Case No. 21-11159

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

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF APPELLANTS AND IN OPPOSITION TO APPELLEE'S MOTION TO VACATE PANEL OPINION

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CERTIFICATE OF INTERESTED PERSONS

The case number for this *amicus curiae* brief is No. 21-11159, *SAMBRANO, ET AL. v. UNITED AIRLINES, INCORPORATED.*

Amicus Curiae Association of American Physicians and Surgeons is a non-profit corporation which has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Association of American Physicians and Surgeons, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amicus Curiae*.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Association of American Physicians and Surgeons

Dated: March 17, 2022

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians and Surgeons ("AAPS") was founded in 1943 and is dedicated to the practice of ethical medicine. Over its 79-year history, AAPS has brought several precedent-setting lawsuits, including *AAPS v. Hillary Clinton*, 997 F.2d 898 (D.C. Cir. 1993), and *AAPS v. Weinberger*, 395 F. Supp. 125 (N.D. Ill.), *aff'd sub nom., AAPS v. Mathews*, 423 U.S. 975 (1975). In addition, AAPS has filed *amicus* briefs that were cited by Supreme Court justices and other appellate courts. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting); *Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). AAPS recently filed an *amicus* brief that was accepted by the federal district court in D.C., in opposition to a new D.C. law that authorizes vaccinating schoolchildren as young as 11 years old without parental consent or even

[1] Appellants have consented to the filing of this brief by *Amicus*. Appellee United does not oppose this filing while not taking a position on whether leave of the court is required at this post-decision stage. Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

subsequently informing their parents. *See Booth v. Bowser*, No. 1:21-cv-01857-TNM (D.D.C.).

AAPS defends the fundamental liberties at stake in mandatory vaccination by a controversial biological agent, particularly when there is an incomplete understanding of its adverse effects and bodily impact. AAPS opposes a return to the era of coerced sterilization, or risk thereof, even by private entities. Expedited vaccine mandates, particularly those lacking meaningful exemptions, are a slippery slope that could lead to inhumane experimentation during an alleged crisis.

For all of the foregoing reasons, AAPS has a strong interest in opposing the motion to vacate the merits panel opinion.

STATEMENT OF THE CASE

Despite substantial public opposition to the Covid vaccines, United Airlines ("United") has required that its employees receive a Covid vaccine or be placed on unpaid leave. United did not require any passengers on its planes to be vaccinated, or its employees in other countries to get vaccinated, or pilots from other airlines who ride in its cockpits to be vaccinated. Passengers and employees on United flights could thereby be surrounded by unvaccinated passengers, as presumably occurred according to government data that many tens of millions of Americans have declined Covid vaccines despite heavy promotion of them.

United demoted to unpaid leave its employees who obtained religious exemptions from the Covid vaccine. Several of them unsuccessfully sought injunctive relief in the district court below, and were again unsuccessful in seeking such relief by a motions panel of this Court. Ultimately, however, the merits panel ruled 2-1 in favor of two such employees, finding that they have shown irreparable harm and thus may be entitled to a preliminary injunction against United. The merits panel then remanded this case to the district court to analyze additional factors before deciding whether to grant a preliminary injunction.

After losing this appeal, United reversed its position and welcomes the exempted unvaccinated employees back to work. Yet United demands vacatur of the merits panel opinion ("panel opinion") or, in the alternative, rehearing it en banc. No compelling motivation is provided by United for insisting on erasing a limited opinion that United says is moot. It does not describe any continuing prejudice against it from the merits panel opinion, or identify anything in it that should be stricken as inappropriate. United provides no reason why it would not simply move on at this point, and let the record stand.

Many tens of millions of Americans have declined to receive the Covid vaccine and its boosters,[2] despite adamant demands for vaccination by the Biden

[2] As of March 14, 2022, the CDC reports that only 65% of Americans have been fully vaccinated, and only 44% of them received the recommended booster

Administration. Government-managed data in the Vaccine Adverse Event Reporting System ("VAERS"), which threatens imprisonment for any false reporting,[3] is alarming: 1,151,450 reported adverse reactions, 135,783 hospitalizations, and 24,827 deaths.[4] Yet the same agency that urges Covid vaccination, the CDC, both fails to investigate these reports of immense harm and admits that it is withholding from the public additional data that it has concerning effects of the Covid vaccine.[5]

Meanwhile, powerful political incentives for mandatory vaccination exist regardless of their effect. Mandatory vaccination is a pathway to unprecedented new controls on travel, employment, schooling, religious worship, and other fundamental liberties. For example, by invoking the Covid pandemic, D.C. lawmakers granted permanent authority to school administrators to inject schoolchildren as young as 11 years with any authorized vaccine at any time and for any reason, without parental consent or even knowledge. The Supreme Court

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shot. https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total (viewed 3/15/22).

[3] https://vaers.hhs.gov/reportevent.html (viewed 3/12/22).

[4] https://vaersanalysis.info/2022/03/05/vaers-summary-for-covid-19-vaccines-through-2-25-2022/ (viewed 3/9/22).

[5] Apoorva Mandavilli, "CDC Isn't Publishing Large Portions of the COVID-19 Data It Collects," NEW YORK TIMES (Feb. 20, 2022) https://www.moneycontrol.com/news/trends/health-trends/cdc-isnt-publishing-large-portions-of-the-covid-19-data-it-collects-8143741.html (viewed 3/16/22).

squarely rejected a breathtakingly broad attempt by the Biden Administration to impose a Covid vaccine mandate on 84 million employed Americans. *See Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661 (2022) (per curiam).

SUMMARY OF ARGUMENT

The panel opinion is a landmark ruling against abuse of power under the pretext of public health, and this splendid opinion should be fully published rather than vacated. The panel opinion ranks with Justice Robert Jackson's concurrence in *Youngstown Sheet* and other watershed opinions that reject exploitation of a crisis to infringe on basic rights. Far from being withdrawn, the panel opinion should become a foundational precedent against similar future violations of individual rights, particularly the unwanted injection of biological agents that have irreversible life-changing effects.

By abruptly reversing its position in this case, United has done the equivalent of a U-turn on the runway and this Court should have a healthy skepticism about its explanation from its cockpit. On the one hand United asserts that this case is moot and thus the opinion should be vacated on that basis, yet simultaneously argues that the opinion is so monumental in continuing importance that an extraordinary rehearing en banc is required. Are we taking off or landing? United is not in the business of making public health pronouncements, so it no longer legitimately has a dog in this hunt. But the intense political overtones of

mandatory vaccination are unmistakable. United curries political favor in Washington, D.C., where its incredibly well-connected lead counsel Jones Day is located, and United continues to carry water for the mandatory vaccination approach attempted by President Biden and the Democrat-controlled Congress. United is heavily dependent on the Democrat-controlled Congress for massive subsidies to the airline industry that totaled $54 billion for Covid prior to this year,[6] and thus United is a far cry from being merely an independently acting "private firm" as portrayed in the dissent. *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 U.S. App. LEXIS 4347, at *34 (5th Cir. Feb. 17, 2022) (Smith, J., dissenting).

The dissent from the panel opinion should be vacated for embracing an abuse of power that would subject millions of Americans to future medical experimentation whenever sought by federal bureaucrats, just as Big Tech today censors free speech in appeasement of politicians in Washington who could revoke their immunity. Nothing in the dissent limits the power of large corporations, acting for political or other gain, to again attempt to force many thousands of employees to accept injections of a biological agent they do not want. There will be future pandemics and future misguided attempts to play God, and the dissent

[6] https://www.reuters.com/news/picture/us-airlines-to-defend-54-billion-covid-1-idUSKBN2IU0XW (viewed 3/12/22).

should be vacated rather than welcoming that. The much-hyped Covid pandemic is ending, and so should any invitation to abuse power in exploitation of it.

ARGUMENT

For starters, United lost on substantive grounds in the panel opinion and thus is plainly not entitled to vacatur of it under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). United is not prevented from continuing to contest the decision that it lost, in contrast with situations where vacatur might be equitable. Moreover, further appellate review at this point is exceedingly unlikely, as rehearings en banc of an interlocutory ruling are particularly rare, as are grants of petitions for *certiorari* by the Supreme Court.

I. Rather than Vacatur, the Panel Opinion Should Be Fully Published.

The panel opinion stands as a brilliantly reasoned bulwark against a horrific assault on liberty, and in less than a month the ruling has already been vindicated by United's capitulation. The panel opinion ranks with other courageous historic rulings, such as Justice Robert Jackson's defense of private property amid a crisis of war in his widely cited concurrence to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) (warning that "powers over labor or property would be claimed to flow from Government possession if we should legalize it"). There Justice Jackson responded to a panic-stricken Truman Administration by standing up against its presidential abuse of power, analogous to

what the panel properly did here in ruling against a corporate behemoth. Far from vacating the panel opinion, it should be fully published as precedential.

The esteemed Justice Jackson would have praised the panel opinion, as he emphasized in another concurrence that "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority ...." *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (rejecting the reasoning of the notorious *Buck v. Bell*, 274 U.S. 200, 207 (1927), which approved mandatory sterilization based expressly on the vaccine mandate decision of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). Indeed there must be limits, which include putting the brakes on an hysteria-induced infringement on liberty during an overhyped crisis. What Justice Jackson objected to is precisely what a handful of unelected, unaccountable public health authorities and United did by imposing a biological agent under the pretext of addressing an exaggerated crisis.

II. United Failed to Meet Its Burden for Vacatur.

As the movant, United carries the burden but comes nowhere near satisfying it. The public, not United, paid the costs associated with the deliberations and issuance of this opinion. The public has a right to continued benefit from its wisdom, which is substantial. What belongs to the public – the spot-on panel opinion – should not be taken from the public now. *Cf. Veeck v. S. Bldg. Code*

Cong. Int'l, 293 F.3d 791, 799 (5th Cir. 2002) (en banc) ("[P]ublic ownership of the law" includes judicial opinions and allows use by citizens "to influence future legislation, educate their neighborhood association, or simply to amuse.").

When I am a passenger jammed into a middle seat on United, neither the person to the left nor right of me is required to be vaccinated, nor is the entire row of coughing passengers behind me. No passenger who uses the airplane restroom before me is required to be vaccinated. And yet United insisted on vaccinating a pilot whom passengers never even see, under the pretext of protecting the public?

Let's not be naïve here. Vaccine mandates are an alarming gateway to promote public allowance of abortion (through use of fetal cells in mandated vaccines), infringe on parental rights (the D.C. law at issue in *Booth v. Bowser*, *supra*), violate the patient-physician relationship (by overriding physicians who advise against the vaccine), erode private medicine (by revoking medical licenses of physicians who speak publicly against a mandated vaccine), control the right to assemble (through vaccine passports), and limit the ability to earn a living (as shown in this case). In essence, United booked a ticket on this flight to tyranny, whether intentionally or not.

Fortunately, United's flight landed before its ill-fated destination. Time to deboard rather than vacate the brilliant panel opinion.

III. The Dissent Should Be Vacated.

The lengthy dissent sides with unrestrained imposition by large corporations of novel new biological agents causing unknown long-term harm and controversial short-term effects on millions of Americans. The Orwellian dystopia allowed by the dissent should be vacated before it lends support to future attempts to force biological agents on objecting Americans. Vaccine mandates are instruments of control, and what United did in advancing such control should not be encouraged for future corporate leviathans to imitate. The dissent should be vacated.

Like the *Korematsu* catastrophe and other judicial errors borne of panic, an exaggeration of a crisis underlies this invasion of liberty. Merely three weeks after the dissent issued, United itself declared its hardline approach was no longer needed, and United moved to vacate the panel opinion as moot. A supposedly unfathomable crisis that somehow requires injecting everyone with a controversial vaccine is, a mere three weeks later, much ado about nothing. Overhyped crises are how liberties are permanently lost, values destroyed, and religious rights infringed. The abrupt U-turn by United and its own motion to vacate the opinion as moot is a wonderful opportunity to withdraw the Orwellian dissent that implicitly invites a slippery slope of future abuses of power with biological agents.

In *Korematsu v. United States*, 323 U.S. 214 (1944), the crisis of World War II was used by the Supreme Court to justify forced internment of American citizens

who happened to have Japanese ancestry. Justice Jackson, consistent with his stance against medical experimentation, dissented in *Korematsu*. *Id.* at 243 (Jackson, J., dissenting) (Korematsu's "crime … consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived."). Here, the "crime" of the victims of unwanted Covid vaccination was that they happened to work for United. In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the crisis of the impending Civil War caused the Supreme Court to declare that all African Americans lacked fundamental, God-given rights. While it is often said that bad facts make bad law, perhaps even more important is how invocation of a crisis makes for even worse law.

The dissent was based on its mistaken premise that "[w]e should not hasten to crush a private firm's effort to protect its customers and employees during a global pandemic." *Sambrano,* 2022 U.S. App. LEXIS 4347, at *34 (Smith, J., dissenting). But United did not even impose its vaccine mandate globally, and the much-hyped "global pandemic" was apparently over a mere three weeks after the dissent was published, even though United opined the crisis would last another 6 years. *Sambrano*, 2022 U.S. App. LEXIS 4347, at *5 United welcomed many passengers who were not vaccinated, as a substantial percentage of Americans have rejected Covid vaccination and a booster shot urged by federal bureaucrats. The United employees victimized by its vaccine mandate, meanwhile, have to live

with its biological changes the rest of their lives. Those forced to choose between their faith and their lifelong jobs at United have to live with the scars remaining from that improper coercion.

Now United apparently acts as Appellants sought, consistent with what the panel majority held. The dissent is what should be vacated.

CONCLUSION

For the foregoing reasons, United's motion to vacate the merits panel opinion should be denied.

Respectfully submitted,

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Dated: March 17, 2022

Counsel for Amicus Curiae Association of American Physicians and Surgeons

CERTIFICATE OF SERVICE

I hereby certify that, on March 17, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Andrew L. Schlafly
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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14-point, proportionately spaced, serif typeface, in Microsoft Word.

2. This brief complies with FED. R. APP. P. 27(d)(2)(A), 29(a)(5), and 32(a) because it contains a total of 2,597 words, excluding material not counted under Rule 32(f).

Dated: March 17, 2022

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