9 (providing cases and reasoning supporting this alternative disposition).

In previously insisting that there remains a live controversy on appeal, Sambrano and Kincannon contended that United has effectively reduced their compensation upon their return to work by restricting them from flying to certain countries that have imposed legal limits and practical constraints on unvaccinated flight-crew members. Even setting aside that the reduced-compensation premise is

factually misleading (*see* Supp. Br. Response 10-13), the live-controversy conclusion is legally baseless. The sole question decided by the district court and the panel was whether *unpaid* leave as a religious accommodation imposes irreparable injury, and *that* dispute is plainly moot. *See id.* at 7-8. Any claim that mere reduction in compensation also imposes irreparable injury—a claim unsupported by even the panel majority’s opinion, *see id.* at 9-10—is *a new dispute* that must be resolved in district court in the first instance. *See id.* at 8-9 (discussing *New York State Rifle & Pistol Ass’n v. City of New York*, [140 S. Ct. 1525, 1526](#) (2020) (per curiam)). And that is especially so since United has been removing travel restrictions when foreign regulations are lifted. *See* Ex. A, ¶ 5.

As the appeal is moot, the proper disposition is to dismiss the appeal but vacate the panel opinion as well as the district court’s preliminary-injunction denial. That is so under both the permissive standard governing vacatur of this Court’s own opinion and also the more restrictive standard governing vacatur of the district court’s order, given that mootness here is attributable to the pandemic’s changed circumstances and United’s reasonable response. *See* Motion 12-15; Motion Reply 9-12. If the panel rejects that disposition of the appeal, however, then the full Court should grant United’s pending petition for rehearing en banc, either to direct that disposition itself (if it agrees the appeal is moot) or to resolve the merits of the appeal (if it believes the appeal remains live).

July 1, 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 July 1, 2022, I served a copy of the foregoing on all counsel of record by CM/ECF.

Dated: July 1, 2022

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

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 27(d)(2)(A) as well as the five-page limitation imposed by this Court's June 2, 2022 order. Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the response contains 1,311 words and was prepared using Microsoft Word and produced in Times New Roman 14-point font.

Dated: July 1, 2022

/s/ Hashim M. Mooppan

Hashim M. Mooppan
Counsel for Defendant-Appellee

EXHIBIT A

**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.)

DECLARATION OF KIRK LIMACHER

I, Kirk Limacher, declare as follows:

1. I currently serve as the Vice President of Human Resource Services for United Airlines, Inc. (“United”). I have held this position since October 2016. I am, as a function of my job responsibilities, familiar with a wide range of United’s COVID-19 policies and related issues.

2. On March 10, 2022, in response to materially changed COVID-19 conditions and new guidance from public-health authorities, United announced

publicly and to its employees that circumstances permitted a full return to work for United employees who had been granted a reasonable accommodation from United's COVID-19 vaccination policy. Specifically, all employees who were on unpaid leave were allowed to return to their regular jobs at United with their usual pay and benefits. Employees who received an alternative accommodation that involved working in a different job (at United or another employer) also were allowed to return to their regular jobs at United with their usual pay and benefits. Accommodated employees began returning to work on March 28, 2022.

3. Plaintiffs David Sambrano and Genise Kincannon, the only plaintiffs remaining in this action who were placed on unpaid leave, are currently back at work in their prior positions (i.e., captain and flight attendant, respectively) at the same pay rates (for both base pay and route-specific pay) and with the same benefits that they had prior to being placed on leave. Since returning to work, Sambrano has flown to Houston, Amsterdam, Los Angeles, Honolulu, and San Francisco, and Kincannon has flown to Honolulu, London, and Paris, among other locations. Seth Turnbough, a pilot who was dismissed from this matter, was also placed on unpaid leave and subsequently returned to his position as a pilot.

4. Plaintiffs David Castillo, Kimberly Hamilton, and Debra Jonas were never placed on unpaid leave and instead received alternative accommodations such as masking / testing and alternative jobs.

5. United currently restricts unvaccinated pilots and flight attendants from traveling to certain international destinations based on COVID restrictions set forth by the foreign jurisdiction. As the foreign imposed restrictions change or are removed, United accordingly adjusts its restrictions for pilots and flight attendants. For example, since April 2022, at least four countries have been removed from the list of restricted destinations, including Chile, Italy, Greece, and French Polynesia.¹ United will continue to adjust its policies as these foreign restrictions evolve.

6. In addition, as of April 2022, United no longer requires its employees or passengers to wear masks on its flights, regardless of vaccination status.

7. Based on the pandemic's current trajectory and current public health guidance, at this time, United does not anticipate reinstating unpaid leave as an accommodation for any plaintiffs.

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



Kirk Limacher

June 30, 2022
Date

¹ Chile was removed from the list for flight attendants and Greece was removed from the list for pilots.