APPENDIX

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APPENDIX A

United States Court of Appeals
For the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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No. 24-10708

GENISE KINCANNON, *on their own behalf and on behalf of all others similarly situated*; DAVID SAMBRANO, *on their own behalf and on behalf of all others similarly situated,*

Plaintiffs—Appellees/Cross-Appellants,

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*; JARRAD RAINS, *on his own behalf and on behalf of all others similarly situated*; ALYSE MEDLIN, *on her own behalf and on behalf of all others similarly situated*; CHARLES BURK, *on his 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—Appellees,

versus

UNITED AIRLINES, INCORPORATED,

Defendant—Appellant/Cross-Appellee.

Appeal from the United States District Court
or the Northern District of Texas
USDC No. 4:21-CV-1074

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges*. KURT D. ENGELHARDT, *Circuit Judge*:*

Several United Airlines employees allege that United failed to offer reasonable religious and medical accommodations to its COVID-19 vaccine mandate, thereby unlawfully discriminating against them and all others similarly situated. Plaintiffs moved to certify three classes of employees aggrieved by United's polices. The district court rejected two of those classes but certified a modified subclass of religious-accommodation seekers whom United accommodated with unpaid leave. The parties cross appeal the district court's class certification order. Because we hold that the district court did not abuse its discretion, we AFFIRM.

I.

In August 2021, United instituted a COVID-19 vaccine mandate for every employee in the United States. To comply with the mandate, employees were required to get vaccinated within five weeks of the FDA's approval of a vaccine, or—if a vaccine was not yet approved—by October 25, 2021. Employees could

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* JUDGE WILLETT concurs in all but Parts IV.B.3 and V of the majority opinion.

avoid getting vaccinated if they requested and received a religious or medical accommodation.

To request a religious accommodation, United required its employees to articulate a religious belief that prevented them from receiving the vaccine and submit a letter from a third party, such as a friend or family member, substantiating that belief. And to request a medical accommodation, employees had to submit medical documentation demonstrating a need for an exemption to the vaccine requirement. In all, 5,885 employees requested an accommodation, and 4,070 accommodations were granted.

Initially, United planned to place all employees who were granted an exemption on unpaid leave beginning on October 2, 2021, and ending whenever the "pandemic meaningfully recede[d]." At the time, this was the only accommodation United planned to offer. However, before this policy went into effect, Plaintiffs—United employees who requested religious or medical accommodations—initiated this suit and moved for a preliminary injunction. They alleged that United's plan violated Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act by forcing them to choose between taking the vaccine in violation of their faiths or at the expense of their health and their livelihoods—i.e., by denying them a reasonable accommodation. The district court issued a temporary restraining order preventing United from placing vaccine-exempt employees on unpaid leave, but it later declined to enter a preliminary injunction after concluding that Plaintiffs failed to show that they would suffer irreparable harm absent an injunction. *Sambrano v. United Airlines, Inc.*, 570 F. Supp. 3d 409, 411 (N.D. Tex. 2021). On appeal, another Panel of this court reversed, concluding that Plaintiffs would be irreparably harmed by the "ongoing coercion of being forced to choose either to contravene their religious convictions or to lose pay indefinitely." *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *9–10 (5th Cir. Feb. 17, 2022) (per curiam).

While this dispute was unfolding, United implemented a revised accommodation policy for non-customer-facing employees, such as mechanics and ramp agents. Under the new policy, those employees were allowed to continue working but were required to comply with United's masking-and-testing regime—which Plaintiffs characterize as intentionally and unlawfully punitive. However, customer-facing employees, such as pilots and flight attendants, were still placed on indefinite unpaid leave starting in November 2021, though they were given the opportunity to apply for an alternative non-customer-facing position within United. In total, 2,221 employees were accommodated with unpaid leave and 1,078 were subjected to United's masking-and-testing accommodation.

Once back in the district court, Plaintiffs moved to certify the following three classes:

1. <u>Rule 23(b)(2) Class</u>: All individuals who submitted a request for a reasonable accommodation from United's COVID-19 vaccine mandate due to a sincerely held religious belief or medical disability and then faced the choice of: abandoning their religious beliefs or medical needs (i.e., get vaccinated); accepting indefinite leave; or being fired or otherwise separated.

2. Rule 23(b)(3) Masking-and-Testing Subclass: All employees United deemed non-customer-facing who received an accommodation due to a sincerely held religious belief or medical disability and were subject to the purposely punitive masking-and-testing accommodation.

3. Rule 23(b)(3) Unpaid-Leave Subclass: All employees United deemed customer facing who received an accommodation due to a sincerely held religious belief or medical disability and who were put on unpaid leave.

The district court granted in part and denied in part Plaintiffs' motion. It concluded that the Rule 23(b)(2) class and the Rule 23(b)(3) masking-and-testing subclass failed to meet the requirements of Federal Rule of Civil Procedure 23, and it thus rejected those classes. However, the court found that the Rule 23(b)(3) unpaid-leave subclass was certifiable as to the religious-accommodation seekers, though it excluded United employees who received a medical exemption for lack of commonality.

Both parties sought leave to appeal the district court's class-certification order, which we granted pursuant to Rule 23(f).[1] Plaintiffs argue that each of their proposed classes comports with Rule 23, and they contend that the district court abused its discretion in rejecting the Rule 23(b)(2) class and the Rule 23(b)(3) masking-and-testing subclass and in excluding the medical-accommodation seekers from the unpaid-

[1] Rule 23(f) allows courts of appeals to hear "an appeal from an order granting or denying class-action certification."

leave subclass.[2] United argues that those denials were correct, but it challenges the court's certification of the modified Rule 23(b)(3) unpaid-leave subclass.

II.

As a preliminary matter, we must determine whether Plaintiffs Genise Kincannon and David Sambrano are proper parties to appeal the district court's rejection of the Rule 23(b)(2) class and the Rule 23(b)(3) masking-and-testing and ADA subclasses. United contends that Kincannon and Sambrano—the only Plaintiffs named in the Rule 23(f) petition—are members only of the certified subclass and, therefore, are not aggrieved by the rejection of the other classes.

"Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980). Conversely, "[a] party is 'aggrieved' and ordinarily can appeal a decision granting in part and denying in part the remedy requested." *Forney v. Apfel*, 524 U.S. 266, 271 (1998).

We conclude that Kincannon and Sambrano are aggrieved by the district court's adverse determinations, and therefore their cross-appeal is

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[2] Plaintiffs proposed one unpaid-leave subclass comprising both religious- and medical-accommodation seekers. However, the district court's order subdivided this class when it excluded the medical-accommodation seekers. For purposes of this appeal, the court will separately analyze whether certification is proper for the Title VII claimants and the ADA claimants, the latter of whom we will refer to as the "ADA subclass."

proper. As for the Rule 23(b)(2) class, Kincannon and Sambrano fall squarely within Plaintiffs' proposed definition. They sought religious accommodations to United's vaccine mandate and were subject to United's initial universal unpaid-leave policy. So, they are proper parties to appeal the district court's rejection of that class.

Next, although Kincannon—a flight attendant—is a customer-facing employee, Plaintiffs argue that she belongs in the masking-and-testing sub-class (as well as the unpaid-leave subclass) because she was subjected to United's masking-and-testing accommodation when United was temporarily enjoined from implementing its unpaid-leave policy. While it is unclear that Kincannon meets the class definition for this subclass, her claim of class membership and the district court's rejection of this subclass make her a proper party to appeal the court's decision.

Finally, Kincannon and Sambrano have "individual interest[s]" in the inclusion of medical-accommodation seekers in the unpaid-leave subclass to which they belong, making them aggrieved parties with standing to appeal. *See Roper*, 445 U.S. at 340 (emphasis omitted). Most obviously, the exclusion of ADA claimants from this subclass reduces the availability of attorney's fees and shrinks the punitive damages pot. *See id.* at 336, 340 (holding that plaintiffs could appeal an adverse certification ruling—notwithstanding the district court's entry of judgment in their favor—because they had an "individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails”). Accordingly, Kincannon and Sambrano may appeal the district court’s refusal to certify the proposed subclass as a whole.

Thus, we conclude that Kincannon and/or Sambrano were aggrieved by each denial of certification, and therefore they are proper parties to appeal. We turn now to the parties’ substantive arguments regarding class certification.

III.

We review class certification orders for abuse of discretion, recognizing the “essentially factual basis of the certification inquiry and of the district court’s inherent power to manage and control pending litigation.” *Sampson v. United Servs. Auto. Ass’n*, 83 F.4th 414, 418 (5th Cir. 2023) (quoting *Ahmad v. Old Republic Nat’l Title Ins. Co.*, 690 F.3d 698, 701–02 (5th Cir. 2012)). “An abuse of discretion occurs only when all reasonable persons would reject the view of the district court.” *Id.* at 418–19 (quoting *Cleven v. Mid-Am. Apartment Cmtys., Inc.*, 20 F.4th 171, 176 (5th Cir. 2021)). However, we review de novo whether the district court applied the correct legal standard. *Id.* at 419.

IV.

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). A party seeking to certify a class “must affirmatively demonstrate” that the requirements of Federal Rule of Civil Procedure 23 are met. *Wal-Mart Stores, Inc. v.*

Dukes, 564 U.S. 338, 350 (2011). Specifically, he must show that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). Rule 23 also implicitly requires that the class members be ascertainable. *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007).

In addition to these prerequisites, the party must also demonstrate that the putative class complies with one of Rule 23(b)'s requirements. *Sampson*, 83 F.4th at 418 ("Certification requires plaintiffs to satisfy all requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—and at least one of the three requirements listed in Rule 23(b)."). Here, Plaintiffs sought certification under Rule 23(b)(2) and Rule 23(b)(3). We start with the Rule 23(b)(2) class and then consider the three Rule 23(b)(3) subclasses.

A.

A class is certifiable under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."

Wal-Mart, 564 U.S. at 360 (citation omitted). This requires that "a single injunction or declaratory judgment" be capable of providing relief to each class member. *Id.*

In our circuit, "monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998). Put differently, for monetary relief to be available, it must be "incidental to requested injunctive or declaratory relief," meaning that it "flow[s] directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Id.* at 415. When damages "require separate adjudication, they predominate under *Allison*," and thus a Rule 23(b)(2) class is improper. *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 269 (5th Cir. 2000). Further, while this court has "[a]ssum[ed] [that] punitive damages may be awarded on a class-wide basis, without individualized proof of injury, where the entire class or subclass is subjected to the same discriminatory act or series of acts," any such damages must be incidental and should "typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief." *Allison*, 151 F.3d at 415, 417.

Here, Plaintiffs allege that United violated Title VII and the ADA by attempting to offer an unreasonable accommodation—unpaid leave—to this class's members. They seek an injunction preventing United from terminating or placing on unpaid leave any employee who requires a religious or me-ical accommodation to the vaccine, as well as punitive damages.

The district court rejected this class, concluding that Plaintiffs failed to show that the putative class members were injured by United's policy in the same way. Although each member was allegedly threatened with the same policy, the district court explained that the members responded differently—and so were harmed differently. For example, some employees vaccinated, while others accepted unpaid leave or decided to work elsewhere. Because the allegedly unlawful policy impacted the class members differently, the court determined that commonality and typicality were lacking. For the same reason, it also held that Plaintiffs' request for punitive damages would require individualized inquiries, rendering punitive damages predominant.

Plaintiffs argue that the district court missed the mark by looking at the downstream harm stemming from United's policy, rather than the harm inflicted by the policy's coercive effect alone. Citing our previous statement that United's "coercion [was] harmful in and of itself," *see Sambrano*, 2022 WL 486610, at *3, *9, Plaintiffs contend that each member was injured in the same way because each was unlawfully coerced. Accordingly, it avers that commonality is satisfied and that punitive damages can be awarded class-wide without individualized proof of injury.

Plaintiffs' arguments fail to persuade us that the district court abused its discretion. For starters, this court's prior holding that United's coercion threatened irreparable harm establishes—at most—"that there has been general harm to the group and that injunctive relief [may be] appropriate." *Allison*, 151 F.3d at 417. But "[p]unitive damages cannot be assessed merely upon a finding that the defendant engaged in a pattern or practice of discrimination." *Id.* Our previous holding does not establish that punitive damages are necessarily available to Plaintiffs, nor that they could be awarded to the class as a whole merely because each putative member suffered a generalized harm.

Further, as the district court found, United's policy impacted the putative class members differently, with some members suffering more severely than others. At trial, a jury would be required to decide, for example, whether a class member who succumbed to United's threat and took the vaccine in contravention of his faith or at the detriment of his health is entitled to more or less punitive damages than a member who accepted unpaid leave or a member who quickly found another job. The district court reasonably concluded that punitive damages are not incidental because they do not "flow directly from liability to the class *as a whole*," but instead require individualized inquiries. *See id.* at 415 ("Liability for incidental damages should not re-quire additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations."). This class therefore falls outside *Allison*'s confines for punitive-damages awards, as the putative class members here were not "affected by [United's] policies and practices in the same way." *Id.* at 417. Accordingly, because Plaintiffs' request for punitive damages predominates, the district court did not abuse its discretion in rejecting this class.[3] *See id.* at 416 ("The district courts, in the exercise of their discretion, are in the best position to assess whether a monetary remedy is sufficiently incidental to a claim for injunctive or declaratory relief to be appropriate in a (b)(2) class action.").

B.

Next, we consider Plaintiffs' Rule 23(b)(3) subclasses. A (b)(3) class is certifiable if "the questions of law or fact common to class members pre-dominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

Commonality, a prerequisite to certification, is a central dispute for each subclass at issue here. To establish commonality, the party seeking class certification must show that each class member "suffered the same injury." *Wal-Mart*, 564 U.S. at 349–50 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). "This does not mean merely that they have all suffered a violation of the same provision of law." *Id.* at 350. Rather, the claims must depend on a "common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

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[3] Because we agree with the district court that this class does not comport with Rule 23(b)(2), we need not consider whether Rule 23(a)'s prerequisites are met.

Predominance is also contested. To establish predominance, the party moving for certification must show that the "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). This requires him to demonstrate that common questions are "more prevalent or important" than individualized questions. *Id.* (citation omitted); *see Chavez v. Plan Benefit Servs., Inc.*, 108 F.4th 297, 316 (5th Cir. 2024) ("In order to 'predominate,' common issues must constitute a significant part of the individual cases." (quoting *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999)). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods*, 577 U.S. at 453 (citation modified).

The predominance requirement is "far more demanding" than the commonality requirement. *Amchem*, 521 U.S. at 623–24. But "[w]hen one or more of the central issues in the action are common to the class and can be said to predominate," the class may be certified "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 577 U.S. at 453 (citation modified).

Plaintiffs appeal the district court's rejection of their Rule 23(b)(3) masking-and-testing and ADA subclasses, and United appeals the certification of the modified unpaid-leave subclass. We consider each in turn.

1.

The masking-and-testing subclass comprises United employees who were allowed to continue working after receiving a religious or medical accommodation but were required to comply with purportedly "punitive" and "intentionally harsh" masking-and-testing requirements. The district court rejected this subclass for lack of commonality and typicality. In light of its previous ruling that "the requirement to eat in designated areas, wear an FDA-approved mask at work, and submit COVID-19 test results" alone does not constitute a sufficient adverse employment action for Title VII, *Sambrano v. United Airlines, Inc.*, 707 F. Supp. 3d 652, 664 (N.D. Tex. Dec. 18, 2023), the court held that the class could not rely on the masking-and-testing requirement as their common injury. Instead, it found that the actionable harm among the class members varied. For example, some putative members allege that masking made it difficult to communicate, while others allege that they were harassed or struggled to breathe. Because the court found that the employees did not suffer the same injury, it concluded that the claims were not amenable to class-wide resolution.

Plaintiffs challenge this conclusion, arguing that the masking-and-testing accommodation itself imposed "some harm" on each class member, such that the legality of United's policy can be decided on a class-wide basis. *See Muldrow v. City of St. Louis*, 601 U.S. 346, 354–55 (2024) ("To make out a Title VII discrimination claim, a [plaintiff] must show some harm respecting an identifiable term or condition of employment.").

We again conclude that the district court did not abuse its discretion. At the outset, the district court's order holding that United's masking-and-testing accommodation is not an adverse employment action is not on appeal, and Plaintiffs' attack of that holding—the crux of their challenge to the rejection of this subclass—is not proper at this juncture.[4] But even if the district court were incorrect on that point, it still did not abuse its discretion because it reasonably concluded that masking-and-testing inflicted diverse injuries. And although these harms—such as eating alone or being sprayed with Lysol—purportedly stem from forced mask-wearing, each putative member would have to present evidence demonstrating the extent of his or her injury; Plaintiffs cannot rely merely on their characterization of the accommodation as "punitive" to establish a uniform harm, given that putative members had different experiences. In other words, regardless of whether the accommodation was in fact punitive, the putative class members were punished in different ways.

Since the harms suffered—that is, the alleged adverse employment actions—among the putative members vary significantly, Plaintiffs will have to "present evidence that varies from member to member" to establish United's liability. *Tyson Foods*,

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[4] Plaintiffs previously appealed the district court's order holding that the masking-and-testing requirement is not an adverse employment action. However, they voluntarily dismissed that appeal.

577 U.S. at 453 (citation modified). Notwithstanding the presence of other common questions, the individualized nature of this crucial question is sufficient to find predominance lacking. *See Davis v. Ft. Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014) ("To establish a prima facie case of religious discrimination under Title VII, the plaintiff must present evidence that . . . she suffered an adverse employment action . . ." (citation modified)); *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 697 (5th Cir. 2014) ("To establish a prima facie discrimination claim under the ADA, a plaintiff must prove . . . that he was subject to an adverse employment decision . . ." (citation modified)).

2.

The district court also found commonality lacking among the ADA claimants who were accommodated with unpaid leave. It concluded that the underlying ADA claim requires individualized assessments to determine whether each class member had a qualifying disability. *See generally* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). Plaintiffs counter that individualized assessment is not necessary here because United accepted the putative members' accommodation requests, and the record contains supporting medical documentation. Neither point persuades us that the district court abused its discretion.

First, United's grant of a medical accommodation does not establish as a matter of law that any employee had a qualifying disability. Even if United's view regarding whether an individual met the standard were relevant, the record reflects that United did not in fact limit medical accommodations to those who were protected under the ADA. Instead, United accepted accommodation requests from "employees who [could not] get vaccinated due to medical reasons, including a disability (as defined by applicable law), pregnancy (or childbirth or a related medical condition), being a nursing mother, or having a documented medical condition that contraindicates the vaccination." And even supposing the subclass is limited to those who specifically asserted that they had a disability, United's Human Resources manager explained that "[b]oth prior to and during the pandemic, United did not require employees who submitted accommodation requests to satisfy the legal requirements of . . . the Americans with Disabilities Act. In my experience United freely granted many accommodation requests regardless of whether or not those requests would have satisfied certain technical legal requirements." Plaintiffs do not refute this evidence.

Second, and even more fundamentally, the determination of whether someone has a qualifying disability under the ADA does not generally lend itself to class-wide resolution, at least where the putative class members suffer from a variety of disabilities. Under the ADA, "disability" means "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). Whether someone is limited in a major life activity due to an impairment or is regarded as such, or even whether he has a record of a disability, are individualized questions. *See Mueck v. La Grange Acquisitions, L.P.*, 75 F.4th 469, 479 (5th Cir. 2023) ("Determining whether a plaintiff has a disability . . . requires an individualized assessment of the impact of the impairment on an individual's major life activities."); *Chandler v. City of Dall.*, 2 F.3d 1385, 1396 (5th Cir. 1993) ("[T]he determinations of whether an individual is handicapped or 'otherwise qualified' [under the similarly-worded Rehabilitation Act] are necessarily individualized inquiries."); *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999) (holding that the district court did not abuse its discretion in rejecting a class of disabled police officers because it "would have had to conduct individualized inquiries to determine whether a potential class member met the statutory definition"). The court did not err in declining to certify this subclass, given the inability to resolve these significant questions class-wide.

None of the out-of-circuit district court cases Plaintiffs cite to show that ADA claims have been heard on a class-wide basis persuade us. While some courts have found commonality among class members with diverse disabilities, *see, e.g.*, *Newkirk v. Pierre*, No. 19-CV-4283, 2020 WL 5035930, at *8–9 (E.D.N.Y. Aug. 26, 2020), the district court in this case did not abuse its discretion in reaching the opposite conclusion. Our circuit precedent and the ADA's text evince a preference—if not a mandate—for an individualized inquiry into each plaintiff's claimed disability. The importance of this issue and the need for individualized proof at least undermine the predominance requirement. We therefore affirm the exclusion of the ADA claimants from the unpaid-leave subclass.

3.

Finally, United appeals the district court's certification of a subclass of customer-facing employees who received religious exemptions to United's vaccine mandate and who were accommodated with unpaid leave. It argues that commonality is lacking, individualized questions predominate, and a class action is not the superior method of adjudicating this Title VII religious-discrimination claim.[5] We address each of these arguments in turn.

a.

Title VII makes it unlawful for an employer to discriminate against its employees on the basis of the employees' religion. 42 U.S.C. § 2000e-2(a)(1). To that end, Title VII imposes on the employer an "obligation to make reasonable accommodations for the religious observances of its employees" unless doing so would cause it to "incur undue hardship." *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5th Cir. 2000). Courts analyze failure-to-accommodate claims under a burden-shifting framework that requires the employee to first make a prima facie case of religious discrimination. *Davis*, 765 F.3d at 485. To do so, the employee must show that "(1) she held a bona fide religious belief, (2) her belief conflicted with a

[5] United does not dispute that the numerosity, typicality, ascertainability, and adequacy requirements are satisfied.

requirement of her employment, (3) her employer was informed of her belief, and (4) she suffered an adverse employment action for failing to comply with the conflicting employment requirement." *Id.* (quoting *Tagore v. United States*, 735 F.3d 324, 329 (5th Cir. 2013), *abrogated on other grounds by*, *Groff v. DeJoy*, 600 U.S. 447 (2023)); *see generally id.* ("[A] belief is 'religious' if it is 'a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God.'" (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)). If the employee makes a prima facie case, the employer then must demonstrate either that it reasonably accommodated her or that it was unable to do so without incurring undue hardship. *Id.*

United contends that three questions—the sincerity of the class members' beliefs, the reasonableness of the unpaid-leave accommodation, and whether a different accommodation would have imposed an undue hardship on United—are not amenable to class-wide adjudication but rather require individualized inquiries that undermine commonality. The district court engaged in a robust analysis of each of these contentions and ultimately concluded that the commonality requirement was satisfied. We hold that the district court did not abuse its discretion.

i.

Anytime a court considers the sincerity of an individual's religious beliefs, it must act with "a light touch, or judicial shyness." *Id.* at 486 (quoting *Tagore*, 735 F.3d at 328). "Examining religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread."

Id. (citation modified). But while sincerity is "easily established"—in the rare instance it is even challenged, *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 791 (5th Cir. 2012)—that "does not mean it is a non-existent requirement or non-essential for Rule 23 purposes," *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 935 (5th Cir. 2023).

"The sincerity of a person's religious belief is a question of fact unique to each case." *Davis*, 765 F.3d at 485. "[A] plaintiff's sincerity in espousing a religious practice 'is largely a matter of individual credibility,'" and it is sometimes "accepted on little more than the plaintiff's credible assertions." *Wright v. Honeywell Int'l, Inc.*, 148 F.4th 779, 783–84 (5th Cir. 2025) (citations omitted). Courts also often look to the plaintiff's "words and actions" for evidence of a sincere religious belief. *Moussazadeh*, 703 F.3d at 791.

The district court concluded that the words and actions common to each class member here substantiated the sincerity of their religious convictions against getting the COVID-19 vaccine. As the district court explained, to receive a religious accommodation, an employee had to request a religious exemption, which required him to articulate a religious reason for not getting the vaccine. The employee also had to submit a letter from a third-party who could attest to his religious beliefs. If United was satisfied with the employee's showing of sincerity, it placed him on indefinite unpaid leave—stripping the employee of his income but enabling him to live out his claimed religious beliefs. For the past four years, Plaintiffs have sought to hold United accountable for its purported violation of their beliefs through this lawsuit. The district court found that this uniform conduct evinces the sincerity of the class members' religious beliefs and satisfies the commonality requirement.

United challenges this conclusion, arguing that claims raising questions of religious sincerity can never be decided in a class action. It avers that our decision in *Braidwood*, along with other circuit precedent, requires an individualized inquiry into the sincerity of each class member's beliefs and that conflicting evidence in the record demonstrates that not all class members' beliefs were sincere. Neither of these arguments convince us that the district court abused its discretion, though we note that class certification does not prevent United from challenging the sincerity of the class-representative Plaintiffs at trial, nor the sincerity of general class members during class rostering, as discussed below.

To start, United's reliance on *Braidwood* is misguided. In that case, the plaintiffs sought to certify classes of employers who claimed that their religious beliefs exempted them from Title VII's requirement that they not discriminate on the basis of sexual orientation or transgender status. *Braidwood*, 70 F.4th at 921; *see generally* 42 U.S.C. § 2000e-1(a) (Title VII "shall not apply to . . . a religious corporation . . ."). This court reversed certification, partly because it would have to "make subjective distinctions to determine whether 'religion play[ed] an important role' in an organization" such that it was exempt from Title VII. *Braidwood*, 70 F.4th at 935. That determination, the court explained, "can be made only on a case-by-case basis and not at this level of abstraction at the class-certification stage." *Id.* But that holding—on which United heavily relies—

concerned whether the businesses were subject to Title VII's requirements, not whether the businesses held sincere religious beliefs. *Id.* at 935 n.45, 936 n.48 (citing *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217 (3d Cir. 2007), for its nine-factor religious-exemption test for entities). On its face, *Braidwood*'s rejection of class-wide resolution of Title VII-exemption questions does not foreclose class adjudication of individual religious-discrimination claims.

What *Braidwood* says regarding sincerity, not Title VII exemption, instructs our holding here. After addressing the need for individualized review of the entity exemption, the court further faulted the district court for "ignor[ing] the requirement of having common questions of law and fact" as to the businesses' religious sincerity. *Id.* at 935. Rather than engage with this requirement, the district court "merely state[d] that sincerity does not require an exacting review." *Id.* The *Braidwood* court reversed, explaining that "the fact that a review of religious sincerity may not be demanding does not mean it is a non-existent requirement or non-essential for Rule 23 purposes." *Id.*

We do not read *Braidwood* to foreclose class action whenever religious sincerity is in question. Instead, under *Braidwood*, certification may be appropriate if the district court adequately assesses the issue of religious sincerity and finds common questions of law and fact, rather than ignores it as "a non-existent requirement or non-essential." *See id.* The district court followed that directive here: Unlike in *Braidwood*, the court here analyzed the common evidence, considered it in light of our precedents governing review of religious sincerity, and concluded that it sufficiently unified the employees for class-action purposes.[6]

We also reject United's contention that our precedent describing religious sincerity as a "fact-specific" inquiry that requires "case-by-case" review forecloses class certification here. *See, e.g.*, *Moussazadeh*, 703 F.3d at 791 (citation omitted). The facts the district court addressed—the words and actions indicating religious sincerity—are common to all class members, meaning they are generalized and can be reviewed class-wide.

Despite the common evidence demonstrating sincerity, United contends that countervailing evidence discredits some members' claims. For example, it argues that some class members stated non-religious reasons for their aversion to the vaccine, some relied on internet sources for their religious attestations and third-party statements, and some had originally planned on getting the vaccine or had received other vaccines in the past. Although none of this evidence definitively establishes that any member of the class is insincere in his or her beliefs, we agree that it might be relevant. *See id.* ("A showing of sincerity does not necessarily require strict doctrinal adherence to standards created by organized religious hierarchies," nor does sincerity "require perfect adherence to beliefs expressed by the [plaintiff]."));

[6] And that's all the court did: Contrary to United's claim, the district court did not find religious sincerity as a matter of law. Instead, it merely determined that common evidence supported the class members' claims of religious sincerity and concluded that such evidence could be presented to the jury class-wide.

Wright, 148 F.4th at 783 ("The fact that [the plaintiff] gave additional reasons for his vaccine refusal does not show that his belief is 'merely a preferred practice.' Instead, it simply shows that his vaccine refusal is grounded on both religious and non-religious reasons." (quoting *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2351 (2025))).

But its relevance at the class certification stage is limited and does not demonstrate an abuse of discretion as to commonality. United will have ongoing opportunities to present evidence demonstrating a specific employee's lack of religious sincerity and object to his or her inclusion in the class. For example, during class rostering, after discovery, or whenever the district court finds it most appropriate,[7] the court may entertain evidence showing that a particular employee does not sincerely hold the beliefs to which he or she attested. Once the final roster is established and the class contains only members whose religious sincerity United does not contest or whom United failed to show lacked sincerity, the case can be tried.

This methodology works in conjunction with the district court's preliminary conclusion that common evidence regarding religious sincerity unites the subclass, while recognizing that United may defend its case and present refuting evidence. Although some individualized questions will be presented, allowing good-faith challenges to individual employees'

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[7] For instance, the district court will establish a protocol for notice to be provided and pertinent class-membership responses to be compiled and reviewed. United will have the ability to raise good-faith objections to individual claims to class-membership status.

inclusion in the class affords United due process without dismembering an otherwise cohesive class.[8] *See infra* Section IV.B.3.b; *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014) ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate."). Were we to hold otherwise, notwithstanding the district court's well-reasoned analysis and its sound finding that the common evidence evinces sincerity, we would effectively be establishing a bright-line rule against class actions in religious-discrimination cases. Neither the Supreme Court nor this court has ever held that such claims are excluded from Rule 23, and we decline to be the first to hinder the vindication of religious freedom in this way.

ii.

Next, United challenges the district court's conclusion that the reasonableness of the unpaid-leave accommodation, which included the option to apply for a different job, can be assessed class-wide. It contends that the availability of other positions may render the accommodation reasonable for some, but not others, and that each employee's financial circumstances are relevant to the reasonableness of the accommodation. Both arguments fail.

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[8] The district court did not abuse its discretion in concluding that the religious-accommodation subclass satisfied the commonality requirement but the ADA subclass did not. No common evidence supports the ADA claimants' assertions that they each have qualifying disabilities, whereas each Title VII claimant presented the same evidence to support their exemption requests.

First, the jobs for which employees could have applied does not raise individualized questions as to the reasonableness of the accommodation. After all, United did not accommodate its employees by giving them different jobs—it accommodated them by placing them on unpaid leave and giving them the *opportunity to apply* for other jobs. And this accommodation was the same for every member of this class.

Second, we agree with the district court that the financial circumstances of the class members are irrelevant to the question of reasonableness. Every member was placed on unpaid leave, meaning they lost their income and were prohibited from working. While some members may have felt the loss of income more than others, United accommodated all members the same way. The district court correctly concluded that the reasonableness of the accommodation can be assessed by the jury and resolved in "one stroke." *See Wal-Mart*, 564 U.S. at 350.

iii.

Lastly, United argues that the undue-hardship defense must also be resolved on an individualized basis. Under Title VII, "employers . . . have a defense against a failure-to-accommodate claim if accommodating the employee's religious practice or observance would impose an undue hardship." *See Carter v. Local 556, Transp. Workers Union of Am.*, 156 F.4th 459, 479 (5th Cir. 2025). This defense requires the employer to "show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Groff*, 600 U.S. at 470. Because Title VII imposes on the employer a "positive duty to accommodate," *Hebrew v. Tex. Dep't of Crim. Just.*, 80 F.4th 717, 721 (5th Cir. 2023), it is not enough for the employer to "merely . . . assess the reasonableness of a particular possible accommodation or accommodations," *Groff*, 600 U.S. at 473. Rather, it must consider all alternatives. *See id.*; *see also Hebrew*, 80 F.4th at 722 ("If a requested accommodation poses an undue hardship, the employer must *sua sponte* consider other possible accommodations. Only after thorough consideration of other options may the employer deny the employee's request for accommodation." (citation omitted)).

United argues that one alternative accommodation to unpaid leave—masking-and-testing—requires a fact-intensive, individualized review to determine whether it would have been feasible. According to United, the degree to which masking-and-testing would have imposed a burden depends on airport size, the availability of a reserve crew, and flight schedules. The district court rejected these contentions, concluding that United's institution of a masking-and-testing accommodation for other employees demonstrates that it was a workable alternative, and that masking-and-testing would have alleviated staffing shortages, rather than exacerbate them. It therefore found that these particularized questions do not demonstrate undue hardship and did not defeat commonality.

We agree with the district court that whether masking-and-testing would have imposed an undue burden can be answered class-wide. Of course, United may argue to a jury that the purported difficulties it identified would have resulted in "substantial increased costs." *Groff*, 600 U.S. at 470. But this does not require United to submit employee-specific evidence, given that the relevant inquiry is whether an alternative masking-and-testing accommodation would have imposed a burden that is "substantial in the *overall context* of [United's] business." *Id.* at 468 (emphasis added).

In any event, even if masking-and-testing would have imposed an undue hardship on United, at least as to some employees, United bears the burden of demonstrating, "that any and all accommodations would have imposed an undue hardship." *Hebrew*, 80 F.4th at 722 (quoting *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 455 (7th Cir. 2013)). United has failed to demonstrate that *that* question—whether every other possible alternative accommodation would have imposed a substantial increase in costs—requires individualized review, even if *some* of the possibilities raise more individualized questions.[9] Therefore, we hold that the district court did not abuse its discretion in finding that commonality was satisfied for the undue-burden inquiry.

b.

United also appeals the district court's conclusion that common questions predominate for the unpaid-leave subclass, arguing that individualized liability and damages questions require each member to

[9] For example, even if United were correct that masking-and-testing would have imposed different burdens depending on the pilot, it's hard to believe that a quarantine requirement or the creation of an unvaccinated-only flight crew for customers not apprehensive of the virus would require individualized assessment.

present evidence. We again conclude that the district court did not abuse its discretion.

As discussed above, all the questions of liability—except perhaps some questions regarding the sincerity of certain members' beliefs—are common questions that can be resolved using the same evidence. But even as to religious sincerity, "[t]hat [United] might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton*, 573 U.S. at 276; *see also Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 645–46 (5th Cir. 2016) (en banc) ("Evidence indicating that a few class members decided to take the risk of being a winner in an illegal pyramid scheme does not automatically rebut the inference of reliance for the overwhelming remainder of class members or mean that individual issues concerning the atypical knowing fraudsters will predominate at trial."); *see also Moussazadeh*, 703 F.3d at 791 ("Sincerity is generally presumed or easily established.").

Nor did the district court err in concluding that common questions predominate for damages. Our precedent holds that "[e]ven where plaintiffs seeking class certification show that common issues predominate on questions of liability, they must also present a damages model 'establishing that damages are capable of measurement on a classwide basis.'" *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 258 (5th Cir. 2020) (quoting *Comcast Corp.*, 569 U.S. at 34). While there is some tension with that requirement and other binding precedent, we hold that the district court reasonably concluded that damages are largely measurable class-wide. *Compare id.*, *with Tyson*

Foods, 577 U.S. at 453 (explaining that certification may be appropriate when "one or more of the central" issues are common and predominate, "even though other important matters will have to be tried separately, such as damages" (citation omitted)), *and Sampson*, 83 F.4th at 422 ("[I]t is well established that common questions may predominate under Rule 23(b)(3) 'even though other important matters will have to be tried separately, *such as damages*.'" (quoting *Tyson Foods*, 577 U.S. at 453)), *and Chavez*, 108 F.4th at 318–19 ("[R]ecognizing the necessity for individual damages calculations does not preclude class certification under Rule 23(b)(3).").

The class here seeks backpay, compensatory damages, and punitive damages. The district court determined that backpay could be calculated with a mathematical formula[10] using the average earnings for each member, and that the jury could determine an appropriate multiplier for any punitive damages. We agree that a jury could use this or a similar methodology to calculate backpay and punitive damages, and thus these damages are amenable to class-wide resolution, even though they will result in individualized awards.[11] *See Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 739 (5th Cir. 2023) ("Some degree of individual calculation, however, is not fatal to satisfying predominance."). And although

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[10] Indeed, the data on each employee's compensation and regular work hours and schedule is in United's possession and presumably not difficult to retrieve.

[11] Unlike the Rule 23(b)(2) class members who suffered various injuries, each member here incurred the same harm—unpaid leave.

United argues that the formula is inaccurate and fails to take into account other pertinent information, these defenses are themselves "common to the claims made by all class members" and do not undermine predominance. *See Tyson Foods*, 577 U.S. at 457.

United also argues that the formula is faulty because it cannot calculate compensatory damages, such as the damages stemming from emotional harm. However, the formula does not purport to calculate those damages, nor could it. "The very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy. The amount of compensatory damages to which any individual class member might be entitled cannot be calculated by objective standards." *Allison*, 151 F.3d at 417 (footnote omitted).[12] Therefore, these damages will likely have to be separately tried. But given that all other "central issues in the action are common to the class," the class's request for compensatory damages does not defeat predominance. *See Tyson Foods*, 577 U.S. at 453–54 (citation omitted); *see also*

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[12] The court in *Allison* also said that, in addition to compensatory damages, "punitive damages require[] particularly individualized proof of injury, including how each class member was personally affected by the discriminatory conduct." 151 F.3d at 416. However, it also left open the possibility that "punitive damages may be awarded on a class-wide basis, without individualized proof of injury, where the entire class or subclass is subjected to the same discriminatory act or series of acts." *Id.* at 417. The class members' allegations here fall squarely within this category. For the purposes of this appeal, we do not disturb *Allison*'s assumption that class-wide punitive damages are available in the circumstances it described.

Chavez, 108 F.4th at 318 ("Notably, the predominance inquiry can still be satisfied under Rule 23(b)(3) if the proceedings are structured to establish liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members." (citation modified)); *Bertulli v. Indep. Ass'n of Cont'l Pilots,* 242 F.3d 290, 298 (5th Cir. 2001) ("Determining damages may require the district court to reconsider class treatment of damages, but given the great significance of common issues in this case, we find no abuse of discretion in the district court's determination that common issues predominated.").

Accordingly, we conclude that the district court did not abuse its discretion in finding that the common questions predominate for the unpaid-leave subclass.

c.

Finally, United challenges the district court's determination that a class action is the superior method for adjudicating this claim. To determine whether a class action is superior, "the district court must compare and 'assess the relative advantages of alternative procedures for handling the total controversy.'" *Ibe v. Jones*, 836 F.3d 516, 529 (5th Cir. 2016) (quoting *In re TWL Corp.*, 712 F.3d 886, 896 (5th Cir. 2013)). This is a "fact-specific" inquiry that "varies depending on the circumstances of each case." *Id.* When assessing superiority, courts consider "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3).

We conclude that the district court did not abuse its discretion in holding that superiority is satisfied here. As the district court explained, judicial economy is well served by resolving in one action the claims of hundreds of individuals who raise the same questions of law and fact and for whom identical evidence supports (and opposes) their claims. By letting one jury consider these common questions—rather than asking multitudes of juries the same questions—the district court will conserve considerable resources. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 749 n.27 (5th Cir. 1996) ("The procedural device of Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort, and expense." (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196 (6th Cir. 1988))). Simply put, the overwhelming predominance of common questions as to the "relevant claims, defenses, facts, and substantive law" supports adjudicating this case as a class action. *See Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525 (5th Cir. 2007) (quoting *Allison*, 151 F.3d at 419).

Other considerations, such as some class members' possible "unwilling[ness] to sue individually or join a suit for fear of retaliation at their jobs" and the district court's acute familiarity with the parties and the issues, further demonstrate that a class action is superior. *See Mullen*, 186 F.3d at 625 (affirming district court's holding that joinder of all potential class members would be impracticable, at least in part because some members would be reluctant to individually sue).

United argues that superiority is lacking because Title VII's generous damages cap and the availability of attorney's fees incentivizes those harmed by its policies to pursue their claims individually. *See Allison*, 151 F.3d at 420 ("The relatively substantial value of these claims (for the statutory maximum of $300,000 per plaintiff) and the availability of attorneys' fees eliminate financial barriers that might make individual lawsuits unlikely or infeasible. Thus, the principles underlying the (b)(3) class action counsel against (b)(3) certification in this case." (citation omitted)); *see also Castano*, 84 F.3d at 748 (noting that the "most compelling rationale for finding superiority in a class action" is "the existence of a negative value suit"). It further argues that the existence of similar suits against United and manageability problems with a 1,000-member class make a class action inferior.

While these are indeed relevant considerations, they do not convince us that the district court abused its discretion in finding that a class action is superior. Regardless of Title VII's financial incentives or the fact that others have brought individual claims, the court reasonably determined that it would be efficient to resolve the common questions this class presents in one action. *See Sampson*, 83 F.4th at 418–19 ("An abuse of discretion occurs only when all reasonable persons would reject the view of the district court." (citation omitted)). Further, the identity among the class reduces the likelihood of manageability problems. Therefore, we conclude that the district court acted within its discretion when it concluded that a class action is superior.

V.

The district court thoroughly assessed whether each of Plaintiffs' proposed classes comported with Rule 23. It concluded that only a Rule 23(b)(3) subclass of employees whose religious convictions prevented them from getting the COVID-19 vaccine and whom United accommodated with unpaid leave could proceed as a class, rejecting Plaintiffs' proposed Rule 23(b)(2) class and Rule 23(b)(3) ADA and masking-and-testing subclasses. We find no abuse of discretion in any of these conclusions. Accordingly, we AFFIRM.

DON R. WILLETT, *Circuit Judge*, concurring in part and concurring in the judgment:

Class actions are an extraordinary procedural device. They make possible the vindication of meritorious claims that would otherwise be too small to pursue,[1] protect defendants from inconsistent judgments about identical conduct,[2] and—when used wisely—promote judicial efficiency by avoiding repetitive litigation of the same issues.[3]

But the very features that make class actions powerful can also make them perilous. Although "[c]lass actions serve an important function in our system of civil justice," they also "present . . .

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[1] *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (describing "overcom[ing] the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" as "[t]he policy at the very core of the class action mechanism" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

[2] *See* FED. R. CIV. P. 23(b)(1)(A).

[3] *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974) (describing "efficiency and economy of litigation" as "a principal purpose of the [class action] procedure"); *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity.").

opportunities for abuse as well as problems for courts and counsel in the management of cases."[4] They can produce "potential unfairness" for absent class members whose claims may be extinguished without their direct participation.[5] And they can "create[] insurmountable pressure on defendants to settle" to avoid "[t]he risk of . . . an all-or-nothing verdict . . . , even when the probability of an adverse judgment is low."[6]

These competing realities explain why Federal Rule of Civil Procedure 23 imposes demanding requirements for class certification—requirements designed to ensure that class actions remain a narrow "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[7] And because Rule 23 entrusts the application of those requirements largely to district courts, appellate review of certification decisions is correspondingly restrained.

However narrow the role Rule 23 assigns to the class-action mechanism, the role it assigns appellate courts is narrower still. "[M]ost issues arising under Rule 23" are "committed in the first instance to the

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[4] *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99–100 (1981).

[5] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *see also Sosna v. Iowa*, 419 U.S. 393, 399 n.8 (1975) (noting the "important consequences" of class certification "for the unnamed members of the class").

[6] *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted).

[7] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

discretion of the district court,"[8] which is "vested" with "broad power and discretion" over those matters.[9] Although "order[s] granting or denying class-certification" may be appealed,[10] our review remains "deferential."[11] "We will reverse a district court's decision to certify a class only upon a showing that the court abused its discretion or that it applied incorrect legal standards in reaching its decision."[12] Rule 23 entrusts its many judgment calls to district judges on the front lines—not appellate panels on the sidelines.

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[8] *Yamasaki*, 442 U.S. at 703.

[9] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *see also Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 933–34 (5th Cir. 2023) ("District courts have significant leeway over the management of class actions."); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) ("[W]e note that the district court maintains great discretion in certifying and managing a class action."); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998) ("We note at the outset that the district court maintains substantial discretion in determining whether to certify a class action. ").

[10] FED. R. CIV. P. 23(f). Ordinarily "the Federal Rules 'do not create or withdraw federal jurisdiction'" because "Congress alone" has that authority. *In re Serta Simmons Bedding, LLC*, 125 F.4th 555, 575 (5th Cir. 2024) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004)). But the Federal Courts Administration Act of 1992 authorizes the Supreme Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for." 106 Stat. 4506, § 101 (codified at 28 U.S.C. § 1292(e)). The Court exercised that authority in 1997 by promulgating Rule 23(f). *See Amendments to the Federal Rules of Civil Procedure*, 523 U.S. 1225 (1997).

[11] *Vizena v. Union Pac. R.R.*, 360 F.3d 496, 504 (5th Cir. 2004) (per curiam).

[12] *Mullen*, 186 F.3d at 624 (citations omitted).

When a case can be resolved by respecting that allocation of authority, appellate courts should refrain from deciding more than necessary.

For those reasons, I join Parts IV-A and IV-B-1 of the majority opinion, which ably explain why the district court acted within its discretion in declining to certify the plaintiffs' proposed Rule 23(b)(2) class and their proposed Rule 23(b)(3) masking-and-testing class. I also join Part IV-B-2, which correctly concludes that the district court likewise acted within its discretion in separating the ADA claims from the unpaid-leave class it did certify.

I also agree with the majority that the district court acted within its discretion in certifying a class "consisting of all employees of United deemed customer-facing who received an accommodation due to a sincerely held religious belief[] and who were put on unpaid leave." The majority, however, rests that conclusion in part on its holding that religious sincerity presents a common issue capable of classwide resolution. That is a difficult question—and I am not convinced the answer is yes. But we need not decide it today. Because this case can be resolved on narrower grounds, I would leave that question for another day. Still, the majority's treatment of religious sincerity as a common issue merits brief discussion.

I. Religious Sincerity as a Common Issue

Title VII prohibits discrimination based on certain protected characteristics, including (as relevant here) religion.[13] One "essential part" of a Title VII religious-

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[13] *See* 42 U.S.C. §§ 2000e-2(a)(1); *Wright v. Honeywell Int'l, Inc.*, 148 F.4th 779, 782 (5th Cir. 2025) ("Title VII of the Civil Rights

discrimination claim is "[t]he sincerity of a plaintiff's belief in a particular religious practice."[14] The majority holds that the class members' religious sincerity is an issue common to all class members. That holding gives me pause.

To be "common," a question "must be of such a nature that it is capable of classwide resolution."[15] That is, it must "resolve an issue that is central to the validity of" each class member's claims "in one stroke."[16] Yet evaluating religious sincerity requires a court to inquire into each individual's "own scheme of things."[17] Thus, one person's religious beliefs reveal little about another's. Religious conviction, after all, is no herd phenomenon but a matter of individual conscience. Religious beliefs need not be shared by others, nor must they be "acceptable, logical, consistent, or comprehensible to others."[18] Courts may not evaluate "the 'truth' of a belief," but we *must* determine whether it is "truly held."[19]

Act of 1964 prohibits employers from discriminating against employees on the basis of religion.").

[14] *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013), *abrogated on other grounds by Groff v. DeJoy*, 600 U.S. 447 (2023).

[15] *Wal-Mart*, 564 U.S. at 350.

[16] *Id.*

[17] *United States v. Seeger*, 380 U.S. 163, 185 (1965).

[18] *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

[19] *Gillette v. United States*, 401 U.S. 437, 457 (1971) (quoting *Seeger*, 380 U.S. at 185).

As a result, "[t]he sincerity of a person's religious belief is a question of fact unique to each case."[20] Evidence about one person's beliefs therefore sheds little light on anyone else's—including a co-worker's in a religiously diverse workplace. And because sincerity "is largely a matter of individual credibility,"[21] it ordinarily "demands . . . the opportunity for the factfinder to observe the claimant's demeanor during direct and cross-examination."[22] Conducting only "[a] more cursory evaluation raises the spectre that the sincerity issue will be decided by reference to the factfinder's perception of what a religion should resemble."[23] I therefore have serious reservations about the majority's conclusion that layering individualized inquiries atop one another can produce a question capable of resolution "in one stroke."[24]

The majority purports to resolve this problem by suggesting that the plaintiffs will prove their sincerity in the same way—by pointing to their exemption requests, third-party attestations, and willingness to forgo their paychecks to live out their claimed religious beliefs. But that only raises more questions. While an issue may be common when "the same evidence will suffice for each member to make a prima facie showing,"[25] what these class members have is not *the*

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[20] *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014).

[21] *Tagore*, 735 F.3d at 328.

[22] *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

[23] *Id.*

[24] *Wal-Mart*, 564 U.S. at 350.

[25] *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted).

same evidence; it is merely evidence *of the same type*. There is not one piece of evidence that is even *relevant* across the board, let alone "suffic[ient] for each member to make a prima facie showing" of sincerity.[26] No class member's exemption request, third-party attestation, or financial sacrifice is relevant to any other class member's sincerity. And a factfinder will have to evaluate each request, attestation, and sacrifice independently. If that sort of independent-but-parallel proof were enough, no putative class would ever fail the commonality requirement.[27]

* * *

Whether sincerity is—or can ever be—a common issue is a thorny question. But we need not answer it today. "[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more"—counsels exactly that course here.[28] Because the district court's certification decision can be sustained without resolving the sincerity question, our task reduces to a familiar one: asking only whether the court abused its discretion.

II. ABUSE OF DISCRETION

The majority suggests that, if sincerity is not a common issue, there is "effectively . . . a bright-line rule against class actions in religious-discrimination

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[26] *Id.*

[27] *But see Wal-Mart*, 564 U.S. at 348–60 (reversing certification for lack of commonality).

[28] *PDK Lab'ys v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (ROBERTS, J., concurring in part and concurring in the judgment).

cases."[29] But Rule 23 "does not require that all issues be common to all parties."[30] Rather, so long as the other requirements are satisfied, "even a single common question will do."[31] And, as the majority explains, there are two other common questions in this case. As far as commonality is concerned, either one would do the trick.

That leaves the remaining Rule 23 requirements: numerosity, typicality, adequacy, predominance, and superiority. Numerosity, typicality, and adequacy—the remaining Rule 23(a) prerequisites—are satisfied for the reasons the majority explains. The only remaining questions are whether the common issues predominate and whether the class action mechanism is superior to "other available methods"[32]—two questions that often overlap.[33]

In evaluating predominance and superiority, the district court's discretion is at its apex. Both inquiries require predictions about how the remaining

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[29] Maj. Op. at 23.

[30] *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992).

[31] *Wal-Mart*, 564 U.S. at 359 (cleaned up); *accord In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014); *see* 1 NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 3:20 (6th ed.) ("Since one common issue is sufficient, notwithstanding the plural language of Rule 23(a)(2), courts uniformly recognize that not *all* questions of law and fact need be common to the class.").

[32] FED. R. CIV. P. 23(b)(3).

[33] *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 (5th Cir. 2006) (noting "the interrelationship between predominance and superiority").

proceedings will unfold.[34] And the district judge—who has handled this case since its inception—is far better positioned to make those predictions than we are. We may second-guess his assessment only if it is unreasonable. And I cannot say that it is; though United has raised serious questions about some class members' sincerity, the "light touch" with which courts must handle claims of sincerity suggests that issue will not dwarf the other, common issues.[35] And while United points to other individualized issues—such as compensatory and punitive damages—the district court could have reasonably concluded that the common issues (the reasonableness of the unpaid leave accommodation and whether a more fulsome accommodation would have imposed an undue hardship on United) predominate over those issues as well.

The Supreme Court's recent decision in *Mirabelli v. Bonta* illustrates that resolving complex questions about whether sincerity can ever be a common

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[34] *See* FED. R. CIV. P. 23(b)(3)(D) (directing courts assessing predominance and superiority to consider "the likely difficulty in managing a class action"); *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370, 376 (5th Cir. 2016) ("At bottom, the [predominance] inquiry requires the trial court to weigh common issues against individual ones and determine which category is likely to be the focus of a trial."); *Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551, 555 (5th Cir. 2011) ("Determining whether the superiority requirement is met requires a fact-specific analysis and will vary depending on the circumstances of any given case." (citation omitted)).

[35] *See Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 792 (5th Cir. 2012) ("Though the sincerity inquiry is important, it must be handled with a light touch, or judicial shyness." (cleaned up)).

question is unnecessary here.[36] The plaintiffs in *Mirabelli* raised claims under the Free Exercise Clause, which—like Title VII—requires sincerity.[37] The district court certified a class without addressing sincerity[38] and issued a classwide injunction.[39] The Ninth Circuit stayed that injunction, concluding (among other things) that "the District Court had granted class certification without undertaking the 'rigorous analysis' required by" Rule 23.[40] But the Supreme Court vacated the stay, explaining that "class certification was likely proper" because "[t]he District Court addressed the requirements for certification under Rule 23 and explained why it concluded they were met."[41] Although *Mirabelli* is an "interim[] order" and therefore "not conclusive as to the merits," it nevertheless "informs" the proper role of appellate review.[42]

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[36] *See* No. 25A810, 2026 WL 575049 (U.S. Mar. 2, 2026) (per curiam).

[37] *Id.* at *1; *see DeMarco v. Davis*, 914 F.3d 383, 388 (5th Cir. 2019) ("To fall within the purview of the Free Exercise Clause, a claimant must possess a sincere religious belief."); *Union Gospel Mission of Yakima v. Brown*, 162 F.4th 1190, 1205 (9th Cir. 2026) ("[T]he First Amendment protects only sincerely held religious belief and acts rooted in religious belief." (cleaned up)).

[38] *See Mirabelli v. Olson*, 350 F.R.D. 138 (S.D. Cal. 2025).

[39] *See Mirabelli v. Olson*, No. 3:23-cv-0768-BEN-VET, 2025 WL 3712993 (S.D. Cal. 2025).

[40] *Mirabelli*, 2026 WL 575049, at *2.

[41] *Id.* at *3.

[42] *See Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (per curiam); *see NIH v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2663–64 (2025) (GORSUCH, J., concurring in part and dissenting in part).

Mirabelli thus underscores an important point: appellate courts need not settle every doctrinal question to resolve the case before them. And it demonstrates that appellate courts may sustain a district court's certification decision without announcing a sweeping rule about whether religious sincerity can be resolved without individualized assessment.

* * *

Even if sincerity is not a common issue, the district court's conclusion that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"[43] was neither unreasonable nor an abuse of discretion. As a result, it is not necessary for us to decide whether sincerity is a common issue.

III. PROCEEDINGS ON REMAND

Rule 23's grant of discretion to the district courts does not end with certification. Rather, district courts have "broad power and discretion . . . with respect to matters involving the certification *and management* of potentially cumbersome . . . class actions."[44] As a result, the district court's discretion over *this* class action does not end when we issue our mandate affirming the class certification.

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[43] FED. R. CIV. P. 23(b)(3).

[44] *Reiter*, 442 U.S. at 345 (emphasis added); *accord Mullen*, 186 F.3d at 624 ("[W]e note that the district court maintains great discretion in certifying *and managing* a class action." (emphasis added)).

As the majority recognizes, the district "court may entertain evidence showing that a particular employee does not sincerely hold the beliefs to which he or she attested" "[d]uring class rostering, after discovery, or whenever the district court finds it most appropriate."[45] In adopting mechanisms to separate the sincere wheat from the disingenuous chaff, the district court should keep in mind that because the class seeks damages for intentional discrimination, Title VII (not to mention the Seventh Amendment) gives United the right to have a jury determine its objections to individual class members' sincerity.[46] That procedure is not optional; it is "as central to the American conception of the consent of the governed as an elected legislature or the independent judiciary."[47] And the class action device cannot be used to circumvent it.[48]

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[45] Maj. Op. at 22.

[46] 42 U.S.C. § 1981a(c)(1); *see* U.S. CONST. amend. VII; *Allison*, 151 F.3d at 423 ("Once the right to a jury trial attaches to a claim, . . . it extends to all factual issues necessary to resolving that claim." (citation omitted)).

[47] Jennifer Walker Elrod, *Is the Jury Still Out? A Case for the Continued Viability of the American Jury*, 44 Tex. Tech L. Rev. 303, 303–04 (2012).

[48] *Cimino v. Raymark Indus.*, 151 F.3d 297, 312 (5th Cir. 1998) ("[T]his Court has long held that the applicability of the Seventh Amendment is not altered simply because the case is a Rule 23(b)(3) class action." (citing *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978)); *see also Ross v. Bernhard*, 396 U.S. 531, 541 (1970) (noting that, despite class actions' equitable ancestry, "it now seems settled . . . that class action plaintiffs may obtain a jury trial on any legal issues they present").

Once rubber meets the road, the district court may find that whatever individualized mechanism is necessary to resolve United's challenges to individual class members' sincerity is unreasonably cumbersome or seriously undermines the advantages of classwide proceedings. If so, the district court retains discretion to decertify the class and require individual suits—as it has already done for the two other putative classes.[49] But the possibility that decertification may be warranted eventually is not a reason for reversing certification immediately.

IV. CONCLUSION

When a district court certifies a class, we review that decision only for abuse of discretion.[50] And a decision survives that deferential standard "unless it is arbitrary or clearly unreasonable."[51] The district court's decision certifying the unpaid-leave class was neither—regardless of whether religious sincerity is a common issue. Accordingly, we must affirm. And because "[w]e need not decide more, . . . I would not decide more."[52]

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[49] *See* FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *In re Rodriguez*, 695 F.3d 360, 367 n.8 (5th Cir. 2012) ("[O]ur caselaw is clear that courts are free as often as necessary before judgment to reconsider whether class certification continues to be appropriate." (cleaned up)).

[50] *See Mullen*, 186 F.3d at 624.

[51] *Banco Mercantil de Norte, S.A. v. Paramo*, 114 F.4th 757, 760 (5th Cir. 2024) (cleaned up).

[52] *Trump v. Illinois*, 146 S. Ct. 432, 435 (2025) (KAVANAUGH, J., concurring).

APPENDIX B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 9, 2026
Lyle W. Cayce
Clerk

No. 24-10708

GENISE KINCANNON, *on their own behalf and on behalf of all others similarly situated*; DAVID SAMBRANO, *on their own behalf and on behalf of all others similarly situated,*

Plaintiffs—Appellees/Cross-Appellants,

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*; JARRAD RAINS, *on his own behalf and on behalf of all others similarly situated*; ALYSE MEDLIN, *on her own behalf and on behalf of all others similarly situated*; CHARLES BURK, *on his 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—Appellees,

versus

UNITED AIRLINES, INCORPORATED,

Defendant—Appellant / Cross-Appellee.

Appeal from the United States District Court
or the Northern District of Texas
USDC No. 4:21-CV-1074

JUDGMENT

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges*:*

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See FED. R. APP. P. 41(B). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.

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* JUDGE WILLETT concurs in all but Parts IV.B.3 and V of the majority opinion.

APPENDIX C

United States Court of Appeals
Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 1, 2024
Lyle W. Cayce
Clerk

No. 24-90016

DAVID SAMBRANO, *on their own behalf and on behalf of all others similarly situated,*

Plaintiff—Respondent/Cross-Petitioner,

DAVID CASTILLO, *on their own behalf and on behalf of all others similarly situated,*

Plaintiff—Respondent,

GENISE KINCANNON, *on their own behalf and on behalf of all others similarly situated,*

Plaintiff—Respondent/Cross-Petitioner,

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*; JARRAD RAINS, *on his own behalf and on behalf of all others similarly situated*; ALYSE MEDLIN, *on her own behalf and on* *behalf of all others similarly situated*; CHARLES BURK, *on his 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—Respondents,

versus

UNITED AIRLINES, INCORPORATED,

Defendant—Petitioner.

Motion for Leave to Appeal
under FED. R. CIV. P. 23(f)
USDC No. 4:21-CV-1074

UNPUBLISHED ORDER

Before JONES, DUNCAN, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the Petitioner's motion for leave to appeal under FED. R. CIV. P. 23(f) is GRANTED.

IT IS ORDERED that the Respondents' cross-motion for leave to appeal under FED. R. CIV. P. 23(f) is GRANTED.

A True Copy
Certified order issued Aug 01, 2024
Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX D

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 10, 2026
Lyle W. Cayce
Clerk

No. 24-10708

GENISE KINCANNON, *on their own behalf and on behalf of all others similarly situated*; DAVID SAMBRANO, *on their own behalf and on behalf of all others similarly situated*,

Plaintiffs—Appellees / Cross-Appellants,

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*; JARRAD RAINS, *on his own behalf and on behalf of allothers similarly situated*; ALYSE MEDLIN, *on her own behalf and on behalf of allothers similarly situated*; CHARLES BURK, *on his own behalf and on behalf of allothers similarly situated*; SETH TURNBOUGH, *on their own behalf and on behalf of all others similarly situated*,

Plaintiffs—Appellees,

versus

UNITED AIRLINES, INCORPORATED,

Defendant—Appellant / Cross-Appellee.

Appeal from the United States
District Court
for the Northern District of Texas
USDC No. 4:21-CV-1074

ON PETITION FOR REHEARING EN BANC

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DAVID SAMBRANO, ET AL.,

Plaintiffs,

v. **No. 4:21-cv-1074-P**

UNITED AIRLINES, INC.,

Defendant.

OPINION & ORDER

Before the Court is Plaintiffs' Motion for Class Certification and Appointment of Counsel. ECF No. 238. Having considered the Motion, briefs, and applicable law, the Court finds the Motion should be and is hereby **GRANTED in part** and **DENIED in part.** Additionally, Plaintiffs' Motion for Reconsideration (ECF No. 241) is **DENIED.**

BACKGROUND

Plaintiffs' claims arise from United's COVID-19 vaccine mandate. On August 6, 2021, United announced that all U.S.-based employees must get vaccinated by September 27, 2021. United employees could request an accommodation for religious or medical reasons.

In November 2021, United put some unvaccinated flight crew employees who received accommodations on indefinite unpaid leave. All employees on unpaid leave had the option to apply for alternative positions, which varied widely in terms of location, pay, and required qualifications. Some applied; others didn't. Other accommodated employees were never put on unpaid leave but were instead required to wear masks and regularly submit COVID-19 test results. United ultimately allowed all employees on unpaid leave to return to work in March 2022. According to United's records, 5,885 employees submitted accommodation requests, 4,070 employees were granted an accommodation, 2,211 were put on unpaid leave, and 1,078 were required to mask and test.

Plaintiffs sued on September 21, 2021, alleging employment discrimination and retaliation on behalf of themselves and other similarly situated employees. Plaintiffs say United violated the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII") by refusing to provide reasonable medical and religious accommodations. After two years, an appeal to the Fifth Circuit, and hundreds of filings, Plaintiffs filed the instant Motion for Class Certification and Appointment of Counsel. Plaintiffs ask the Court to certify the following classes:

1. <u>Rule 23(b)(2) Class</u>: "All individuals who submitted a request for a reasonable accommodation from United's COVID-19 vaccine mandate due to a sincerely held religious belief or medical disability and then faced the choice of: abandoning their religious beliefs or medical needs (i.e., get vaccinated); accepting indefinite leave; or being fired or otherwise separated."

2. Rule 23(b)(3) Masking-and-Testing Subclass: "[A]ll employees United deemed non-customer-facing who received an accommodation due to a sincerely held religious belief or medical disability and were subject to the purposely punitive masking-and-testing accommodation."
3. Rule 23(b)(3) Unpaid Leave Subclass: "[A]ll employees United deemed customer facing who received an accommodation due to a sincerely held religious belief or medical disability and who were put on unpaid leave."

ECF No. 238 at 23–24 (cleaned up).

LEGAL STANDARD

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). Federal Rule of Civil Procedure 23 controls whether this limited exception applies. A party seeking class certification thus "bear[s] the burden of proof to establish that the proposed class satisfies the requirements of Rule 23." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). A plaintiff "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, and so on." *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 545–46 (5th Cir. 2020) (internal quotations omitted).

Given the extraordinary nature of class actions, Rule 23 requires a "rigorous analysis." *Id.* Rule 23 requires courts "to probe behind the pleadings before coming to rest on the certification question." *Wal-*

Mart, 564 U.S. at 350–51. The Court must "understand the claims, defenses, relevant facts, and applicable substantive law to make a meaningful determination. If some of the determinations cannot be made without a look at the facts, then the judge must undertake that investigation." *Chavez*, 957 F.3d at 546. The Court must then "detail with specificity" the reasons for its conclusions, "explain and apply the substantive law governing the plaintiffs' claims to the relevant facts and defenses," and "articulat[e] why the issues are [or are not] fit for class wide resolution." *Id.* This is not a rubber-stamp procedure. *See Greathouse v. Cap. Plus Fin., LLC*, No. 4:22-CV-0686-P, 2023 WL 5746927, at *3 (N.D. Tex. Sept. 6, 2023) (Pittman, J.). "[T]he district court maintains great discretion in certifying and managing a class action." *See Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citing *Montelongo v. Meese*, 803 F.2d 1341, 1351 (5th Cir. 1986)).

This arduous process exists because "certification can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit." *Id.* And further, after certifying a class, any judgment binds absent class members forever. *See Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 454 (5th Cir. 2016). Thus, the "existence of a class fundamentally alters the rights of present and absent members." *Chavez*, 957 F.3d at 547.

ANALYSIS

Plaintiffs ask the Court to certify a Rule 23(b)(2) class comprised of all employees who requested an accommodation, as well as two Rule 23(b)(3) subclasses comprised of all employees put on unpaid leave (the "Unpaid Leave Subclass") and all employees who had to mask and test (the "Masking-and-Testing Subclass"). *See* ECF No. 238 at 23–24. To certify any of these classes, the Court must find the class (1) is ascertainable, (2) satisfies Rule 23(a)'s prerequisite requirements, and (3) satisfies the specific requirements of either Rule 23(b)(2) or Rule 23(b)(3).

First, the Court finds that the Rule 23(b)(2) Class: (1) satisfies the ascertainability requirement; (2) does not satisfy all Rule 23(a) prerequisite requirements; and (3) does not satisfy Rule 23(b)(2)'s specific requirements. *Second*, the Court finds that the Masking-and-Testing Subclass: (1) satisfies the ascertainability requirement; (2) does not satisfy all Rule 23(a) prerequisite requirements; and (3) does not satisfy Rule 23(b)(3)'s specific requirements. *Third*, the Court finds that the Unpaid Leave Subclass: (1) satisfies the ascertainability requirement; (2) satisfies all Rule 23(a) prerequisite requirements with respect to the Title VII claims; and (3) satisfies Rule 23(b)(3)'s specific requirements with respect to the Title VII claims. Thus, the Court will not certify the 23(b)(2) Class or the 23(b)(3) Masking-and-Testing Subclass. But the Court will certify a class of all employees United deemed "customer-facing" who received an accommodation due to a sincerely held religious belief and who were put on unpaid leave. For these reasons, the Court will **GRANT in part and DENY in part** Plaintiffs' Motion for Class Certification and Appointment of Counsel (ECF No. 238).

I. Ascertainability

The Fifth Circuit has articulated an "implicit 'ascertainability' requirement" for Rule 23 class certification. *In re Deepwater Horizon*, 739 F.3d 790, 821 (5th Cir. 2014); *see also John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."). "In order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012) (cleaned up).

Plaintiffs argue the proposed classes are ascertainable because United has the records necessary to identify each class member. *See* ECF No. 238 at 24. The Court agrees, and United does not dispute that this requirement is met. *See* ECF No. 246 at 14–31. The threshold requirement for membership in the 23(b)(2) Class is that the class member requested an accommodation. United has detailed records of employees who submitted an accommodation request. *See* ECF No. 246 at 8. United's records can also show which employees were put on unpaid leave or were subject to United's masking-and-testing protocol, relevant for the proposed 23(b)(3) subclasses. *See id.* Thus, the proposed classes are ascertainable. The Court now turns to Rule 23(a)'s prerequisite requirements.

II. Rule 23(a) Prerequisite Requirements

Rule 23(a) prescribes four prerequisites for class certification: (1) that the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) that there are questions of law or fact common to the class ("commonality"); (3) that the claims and defenses of the parties are typical of the claims or defenses of the class ("typicality"); and (4) that the representative parties will fairly and adequately protect the interests of the class ("adequacy of representation"). FED. R. CIV. P. 23(a); *see also Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 736 (5th Cir. 2023). The Court addresses each below.

A. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). To meet this standard, a plaintiff "must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981).

Plaintiffs meet this standard. Plaintiffs estimate that more than 5,000 accommodation requests were submitted and nearly 2,300 were approved. *See* ECF No. 239 at 25. Of the 2,300 employees whose accommodation requests were approved, Plaintiffs estimate that over 1,000 were put on indefinite unpaid leave and at least 800 were required to mask and test. United's records show that 5,885 accommodation requests were submitted, 4,070 employees were granted an accommodation, 2,211 were put on unpaid leave, and 1,078 were required to mask and test. *See* ECF No. 246 at 8. Thus, it's clear that the classes are sufficiently numerous—each containing hundreds or thousands of class members. *See Mullen*, 186 F.3d at 624 (a class size of 100 to 150 members "is within the range that generally satisfies the numerosity requirement"). The Court next addresses Rule 23(a)'s commonality requirement.

B. Commonality

Commonality requires "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). A common question must be "of such a nature that it is capable of classwide resolution—which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Stukenberg*, 675 F.3d at 834. This serves the ultimate purpose of the class action procedure: efficiency. If every individual plaintiff requires his or her own in-depth factual analysis, the purpose of the class action is defeated—rendering the litigation unruly and inefficient. *See id*.

Because the commonality test focuses on issues that are "central to the validity of each one of the claims," courts must analyze commonality through the lens of "the elements of the underlying cause of action." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766–67 (5th Cir. 2020). The Court will discuss the proposed Rule 23(b)(2) Class, the Masking-and-Testing Subclass, and the Unpaid Leave Subclass separately.

1. Rule 23(b)(2) Class

As an initial matter, the Court notes that commonality is not, as Plaintiffs represent, a low bar. Plaintiffs argue that "the test for commonality is not demanding," and the bar is "not particularly high." *See* ECF No. 256 at 6, 9. Not so. Before the Supreme Court's decision in *Wal-Mart v. Dukes*, the Fifth Circuit had indeed held "the commonality hurdle is not particularly high." *Smith v. Texaco, Inc.*, 263 F.3d 394, 405 (5th Cir. 2001), *opinion withdrawn, cause dismissed*, 281 F.3d 477 (5th Cir. 2002) (internal citation omitted); *see also James v. City of Dall.*, 254

F.3d 551, 570 (5th Cir. 2001) ("The test for commonality is not demanding."). Pre-*Walmart*, commonality was met "where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Smith*, 263 F.3d at 405. Thus, prior Fifth Circuit caselaw held "the interests and claims of the various plaintiffs need not be identical," and "the fact that some of the Plaintiffs may have different claims, or claims that may require some individualized analysis, is not fatal to commonality." *Stukenberg*, 675 F.3d at 839–40.

But in *Wal-Mart*, the Supreme Court held all class members' claims must depend on a common issue of law or fact the determination of which "will resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Accordingly, the Fifth Circuit observed in *Stukenberg* that "the *Wal-Mart* decision [] heightened the standards for establishing commonality under Rule 23(a)(2)." 675 F.3d at 839. In vacating the district court's class certification, the court in *Stukenberg* explained: "the district court relied, in large part, on this circuit's pre-*Wal-Mart* case law finding that '[t]he test for commonality is not demanding.'" *Id.* (citation omitted). The court explained that post-*Wal-Mart*, commonality can no longer be satisfied if the interests, claims, and injuries of the plaintiffs are varied. Rather, "commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* at 840 (emphasis added) (citing *Wal-*

Mart, 564 U.S. at 350).[1] In the present case, this is a distinction with a difference.

a. *The Rule 23(b)(2) Class members have different injuries.*

Plaintiffs' proposed Rule 23(b)(2) Class includes everyone who sought an accommodation based on a sincerely held religious belief or medical disability. *See* ECF No. 238 at 23. Plaintiffs theorize that United's unpaid leave policy forced employees to choose between "abandoning their religious beliefs or medical needs," (in other words, choosing to get vaccinated), "accepting unpaid leave" (even though many employees were never put on unpaid leave), or "being fired or otherwise separated" (if they refused the vaccine without an accommodation). *Id.* The "glue" holding these injuries together is the idea that United "operated under a general policy of

[1] Notably, Plaintiffs misquote a footnote parenthetical in *In re Rodriguez* for the proposition that "commonality exists even when 'Plaintiffs may have different claims, or claims that may require some individualized analysis.'" ECF No. 256 at 6 (citing *In re Rodriguez*, 695 F.3d 360, 367 n.9 (5th Cir. 2012)). Quite the opposite, the parenthetical in *Rodriguez* correctly notes:

> [C]ontrary to prior Fifth Circuit caselaw that "the fact that some of the Plaintiffs may have different claims, or claims that may require some individualized analysis, is not fatal to commonality," the Supreme Court held in *Wal–Mart v. Dukes*, that "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury."

695 F.3d 360, 367 n.9 (5th Cir. 2012) (cleaned up). In other words, *Rodriguez* observes the exact opposite proposition—post-*Wal-Mart*, commonality does not exist when plaintiffs have different claims or claims that require individualized analysis. Instead, all class members must have the *same injury*.

discrimination through its accommodation process and the accommodations it provided to employees." *Id.* at 27. And Plaintiffs propose two primary common questions: (1) "whether United violated the law with its intentionally harsh masking-and-testing accommodation;" and (2) "whether universal unpaid leave is a lawful accommodation." *Id.*

For the first question, Plaintiffs argue that "determining [whether] United's harsh masking-and-testing accommodation was unlawful will resolve additional claims brought by a large part of the class." *Id.* If the Court applied pre-*Wal-Mart* caselaw, this question might suffice. *See Stukenberg*, 675 F.3d at 839–840 ("Before *Wal-Mart*, . . . the commonality test [was] met when there is at least one issue whose resolution will affect all or a *significant number* of the putative class members." (cleaned up) (emphasis added)). But post-*Wal-Mart*, commonality is met when an issue that is central to the validity of each one of the class members' claims can be resolved *in one stroke*. *See Wal-Mart*, 564 U.S. at 350. Resolution of the masking-and-testing issue does no such thing, and thus, this question is not common to the class.

For the second question, Plaintiffs argue a determination that indefinite unpaid leave was unlawful "will resolve claims across the board." ECF No. 256 at 28 ("In all, the legality of United's universal and punitive accommodations is a common question that can be resolved on a classwide basis."). The first and most obvious issue with this theory is that not all employees in the Rule 23(b)(2) Class were put on unpaid leave. Thus, any determination of legality vis-à-vis unpaid leave would only resolve "in one stroke" the claims of the Unpaid Leave Subclass, not the entire Rule 23(b)(2) Class. For instance, a determination that unpaid leave was unlawful does not further the claims of those employees who masked and tested, worked remotely, changed jobs, or decided to get vaccinated—all of whom are part of the proposed Rule 23(b)(2) Class. Because not all Plaintiffs in the Rule 23(b)(2) Class "have suffered the same injury," the proposed class does not satisfy commonality. *Stukenberg*, 675 F.3d at 840 (citing *Wal-Mart*, 564 U.S. at 350). It is not enough that Plaintiffs allege they "all suffered a violation of the same provision of law." *Wal-Mart*, 564 U.S. at 350.

But Plaintiffs don't even allege that much, as the Rule 23(b)(2) Class includes claims under both Title VII (religious discrimination) and the ADA (disability discrimination). Because the Court must analyze Plaintiffs' common question through the lens of "the elements of the underlying cause of action," *Flecha*, 946 F.3d at 766–67, the Court will briefly discuss the elements needed to prove United's unpaid leave policy was unlawful.

With regard to religious discrimination, courts analyze a Title VII claim for failure to accommodate under a burden-shifting framework akin to that in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Davis v. Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014). "The employee must first establish a prima facie case of religious discrimination." *Id.* (citing *Antoine v. First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013)). To do so, a plaintiff must show: (1) they held bona fide religious beliefs, (2) the belief conflicted with a requirement of employment, (3) the employer was informed of the belief, and (4) they suffered an adverse employment action for failing to comply with the conflicting requirement. *See id.* If a plaintiff makes out a prima facie case, the burden shifts to the defendant to show either: (1) that it reasonably accommodated the employee; or (2) that it was unable to do so without undue hardship. *See id.*

For the moment, the Court focuses on the fourth element of the prima facie case: adverse action. The alleged adverse actions vary among the Rule 23(b)(2) Class—some were put on unpaid leave, some were required to mask and test, some changed jobs, and others decided to get vaccinated. And the lawfulness of United's unpaid leave policy cannot be determined across the proposed class without reference to a specific adverse employment action. Because the alleged adverse actions differ within the proposed class, all putative class members have not suffered the same injury and their claims cannot be productively litigated at once.[2] *Wal-Mart*, 564 U.S. at 350.

Further, even if all Rule 23(b)(2) Class members could establish a prima facie case of religious discrimination, the burden would shift to United to show that the accommodation was reasonable. *See Davis*, 765 F.3d at 485. A jury could find, for example, that United's masking and testing protocol was a reasonable accommodation, but indefinite unpaid leave was not. This further suggests the class members' claims are not conducive to class-action litigation. *See Wal-Mart*, 564 U.S. at 350.

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[2] The Court has already rejected Plaintiffs' contention that United's initial decision to put all unvaccinated employees on unpaid leave was itself an adverse action, as that decision was never carried out. See ECF No. 231 at 8.

The same is true for the ADA claims. "To prevail on an ADA failure-to-accommodate claim, a plaintiff must show that: '(1) the plaintiff is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations.'" *Milteer v. Navarro Cnty., Tex.*, 652 F. Supp. 3d 754, 762 (N.D. Tex. 2023) (Fitzwater, J.) (citing *Feist v. La., Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 452 (5th Cir. 2013)). The reasonableness of United's accommodations under the ADA cannot be determined on a class-wide basis because United did not provide the same accommodation to all class members. Nor can the factfinder determine in one stroke whether each class member had a qualifying disability within the meaning of the ADA. *See infra*, Part II(B)(3)(b). Accordingly, the lawfulness of United's accommodations under the ADA cannot be determined on a class-wide basis.

For these reasons, the Court finds Plaintiffs' proposed common questions do not generate common answers for the Rule 23(b)(2) Class. And the Court finds no other questions common to the Rule 23(b)(2) Class that would resolve an issue central to the validity of each class member's claim in one stroke.

b. *A "general policy of discrimination" does not hold together the Rule 23(b)(2) Class members' injuries.*

Plaintiffs strain to argue the above injuries can be tied together because they arise from the same accommodation policy. Borrowing language from *Wal-Mart*, "a general policy of discrimination," they argue, demonstrates commonality. ECF No. 256 at 26 (citing *Wal-Mart*, 564 U.S. at 353). But examination of *Wal-Mart* reveals that "a general policy of discrimination" cannot tie together the injuries at issue here.

In *Wal-Mart*, three named plaintiffs—who sought to certify a class of 1.5 million employees—alleged that Wal-Mart discriminated against them based on sex by refusing to hire and promote women. *See Wal-Mart*, 564 U.S. at 343. The plaintiffs alleged "the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees," and a strong and uniform corporate culture permits bias against women to, "perhaps subconsciously," infect the discretionary decision-making of each one of Wal-Mart's thousands of managers. *Id.* at 345. Thus, the plaintiffs claimed that "every woman at the company [is] the victim of one common discriminatory practice." *Id.* The plaintiffs sought to certify a class of people across many facilities nationwide, some of whom were wrongfully denied promotions and others who were wrongfully denied jobs.

In addressing commonality, the Supreme Court explained there is a conceptual gap between (1) an individual's claim that they have been discriminated against, and (2) "the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact." *Id.* at 353. To bridge this gap, the Supreme Court theorized that "significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* In other words, if Wal-Mart had a company-wide policy of discriminating against women, then plaintiffs across the country—whether they were passed over for a promotion or turned down for a job—could point to a single, company-wide policy as the common answer to the question: "why was I disfavored?" *Id.* at 352–353.

Thus, a class can demonstrate commonality by identifying a "general policy of discrimination." *See id.* It is *not* an alternative commonality analysis, under which a court may certify a class of varied injuries. Crucially, to satisfy the commonality requirement, a plaintiff must always show "the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact." *Id.* at 353. *Wal-Mart* did not change this requirement; it simply noted an identifiable policy may serve as a common denominator that satisfies the inquiry.

Here, Plaintiffs take this to mean that general discussions of United's corporate culture, led by CEO Scott Kirby, can tie together the Rule 23(b)(2) Class's various claims and injuries. As Plaintiffs see things, United's disparate accommodation decisions "were enacted by the same officials in defendant's central office [and] they affected the class as a whole." *See* ECF No. 256 at 34 (cleaned up); *see also id.* at 26 ("[T]he 'glue' holding the claims together here is [] United's 'general policy' of disdain for anyone who dared not march in lockstep with its vaccine mandate.").

Review of cases applying *Wal-Mart* to certify a class undermines Plaintiffs' position. In the few cases that have done so, the respective courts identified policies that were facially discriminatory or otherwise illegal in every case, as opposed to a policy that might be illegal as applied to certain individuals. Indeed, the two out-of-circuit cases on which Plaintiffs rely make this clear, as both suggest a general policy of discrimination cannot justify class certification when the proposed class members have different injuries.

First, in *Sughrim v. New York*, a group of correctional officers sought to certify a class for violations of Title VII, claiming that the prison system's accommodation policies failed to accommodate their dress and grooming needs. *Sughrim v. New York*, No. 19CV7977RASDA, 2023 WL 5713191, at *26 (S.D.N.Y. Sept. 5, 2023) (Abrams, J.). The plaintiffs alleged the New York State Department of Corrections and Community Supervision ("DOCCS") treated different religious practices differently, "granting religious accommodations for members of some faiths but denying accommodations to others." *Id.* The common questions in *Sughrim* were: (1) "whether DOCCS denied officers' applications absent a finding of undue hardship," and (2) "whether DOCCS had a practice of denying applications based on the tenets of officers' faiths." *Id.* DOCCS argued the plaintiffs did not satisfy commonality because they were members of different religions and had "'lumped' together 'Pagan, Heathen, Odinist, Asatru, Forn Sidr, and other variations of Norse Pagan religious traditions,' defeating commonality." *Id.* The court held that the fact the plaintiffs came from different religious traditions did not undermine commonality—all plaintiffs "challenge central and systemic failures of Defendants' religious accommodation policies as they affect the class as a whole." *Id.* at *24–25.

Plaintiffs ask the Court to view the Rule 23(b)(2) Class not as "a series of individualized inquiries," but as a challenge to United's central and systemic failure to reasonably accommodate its employee's religious beliefs and medical conditions. Plaintiffs cite *Sughrim* for the proposition that failure-to-accommodate claims can be certified as a class "where, as here, the same officials in defendant's central office decided whether to grant the request," and the plaintiffs challenge "systemic failures of the defendants to comply with Title VII." *See* ECF No. 238 at 32–33. But *Sughrim* doesn't apply here. Crucially, unlike here, the plaintiffs in *Sughrim* suffered the same injury—denial of their religious accommodation requests. *Sughrim* stands for the uncontroversial proposition that a defendant's "general policy of discrimination" against multiple religions does not undermine commonality when plaintiffs from different religions suffer the same injury.

Second, in *Holmes v. Godinez*, a group of deaf and hard-of-hearing inmates brought a putative class action against the Illinois Department of Corrections ("IDOC"). 311 F.R.D. 177 (N.D. Ill. 2015). The plaintiffs sought to certify a class of deaf and hard-of-hearing inmates who require accommodations. They proposed several common questions including, among others, "whether IDOC systematically failed to provide class members with effective communication and adequate access to its programs and services" and "whether IDOC provides class members with safe and effective visual notification systems to advise them of emergencies." *Id.* at 218. *Holmes* challenged IDOC's system-wide failure to provide accommodations, and the court explained that "[t]his litigation will focus on whether IDOC's policies and procedures are illegal as applied to all hearing impaired inmates, and thus will not depend on [] intensive individualized analysis." *Id.* at 222.

Here, however, the various accommodations provided by United and the various injuries alleged make it impossible to determine in one stroke whether United's accommodation policy was illegal as to all employees. As noted, while United's unpaid leave policy may have been unlawful, its masking-and-testing protocol may not have been. Determining the legality of United's unpaid leave policy does not resolve the masking-and-testing claims, and vice versa. It is therefore impossible to determine that United's overarching policy was unlawful "as applied to all" putative class members in the Rule 23(b)(2) Class. Thus, the proposed class does not satisfy commonality. The Court turns now to the Rule 23(b)(3) Masking-and-Testing Subclass.

2. Rule 23(b)(3) Masking-and-Testing Subclass

Plaintiffs ask the Court to certify a subclass consisting of "all employees United deemed non-customer-facing who received an accommodation due to a sincerely held religious belief or medical disability and were subject to the purposely punitive masking-and-testing accommodation." ECF No. 238 at 23–24 (cleaned up). For the reasons below, the Court concludes the Masking-and-Testing Subclass does not satisfy commonality either.

This Court has already held that Plaintiffs who were required to mask and test did not suffer a more than *de minimis* adverse employment action. "Employers across the country imposed these requirements in response to the COVID-19 pandemic, and trial courts should not be in the business of scrutinizing these details of personnel management in such extraordinary circumstances." *Sambrano v. United Airlines, Inc.*, No. 4:21-CV-1074-P, 2023 WL 8721437, at *4 (N.D. Tex. Dec. 18, 2023) (Pittman, J.). But to the extent the Masking-and-Testing Subclass alleges they have suffered a more than *de minimis* adverse action, the nature of the adverse action will necessarily vary. David Castillo, for example, complains that United required "that he wear an N-95 respirator at all times while at work, eat his meals alone and outdoors, and provide regular COVID-19 test results." ECF No. 156 at 27. For Mr. Castillo, the masking requirement "limited his ability to communicate with colleagues during important maintenance activities." *Id.* In contrast, Ms. Hamilton alleges that as a result of United's masking requirement, her coworkers harassed her by "spraying Lysol into her area making it hard for her to breathe." *Id.* at 29.

Because masking and testing is not, by itself, an adverse action, whether an employee in this subclass can make out their prima facie case will depend on a fact-specific inquiry. The Supreme Court's recent ruling in Muldrow v. City of St. Louis underscores this point. *See* __ U.S. __, 144 S. Ct. 967, 974 (2024) ("To make out a Title VII discrimination claim, a[n] [employee] must show *some harm* respecting an identifiable term or condition of employment."

(emphasis added)). Whether any individual employee suffered some harm as a result of United's masking-and-testing protocol depends on the facts, but Plaintiffs' Complaint does not allege that all employees suffered the same harm as a result of the protocol.

Accordingly, the Rule 23(b)(3) Masking-and-Testing Subclass suffers the same deficiency as the Rule 23(b)(2) Class—all putative class members did not suffer the same injury. Some allege that masks made it difficult to communicate with coworkers, others allege they experienced harassment and difficulty breathing. But, by itself, the masking-and-testing requirement won't cut it. Thus, the Rule 23(b)(3) Masking-and-Testing Subclass cannot resolve an issue that is central to the validity of each class member's claim in one stroke, and it fails the commonality requirement accordingly.

3. Rule 23(b)(3) Unpaid Leave Subclass

Plaintiffs also ask the Court to certify a Rule 23(b)(3) subclass consisting of "all employees United deemed customer facing who received an accommodation due to a sincerely held religious belief or medical disability and who were put on unpaid leave." ECF No. 238 at 23–24 (cleaned up). Unlike the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass, all employees who were put on indefinite unpaid leave suffered the same injury. Thus, a class-wide proceeding could generate common answers for this Subclass—at least, for the Title VII claims.

For the Unpaid Leave Subclass, United argues five issues require individualized assessment, precluding commonality: (1) whether the Title VII class members' religious beliefs were sincere; (2) whether the ADA class members had a qualifying disability; (3) whether the unpaid leave accommodation was reasonable; (4) whether the class members suffered an adverse action; and (5) whether United would incur undue hardship in providing an alternative accommodation. The Court agrees on the second point. But on all others, the Court concludes that these issues do not undermine commonality.

a. *The sincerity issue does not undermine commonality.*

For class members bringing claims for religious discrimination, United argues that the sincerity of religious beliefs is an individualized inquiry that precludes class certification. The Court disagrees. As an initial matter, the sincerity of a plaintiff's religious belief is not an exacting inquiry. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (in evaluating sincerity, "[t]he Court's 'narrow function . . . is to determine' whether the plaintiffs' [asserted religious belief] reflects 'an honest conviction'"); *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 791 (5th Cir. 2012) ("[s]incerity is generally presumed or easily established" and any inquiry "must be handled with a light touch, or judicial shyness"). It's true that a person's religious beliefs are deeply individualized and personal, but "the contours of those beliefs are purely objective." *DeOtte v. Azar*, 332 F.R.D. 188, 197 (N.D. Tex. 2019) (O'Connor, J.). And the Court "need not—indeed, *may not*—delve into each individual's [] state of mind." *Id.* Courts have few occasions to conduct this part of the inquiry, as "the sincerity of a religious belief is not often challenged." *Moussazadeh*, 703 F.3d at 791. But when courts in the Fifth Circuit have analyzed sincerity, they "have looked to the words and actions" of the plaintiff. *Id.* Here, the words and actions of the Unpaid Leave Subclass evince the sincerity of their religious beliefs.

First, with regard to the employees' *words*, the putative class members sought a religious exemption in the first place. In doing so, employees were required to articulate a religious reason for not receiving the vaccine. Employees were also required to submit a letter from a third party—someone the employee knew firsthand—who would attest to the employee's sincerely held religious belief. *See* ECF No. 238 at 14. Because these employees articulated a religious reason for not receiving the vaccine and a third-party attested to the sincerity of that belief, United granted their accommodation requests. Thus, the employees' own words and the words of all attesting third parties indicate that the class members had sincere religious objections to the vaccine. *See U.S. Navy SEALs 1-26 v. Austin*, 594 F. Supp. 3d 767, 780 (N.D. Tex. 2022) (O'Connor, J.), *appeal dismissed as moot sub nom., U.S. Navy SEALs 1-26 v. Biden*, 72 F.4th 666 (5th Cir. 2023) ("[E]veryone eligible for the class has submitted a religious accommodation request, and no one may submit that request without a chaplain's memorandum attesting to the applicant's sincerity. Thus, all potential class members have carried their (light) burden of demonstrating their religious beliefs are sincere.").

Second, as to the employees' *actions*, the putative class members chose to accept indefinite unpaid leave rather than get vaccinated—a difficult decision that itself evinces the sincerity of their belief. To be sure, non-religious beliefs may motivate a person to forego a vaccine and accept unpaid leave (e.g., safety concerns). But a decision to accept unpaid leave in conjunction with a professed religious objection and a third-party attestation to the sincerity of that objection—taken together—are sufficient to demonstrate sincerity. *See Moussazadeh*, 703 F.3d at 791. Additionally, because the Unpaid Leave Subclass is comprised of employees who were put on unpaid leave "due to a sincerely held religious belief," any person who opts into the class further contends that they had a sincere religious objection to the vaccine. *DeOtte*, 332 F.R.D. at 197 ("So long as those employers and individuals who opt into the proposed classes contend that the contraceptive mandate is forbidden by their sincerely held religious beliefs, the Court must accept those contentions.").

United relies heavily on the Fifth Circuit's decision in *Braidwood Management, Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023). In *Braidwood*, the plaintiffs sought to certify a class consisting of "all employers that oppose homosexual or transgender behavior for sincere religious reasons." *Id.* at 921. The employer-defendants argued that the application of Title VII to these employers would substantially burden their exercise of religion, implicating the Religious Freedom Restoration Act ("RFRA"). *See id.* To qualify for RFRA's protection, an asserted belief must be "sincere," making sincerity a salient issue in *Braidwood*.[3] The court held that just because "a

[3] United cites *Braidwood* for the proposition that "the sincerity 'determination can be made only on a case-by-case basis and not

review of religious sincerity may not be demanding does not mean it is a non-existent requirement or non-essential for Rule 23 purposes." *Braidwood*, 70 F.4th at 935. For commonality, it is not enough to say that "sincerity does not require an exacting review." *Id.*

Here, while sincerity indeed "does not require an exacting review," *see id.*, the Unpaid Leave Subclass would demonstrate sincerity even if it did. Viewing the facts of this case holistically, the words and actions of members in the Unpaid Leave Subclass demonstrate sincerity. *See Moussazadeh*, 703 F.3d at 791. Motivated by religious beliefs, they opted out of a vaccine in the middle of a life-threatening global

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at [a higher] level of abstraction at the class-certification stage.'" ECF No. 246 at 16. But the court applied this line of reasoning expressly to the *employer-defendants' organizations*. *See Braidwood*, 70 F.4th at 935. This issue of whether religion plays an important role in an *organization* is an entirely different and much more exacting inquiry than the sincerity of an employee's religious beliefs under Title VII. In the organizational context, courts analyze nine factors, including: (1) whether the entity operates for a profit; (2) whether it produces a secular product; (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose; (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue; (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees; (6) whether the entity holds itself out to the public as secular or sectarian; (7) whether the entity regularly includes prayer or other forms of worship in its activities; (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution; and (9) whether its membership is made up by coreligionists. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (cited in *Braidwood*, 70 F.4th at 935 n.45). This fact-intensive and highly-individualized inquiry is inapplicable to the sincerity analysis here.

pandemic. *See* ECF No. 156 at 32–34. They were willing to face the professional and social ramifications of seeking a contentious religious accommodation to do so. *See id.* They went through a formal process to seek such accommodations. *See id.* Their religious affiliates and/or members of the clergy attested to the sincerity of their believe. *See id.* And to put their money where their mouth was, they accepted unpaid leave to adhere to their religious convictions. *See id.* Now they seek to undergo the arduous process of litigation to vindicate those sincere beliefs. In whole and in part, these words and actions are not the words and actions of someone with insincere religious beliefs. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 216–17 (1972) (examining external behaviors in addition to assertion of sincerity to determine religious beliefs of Old Order Amish were sufficiently sincere to exempt them from compulsory public-school attendance laws); *U.S. v. Seeger*, 380 U.S. 163, 186 (1965) (examining external behaviors in addition to assertion of sincerity to determine non-taxonomized religious beliefs were sufficiently sincere to qualify belief-holder for conscription exemption); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (finding a religious belief was sincere despite plaintiff's inability to "articulate his belief precisely" where he explicitly stated he "quit [his job] due to his religious convictions"); *Moussazadeh*, 703 F.3d 781, 791–92 (5th Cir. 2012) (finding deviations from religious observance did not undermine asserted sincerity where sincerity was shown "though [plaintiff's] initial claims, his actions while [incarcerated], and his *continued prosecution of this* *suit*" (emphasis added)). Accordingly, *Braidwood* does not foreclose class certification in this case.

b. *The disability issue undermines commonality for Plaintiffs' ADA claims.*

The Court now turns to the Unpaid Leave Subclass members' ADA claims. For class members alleging disability discrimination, United argues that the existence of a qualifying disability is an individual inquiry. On this point, the Court agrees. Unlike the sincerity element of a Title VII religious discrimination claim—a light burden which is rarely challenged—parties frequently dispute whether an employee has a qualifying disability within the meaning of the ADA.

To prevail on an ADA failure-to-accommodate claim, a plaintiff must show: (1) the plaintiff is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered employer; and (3) the employer failed to make reasonable accommodations for such known limitations. *See Milteer*, 652 F. Supp. 3d at 762 (citing *Feist v. La., Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 452 (5th Cir. 2013)). For the first element, the ADA defines a "disability" as (a) a physical or mental impairment that substantially limits one or more major life activities, (b) a record of such an impairment, or (c) being regarded as having such an impairment. *Id.* at 762 (citing 42 U.S.C. § 12102(1)). Thus, the ADA "requires an individualized assessment of the impact of the impairment on an individual's major life activities." *Mueck v. LaGrange Acquisitions, L.P.*, 75 F.4th 469, 479 (5th Cir. 2023) (emphasis added).

Because the disability element requires an individual assessment, the Court cannot resolve Plaintiffs' ADA claims in one stroke. The Unpaid Leave Subclass includes employees with an array of disabilities. Some may qualify and require accommodation under the ADA, others may not. *See* ECF No. 246 at 19. United is entitled to argue that some employees who requested accommodations do not have a qualifying disability within the meaning of the ADA, and thus, class certification for Plaintiffs' ADA claims is inappropriate. *See Chandler v. City of Dall.*, 2 F.3d 1385, 1396 (5th Cir. 1993) (determinations "of whether an individual is handicapped [are] necessarily individualized inquiries" for which "class certification and class relief [are] inappropriate").

c. *The adverse action issue does not undermine commonality.*

United also argues that whether class members suffered an adverse action is a question that cannot be resolved on a class-wide basis. The Court disagrees. Here, all class members suffered the same adverse action—indefinite unpaid leave. As this Court has already noted, indefinite unpaid leave is clearly a more than *de minimis* adverse employment action. *See* ECF No. 231 at 8. And because all employees in the proposed subclass were put on unpaid leave, they all suffered the same adverse employment action.

d. *The reasonableness issue does not undermine commonality.*

Similarly, the reasonableness of United's indefinite unpaid leave accommodation is a question that can be resolved on a class-wide basis.

It's true that "whether an accommodation is reasonable is a fact-specific inquiry." ECF No. 231 at 9. However, because the accommodation in this case is the same across the proposed class, the only factual differences between individual class members are questions of damages. The commonality requirement can be satisfied "by an instance of the defendant's injurious conduct, even when the resulting injurious effects—the damages—are diverse." *In re Deepwater Horizon*, 739 F.3d at 810–11.

United raises two arguments on reasonableness. *First*, United argues the unpaid leave accommodation was not the same for each class member because some employees were able to draw on sick pay, take vacation time, or rely on other streams of income. ECF No. 246 at 23. Indeed, some employees who were put on unpaid leave may have been able to use up their accrued vacation time to offset their losses for some time, but that does not prevent class certification. If anything, these varying circumstances are likewise a question of damages. And these individual circumstances do not change the uniform nature of United's unpaid leave accommodation—employees put on unpaid leave stopped receiving their paycheck once they ran out of vacation days. The fact that every employees' financial circumstances are not identical does not undermine commonality either. United points out that employees' individual circumstances varied, including their "current financial resources," whether they have "another breadwinner in the family," or their "potential outside earning opportunities during leave." *Id.* But whether an employee's spouse also earns an income does not factor into the reasonableness of a religious accommodation.

Second, United argues that reasonableness may vary between employees because every employee on unpaid leave had the option to apply for a non-customer-facing job. United apparently argues that the reasonableness of an employee's accommodation depends on the jobs available to that employee, which "varied widely in terms of location, pay, qualifications, and the like." *Id.* at 11. The Court disagrees. The accommodation was the same across the board—all employees in the Unpaid Leave Subclass were put on unpaid leave. Having an opportunity to apply for (but no guarantee of receiving) a new job does not tether the reasonableness inquiry to the jobs an employee might have received had they applied. The common question is whether United's unpaid leave accommodation was reasonable. The fact that employees could have applied for other jobs may be relevant to the reasonableness of the unpaid leave accommodation, but the job offers they might have received are not. Such an inquiry would be irrelevant and speculative.

e. *The undue hardship issue does not undermine commonality.*

Finally, United argues that a factfinder cannot determine—without individualized inquiry—whether United would have incurred undue hardship in providing an alternative accommodation, such as masking and testing for customer-facing employees. *See Groff v. DeJoy*, 600 U.S. 447, 468 (2023) ("[U]ndue hardship is shown when a burden is substantial in the overall context of an employer's business." (quotations omitted)). United contends that variations in testing capabilities at different airports, different working conditions and risks, differences in state law, and the unavailability of reserve crews at certain airports make a class-wide analysis impossible. ECF No. 246 at 25. The Court disagrees.

As an initial matter, the Court notes that United somehow managed to require masking-and-testing for over 1,000 non-customer facing employees across the country, overcoming the supposed logistical and state law hurdles they now argue preclude class certification. *See id.* at 8. Plaintiffs say they will present testimony about the costs of testing, "which will address logistics at hub airports and non-hub airports." ECF No. 256 at 12. Plaintiffs also say they will present testimony about "the costs of employees taking tests themselves and providing results," and any state laws that may be implicated in such a policy. *Id.* Indeed, United's two-sentence point on variations in state law refers to some state laws "that could be interpreted as requiring the employer to pay for COVID-19 testing," thereby increasing the costs associated with testing for employees in those states. *See* ECF No. 77 at 6. But the question of whether United would have incurred a substantial burden by paying for some employees' COVID-19 tests is a question that can be resolved class-wide. And again, United managed to make it work for its non-customer-facing employees—apparently without incurring undue hardship.

Further, the unavailability of reserve crews at certain airports does not create individualized questions of undue hardship. United argues that masking and testing at airports without reserve crews would create an undue hardship because positive COVID-19 tests would result in cancelled flights. *See* ECF No. 246 at 25. Of course, the risk of unexpected illness was not limited to unvaccinated employees. Employees who got the shot could also catch COVID-19 (or the flu), resulting in staffing shortages. And increasing the number of available employees (i.e., requiring employees to mask and test instead of putting everyone on unpaid leave) would *alleviate* those staffing shortages—not exacerbate them. Thus, United's argument that masking and testing could cause staffing shortages is unavailing—especially when United's solution was to prevent its customer-facing staff from working at all. Stephen Jones, *Why are so many flights being canceled?*, BUS. INSIDER (Jul. 23, 2022, 4:53 AM), https://www.businessinsider.com/airlines-labor-shortage-cancelling-flights-aviation-jobs-market-2022-6 ("Airlines have collectively canceled thousands of flights, with labor shortages often being blamed."). Accordingly, the question of whether United would have incurred a "burden [that] is substantial in the overall context of [its] business" by offering an alternative accommodation is a question that is common to the class. *See Groff*, 600 U.S. at 468.

Of United's five proposed individualized issues—sincerity, disability, reasonableness, adverse action, and undue hardship—one persuades. The Court thus finds that the Unpaid Leave Subclass' Title VII claims satisfy commonality, but the ADA claims do not.

* * *

For the above reasons, the Court concludes that the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass fail to satisfy commonality. The Rule 23(b)(3) Unpaid Leave Subclass satisfies commonality for its Title VII claims, but not its ADA claims. The Court now turns to typicality.

C. Typicality

The typicality test concerns three questions: (1) whether other members have the same or similar injury; (2) whether the action is based on conduct which is not unique to the named plaintiffs; and (3) whether other class members have been injured by the same course of conduct. *Miller v. Grand Canyon Univ., Inc.*, 540 F. Supp. 3d 625, 634–35 (N.D. Tex. 2021) (Pittman, J.) (citations omitted). In short, "class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Id.*; *Angell v. GEICO Advantage Ins. Co.*, 67 F.4th 727, 736 (5th Cir. 2023) ("[T]he critical inquiry is whether the named plaintiff's claims have the same essential characteristics as those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." (cleaned up)); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). Having considered the three typicality questions, the Court concludes that the Title VII Unpaid Leave Subclass meets the typicality requirement, but the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass do not.

First, as discussed above, all members of the Title VII Unpaid Leave Subclass suffered the same injury. The named Plaintiff, Genise Kincannon, and the other subclass members were all put on unpaid leave. This policy was uniformly applied to the entire class. *Second*, the action is based on conduct which is not unique to Ms. Kincannon. United's unpaid leave policy was the same across the board. United's uniform application of this policy means that the legal and factual questions relevant to Ms. Kincannon are the same as those relevant to the other subclass members. *Third*, for the same reason, all members of the Unpaid Leave Subclass have been injured by the same course of conduct: they requested religious exemptions from United's vaccine mandate, participated in United's accommodation process, and were all put on unpaid leave. Thus, a determination as to Ms. Kincannon's claim would necessarily resolve the claims of other putative class members. *See Braidwood*, 70 F.4th at 934 n.39. The Title VII Unpaid Leave Subclass therefore satisfies typicality.

However, the proposed Rule 23(b)(2) Class does not. The varied harms within the class do not lend themselves to any "typical" claim, and none of the named Plaintiffs' experiences are typical of the entire class. Some were put on unpaid leave, some were subject to the masking-and-testing protocol, and others decided to get vaccinated. Thus, there is no single plaintiff whose claim the Court could resolve that would in turn resolve the claims of all others. *See id.* Similarly, the Masking and Testing Subclass does not meet the typicality requirement. Since masking and testing alone is insufficient to establish an adverse employment action, individualized inquiry is necessary to determine the nature of the harm suffered. There are no typical claims.

Thus, the Court concludes that the proposed Title VII Unpaid Leave Subclass satisfies the typicality requirement because the class representative's claims are typical of the class members' claims, arise from the same course of conduct, and are based on the same legal theories. However, the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass do not satisfy typicality.

D. Adequacy of Representation

The final Rule 23(a) prerequisite requirement for certification demands that a plaintiff show "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). "Rule 23(a)'s adequacy requirement encompasses class representatives, their counsel, and the relationship between the two." *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002) (citing *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 479 (5th Cir. 2001)). "[T]he adequacy requirement mandates an inquiry into (1) the zeal and competence of the representatives' counsel and (2) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees." *Berger*, 257 F.3d at 479 (cleaned up) (citing *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982)).

Here, Ms. Kincannon has demonstrated a willingness and ability to take an active role in controlling the litigation since its inception. She has participated in hearings and mediation, provided written discovery, and sat for depositions. *See* ECF No. 238 at 31. The class representative does not have conflicts of interest with other members of the class. Likewise, Plaintiffs are represented by competent counsel with extensive experience in complex litigation and class actions. *See id.* Indeed, United does not dispute that the class representatives and their counsel satisfy this requirement. *See* ECF No. 246 at 14 ("Rule 23(a) requires proof of numerosity, commonality, typicality, and adequacy of representation. In this case, Plaintiffs stumble over two of those four elements: commonality and typicality." (citation omitted)). Accordingly, Rule 23(a)'s adequacy-of-representation requirement is satisfied.

* * *

In sum, the Court concludes that the Rule 23(b)(2) Class and the Rule 23(b)(3) Masking and Testing Subclass do not satisfy Rule 23(a)'s requirements, but the Title VII Unpaid Leave Subclass does.

III. Rule 23(b)(2)-Specific Requirements

Although the Court has already determined the Rule 23(b)(2) Class fails the prerequisite commonality and typicality requirements, the 23(b)(2) Class fails for another, independent reason. Even if the proposed class satisfied Rule 23(a), Rule 23(b)(2) certification would still be inappropriate because Plaintiffs' request for punitive damages is not "incidental" to the requested injunctive relief.

Certification under Rule 23(b)(2) is appropriate if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2). In other words, Rule 23(b)(2) certification is appropriate when plaintiffs seek injunctive or declaratory relief, not monetary damages. But here, Plaintiffs also seek monetary relief in the form of punitive damages, backpay, and compensatory damages. *See* ECF No. 238 at 40–41.

The underlying premise of the 23(b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—"begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 413 (5th Cir. 1998). Accordingly, certification under Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." FED. R. CIV. P. 23 (advisory committee notes) (emphasis added) (quoted in *Allison*, 151 F.3d at 411). Instead, monetary relief may be obtained in a Rule 23(b)(2) class action only if "the predominant relief sought is injunctive or declaratory." *Allison*, 151 F.3d at 411.

The Fifth Circuit has held that "monetary relief predominates in (b)(2) class actions unless it is *incidental* to requested injunctive or declaratory relief." *Allison*, 151 F.3d at 415 (emphasis added). In defining incidental damages, the Fifth Circuit explained:

> Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be

> capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Id. Under this framework, the Court concludes that money damages are not incidental to the equitable relief sought by Plaintiffs.

The reasoning in *Allison* is instructive on this point. The court in *Allison* had "little trouble affirming the district court's finding that the plaintiffs' claims for compensatory and punitive damages are not sufficiently incidental" to the injunctive relief sought. *Id.* at 416. In *Allison*, the court began by addressing the plaintiffs' claims for compensatory damages, explaining: "[t]he very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy." *Id.* at 417. Thus, the court held that "compensatory damages under Title VII and 42 U.S.C. § 1981 are not incidental to class-wide injunctive or declaratory relief for discrimination." *Id.*

But Plaintiffs say they do not seek backpay and compensatory damages for the proposed Rule 23(b)(2)

Class. Rather, "they seek certification of those claims under (b)(3)," apparently referring to the proposed (b)(3) subclasses. ECF No. 256 at 17. Plaintiffs do, however, seek punitive damages for the proposed (b)(2) class. *See* ECF No. 238 at 37 ("[T]he intangible harm Plaintiffs suffered from this coercive choice warrants a two-pronged remedy: (1) an injunction prohibiting United from engaging in this conduct again; and (2) a class-wide award of incidental (here, punitive) damages . . . ."). Thus, the Court must determine whether Plaintiffs' request for punitive damages is incidental to the injunctive relief sought.

In *Allison*, "the court assumed—with reservations—that punitive damages could be awarded on a classwide basis without individualized proof of injury, but emphasized that such damages would be limited to claims that an entire class or subclass was subjected to the same discriminatory act or series of acts." *Colindres v. QuitFlex Mfg.*, 235 F.R.D. 347, 377 (S.D. Tex. 2006) (Rosenthal, J.) (citing *Allison*, 151 F.3d at 417). Even assuming that punitive damages could be awarded on a class-wide basis, the court in *Allison* held that such an award was not appropriate in the case at hand because the plaintiffs did not allege that "each plaintiff was affected by these policies and practices in the same way." *See Allison*, 151 F.3d at 417. Thus, when plaintiffs ask a court to certify both equitable and punitive damages claims under Rule 23(b)(2), two questions emerge. *See Colindres*, 235 F.R.D. at 377. First, can punitive damages be assessed without proof of liability to individual class members? *See id.* Second, was each plaintiff affected by the challenged policy in the same way? *See id.*

As to the first question, *Allison's* reasoning against a class-wide award of punitive damages applies here. The court explained that punitive damages in the Title VII context "must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs," and thus "necessarily turn on the recovery of compensatory damages." *Allison*, 151 F.3d at 417–18. "[B]eing dependent on non-incidental compensatory damages, punitive damages are also non-incidental—requiring proof of how discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards." *Id.* at 418.

Plaintiffs here seek punitive damages for their 23(b)(2) Class, but they acknowledge that compensatory damages are non-incidental and require individualized inquiries not appropriate for (b)(2) certification. *See* ECF No. 256 at 17 ("Plaintiffs do not seek certification of their claims for backpay and compensatory damages under (b)(2), they seek certification of those claims under (b)(3), where claims for individualized damages are appropriate."). Like in *Allison*, because punitive damages must be related to the non-incidental compensatory damages awarded, punitive damages are likewise non-incidental here.[4]

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[4] The Court notes that Plaintiffs, in a footnote, propose that "[i]f the Court disagrees" on this point, "it should instead adopt a hybrid approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief." ECF No. 238 at 37 n.29 (quotations omitted). But "[t]he Court [in *Allison*] specifically rejected the possibility of a 'hybrid' class with injunctive relief under Rule 23(b)(2) and

As to the second question, even assuming punitive damages could be awarded on a class-wide basis in this case, Plaintiffs do not allege that "each plaintiff [in the 23(b)(2) Class] was affected by these policies and practices in the same way." *See* ECF No. 238 at 29 ("It is of no moment that some Plaintiffs did not experience United's discrimination in exactly the same way."). Mr. Burk, for example, decided to get vaccinated. Ms. Kincannon, on the other hand, was put on unpaid leave. Other class members took different jobs, and most were never actually put on unpaid leave. Thus, Plaintiffs do not—and cannot—contend that each 23(b)(2) Class member was affected by United's vaccine mandate and unpaid leave policy in the same way. Therefore, the Court finds that punitive damages are not incidental to the injunctive relief sought, rendering (b)(2) certification improper.

IV. Rule 23(b)(3)-Specific Requirements

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). As explained below, the Court concludes that the proposed Unpaid Leave Subclass satisfies both predominance and superiority, but the Masking-and-Testing Subclass does not.

A. Predominance

Factual predominance requires that "proposed classes are sufficiently cohesive to warrant

damages relief under Rule 23(b)(3)." *See Colindres*, 235 F.R.D. at 370 (quoting *Allison*, 151 F.3d at 419).

adjudication by representation." *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 253 (5th Cir. 2020). As with commonality and typicality, "the risk of voluminous and individualized extrinsic proof defeating predominance runs particularly high where a defendant raises substantial affirmative defenses." *Id.* at 256. The predominance requirement "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case," and is a "far more demanding" hurdle than Rule 23(a)'s commonality requirement. *Prantil v. Arkema Inc.*, 986 F.3d 570, 576–77 (5th Cir. 2021). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where *the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.*" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (cleaned up) (emphasis added). As long as individual questions will not overwhelm common ones, individualized questions will not rule out certification. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014).

Here, United argues that Plaintiffs' 23(b)(3) subclasses fail to satisfy predominance due to (1) individualized liability issues and (2) individualized damages issues. United devotes one page of its brief to the individualized liability issues that may preclude predominance. *See* ECF No. 246 at 38. To fully address potential predominance issues, the Court draws on United's commonality concerns under Rule 23(a). *See* Prantil, 986 F.3d at 579 (explaining that courts must "respond to the defendants' legitimate protests of individualized issues that could preclude class treatment"). The Court will first discuss the elements of the Unpaid Leave Subclass's Title VII claims and their bearing on the predominance inquiry. Then, the Court will discuss United's concerns that damages cannot be calculated without individual inquiry.

1. Liability Issues

Once again, the elements of Plaintiffs' Title VII claims are: (1) the employee had a sincere religious belief, (2) the belief conflicted with a requirement of employment, (3) the employer was informed of the belief, and (4) the employee suffered an adverse employment action for failing to comply with the conflicting requirement. *See Davis*, 765 F.3d at 485. If they satisfy that showing, the burden shifts to United to demonstrate either (1) that it reasonably accommodated the employee, or (2) that it was unable to do so without undue hardship. *See id.* These questions of law are common across the Unpaid Leave Subclass.

Here, two elements of the prima facie case will clearly be satisfied using the same evidence: the class members' beliefs conflicted with United's vaccine mandate and United was informed of their beliefs. Both elements can be demonstrated class-wide based on evidence that the class members cleared United's hurdles for requesting a religious accommodation. In so doing, the class members informed United of their belief and made a prima facie showing that the belief conflicted with United's vaccine mandate.

But United's Response raises four individual-liability issues: (1) the sincerity of Plaintiffs' beliefs, (2) the reasonableness of the accommodation, (3) whether Plaintiffs suffered an adverse action, and (4) whether United would incur undue hardship in providing an alternative accommodation. Although the Court addressed each issue in its commonality analysis, the Court will now address the reasons common questions predominate with respect to each issue.

First, the words and actions of the unpaid leave class members evince a sincerely held religious belief such that Plaintiffs can make a prima facie showing with the same evidence. Each class member necessarily (1) articulated a religious reason for not getting vaccinated, (2) submitted a third-party letter attesting to the sincerity of their religious beliefs, (3) chose to accept unpaid leave instead of get vaccinated, and (4) opted into the class. *See supra*, Part II(B)(2)(c). These words and actions are sufficient to carry the class members' light burden of demonstrating sincerity. *See U.S. Navy SEALs 1-26*, 594 F. Supp. 3d at 780. And because these words and actions are common to each class member, the same evidence will suffice for each member to make a prima facie showing on sincerity. Specifically, the class members can satisfy their burden by demonstrating that United's accommodation process required these words and actions, that they complied with that process, and that they were granted an accommodation as a result. Thus, common questions predominate with respect to the sincerity of the class members' religious beliefs.

Second, the reasonableness of the unpaid leave accommodation is a common question. All class members in the Unpaid Leave Subclass received the same accommodation—unpaid leave—and the reasonableness of that accommodation will not depend on individual inquiries. United argues the unpaid leave accommodation was not the same across the class for four reasons: (1) employees who qualified for medical leave could use paid sick leave, (2) employees who had pre-scheduled vacations during the unpaid leave period could be paid for that time, (3) some employees may have still been able to pay their bills even though they lost a paycheck, and (4) all employees had the opportunity to apply for a non-customer-facing job. *See* ECF No. 246 at 21–23. None persuade.

For the first and second points, the ability of some employees to offset the financial burden of unpaid leave using sick days or vacation days has no bearing on the reasonableness of the accommodation. Employees stopped receiving their paycheck once they ran out of vacation days, and that policy was common to the class. These considerations relate solely to damages. United's third point is even less persuasive, as the reasonableness of United's accommodation does not depend on whether an employee earned other income from investments, received financial support from family, or had "another breadwinner in the family." *Id.* at 23. The accommodation was the same across the class, and its reasonableness can be determined class-wide.

United also argues that reasonableness varied because employees had the opportunity to apply for (but no guarantee of receiving) another job at United. *Id.* at 23. Not so. All employees in the Unpaid Leave Subclass received the same accommodation—unpaid leave. And the reasonableness of that accommodation is a question common to the class. To the extent United allowed employees to apply for another job, that fact may indeed be relevant in determining the reasonableness of the accommodation. Some employees applied for but did not get offered another job, some did not apply at all, and others may have received an alternative job offer but decided not to take it. In this instance, a factfinder need not speculate about jobs an employee may have received. The reasonableness inquiry turns on whether the unpaid leave accommodation was reasonable, in light of the fact that qualified employees had the option of applying for other jobs. This accommodation was the same across the class, and thus, the issue may be determined based on generalized, class-wide proof.

Third, no individualized inquiry is necessary to determine whether the class members suffered an adverse employment action. All employees were subject to the same adverse action—they were put on indefinite unpaid leave. Accordingly, evidence that the class was put on unpaid leave—a prerequisite for membership in the class itself—will suffice for each class member to make a prima facie showing that they suffered an adverse employment action.

Fourth, common questions predominate over individual ones with respect to United's undue hardship defense. United put unvaccinated customer-facing employees on unpaid leave, and the question of whether it would have incurred undue hardship in offering a different accommodation is an issue that is susceptible to generalized, class-wide proof. Plaintiffs can present testimony about "the costs of employees taking tests themselves and providing results," and any state laws that may be implicated in such a policy. And the parties can present testimony "from employees within various work groups" explaining whether "the alternative accommodations Plaintiffs proposed would have been feasible." ECF No. 256 at 12.

For these reasons, the proposed Rule 23(b)(3) Unpaid Leave Subclass satisfies the predominance requirement. Common questions of law and fact concerning the sincerity of religious beliefs, the reasonableness of the unpaid leave accommodation, the occurrence of adverse employment actions, and the applicability of the undue hardship defense predominate over any individualized issues. Thus, the Court finds that the Title VII Unpaid Leave Subclass meets predominance under Rule 23(b)(3). However, for the reasons stated in the Court's commonality analysis, the Masking-and-Testing Subclass and the ADA claims in the Unpaid Leave Subclass require individualized inquiry such that common questions do not predominate. The Masking-and-Testing Subclass didn't suffer the same adverse action because masking and testing is insufficient by itself. And for the ADA claims, individualized inquiry is necessary to determine whether each Plaintiff has a qualifying disability under the ADA. Thus, the Masking-and-Testing Subclass members and the Unpaid Leave Subclass's ADA members cannot satisfy their prima facie showing using the same evidence or generalized, class-wide proof. The Court now turns to damages.

2. Damages Issues

United argues that individualized damages issues preclude predominance. "Even where plaintiffs seeking class certification show that common issues predominate on questions of liability, they must also present a damages model 'establishing that damages are capable of measurement on a class-wide basis.'" *Cruson*, 954 F.3d at 258 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)). The issue of damages will defeat predominance "where the calculation of damages is not susceptible to a mathematical or formulaic calculation." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003). Having considered the damages model proposed by Plaintiffs, the Court concludes that the calculation of damages is easily susceptible to mathematical calculation for employees who were put on unpaid leave.

Plaintiffs propose a damages model that begins by averaging each employee's past earnings to determine an "average wage rate" for calculating backpay during the unpaid leave period. "It is well-established in the Fifth Circuit that the trier of fact may rely on a lost income stream calculation that is based on an average wage rate, particularly if the plaintiff has an inconsistent work history." *Nelson v. Cooper T. Smith Stevedoring Co.*, No. CIV.A. 12-2890, 2013 WL 4591362, at *1 (E.D. La. Aug. 28, 2013); *see also In re Parker Drilling Offshore USA LLC*, 323 F. App'x 330, 335 (5th Cir. 2009) (explaining that lost wages at the time of injury can be calculated by "estimating the earnings from past data when earnings data was inconsistent"); *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1050 (5th Cir. 1990) (affirming district court's determination that lost wages can be calculated based on Plaintiff's "earnings record over the previous two years"). This "average wage rate" calculation is appropriate here because, as United points out, flight crew employees do not have salaries. Their compensation is highly variable, driven by personal preferences, available flights, and other factors. *See* ECF No. 246. Courts in this circuit routinely confront this issue in calculating backpay, and the average wage rate calculation is an easily calculable and well-established method of calculating backpay in such instances.

United, however, argues that "the use of averages would, by definition, undercompensate some putative class members" and overcompensate others. *See* ECF No. 246 at 40. This argument misconstrues Plaintiffs' damages model. As applied to the Unpaid Leave Subclass, Plaintiffs seek to take the average wage rate for each individual class member, multiplied by the time each employee was on unpaid leave, to determine lost wages during the unpaid leave period. This ensures a fair and accurate measure of damages, tailored to each employee's earnings history. Though this necessarily involves some individual inquiry—insofar as it hinges on an employee's past earnings—the determination is conducive to mathematical calculation.

After calculating backpay, Plaintiffs propose a method of calculating punitive damages on a class-wide basis "by allowing the factfinder to determine an appropriate ratio of punitive to economic damages, which can then be mechanically applied to all members of this subclass." *See* ECF No. 238 at 41. Such an approach is consistent with prior cases in this circuit, in which a ratio or multiplier has been used to assess punitive damages. *See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 323 (5th Cir. 1998) (rejecting a challenge to the use of a multiplier in determining punitive damages); *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 282 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986) (holding a punitive award shall be made "by determining the entire amount of compensatory damages awarded by trial or settlement" and determining the "ratio thereto of each individual's award").

United argues that punitive damages are not capable of class-wide proof because they require "proof of how discrimination was inflicted on each plaintiff." *See* ECF No. 246 at 42. United says this means punitive damages must be assessed on an individual basis. United is correct as applied Plaintiffs' proposed 23(b)(2) Class, which is comprised of employees who allegedly suffered a wide array of harms. But as applied to the Unpaid Leave Subclass's Title VII claims, all class members suffered the same harm—they were put on unpaid leave. Thus, punitive damages will not vary with individual circumstances, except in relation to the economic loss incurred by an individual class member. If a jury finds that United acted "with malice or with reckless indifference," *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (quoting 42 U.S.C. § 1981a(b)(1)), it can award a uniform amount of punitive damages as a remedy. Such an award will be proportional to the economic loss incurred by individual class members as a result of the unpaid leave policy. For that reason, United's uniform treatment of the Unpaid Leave Subclass makes the punitive damages calculation capable of mathematical calculation (by determining an appropriate multiplier of punitive damages to compensatory damages) should the factfinder determine such an award is appropriate. *See Cimino*, 151 F.3d at 323.

Accordingly, Plaintiffs have demonstrated that their proposed damages model for backpay and punitive damages is capable of measurement on a class-wide basis using established, mathematical methods. The use of an average wage rate to calculate backpay is well-supported by precedent and is particularly suited to situations where employees' earnings are highly variable. Additionally, the proposed method for determining punitive damages by applying a ratio to economic damages is consistent with prior rulings in this circuit and ensures a uniform approach across the class. Therefore, the Court finds that Plaintiffs' damages model satisfies the Rule 23(b)(3) predominance inquiry with respect to damages.

B. Superiority

"Superiority" requires that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). This involves a "fact-specific analysis and will vary depending on the circumstances of any given case," *Madison v. Chalmette Refin.*, LLC, 637 F.3d 551, 555 (5th Cir. 2011). Rule 23(b)(3) contemplates four considerations in determining the superiority of a class action vis-à-vis other available methods: (1) the class members' interests in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already begun by or against class members, (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (4) the likely difficulties in managing a class action.

As an initial matter, it is clear that one of the primary rationales for class treatment—judicial efficiency—is well-served here. The unpaid leave class consists of hundreds of employees who requested religious accommodations and were put on indefinite unpaid leave. For the reasons discussed above, all class members suffered the same injury, received the same accommodation, and share common questions of law and fact. Requiring courts to manage hundreds of lawsuits addressing the same questions and evidence makes little sense. Thus, in this case, certification "would promote judicial economy and avoid the wasteful, duplicative litigation which would inevitably result if these cases were tried individually." *Mullen*, 186 F.3d at 627.

United argues that the practical difficulties of managing the proposed classes undermine the judicial efficiency of class-wide resolution. If the Court were to certify Plaintiffs' proposed Rule 23(b)(2) and both Rule 23(b)(3) subclasses, the Court would agree. The difficulty in managing a Rule 23(b)(2) class consisting of over 6,000 class members with varying injuries, accommodations, and causes of action would wholly undermine the superiority of the class action mechanism. Likewise, a 23(b)(3) class consisting of employees who were required to mask and test, each of whom suffered different harms and adverse employment actions—harassment, difficulty breathing, lonely lunches, excessive Lysol spraying—would be unmanageable and inefficient. The class members could not make out a prima facie case of religious discrimination without individualized inquiry. Contrast this with a class consisting of employees who sought religious accommodations and were put on indefinite unpaid leave. All class members suffered the same injury, were granted the same accommodation, and assert the same cause of action. The same evidence will support each class members' prima facie case of religious discrimination, and the reasonableness of the accommodation and undue hardship defense can be determined class-wide. Thus, United's arguments do not persuade when it comes to the unpaid leave Title VII class.

"The greater the number of individual issues, the less likely superiority can be established." *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). Naturally, the inverse is also true—claims with few or no individual issues lend themselves to class-wide resolution. In the preceding section, the Court discussed the common evidence relevant to each element of Plaintiffs' prima facie case. Furthermore, United's reasonableness and undue hardship defenses apply class-wide. The reasonableness of the unpaid leave accommodation does not hinge on individuals' financial circumstances or the jobs for which they were qualified—thus, such a defense will succeed or fail as to each class member on the same evidence. Similarly, United's undue hardship defense is capable of class-wide proof.

Further, the fact that many class members still work at United weighs in favor of superiority because "those potential class members still employed by [United] might be unwilling to sue individually or join a suit for fear of retaliation at their job." *Mullen*, 186 F.3d at 625. Indeed, another principal function of the class action mechanism is the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). This includes cases where plaintiffs "are vulnerable to reprisals by the defendant due to a continuing economic relationship, such as employment." 2 Wm. B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 4.65 (6th ed. 2023). Many class members are still employed by United, and thus may be dissuaded from suing individually for fear of jeopardizing their employment. This is, of course, in addition to the burden and potential expense of bringing individual claims against United, who has far more time and resources to litigate such matters.

Lastly, at this point in the litigation, the Court is painfully familiar with the law, facts, and applicable defenses in this case, making this Court a desirable forum for litigating this action. Ultimately, having considered the available methods for fairly and efficiently adjudicating the controversy, the Court concludes that a class of employees who requested religious accommodations and were put on unpaid leave satisfies Rule 23(b)(3)'s superiority requirement.

* * *

In sum, the Court finds that the Plaintiffs' Motion for Class Certification should be **GRANTED in part** and **DENIED in part**. The proposed Rule 23(b)(2) Class and the Rule 23(b)(3) Masking-and-Testing Subclass do not satisfy the commonality and typicality requirements under Rule 23(a), nor do they meet the criteria under Rule 23(b). The different injuries suffered and the individual questions raised within these proposed classes preclude class-wide resolution of their claims.

However, the Court concludes that the Rule 23(b)(3) Unpaid Leave Subclass's Title VII claims meet the criteria for certification. This subclass includes all employees United deemed customer-facing who received an accommodation due to a sincerely held religious beliefs and who were put on unpaid leave. The claims of these employees satisfy the commonality and typicality requirements under Rule 23(a), share common legal and factual questions that predominate over any individual issues, and a class action is the superior method for adjudicating their claims efficiently and fairly. Accordingly, the Court appoints Plaintiffs' counsel as class counsel with Ms. Kincannon as the named plaintiff and modifies Plaintiffs' proposed Unpaid Leave Subclass to encompass only the Title VII claims. The Court thus certifies a class consisting of <u>all employees United deemed customer-facing who received an accommodation due to a sincerely held religious beliefs and who were put on unpaid leave</u>. *See Braidwood*, 70 F.4th at 934. (explaining the court "may modify the classes to fit the requirements better and should not dismiss an action purely because the proposed class definition is too broad").

V. Plaintiffs' Motion for Reconsideration

Finally, Plaintiffs' Motion for Reconsideration is also before the Court. ECF No. 241. Plaintiffs ask the Court to reconsider its prior order granting in part United Motion to Dismiss. Having reviewed the Motion, the Court finds that the Motion for Reconsideration should be and is hereby **DENIED**.

CONCLUSION

For the reasons stated above, the Court finds that the Plaintiffs' Motion for Class Certification (ECF No. 238) should be **GRANTED in part** and **DENIED in part**. Additionally, the Court finds that the Motion for Reconsideration (ECF No. 241) should be and is hereby **DENIED**.

SO ORDERED on this **21st day of June 2024**.

Mark T. Pittman

Mark T. Pittman
UNITED STATED DISTRICT JUDGE

APPENDIX F

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class*; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice*.

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issue*s. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) I*nformation That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements*. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections*.

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).