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' RESPONSE TO REQUEST FOR 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,<br>Kimberly Hamilton, Seth Turnbough,<br>David Castillo, Debra Jennefer Thal Jonas |
| Counsel for<br>Plaintiffs-Appellants: | SCHAERR \| JAFFE LLP<br>Gene C. Schaerr (gschaerr@schaerr-jaffe.com)<br>Mark R. Paoletta (mpaoletta@schaerr-jaffe.com)<br>Brian J. Field (bfield@schaerr-jaffe.com)<br>Kenneth A. Klukowski (kklukowski@schaerr-jaffe.com)<br>Joshua J. Prince (jprince@schaerr-jaffe.com)<br>Annika M. Boone (aboone@schaerr-jaffe.com)<br><br>S\|L LAW PLLC<br>John C. Sullivan (john.sullivan@the-sl-lawfirm.com)<br><br>STEWART WIEGAND & OWENS PC<br>Robert C. Wiegand (bob.wiegand@swolegal.com)<br>Melissa J. Swindle (melissa.swindle@swolegal.com) |
| Defendant-Appellee: | United Airlines, Inc. |
| Counsel for<br>Defendant-Appellee: | JONES DAY<br>Donald J. Munro (dmunro@jonesday.com)<br>Alexander V. Maugeri (amaugeri@jonesday.com)<br>Hashim M. Mooppan (hmmooppan@jonesday.com) |

Jordan M. Matthews (jmatthews@jonesday.com)

KELLY HART & HALLMAN LLP
Russell D. Cawyer (Russell.cawyer@kellyhart.com)

SEYFARTH SHAW LLP
Esteban Shardonofsky (sshardonofsky@seyfarth.com)
Vanessa Nicole Rogers (vrogers@seyfarth.com)

Other interested entity: Airline Employees 4 Health Freedom

*/s/ Gene C. Schaerr*
Gene C. Schaerr

*Counsel of Record for Plaintiffs-Appellants*

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## INTRODUCTION AND SUMMARY

In response to this Court's June 21, 2022, Order, Appellants provide this supplemental brief explaining why they have appellate standing and why there remains a live controversy between the parties. But irrespective of how the Court resolves those questions, it should not vacate the panel's opinion finding that United irreparably harmed Appellants. *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *1 (5th Cir. Feb. 17, 2022) (per curiam).

## ARGUMENT

1. Appellants' appellate standing is clear and, indeed, has not been questioned by the Court or United during this appeal. As this Court has held, "[a]ppellate standing is measured at the time of filing the notice of appeal[.]" *DeOtte v. State of Nev.*, 20 F.4th 1055, 1070 (5th Cir. 2021). And, as this Court further explained, "[s]tanding to appeal requires injury from the judgment of the lower court." *Id.*

Here, on November 8, 2021, the district court denied Appellants' motion for a preliminary injunction. R.3263. That decision unquestionably injured Appellants by allowing United to force them to decide between: "violat[ing] their religious convictions or los[ing] all pay and benefits indefinitely." *Sambrano*, 2022 WL 486610, at *9. When Appellants filed their notice of appeal on November 19, 2021, ROA.3411, they faced exactly that harmful, irreparable choice. Appellants were

thus suffering an injury from the district court's decision when they filed their notice or appeal, and therefore have appellate standing. *DeOtte*, 20 F.4th at 1070–71.

2. This appeal also is not moot because there remains a live controversy between the parties. As noted, the central question on appeal is "whether plaintiffs have shown substantial likelihood of irreparable injury." *Sambrano*, 2022 WL 486610, at *8. And, as the panel found, forcing Appellants "either to contravene their religious convictions or to lose pay indefinitely" satisfies the "irreparable harm factor of the preliminary injunction analysis[.]" *Id.* at *9. Indeed, the coerciveness of this choice "is harmful in and of itself and cannot be remedied after the fact." *Id.* at *3.

At the time of the panel decision, the coercion was caused by United's placing Appellants and other employees on unpaid leave because of their beliefs. *See id.* at *1. They were given a choice between "their job(s) and their jab(s)." *BST Holdings LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). But United's subsequent decision to return employees to work, under certain conditions, did not eliminate that coercion. Rather, as Appellants explained in their supplemental brief opposing United's motion to vacate, United continued to pressure them to "contravene their religious convictions or to lose pay indefinitely." *Sambrano*, 2021 WL 486610, at *9. This time, United did so by restricting the ability of "accommodated" pilots and flight attendants to return to their previous positions due. Because of these

employees' beliefs, United prohibited them from working many of the lucrative flight routes that are available to other employees. *See* Appellants' Supp. Br. at 2–6 (Apr. 7, 2022).

Either way, the injury is the same: United withholds income from Appellants unless they decide to receive the COVID-19 vaccine in violation of their beliefs. Accordingly, the controversy remains live because it is still "[]possible for the court to grant" Appellants "effectual relief[.]" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12–13 (1992) (cleaned up). Indeed, by remanding the matter for the district court to address the preliminary injunction factors, the Court provided Appellants with substantial relief in the form of an opinion establishing that both their original harm and their current, ongoing harm constitutes irreparable injury. As a result, the district court must now consider the other preliminary injunction factors with the understanding that United has irreparably harmed Appellants.

3. In any event, irrespective of how the Court resolves these questions, it is critical that it not vacate the panel opinion. As Appellants explained more fully in their March 17, 2022, opposition to United's motion to vacate, Supreme Court authority prevents this Court from vacating the panel opinion. *See* Appellants' Opp. to Mot. to Vacate at 3–4 (citing *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 71–72 (1997)). If this appeal is moot, it is only because of United's "voluntary action" in returning Appellants to work. *Arizonans for Off. English*, 520 U.S. at 48–

49, 75. But, as United conceded in its motion to vacate (at 10), vacatur is inappropriate when the losing party (United) takes unilateral action to render the dispute moot. Rather, as the Supreme Court has explained, vacatur may be appropriate where the *prevailing party* (Appellants) take a "voluntary action that moots the dispute" in order to "retain the benefit of the judgment." *Arizonans for Official English*, 520 U.S. at 75 (cleaned up). Appellants have done nothing to render this case moot.

Rather, there can be no serious debate that United voluntarily and unilaterally took the action that it contends renders the case moot—purportedly returning Appellants Sambrano and Kincannon to their previous positions. As Appellants demonstrated, United cannot point to any "intervening event[]" that caused its change in course. Appellants' Opp. to Mot. to Vacate at 4. For instance, there has been no settlement that caused the case to become moot. *Id.* Nor has this case progressed to final judgment while the matter remained on appeal. *Id.* at 5. Instead, the record shows that United could have allowed Appellants to continue working all along with certain mitigation measures in place (*e.g.*, mask-wearing, periodic testing, etc.). *See* Opening Br. at 11–12, 16. Yet United did not do so until it wished to escape the panel's opinion, which presented a damning picture of the ways that United's senior leadership had treated Appellants. *See Sambrano*, 2022 WL 486610, at *9 (discussing the ways that United's CEO Scott Kirby "revealed United's

sentiments towards parties like plaintiffs"). Accordingly, Supreme Court authority forecloses United's request for vacatur.

All the equitable factors also weigh heavily against vacatur. *See DeOtte*, 20 F.4th at 1065. As noted, the panel concluded that United was irreparably harming Appellants and other employees of faith. And it reached that decision with such force that it caused United to do something immediately it had refused to do for months—temporarily stop one aspect of its unlawful actions and partially return employees to work. Without the panel opinion, it is only reasonable to conclude that United will feel free to reverse course again and send Appellants and others back onto unpaid leave. That is made clear by the fact that, even upon their return, United continues to discriminate against Appellants by severely restricting their ability to earn a living.

## CONCLUSION

Appellants have appellate standing because they were suffering a harm when they filed their notice of appeal. There also remains a live controversy between the parties because United still severely restricts the work that "accommodated" pilots and flight attendants may perform. Finally, irrespective of how the Court resolves those questions, it should not vacate the panel opinion finding that United irreparably harmed Appellants.

July 1, 2022

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*

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

## CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on July 1, 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 COMPLAINCE

The foregoing brief complies with the 5-page limit of this Court's June 21, 2022, order. 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 Office 2016 in 14-point Times New Roman font.

I further certify that (1) all privacy redactions have been made; and (2) that the brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

*/s/ Gene C. Schaerr*
Gene C. Schaerr