

No. 21-20311

In the United States Court of Appeals for the Fifth Circuit

JENNIFER BRIDGES; BOB NEVENS; MARIA TREVINO;
RICARDO ZELANTE; LATRICIA BLANK; ET AL,

Plaintiffs-Appellants,

v.

THE METHODIST HOSPITAL D/B/A HOUSTON METHODIST;
METHODIST HEALTH CENTERS D/B/A/
HOUSTON METHODIST THE WOODLANDS HOSPITAL,

Defendants-Appellees.

On Appeal from United States District Court
for the Southern District of Texas
No. 4:21-CV-1774

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No. 21-20311

JENNIFER BRIDGES; BOB NEVENS; MARIA TREVINO;
RICARDO ZELANTE; LATRICIA BLANK; ET AL,

Plaintiffs-Appellants,

v.

THE METHODIST HOSPITAL D/B/A/ HOUSTON METHODIST;
METHODIST HEALTH CENTERS D/B/A/
HOUSTON METHODIST THE WOODLANDS HOSPITAL,

Defendants-Appellees.

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

1. No publicly held company owns 10% or more of the stock of Defendant-Appellee The Methodist Hospital, doing business as Houston Methodist.

2. No publicly held company owns 10% or more of the stock of Defendant-Appellee Methodist Health Centers, doing business as Houston Methodist The Woodlands Hospital.

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Houston Methodist The Woodlands Hospital

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not likely to assist the Court’s decisional process. Plaintiffs have effectively abandoned their pleaded claims based on federal public policy and urge only a Texas public policy claim that was not raised below and is now waived. In any event, oral argument is unnecessary because the law is clear: there is no “public policy exception” to at-will employment under Texas law and, regardless, Houston Methodist’s Vaccine Policy does not violate any state or federal policy. The judgment is correct, and the path to affirm is straightforward.

TABLE OF CONTENTS

	PAGE
Certificate of Interested Persons	2
Statement Regarding Oral Argument.....	6
Table of Authorities	9
Statement of Jurisdiction	20
Issue Presented	20
Introduction	21
Statement of the Case	22
Standard of Review	34
Summary of the Argument.....	35
Argument.....	36
I. Plaintiffs’ Texas Policy Arguments Were Not Pleaded or Raised Below.	36
II. No “Public Policy” or Other Exception to At-Will Employment Applies to Vaccine Mandates.	39
A. There is no at-will exception that prohibits firing an employee who refuses to get vaccinated.	39
B. Neither the Texas Supreme Court nor the Legislature is likely to create an exception.	41
1. Texas courts steadfastly refuse to create exceptions.	41
2. The Texas Legislature declined to create an exception.	44
C. There is no basis to certify a public policy question.....	46
1. The Court certifies questions sparingly.....	46

2.	Texas law is clear.....	47
III.	Federal and Texas Law Allows Hospitals to Mandate Vaccines.....	50
A.	Federal law allows vaccine mandates.....	50
B.	Texas law requires hospitals to protect their patients against “vaccine preventable diseases.”	53
C.	Executive orders do not create a claim or alter Texas public policy.	53
IV.	The District Court Correctly Dismissed All Claims.....	57
A.	Plaintiffs failed to state a claim under <i>Sabine Pilot</i>	57
B.	Plaintiffs failed to state a claim for “Violation of At-Will Employment Doctrine/Public Policy Exception.”	59
1.	Plaintiffs pleaded violations of federal laws that do not create a private right of action.	59
2.	The federal statutes do not apply to Houston Methodist.	61
C.	Plaintiffs failed to state a claim for declaratory relief.	63
	Conclusion	65
	Certificate of Service.....	67
	Certificate of Compliance	68

TABLE OF AUTHORITIES

	PAGE(S)
CASES	
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	59
<i>Armstrong v. Exceptional Child Ctr., Inc.</i> , 575 U.S. 320 (2015).....	64
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	34
<i>Austin v. HealthTrust, Inc.-The Hosp. Co.</i> , 967 S.W.2d 400 (Tex. 1998)	<i>passim</i>
<i>Ball v. LeBlanc</i> , 792 F.3d 584 (5th Cir. 2015)	38
<i>Beckerich v. St. Elizabeth Med. Ctr.</i> , 2021 WL 4398027 (E.D. Ky. 2021).....	65
<i>Biden v. Missouri</i> , 142 S.Ct. 647 (2022)	23, 26, 29, 52
<i>Blase Indus. Corp. v. Anorad Corp.</i> , 442 F.3d 235 (5th Cir. 2006).....	43
<i>Buckman Co. v. Plaintiffs’ Legal Comm.</i> , 531 U.S. 341. (2001)	60
<i>Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep’t Stores, Inc.</i> , 15 F.3d 1275 (5th Cir. 1994)	56
<i>Ciraci v. J.M. Smucker Co.</i> , 2021 WL 6064748 (N.D. Ohio 2021).....	62
<i>City of Midland v. O’Bryant</i> , 18 S.W.3d 209 (Tex. 2000).....	42, 43

Compagnie Francaise De Navigation a Vapeur v. La. State Bd. of Health,
186 U.S. 380 (1902) 50

Doe v. Franklin Square Union Free Sch. Dist.,
2021 WL 4957893 (E.D.N.Y. 2021) 60

E. Line & R.R.R. Co. v. Scott,
10 S.W. 99 (Tex. 1888) 40

Echeverry v. Jazz Casino Co.,
988 F.3d 221 (5th Cir. 2021) 46, 47

Ed Rachal Found. v. D’Unger,
207 S.W.3d 330 (Tex. 2006) 39, 41, 42, 47

Edionwe v. Bailey,
860 F.3d 287 (5th Cir. 2017) 63

Elansari v. Univ. of Pennsylvania,
779 Fed. Appx. 1006 (3d Cir. 2019) 60

Florida v. Dep’t of Health & Hum. Servs.,
19 F.4d 1271 (11th Cir. 2021).....52, 56

Fortis Benefits v. Cantu,
234 S.W.3d 642 (Tex. 2007) 48

Gezu v. Charter Commc’ns,
17 F.4th 547 (5th Cir. 2021) 37

Gonzales v. Allstate Vehicle & Prop. Ins. Co.,
802 Fed. Appx. 109 (5th Cir. 2020) 38

Gotham Ins. Co. v. Warren E & P, Inc.,
455 S.W.3d 558 (Tex. 2014)..... 55

Harmon v. City of Arlington,
16 F.4th 1159 (5th Cir. 2021)..... 34

Harris Cnty. v. MERSCORP Inc.,
791 F.3d 545 (5th Cir. 2015)59, 63

Hawthorne v. Star Enter., Inc.,
45 S.W.3d 757 (Tex. App.—Texarkana 2001, pet. denied) 58

Hayes v. Univ. Health Shreveport, LLC,
2021-CC-01601, 2022 WL 71607 (La. Jan. 7, 2022) 62

Hillman v. Nueces Cty.,
579 S.W.3d 354 (Tex. 2019) 41, 42, 47

In re Hotze,
629 S.W.3d 146 (Tex. 2020) 55

In re Millwork,
631 S.W.3d 706 (Tex. 2021) 56

Jacobson v. Massachusetts,
197 U.S. 11 (1905)..... 50, 51

Johnston v. Del Mar Distrib. Co.,
776 S.W.2d 768 (Tex. App.—Corpus Christi 1989, writ denied) 42, 43

JTB Tools & Oilfield Servs., L.L.C. v. United States,
831 F.3d 597 (5th Cir. 2016) 64

Kansas v. Hendricks,
521 U.S. 346 (1997) 50

Klaassen v. Trustees of Ind. Univ.,
7 F.4th 592 (7th Cir. 2021) 65

Lawrence v. CDB Servs., Inc.,
44 S.W.3d 544 (Tex. 2001) 48

Learmonth v. Sears, Roebuck & Co.,
710 F.3d 249 (5th Cir. 2013)..... 38

M.D.C.G. v. United States,
956 F.3d 762 (5th Cir. 2020) 37

Marren v. Stout,
930 F. Supp. 2d 675 (W.D. Tex. 2013)..... 43

Martinez v. Walgreen Co.,
935 F.3d 396 (5th Cir. 2019)..... 49

McClendon v. Ingersoll-Rand Co.,
779 S.W.2d 69 (Tex. 1989), *rev'd*, 498 U.S. 133 (1990),
and opinion withdrawn, 807 S.W.2d 577 (Tex. 1991)..... 43

McCutcheon v. Enlivant ES, LLC,
2021 WL 5234787 (S.D. W. Va. 2021) 62, 65

Morris v. PLIVA, Inc.,
713 F.3d 774 (5th Cir. 2013) 60

*Nat’l Fed’n of Indep. Bus. v.
Dep’t of Lab., Occupational Safety & Health Admin.*,
142 S. Ct. 661 (2022).....51

Navy Seal 1 v. Biden,
2021 WL 5448970 (M.D. Fla. 2021) 60

Okpalobi v. Foster,
244 F.3d 405 (5th Cir. 2001)..... 64

Parker Plaza W. Partners v. UNUM Pension & Ins. Co.,
941 F.2d 349 (5th Cir. 1991)..... 55

Phillips v. Bramlett,
407 S.W.3d 229 (Tex. 2013) 43

Ray v. Comm’r of Internal Revenue,
13 F.4th 467 (5th Cir. 2021) 37

Rhoades v. Savannah River Nuclear Sols., LLC,
2021 WL 5761761 (D.S.C. 2021) 62

Ritchie v. Rupe,
443 S.W.3d 856 (Tex. 2014) 41, 47

Roache v. Long Island R.R.,
487 F. Supp. 3d 154 (E.D.N.Y. 2020) 64

Robinett v. United States,
62 F.3d 1433, 1995 WL 473105 (Fed. Cir. 1995)..... 60

Royston, Rayzor, Vickery, & Williams, LLP v. Lopez,
467 S.W.3d 494 (Tex. 2015)..... 48

Sabine Pilot Serv., Inc. v. Hauck,
687 S.W.2d 733 (Tex. 1985) *passim*

Safeshred, Inc. v. Martinez,
365 S.W.3d 655 (Tex. 2012)..... 40, 41

Sawyer v. E.I. Du Pont De Nemours & Co.,
430 S.W.3d 396 (Tex. 2014) 39, 40, 41, 43

Swearingen v. Owens-Corning Fiberglas Corp.,
968 F.2d 559 (5th Cir. 1992) 46

Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass’n,
593 S.W.3d 324 (Tex. 2020) 48

Tex. Commerce Bank, N.A. v. Grizzle,
96 S.W.3d 240 (Tex. 2002)..... 48

Tex. Dep’t of Human Servs. of State of Tex. v. Hinds,
904 S.W.2d 629 (Tex. 1995) 43

Tex. Farm Bureau Mut. Ins. Cos. v. Sears,
84 S.W.3d 604 (Tex. 2002)..... 41

Thomas v. Catlin,
141 F. App’x 673 (9th Cir. 2005) 60

Together Emps. v. Mass Gen. Brigham Inc.,
19 F.4th 1 (1st Cir. 2021) 65

U.S. ex rel. Hartwig v. Medtronic, Inc.,
2014 WL 1324339 (S.D. Miss. 2014)..... 60

Valdez v. Grisham,
2021 WL 4145746 (D.N.M. 2021) 60

Valentine v. Collier,
956 F.3d 797 (5th Cir. 2020) 23

Vine St. LLC v. Borg Warner Corp.,
776 F.3d 312 (5th Cir. 2015) 38

Walker v. Beaumont Indep. Sch. Dist.,
938 F.3d 724 (5th Cir. 2019) 34

Wegner v. Dell Computer Corp.,
1999 WL 645086 (Tex. App.—Austin Aug. 26, 1999, no pet.) 43

White v. FCI USA, Inc.,
319 F.3d 672 (5th Cir. 2003) 57

Winters v. Houston Chronicle Pub. Co.,
795 S.W.2d 723 (Tex. 1990)..... 41, 42, 43, 57

CONSTITUTIONAL PROVISIONS, STATUTES, & RULES

21 U.S.C. § 337(a) 60

21 U.S.C. § 360bbb-3 *passim*

21 U.S.C. § 360bbb-3(a) 61

21 U.S.C. § 360bbb-3(b)..... 61

21 U.S.C. § 360bbb-3(c)..... 61

21 U.S.C. § 360bbb-3(d) 61

21 U.S.C. § 360bbb-3(e)..... 59, 61, 63

25 Tex. Admin. Code § 1.701..... 28

25 Tex. Admin. Code § 1.702 28

25 Tex. Admin. Code § 1.703..... 28

25 Tex. Admin. Code § 1.704 28

28 U.S.C. § 1291 20

28 U.S.C. § 1331.....	20
29 U.S.C. § 623(a)(1).....	40
42 U.S.C. § 2000e-2(a)(1)	40
Fed. R. App. P. 28(a)	64
Tex. Const. art. I, § 28.....	54
Tex. Const. art. II, § 1.....	55
Tex. Health & Safety Code § 161.0085	38
Tex. Health & Safety Code § 161.0085(c)	45, 48
Tex. Health & Safety Code § 161.0085(e)(1)	45, 48
Tex. Health & Safety Code § 224.001	27
Tex. Health & Safety Code § 224.002	45, 47, 48, 55
Tex. Health & Safety Code § 224.002(a)	27, 35, 53
Tex. Health & Safety Code § 224.002(b)(1).....	27, 45
Tex. Health & Safety Code § 224.002(b)(3).....	28
Tex. Health & Safety Code § 224.002(b)(4).....	28
Tex. Health & Safety Code § 224.002(b)(5).....	28
Tex. Health & Safety Code § 224.002(b)(6).....	28
Tex. Health & Safety Code § 224.002(b)(9).....	27, 28
Tex. Health & Safety Code § 224.002(c)	28
Tex. Health & Safety Code § 224.004	28
Tex. Health & Safety Code § 81.085(i).....	37

OTHER AUTHORITIES

42 C.F.R. § 482.42(g) 56

45 C.F.R. § 46.101(a) 62

45 C.F.R. § 46.101, *et seq.* 60

45 C.F.R. § 46.102(e)(1) 62

45 C.F.R. § 46.102(l) 62

45 C.F.R. §46.101.....36, 63

45 C.F.R. §46.10236, 63

45 C.F.R. §46.116 *et seq.*36, 63

45 C.F.R. part 46..... 32, 59, 60, 62

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 During the COVID-19 Pandemic; Availability,
 86 Fed. Reg. 28,608 (May 27, 2021) 23

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 (Feb. 28, 2018), *available at* <https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.htm>..... 26

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<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/index.html>..... 26

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available at <https://www.cdc.gov/vaccines/hcp/acip-recs/recs-by-date.html>..... 27

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available at <https://www.cdc.gov/vaccines/hcp/acip-recs/vacc-specific/covid-19.html> 53

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<https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>..... 23

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 Cosmetic Act Prohibits Entities from Requiring the Use of a
 Vaccine Subject to an Emergency Use Authorization
 (July 6, 2021), *available at*
<https://www.justice.gov/olc/file/1415446/download>.....61

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 No. 20-0430, 2020 WL 4207360 (Tex. May 29, 2020) 55

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available at <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>;
<https://www.fda.gov/media/151710/download> 33

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 (PREPP) Initiative: Summary Report (Jan. 2021), *available at*
<https://www.fda.gov/media/145129/download> 23

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<https://www.houstonmethodist.org/texas-vaccine-hub/> 33

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 Workers in Health and Long-Term Care, *available at*
https://www.acponline.org/acp_policy/statements/joint_statement_covid_vaccine_mandate_2021.pdf 26

Julian Gill, *Vaccine mandate drama fades among Houston-area providers as deadlines pass for Baylor, Texas Children’s*, Houston Chronicle
 (Oct. 6, 2021), *available at* <https://www.houstonchronicle.com/news/houston-texas/health/article/Vaccine-mandate-drama-fades-at-Houston-area-16514191.php> 26

Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg.
 61,555 (Nov. 5, 2021) 28, 29, 52, 56

Proc. No. 9994, 85 Fed. Reg. 15,337, 2020 WL 1272563 (Mar. 13, 2020)..... 22

Tex. Exec. Order No. GA-22 (May 7, 2020) 56

Tex. Exec. Order No. GA-34 (Mar. 2, 2021) 38

Tex. Exec. Order No. GA-35 (Apr. 5, 2021) 38

Tex. Exec. Order No. GA-36 (May 18, 2021) 38

Tex. Exec. Order No. GA-40 (Oct. 11, 2021)..... 44, 53, 54

Tex. H.B. 18, 87th Leg., 3d C.S. (2021) 44, 48

Tex. H.B. 24, 87th Leg., 2d C.S. (2021)..... 44, 48

Tex. H.B. 39, 87th Leg., 3d C.S. (2021) 44, 48

Tex. H.B. 164, 87th Leg., 3d C.S. (2021) 44, 48

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https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf..... 22

Tex. S.B. 11, 87th Leg., 3d C.S. (2021) 44, 48

Tex. S.B. 51, 87th Leg., 3d C.S. (2021) 54, 55

Tex. S.B. 77, 87th Leg., 1st C.S. (2021)..... 44, 48

Tex. S.B. 968, 87th Leg., R.S. (2021) (enrolled as of May 31, 2021) 38

Tex. S.B. 2245, 87th Leg., R.S. (2021)..... 44, 48

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THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS,
updated May 28, 2021, *available at*
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UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION, FREQUENTLY ASKED QUESTIONS,
available at <https://www.osha.gov/> 52

VAERS, *available at* <https://vaers.hhs.gov/about.html>..... 30

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. The district court dismissed Plaintiffs' claims and entered a take-nothing judgment. ROA.606-12. This Court has jurisdiction over this appeal from a final judgment under 28 U.S.C. § 1291.

ISSUE PRESENTED

Did the district court correctly rule that plaintiffs failed to state a claim arising from their alleged losses of jobs after they refused to comply with Houston Methodist's policy requiring all employees to be vaccinated against COVID-19?

INTRODUCTION

As vaccine litigation abounds, it is useful to clarify what this case is not. This case is not about science, FDA approvals, or whether vaccines are effective. Nor is it about individual rights, civil liberties, and least of all politics.

This case is about a hospital's business judgment about job requirements. Amid a global pandemic, with crisis levels of hospitalizations and deaths, Houston Methodist decided that the best way to save lives is immunity. It deemed protecting employees and patients so important that it required its employees to be vaccinated. It accepted the risk of losing valued employees over the risk of losing lives.

This case arises during the COVID-19 pandemic, but it could just as easily arise in the context of vaccines for hepatitis, tuberculosis, or the seasonal flu. Requiring vaccinations against contagious diseases is not new, subject to reasonable exceptions, which were allowed in this case and are not at issue.

When the COVID-19 vaccine arrived, virtually all of Houston Methodist's employees got vaccinated voluntarily. Others were motivated to do so with additional incentives or when it became mandatory. This case involves the very few employees who refused the vaccine and instead filed suit for wrongful termination. They had every right to opt out, but they have no valid legal claim for loss of a job. The district court was right to dismiss the suit.

The following facts are based on the employees' Amended Complaint, the documents attached to it, and facts that can be judicially noticed.

STATEMENT OF THE CASE

The parties

The plaintiffs are 119 people, each alleging to be “currently an employee” of one of various entities, some of which are not even parties to this suit. ROA.264-75. Plaintiffs contend on appeal that they have been terminated from their jobs. Br. 20.

The defendant is Houston Methodist,¹ a hospital system that includes an academic center in the Texas Medical Center, several community hospitals and numerous related health care organizations serving the greater Houston area. ROA.376. Houston Methodist employs 26,000 people. ROA.302.

The global pandemic

In January 2020, the World Health Organization declared a “public health emergency of international concern over the global outbreak” of COVID-19. ROA.257. On March 13, 2020, the President declared a national state of emergency, and the Governor of Texas declared a state of disaster.²

¹ Specifically, The Methodist Hospital d/b/a Houston Methodist and Methodist Health Centers d/b/a Houston Methodist The Woodlands Hospital. ROA.255, 275.

² See Proc. No. 9994, 85 Fed. Reg. 15,337, 2020 WL 1272563 (Mar. 13, 2020); Tex. Proc. of Mar. 13, 2020, *available at* https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

In the United States alone, COVID-19 has killed nearly 870,000 people, including 82,000 Texans.³ “COVID-19 is a highly contagious, dangerous, and . . . deadly disease.” *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022).

In public health emergencies, the Food and Drug Administration may strengthen public health protections and approve vaccines for emergency use.⁴ These authorizations are called “emergency use authorizations” or “EUAs.”

By January 2021, the FDA had reviewed thousands of EUA requests and issued more than 600 EUAs for medical countermeasures to combat COVID-19.⁵ “These countermeasures include therapeutics, vaccines, tests, PPE, ventilators, and other devices to meet patients’ needs and prevent, diagnose, and treat COVID-19.”⁶

Since December 2020, the FDA has issued EUAs for three COVID-19 vaccines.⁷ Houston Methodist began offering vaccines immediately. ROA.302.

³ See CDC, Daily Updates of Totals by Week and State *available at* <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>). This Court may take judicial notice of information reported on government websites. *E.g.*, *Valentine v. Collier*, 956 F.3d 797, 801 n.1 (5th Cir. 2020).

⁴ 21 U.S.C. § 360bbb-3.

⁵ See FDA, *FDA COVID-19 Pandemic Recovery and Preparedness Plan (PREPP) Initiative: Summary Report* at 6 (Jan. 2021), <https://www.fda.gov/media/145129/download>.

⁶ *Id.*

⁷ ROA.255-56; see Authorizations of Emergency Use of Certain Biological Products During the COVID-19 Pandemic; Availability, 86 Fed. Reg. 28,608 (May 27, 2021) (Janssen); Authorizations of Emergency Use of Two Biological Products During the COVID19 Pandemic; Availability, 86 Fed. Reg. 5200 (Jan. 19, 2021) (Pfizer and Moderna).

Houston Methodist sets out to be an industry leader

Houston Methodist found the case for vaccinating its workforce so compelling that it set out to be a leader by requiring it. CEO Mark Boom wrote:



April 2021

...

On March 31, Houston Methodist became the first major health care system in the U.S. to require mandatory COVID-19 vaccinations. We started with managers and new hires, and all employees (26,000 of them) and employed physicians will be close behind. Since the first vaccine was approved, more than 195 million doses have been administered safely in the U.S. alone. With supplies of the vaccine more abundant, it's now time that all health care systems follow our example and begin requiring employees to be vaccinated. This will send a strong message that we're doing everything possible to keep patients safe. We'd also be role models for those who may be hesitating to get a vaccine.

As health care workers we've taken a sacred oath to do everything possible to keep our patients safe and healthy – this includes getting vaccinated. This isn't the first time our industry has stepped up and made vaccines mandatory. Not long ago, flu vaccines were voluntary for health care workers. . . . If we mandate flu vaccines for these [much lower numbers of flu deaths], we should also mandate COVID-19 vaccines given how much more deadly it is.

Frontline workers have battled courageously against COVID-19 working long hours to keep patients alive. They've done so at risk to their own health regardless of the many precautions we take to keep them safe. Behind the scenes, researchers and physicians have worked tirelessly to find new treatments and cures to keep those who do contract the disease from its worst outcomes – including death. While we've made tremendous strides, our best shot at defeating it continues to be vaccinating enough Americans to create herd immunity.

Houston Methodist began vaccinating employees on Dec. 11, 2020. Today, more than 84% of our staff is vaccinated. Already we're seeing positive results as the number of employee infections has dropped inversely with the number of employees receiving the vaccine. It appears we've successfully created herd immunity at Houston Methodist.

...

Requiring mandatory vaccinations isn't just about safety. It's also about being examples for those who are hesitant to get vaccinated. Leaders at all levels have championed the vaccine and are doing everything to educate those reluctant to receive the vaccine. By mandating vaccines healthcare institutions will show the world that we trust the safety and efficacy of the vaccine, hopefully setting an example that other others will follow.

Most health care workers will agree that the path toward any sort of return to "normal" must be firmly centered on vaccinating as many Americans as possible to create herd immunity. Not only must we help get us there by administering the vaccine, but also by setting an example for others to follow. I hope other health care systems and employers will quickly join Houston Methodist in making the vaccine mandatory for staff. The sooner we're able to end this pandemic, the fewer lives we will continue to lose to it and the closer we can get to normal.

Marc L. Boom, M.D.

President

Chief Executive Officer Houston Methodist

ROA.302-03.

Dr. Boom’s hope materialized. Other major Houston-area hospitals have since announced their own COVID-19 vaccine requirements.⁸ And in July 2021, a group of nearly 60 major medical organizations called for mandatory vaccination of health care workers, announcing: “This is the logical fulfillment of the ethical commitment of all health care workers to put patients . . . first and take all steps necessary to ensure their health and well-being.”⁹

Writing about COVID-19 vaccinations for healthcare workers, the U.S. Supreme Court recently emphasized:

Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella.¹⁰

So too with COVID-19. In the first year, hundreds of millions of doses of the vaccines have been administered in the United States alone. ROA.259 n.5, 302.¹¹

⁸ Julian Gill, *Vaccine mandate drama fades among Houston-area providers as deadlines pass for Baylor, Texas Children’s*, Houston Chronicle (Oct. 6, 2021), <https://www.houstonchronicle.com/news/houston-texas/health/article/Vaccine-mandate-drama-fades-at-Houston-area-16514191.php> (identifying vaccine mandates for Texas Children’s Hospital, Baylor College of Medicine, Memorial Hermann Health System).

⁹ Joint Statement in Support of COVID-19 Vaccine Mandates for All Workers in Health and Long-Term Care, https://www.acponline.org/acp_policy/statements/joint_statement_covid_vaccine_mandate_2021.pdf.

¹⁰ *Biden*, 142 S. Ct. at 653 (citing CDC, State Healthcare Worker and Patient Vaccination Laws (Feb. 28, 2018), <https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html>).

¹¹ *See also* CDC, Vaccines for COVID-19, *available at* <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/index.html>.

Texas and federal law support vaccine mandates within hospitals

Dr. Boom’s vision was not just sensible policymaking. Both Texas and federal law support hospital requirements for their workforce to be vaccinated.

The Texas Health and Safety Code provides that “[e]ach health care facility shall develop and implement a policy to protect its patients from vaccine preventable diseases.”¹² “Vaccine preventable diseases” “means the diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.”¹³ And since December 2020, the relevant CDC advisory committee recommendations have included COVID-19, making it a “vaccine preventable disease.”¹⁴

Texas law thus required Houston Methodist to implement a policy to protect its patients against COVID-19. “The policy must: (1) require covered individuals to receive vaccines for the vaccine preventable diseases specified by the” hospital based on the level of risk to patients.¹⁵

¹² Tex. Health & Safety Code § 224.002(a); *see also id.* § 224.001(2) (“health care facility” includes a hospital).

¹³ *Id.* § 224.001(4).

¹⁴ *See* CDC, Vaccine-Specific Recommendations, *available at* <https://www.cdc.gov/vaccines/hcp/acip-recs/recs-by-date.html>.

¹⁵ Tex. Health & Safety Code § 224.002(b)(1); *see also id.* § 224.001(1) (“covered individual” includes an employee of a hospital).

The policy must also “include disciplinary actions the health care facility is authorized to take against a covered individual who fails to comply with the policy.”¹⁶ A hospital without such a policy is subject to administrative or civil penalties, including an enforcement action by the Texas Department of State Health Services.¹⁷ Parallel administrative regulations impose the same requirements as the statute.¹⁸

Houston Methodist thus did exactly what Texas law requires: it created a COVID-19 vaccine policy, with reasonable accommodations, and required all employees to be vaccinated. ROA.304-11 (the “Vaccine Policy”). And it did it first — setting an example for the entire country to follow. ROA.301-03.

More recently, the Secretary of Health and Human Services announced that, to receive Medicare and Medicaid funding, participating facilities must ensure that their staff — unless exempted for medical or religious reasons — are vaccinated against COVID-19.¹⁹

¹⁶ *Id.* § 224.002(b)(9). The statute has further requirements, such as including “procedures for verifying whether a covered individual has complied with the policy” and providing exemptions for specific medical reasons. Tex. Health & Safety Code § 224.002(b)(3)-(6). A policy may, but need not, include religious exemptions. *Id.* § 224.002(c). Houston Methodist’s Vaccine Policy is consistent with all of these provisions, including providing for medical and religious exemptions.

¹⁷ *Id.* § 224.004; 25 Tex. Admin. Code § 1.704(1).

¹⁸ *See* 25 Tex. Admin. Code §§ 1.701-704.

¹⁹ Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555 (Nov. 5, 2021).

“The Secretary issued the rule after finding that vaccination of healthcare workers against COVID-19 was ‘necessary for the health and safety of individuals to whom care and services are furnished.’”²⁰ The Secretary found that unvaccinated staff “pose a serious threat to the health and safety of patients.”²¹ “That determination was based on data showing that the COVID-19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated.”²² Further, the “‘fear of exposure’ to the virus ‘from unvaccinated health care staff can lead patients to themselves forgo seeking medically necessary care,’ creating a further ‘ris[k] to patient health and safety.’”²³

The U.S. Supreme Court has thus stayed preliminary nationwide injunctions against enforcement of a broad vaccine mandate for more than 10 million healthcare workers.²⁴

²⁰ See *Biden*, 142 S. Ct. at 651 (quoting Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. at 61,561).

²¹ *Id.*

²² *Id.*

²³ *Id.* (quoting Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. at 61,561).

²⁴ *Id.* at 650.

A word about “facts” outside the record

Plaintiffs include vaccine “facts” in their brief that warrant a response. First, Plaintiffs claim that a significant number of deaths and injuries have been reported to a government database as *caused by* the COVID-19 vaccines. Br. 7.²⁵ Yet they cite to their Original Petition, which does not cite any supporting authority.

Plaintiffs also reference the Vaccine Adverse Event Reporting System. Yet VAERS is just a reporting system—open to *anyone*—to collect any and all reports of adverse events following vaccination—even if not reliable or causally related at all.²⁶

This government website states:

Anyone can report an adverse event to VAERS. . . .

VAERS is a passive reporting system, meaning it relies on individuals to send in reports of their experiences to CDC and FDA. *VAERS is not designed to determine if a vaccine caused a health problem*[.]²⁷

Plaintiffs also cite statistics from *Principia Scientific International*. Br. 8 n.6. This organization advocates for particular viewpoints (primarily to debate climate change but more recently to advocate against COVID-19 vaccinations) and is not remotely the type of authority on which courts rely for judicially noticed facts.

²⁵ Br. 7 (citing ROA.33). This claim appears in the record multiple times, all in Plaintiffs’ allegations and without supporting authority.

²⁶ VAERS, *available at* <https://vaers.hhs.gov/about.html>.

²⁷ *Id.* (emphasis added).

Last, Plaintiffs cite liberally to the Declaration of Dr. Peter McCullough, even though the district court struck his declaration, and that ruling is not challenged on appeal.²⁸ The district court rightly struck his declaration, finding it was improper to consider evidence in a ruling on a motion to dismiss. ROA.612. And it is just as improper to cite to the declaration in the brief as though it were part of the record.

Houston Methodist agrees that, in this rapidly evolving pandemic, the Court can take judicial notice of certain facts and subsequent events, to the extent they come from sources on which courts ordinarily rely and are given their proper weight as context rather than evidence.

Procedural history of this lawsuit

Plaintiffs filed suit in Montgomery County, Texas in May 2021. ROA.28-83. Plaintiffs alleged that they were employed by various entities, including the Houston Methodist defendants. ROA.264-75.²⁹ Plaintiffs further alleged that they had been terminated or were about to be terminated for “for refusing to take the . . . COVID-19 vaccine.” ROA.276.

²⁸ Br. 16-17, 20 (citing ROA.401-09 (Declaration of Peter McCullough)); ROA.612 (order striking declaration).

²⁹ About 83 Plaintiffs alleged they were employed by entities with “Houston Methodist” in the name but that are not named defendants in this case. ROA.264-75. Six other Plaintiffs were employed by entities without “Houston Methodist” in the name, like Cardiva Medical Inc. or Houston Metro Police – Woodlands. ROA.271, 273.

The petition asserted three causes of action:

1. wrongful discharge under a Texas Supreme Court decision called *Sabine Pilot*,
2. violation of federal law resulting in an exception to the Texas at-will employment doctrine, and
3. a request for declarations regarding federal law.

ROA.55-58. Houston Methodist removed the case to the U.S. District Court for the Southern District of Texas. ROA.22-26.

Houston Methodist then moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. ROA.236-54. With their response, Plaintiffs filed their Amended Complaint.³⁰ The Amended Complaint added claims under 45 C.F.R. part 46, which addresses research on human subjects. ROA.283-86.

Houston Methodist then moved to dismiss the Amended Complaint. ROA.375-95. After a hearing in which the district court confirmed that Plaintiffs did not wish to file anything further, ROA.669, it dismissed their claims and rendered final judgment. ROA.606-12. This appeal followed. ROA.615.

³⁰ ROA.255-312 (Amended Complaint); ROA.313-74 (Response). Throughout Plaintiffs' appellate brief, they improperly cite their original petition, which is not the live pleading and has no legal effect. *E.g.*, Br. at 3-10 (citing pages from ROA.28-83).

While this appeal was pending, Houston Methodist's deadline for compliance with its Vaccine Policy passed on June 21, 2021. ROA.307. In their appellate brief, Plaintiffs assert that Houston Methodist did in fact fire them for refusing to take the COVID-19 vaccine, consistent with the Vaccine Policy. Br. 20.

In August 2021, the FDA gave the Pfizer-BioNTech vaccine full approval.³¹ The Pfizer vaccine continues to be the primary vaccine administered by Houston Methodist.³²

³¹ See FDA, FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), *available at* <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>; <https://www.fda.gov/media/151710/download>.

³² See ROA.302; <https://www.houstonmethodist.org/texas-vaccine-hub/>.

STANDARD OF REVIEW

This Court reviews dismissal under Rule 12(b)(6) *de novo* and may affirm “on any basis supported by the record.” *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019).

Claims may be dismissed under Rule 12(b)(6) “on the basis of a dispositive issue of law.” *Id.* (citation omitted). Dismissal “also is warranted if the complaint does not contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “The court does not . . . presume true a number of categories of statements, including legal conclusions; mere labels; threadbare recitals of the elements of a cause of action; conclusory statements; and naked assertions devoid of further factual enhancement.” *Harmon v. City of Arlington*, 16 F.4th 1159, 1162–63 (5th Cir. 2021) (quotation marks omitted).

“In determining whether a plaintiff’s claims survive a Rule 12(b)(6) motion to dismiss, the factual information to which the court addresses its inquiry is limited to the (1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201.” *Walker*, 938 F.3d at 735.

SUMMARY OF THE ARGUMENT

Plaintiffs abandon their pleaded claims and raise entirely new arguments, advocating for a “Texas public policy” exception to employment at will that is not recognized by existing Texas law. This argument is both waived and wrong.

Texas is an employment-at-will state with only one common-law exception. That exception does not apply, and for more than three decades the Texas Supreme Court has refused to create new ones. In 2021, the Texas Legislature had multiple opportunities to create the exception Plaintiffs seek, but each one was declined. Texas law requires hospitals to have vaccine policies against preventable diseases. *See* Tex. Health & Safety Code § 224.002(a). Given that Plaintiffs’ argument is both waived and clearly wrong under existing Texas law, there is no basis to certify a question to the Texas Supreme Court.

Vaccine mandates within hospitals are well supported by existing federal and Texas law, and recent executive orders neither evince public policy nor create a claim for wrongful termination. The claims pleaded and pressed before the district court all look to federal statutes and regulations that do not give rise to private rights of action or apply to Houston Methodist.

Switching arguments on appeal is a sure sign that the judgment is correct. Plaintiffs have failed to state a claim upon which relief can be granted.

ARGUMENT

I. PLAINTIFFS' TEXAS POLICY ARGUMENTS WERE NOT PLEADED OR RAISED BELOW.

On appeal, Plaintiffs frame their claims as arising from alleged “Texas public policy . . . to protect employees from vaccine mandates.” Br. 13, 18-22. They point primarily to executive orders by the Governor of Texas, and especially to one that did not exist until after their claims were dismissed. *E.g., id.* at 2. That is a sharp pivot from their pleadings and arguments below, which were based on *federal* statutory and regulatory provisions. *E.g.,* ROA.281-86.

The Amended Complaint alleges claims for being required to perform an illegal act and a “direct violation of Federal law, specifically 21 U.S. Code § 360bbb-3” and “4[5] C.F.R. §46.101, 46.102, 46.116 et seq.” ROA.283-86; RE.34-36. Specifically, Plaintiffs pleaded and argued that these federal provisions rendered Houston Methodist’s Vaccine Policy illegal and that employees were committing an illegal act if they received a vaccination, and further that the Vaccine Policy violated Texas public policy *because* it violated federal public policy. ROA.281-86, 316-324. In short, Plaintiffs’ prior arguments were based on the contention that “Defendants are in violation of *federal* regulations by coercing with undue influence the participation in clinical trials.” ROA.323 (emphasis added).

Plaintiffs are wrong about all their policy arguments. But the Court need not even reach those issues, because Plaintiffs are urging positions that were not pleaded or presented below, and raising them now is too late. An “argument not raised before the trial court cannot be raised for the first time on appeal. For an argument to be preserved, it must be raised to such a degree that the trial court may rule on it.”³³ In the district court, the argument cannot be merely intimated but must be pressed.³⁴ Arguments raised for the first time on appeal are forfeited.³⁵

Plaintiffs’ shift on appeal is so stark that it essentially states a brand new claim. Although they did attempt below to shoehorn their allegations into a state-law wrongful termination claim, Plaintiffs’ core claim was that the Vaccine Policy violated federal policy. ROA.281-86, 316-324. Now Plaintiffs claim it directly violates Texas state policy, pointing to executive orders and a state statute on “vaccine passports” as evidence.³⁶

³³ *Ray v. Comm’r of Internal Revenue*, 13 F.4th 467, 476 (5th Cir. 2021) (citations and quotation marks omitted).

³⁴ *M.D.C.G. v. United States*, 956 F.3d 762, 770 (5th Cir. 2020) (citation omitted).

³⁵ *Gezu v. Charter Commc’ns*, 17 F.4th 547, 555 (5th Cir. 2021).

³⁶ Plaintiffs also rely on Tex. Health & Safety Code § 81.085, which was last amended in 2013. Br. 19; Br. 3 & n.2 (suggesting incorrectly that this was a COVID-related statute). That statute is not a COVID-related statute, and it does the opposite of what Plaintiffs say it does. It provides: “On request of the department during a public health disaster, an individual shall disclose the individual’s immunization information. If the individual does not have updated or appropriate immunizations, the department may take appropriate action during a quarantine to protect that individual and the public from the communicable disease.” Tex. Health & Safety Code § 81.085(i).

This new Texas policy claim is quite a leap. “It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered.”³⁷ Yet Plaintiffs’ brief does not acknowledge their shifting arguments. If they view the law as changing, this does not help them, as “a change in law normally does not permit a party to raise an entirely new argument that could have been articulated below[.]”³⁸ Instead, a party waives its argument when it “could have made the same ‘general argument’ to the district court, but [has] not done so.”³⁹

Plaintiffs could have made the same “general argument” below. Several executive orders on which they rely were issued before they filed suit in May 2021.⁴⁰ Likewise, the Legislature had passed the bill prohibiting “vaccine passports” before they filed their Amended Complaint and opposition to the motion to dismiss.⁴¹ But they did not make the general argument at all, and the Court may affirm on this basis alone.

³⁷ *Ball v. LeBlanc*, 792 F.3d 584, 596 n.8 (5th Cir. 2015).

³⁸ *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 256 (5th Cir. 2013).

³⁹ *Id.* at 256-57; *accord Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312, 317 n.5 (5th Cir. 2015); *Gonzales v. Allstate Vehicle & Prop. Ins. Co.*, 802 Fed. Appx. 109, 111 (5th Cir. 2020).

⁴⁰ Br. 20. *See* Tex. Exec. Order No. GA-35 (Apr. 5, 2021) (prohibiting government from compelling individuals to receive COVID vaccine and prohibiting various entities from requiring proof of vaccination status); Tex. Exec. Order No. GA-36 (May 18, 2021) (prohibiting government from requiring face masks); *see also* Tex. Exec. Order No. GA-34 (Mar. 2, 2021) (prohibiting certain government restrictions on business or requirements of face masks).

⁴¹ *See* Tex. S.B. 968, 87th Leg., R.S. (2021) (enrolled as of May 31, 2021), ultimately codified at Tex. Health & Safety Code § 161.0085.

II. NO “PUBLIC POLICY” OR OTHER EXCEPTION TO AT-WILL EMPLOYMENT APPLIES TO VACCINE MANDATES.

Even if Plaintiffs had not abandoned their claims based on federal policy and could pursue their new claim based on Texas policy, their appeal still fails. Under Texas law, Plaintiffs simply have no cause of action.

Plaintiffs admit as much. They no longer even argue (beyond a bare assertion, Br. 29) that their claims fall within *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (recognizing a cause of action for “discharge of an employee for the sole reason that the employee refused to perform an illegal act”). And they essentially concede that there is no generalized “public policy exception” to employment at will that applies to this case, contending instead that Texas courts “would likely” create a new exception. Br. 18, 20, 28. This argument is not only waived but also demonstrably wrong.

A. **There is no at-will exception that prohibits firing an employee who refuses to get vaccinated.**

Plaintiffs do not contest the presumption in Texas that employment is at will. *Ed Rachal Found. v. D’Unger*, 207 S.W.3d 330, 332 (Tex. 2006) (per curiam); Br. 13. “For well over a century, the general rule in [Texas] . . . has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.” *Sawyer v. E.I. Du Pont De Nemours & Co.*, 430 S.W.3d 396, 399–400 (Tex. 2014).

The rule works both ways. Either employer or employee “may put an end to [the employment] at will, and so without cause.” *E. Line & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888). The Texas Supreme Court has “long held firm to [this] principle.” *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 660 (Tex. 2012).

Since 1888, the only judicially created exception to at-will employment in Texas is one that is “very narrow.” *Sabine Pilot*, 687 S.W.2d at 735. “That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act.” *Id.* An essential element of a wrongful discharge claim under *Sabine Pilot* is that the employee was required to commit an illegal act that carries criminal penalties. *Id.*

Other exceptions to employment at will are all legislative. Congress prohibits discharge based on age, race, color, sex, religion, or national origin.⁴² And the Texas “Legislature has created a few narrow exceptions, prohibiting, for example, discharge based on certain forms of discrimination or in retaliation for engaging in certain protected conduct.” *Sawyer*, 430 S.W.3d at 399 (footnotes omitted). “But Texas courts have created only one.” *Id.*

Absent an exception, employers may end employment for any reason at all. Nothing in existing Texas law prohibits conditioning employment on vaccinations.

⁴² See 29 U.S.C. § 623(a)(1); 42 U.S.C. § 2000e-2(a)(1).

B. Neither the Texas Supreme Court nor the Legislature is likely to create an exception.

Rather than arguing a claim under *Sabine Pilot*, Plaintiffs rely on that case to represent the potential to create exceptions to employment at-will. But Texas courts repeatedly decline to create new exceptions, and the Texas Legislature has declined to act on this very issue. There is no reason to think that Texas law will change.

1. Texas courts steadfastly refuse to create exceptions.

Texas is “steadfastly an at-will employment state.” *Hillman v. Nueces Cty.*, 579 S.W.3d 354, 358 (Tex. 2019) (quoting *Ritchie v. Rupe*, 443 S.W.3d 856, 885–86 (Tex. 2014)). “At-will employment is an important and long-standing doctrine in Texas,” *Sawyer*, 430 S.W.3d at 402, and the Texas Supreme Court has “consistently refused” to carve out any exceptions beyond *Sabine Pilot*’s one, “narrow exception.” *Safeshred*, 365 S.W.3d at 659. The Texas Supreme Court has declined “to recognize a cause of action for private employees who are discharged for reporting illegal activities.”⁴³ And in several cases, it has rejected employment-related claims to avoid weakening or altering the at-will employment rule.⁴⁴

⁴³ *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 724–25 (Tex. 1990); *Austin v. HealthTrust, Inc.-The Hosp. Co.*, 967 S.W.2d 400, 403 (Tex. 1998) (same); *Ed Rachal Found. v. D’Unger*, 207 S.W.3d 330, 333 (Tex. 2006) (per curiam) (same).

⁴⁴ See *Sawyer*, 430 S.W.3d at 402 (declining to permit at-will employee to bring common-law fraud claims because it “would significantly impair the at-will rule”); *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 608-10 (Tex. 2002) (declining “to recognize a cause of action against employers for negligent investigation of their at-will employees’ alleged misconduct” because it

The Texas Supreme Court refrains from creating additional exceptions even where it “recognize[s] ‘that significant public policy interests [would be] advanced’” by an exception.⁴⁵ This is because the doctrine works best if not riddled with holes. And employers should have great latitude to determine what requirements are important for the job. So rather than showing *willingness* to develop exceptions, *see* Br. 14, Texas courts *steadfastly refuse* to create exceptions.

Plaintiffs cite a handful of cases that actually show their optimism for new exceptions is misplaced.⁴⁶ In *Hillman*, the Texas Supreme Court merely held that *Sabine Pilot* also applies to government employers, not just private employers.⁴⁷ And in *Winters*, the Texas Supreme Court rejected a new wrongful discharge claim for whistleblowers, and the concurring opinion from Justice Doggett (on which Plaintiffs rely) failed to get any traction.⁴⁸

would “significantly damage the at-will employment relationship that Texas has so carefully guarded”); *City of Midland v. O’Bryant*, 18 S.W.3d 209, 216 (Tex. 2000) (declining to recognize duty of good faith and fair dealing, in part, because it “would completely alter the nature of the at-will employment relationship”).

⁴⁵ *Ed Rachal*, 207 S.W.3d at 333 (quoting *Austin*, 967 S.W.2d at 403).

⁴⁶ Br. 14 (citing *Hillman*, 579 S.W.3d at 358; *Winters*, 795 S.W.2d at 725-34 (Doggett, J., concurring); and *Johnston v. Del Mar Distrib. Co.*, 776 S.W.2d 768, 770 (Tex. App.—Corpus Christi 1989, writ denied)).

⁴⁷ *Hillman*, 579 S.W.3d at 358 (“We have no problem holding that the exception applies to all Texas employers, in the sense that they all have a common-law-tort duty not to terminate at-will employees solely because the employee refuses to perform an illegal act.”)

⁴⁸ *See Winters*, 795 S.W.2d at 725-34 (Doggett, J., concurring).

In later cases, the Texas Supreme Court expressly rejected Justice Doggett’s concurrence.⁴⁹ And his prediction that the Court would eventually create new at-will exceptions proved wrong, as the last *three decades* have not resulted in even one.⁵⁰

Finally, Plaintiffs rely on a Texas Supreme Court decision that was withdrawn after the U.S. Supreme Court reversed the judgment. Br. 11, 18 (citing *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 70 (Tex. 1989), *rev’d*, 498 U.S. 133 (1990), and *opinion withdrawn*, 807 S.W.2d 577 (Tex. 1991)). A “judgment that has been wholly reversed . . . is without effect.” *Phillips v. Bramlett*, 407 S.W.3d 229, 238 (Tex. 2013). The Texas Supreme Court treats *McClendon* as a legal nullity and acknowledges only the *Sabine Pilot* exception.⁵¹ So reliance on *McClendon* has been charitably described as “not persuasive.”⁵² *See also Blase Indus. Corp. v. Anorad Corp.*, 442 F.3d 235, 239 (5th Cir. 2006).

⁴⁹ *See Austin*, 967 S.W.2d at 401, 403 (rejecting argument based on the “concurring opinion in *Winters*”); *Tex. Dep’t of Human Servs. of State of Tex. v. Hinds*, 904 S.W.2d 629, 635 (Tex. 1995) (finding “compelling reasons” for rejecting the causation standard advocated by *Winters* concurrence).

⁵⁰ Plaintiffs cite to a 1989 Corpus Christi Court of Appeals decision that recognized a *Sabine Pilot* claim can be brought where the employee believes in good faith the requested act might be illegal, *Johnston*, 776 S.W.2d at 770, but numerous Texas courts have rejected *Johnston* as an “unlawful expansion of *Sabine Pilot*.” *Marren v. Stout*, 930 F. Supp. 2d 675, 681 n.2 (W.D. Tex. 2013) (collecting state cases).

⁵¹ *Sawyer*, 430 S.W.3d at 399 (“Texas courts have created only one”); *City of Midland*, 18 S.W.3d at 215 (same).

⁵² *Wegner v. Dell Computer Corp.*, 1999 WL 645086, at *6 (Tex. App.—Austin Aug. 26, 1999, no pet.).

2. The Texas Legislature declined to create an exception.

In 2021, the Texas Legislature repeatedly considered — but declined to enact — the precise rule advocated by Plaintiffs in this lawsuit. The Legislature considered multiple different bills relating to employer vaccine policies, including several that would have made it an “unlawful employment practice if the employer . . . discharges . . . an individual . . . because the individual has not received a COVID-19 vaccine.”⁵³ Both before and after Plaintiffs brought this suit, the Legislature declined to enact such bills. Even when encouraged by the Governor specifically to enact related legislation, the Legislature declined.⁵⁴

The Texas Supreme Court considers unenacted bills and defers to the Legislature’s policy choices to decline to create additional judicial exceptions to at-will employment.⁵⁵ In the at-will context, it has held that where the Legislature has declined to act, “it would be unwise . . . to expand the common law.”⁵⁶

⁵³ *E.g.*, Tex. H.B. 1687, 87th Leg., R.S. (2021); Tex. S.B. 2245, 87th Leg., R.S. (2021); Tex. S.B. 77, 87th Leg., 1st C.S. (2021); Tex. H.B. 24, 87th Leg., 2d C.S. (2021); Tex. H.B. 18, 87th Leg., 3d C.S. (2021); Tex. H.B. 39, 87th Leg., 3d C.S. (2021); Tex. H.B. 164, 87th Leg., 3d C.S. (2021); Tex. H.B. 170, 87th Leg., 3d C.S. (2021); Tex. S.B. 11, 87th Leg., 3d C.S. (2021).

⁵⁴ *See* Tex. Exec. Order No. GA-40 (adding issue of employers’ vaccine requirements to special session agenda “so that the legislature has the opportunity to consider this issue through legislation”).

⁵⁵ *See Austin*, 967 S.W.2d at 401 (discussing proposed “Whistleblower Act” and collecting statutory exceptions to employment at-will).

⁵⁶ *Id.*

Here, the same considerations counsel forbearance by the courts. The Legislature has actively set public policy on COVID vaccines, vaccine policies in hospitals, and at-will exceptions.⁵⁷ In enacting vaccine policy, the Legislature has “carefully balanced competing interests and policies.”⁵⁸ It has prohibited businesses from requiring customers to have “vaccine passports,” for example, but permitted implementation of COVID-19 screening and infection control protocols.⁵⁹

Existing Texas statutes require hospitals to have vaccine policies that “require covered individuals to receive vaccines for the vaccine preventable diseases.”⁶⁰ So it is only logical that the Legislature would not hamstring hospitals from carrying out this policy by creating a new exception to employment at will.

Nor would the Texas Supreme Court jump ahead of the Legislature where the Legislature has declined invitations to act. The Texas Supreme Court does not judicially legislate on controversial issues, particularly in the at-will employment context. This rapidly evolving pandemic is ill-suited for common law rules, especially ones as significant and sweeping as a new exception to employment at will.

⁵⁷ Tex. Health & Safety Code §§ 161.0085(c), (e)(1), § 224.002; *Austin*, 967 S.W.2d at 402 (collecting statutes on exceptions to at-will employment).

⁵⁸ See *Austin*, 967 S.W.2d at 403.

⁵⁹ See Tex. Health & Safety Code § 161.0085(c), (e)(1).

⁶⁰ Tex. Health & Safety Code § 224.002(b)(1).

C. There is no basis to certify a public policy question.

Plaintiffs ask the Court to either “hold there is a public policy exception to at-will employment to prevent terminating employees for refusal to take COVID-19 vaccines that are not fully authorized by the FDA or certify [the question].” Br. 4-5, 24-28. It would be unprecedented to call upon the Texas Supreme Court to answer a question that was not pleaded or argued below and is waived. And it is unnecessary to certify a question where existing Texas law is crystal clear.

1. The Court certifies questions sparingly.

It first bears mention that the Court certifies questions sparingly: “As a general proposition we are chary about certifying questions of law absent a compelling reason to do so; the availability of certification is such an important resource to this court that we will not risk its continued availability by going to that well too often.” *Echeverry v. Jazz Casino Co.*, 988 F.3d 221, 230 n.2 (5th Cir. 2021) (quoting circuit precedent).

In declining to certify a question on an exception under Texas law to at-will employment, the Court remarked: “‘Certification to State Supreme Courts is a valuable resource of this court . . . so we dare not abuse it by over use lest we wear out our welcome.’” *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 564 (5th Cir. 1992) (quoting circuit precedent).

Instead, the Court uses its “‘best judgment’ to make an ‘*Erie* guess’ as to how the state supreme court would resolve the question.” *Echeverry*, 988 F.3d at 230 n.2 (citations omitted). Here, even though there is no Texas law specifically regarding an employment at-will exception for healthcare employees who refuse vaccines, Texas law already provides ample guidance. *Id.* (the Court declines to certify for many reasons, including where there is “ample authority to resolve the issue”).

2. Texas law is clear.

First, Texas law requires Houston Methodist to require the COVID-19 vaccine for its employees.⁶¹ The only question under Texas law is whether there is an existing public-policy exception to employment at-will for healthcare workers who refuse to be vaccinated against COVID-19.

As explained above, there is not. Texas is “steadfastly an at-will employment state”;⁶² it has not created an exception that could apply here; and it consistently defers to the Legislature to decide whether public policy requires exceptions to the rule.⁶³

⁶¹ See Tex. Health & Safety Code § 224.002.

⁶² *Hillman*, 579 S.W.3d at 358 (quoting *Ritchie*, 443 S.W.3d at 885–86).

⁶³ *Ed Rachal*, 207 S.W.3d at 333 (quoting *Austin*, 967 S.W.2d at 403) (“[R]ather than recognize a common-law cause of action that would effectively emasculate a number of statutory schemes, we leave to the Legislature the task of crafting remedies for retaliation by employers.”).

Where the Legislature is active, the Texas Supreme Court refrains from exercising its common-law authority.⁶⁴ Here, the Legislature has actively set public policy,⁶⁵ yet in 2021, it repeatedly declined to enact the specific rule that Plaintiffs request.⁶⁶ These legislative decisions not to regulate “militate against [the Texas Supreme Court’s] exercise of its common-law authority.”⁶⁷

The Texas Supreme Court admonishes Texas courts to refrain from nullifying private action on “public policy” grounds unless the action “contravenes some positive statute or some well-established rule of law.”⁶⁸ Here, it would be exceedingly odd if a hospital that is required by Texas statutes to have a vaccinated workforce could not enforce such policies by requiring compliance. “It is indeed difficult to declare something contrary to public policy when state law . . . actually suggests approval.” *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007).

⁶⁴ *Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass’n*, 593 S.W.3d 324, 339 (Tex. 2020); *Austin*, 967 S.W.2d at 401-03.

⁶⁵ Tex. Health & Safety Code §§ 161.0085(c), (e)(1), § 224.002; *Austin*, 967 S.W.2d at 402 (collecting statutes on exceptions to at-will employment).

⁶⁶ See Tex. H.B. 1687, 87th Leg., R.S. (2021); Tex. S.B. 2245, 87th Leg., R.S. (2021); Tex. S.B. 77, 87th Leg., 1st C.S. (2021); Tex. H.B. 24, 87th Leg., 2d C.S. (2021); Tex. H.B. 18, 87th Leg., 3d C.S. (2021); Tex. H.B. 39, 87th Leg., 3d C.S. (2021); Tex. H.B. 164, 87th Leg., 3d C.S. (2021); Tex. H.B. 170, 87th Leg., 3d C.S. (2021); Tex. S.B. 11, 87th Leg., 3d C.S. (2021).

⁶⁷ *Teal Trading*, 593 S.W.3d at 339.

⁶⁸ *Id.* at 338 (quotation marks omitted); *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 504 (Tex. 2015) (same); *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002) (same); *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001) (same).

This Court recently addressed a somewhat similar request to certify a question to the Texas Supreme Court about whether to recognize a new negligence duty, in part by looking to statutes. *Martinez v. Walgreen Co.*, 935 F.3d 396, 402-04 (5th Cir. 2019). The Court was able to decide the issue itself, “looking to the factors the Texas Supreme Court would consider—in particular, . . . the danger of interference with the legislature’s balancing of public policies.” *Id.* at 404.

Exceptions to employment at will have been left to the Legislature ever since the only exception was created by the Texas Supreme Court in the 1980s. There is no reason to think that the Texas Supreme Court would wade unnecessarily into controversial waters by creating a new exception where the Legislature has declined to do so. And there is no reason to think the Texas Supreme Court would create such an exception in the middle of a global pandemic when a hospital has deemed vaccination against a deadly disease to be an essential job requirement.

This Court has ample guidance and should decline to certify this issue.

There is no “public policy exception” to at-will employment and no reason to think the Texas Supreme Court would create one. This is another independently sufficient reason the Court may affirm. Further, Houston Methodist’s Vaccine Policy does not conflict with public policy at any level, as we will now explain.

III. FEDERAL AND TEXAS LAW ALLOWS HOSPITALS TO MANDATE VACCINES.

A. Federal law allows vaccine mandates.

The United States Supreme Court has observed that a person’s liberty interest from physical restraint is not absolute, and there are “manifold restraints to which every person is necessarily subject for the common good.” *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)). This principle is reflected in the Supreme Court’s holdings that involuntary quarantine for contagious diseases and a state-imposed mandatory vaccination do not violate due process.⁶⁹

In *Jacobson v. Massachusetts*, the Supreme Court considered a claim that the state’s compulsory vaccination law — enacted amidst a growing smallpox epidemic — violated the defendant’s Fourteenth Amendment right “to care for his own body and health in such way as to him seems best.”⁷⁰ The Court rejected this claim and famously explained: the “liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.” *Id.*

⁶⁹ See *Jacobson*, 197 U.S. at 25 & 29 (mandatory vaccination for smallpox); *Compagnie Francaise De Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 396–97 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases).

⁷⁰ *Jacobson*, 197 U.S. at 26.

Rather, “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”⁷¹ In describing a state’s police power to combat an epidemic, the Court explained:

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.⁷²

It naturally follows that a state’s power to compel public vaccinations in the interest of public safety would encompass the power to permit private employers to make vaccinations a job requirement to further the employer’s interest in safety. *Cf. Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 676 (2022) (Gorsuch, J., concurring) (characterizing legality of OSHA vaccination mandate on private employers as turning on the question of “Who decides?”); *id.* at *12 (Breyer, J., dissenting) (same).

As COVID-19 became a massive public health threat, federal agencies acted swiftly to encourage vaccinated workplaces. The Equal Employment Opportunity Commission (EEOC) updated its public guidance on May 28, 2021, to state that employers may require employees to be vaccinated for COVID-19, subject to

⁷¹ *Id.* at 27.

⁷² *Id.* at 29.

reasonable accommodations.⁷³ Likewise, the Occupational Safety and Health Administration (OSHA), which is responsible for workplace safety, also stated that it is “working diligently to encourage COVID-19 vaccinations.”⁷⁴

Federal policy now requires COVID-19 vaccinations for healthcare workers. While this appeal was pending, the Secretary of Health and Human Services announced a rule requiring facilities receiving federal Medicare and Medicaid funds to ensure their staffs (unless exempted) are vaccinated.⁷⁵

The U.S. Supreme Court has allowed this broad vaccine mandate for more than 10 million healthcare workers to go forward.⁷⁶ The Court observed that

ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the “very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID-19.”⁷⁷

⁷³ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, TECHNICAL ASSISTANCE MANUAL ON WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, updated May 28, 2021, at § K.5., *available at* <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁷⁴ See UNITED STATES DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, FREQUENTLY ASKED QUESTIONS, *available at* <https://www.osha.gov/coronavirus/faqs#vaccine>.

⁷⁵ Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555 (Nov. 5, 2021).

⁷⁶ *Biden*, 142 S. Ct. at 650.

⁷⁷ *Id.* at 652 (quoting *Florida v. Dep’t of Health & Hum. Servs.*, 19 F.4d 1271, 1288 (11th Cir. 2021)).

B. Texas law requires hospitals to protect their patients against “vaccine preventable diseases.”

Further, Texas statutes in effect before this pandemic arose *mandate* that hospitals have vaccine policies. As already fully explained, the Texas Health and Safety Code requires a hospital to have policies “to protect its patients from vaccine preventable diseases.” *See* pages 27-28, *supra* (discussing Tex. Health & Safety Code § 224.002(a)). Since December 2020, this law includes COVID-19.⁷⁸

Houston Methodist thus did exactly what both federal and Texas law require: it created a COVID-19 Vaccine Policy, with reasonable accommodations. ROA.295.

C. Executive orders do not create a claim or alter Texas public policy.

Plaintiffs urge the Court to interpret Texas policy from recent executive orders. Br. 19-22. The only order relevant to employer-issued vaccine mandates is executive order GA-40, issued after this case was dismissed. It states:

No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19. I hereby suspend all relevant statutes to the extent necessary to enforce this prohibition.

Tex. Exec. Order No. GA-40 (Oct. 11, 2021). This order has no bearing on this appeal or to the claims in this suit, for a long list of reasons.

⁷⁸ *See* CDC, Vaccine Recommendations and Guidelines of the ACIP, *available at* <https://www.cdc.gov/vaccines/hcp/acip-recs/vacc-specific/covid-19.html>.

First, GA-40 only addresses exemptions. It does not prohibit vaccine mandates or address an employer's right to end employment relationships based on vaccination status. It certainly does not create a new exception to employment at will. Houston Methodist's Vaccine Policy allows for medical and religious exemptions, as Plaintiffs admit. *E.g.*, ROA.277, 307-08; Br. 8-9. And Plaintiffs make no claim or argument that the allowed exemptions are inadequate.

Plaintiffs misread and overstate the order when they say it "explicitly prohibit[s]" termination. Br. 19. It does not address termination of employees at all. Enforcement of the order is by a \$1,000 fine under the Government Code,⁷⁹ not a private right of action. The order thus has no bearing on Plaintiffs' claims.

Notably, the Texas Legislature declined to enact GA-40 into law. A bill that would have codified the executive order into statute was introduced but failed.⁸⁰

Second, to the extent a governor's executive order attempts to suspend state statutes, it is unconstitutional. The Texas Constitution provides: "No power of suspending laws in this State shall be exercised except by the Legislature." TEX. CONST. art. I, § 28.

⁷⁹ "The maximum fine allowed under Section 418.173 of the Texas Government Code and the State's emergency management plan shall apply to any 'failure to comply with' this executive order. Confinement in jail is not an available penalty for violating this executive order." Tex. Exec. Order No. GA-40.

⁸⁰ Tex. S.B. 51, 87th Leg., 3d C.S. (2021).

Because GA-40 does not prohibit employers from requiring vaccines, it does not suspend Health and Safety Code § 224.002's requirement that hospitals have vaccine policies. To suspend laws by executive order would be unconstitutional.⁸¹

Even if Plaintiffs are only arguing that GA-40 is indicative of Texas public policy, that too is wrong. "Expressions of public policy are found in a state's constitution, statutes and judicial decisions." *Parker Plaza W. Partners v. UNUM Pension & Ins. Co.*, 941 F.2d 349, 352 (5th Cir. 1991). Texas courts frequently emphasize that the "public policy of the State is reflected in its statutes." *Gotham Ins. Co. v. Warren E & P, Inc.*, 455 S.W.3d 558, 564 (Tex. 2014). And, again, the Legislature refused to enact GA-40 into Texas statutory law.⁸² Plaintiffs cite no authority looking to a governor's unilateral order to understand the broader public policy of a state. Here, Texas public policy is clear: hospitals must require employees to receive vaccines to protect patients against vaccine preventable diseases. Tex. Health & Safety Code § 224.002.

⁸¹ See *In re Hotze*, 629 S.W.3d 146 (Tex. 2020) (Devine, J., concurring) (questioning constitutionality of executive orders and statutory delegations purporting to empower the Governor to suspend statutes); see Emergency Petition for Writ of Mandamus, *In re Hotze*, No. 20-0430, 2020 WL 4207360 (Tex. May 29, 2020) (Jared R. Woodfill as counsel); Tex. Const. art. II, § 1 (dividing power among three departments and providing that "no person . . . being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.").

⁸² Tex. S.B. 51, 87th Leg., 3d C.S. (2021).

Third, the U.S. Secretary of Health and Human Services issued an interim rule that requires hospitals like Houston Methodist “to ensure that their staff, unless exempt for medical or religious reasons, are fully vaccinated against COVID-19.”⁸³ The HHS Rule applies to Houston Methodist and preempts inconsistent local rules like executive order GA-40.⁸⁴

Fourth, unlike other COVID-era executive orders, this one is not retroactive.⁸⁵ Executive order GA-40 is written in present tense.⁸⁶ A prospective order that took effect in October 2021 cannot apply to employees who were dismissed in June.

Executive order GA-40 is the only order of five that Plaintiffs cite that relates to private employment, but it does not provide any basis to reverse. Both federal and Texas law confirm that Houston Methodist is fully consistent with public policy.

⁸³ *Florida v. Dep’t of Health & Human Servs.*, 19 F.4th 1271 (11th Cir. 2021); Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555 (Nov. 5, 2021) (HHS Rule) (codified in part at 42 C.F.R. § 482.42(g) (“The hospital must develop and implement policies and procedures to ensure that all staff are fully vaccinated for COVID-19”)).

⁸⁴ See HHS Rule, 86 Fed. Reg. at 61,572 (“[T]his IFC preempts the applicability of any State or local law providing for exemptions to the extent such law provides broader exemptions than provided for by Federal law and are inconsistent with this IFC”); *id.* at 61,568 (“this nationwide regulation preempts inconsistent State and local laws as applied to Medicare- and Medicaid-certified providers and suppliers”).

⁸⁵ See Tex. Exec. Order No. GA-22 (May 7, 2020) (amending prior order to reopen businesses “retroactive to April 2”).

⁸⁶ See *In re Millwork*, 631 S.W.3d 706, 712 (Tex. 2021) (“Use of the present tense strongly suggests the object of reference lies in the present or the future, not in the past.” (alterations and quotation marks omitted)). “[A]dministrative rules should not be construed as having retroactive effect unless their language requires that result.” *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep’t Stores, Inc.*, 15 F.3d 1275, 1291 (5th Cir. 1994).

IV. THE DISTRICT COURT CORRECTLY DISMISSED ALL CLAIMS.

Plaintiffs have effectively abandoned their pleaded claims. If the Court chooses to address them, each one can be swiftly rejected.

A. Plaintiffs failed to state a claim under *Sabine Pilot*.

The Amended Complaint first asserts a claim for “wrongful termination under the Sabine Pilot exception to the employment-at-will doctrine.” ROA.283-84.

“In order to establish a *prima facie* case of wrongful termination under *Sabine Pilot*, the plaintiff must prove that: (1) she was required to commit an illegal act which carries criminal penalties; (2) she refused to engage in the illegality; (3) she was discharged; (4) the sole reason for her discharge was her refusal to commit an unlawful act.”⁸⁷ This common-law exception to employment-at-will is “very narrow,” as it only protects employees required to commit a *crime*.⁸⁸

As the district court correctly found, getting vaccinated is not a crime:

Bridges does not specify what illegal act she has refused to perform, but in the press-release style of the complaint, she says that she refuses to be a “human guinea pig.” Receiving a COVID-19 vaccination is not an illegal act, and it carries no criminal penalties.

ROA.607. The reason the *Sabine Pilot* claim fails is as simple as that.

⁸⁷ *White v. FCI USA, Inc.*, 319 F.3d 672, 676 (5th Cir. 2003) (citing *Sabine Pilot*, 687 S.W.2d at 735).

⁸⁸ *Sabine Pilot*, 687 S.W.2d at 735; see *Winters*, 795 S.W.2d at 723–24 (“Winters does not fit within the *Sabine Pilot* exception because he was not unacceptably forced to choose between risking criminal liability or being discharged from his livelihood.”).

Plaintiffs erroneously argue that the Texarkana Court of Appeals “stretched” *Sabine Pilot* to cover the refusal to participate in non-criminal acts. Br. 26-27 (discussing *Hawthorne v. Star Enter., Inc.*, 45 S.W.3d 757 (Tex. App.—Texarkana 2001, pet. denied)). They claim: “The holding in *Hawthorne* shows Texas courts have held employers cannot terminate their employees for refusing to expose themselves to dangerous health conditions,” and that “The case hints that at least one Texas court has stretched to bar termination resulting from forcing employees to take dangerous risks to their bodies.” Br. 26. This argument was not made below, and it is quite wrong.

The *Hawthorne* court expressly stated it was *not* extending *Sabine Pilot*: “In *Sabine Pilot*, the Texas Supreme Court created a very narrow exception to the at-will employment doctrine, and it is not the intent of this Court to extend that doctrine.” *Hawthorne*, 45 S.W.3d at 761. Rather, that case involved only the question whether reporting employer requirements to OSHA to stop the employer from requiring an allegedly illegal act would defeat the claim. *Id.* This is not even a “hint” that *Sabine Pilot* could possibly apply to refusal to comply with vaccine requirements.

Texas law uniformly recognizes: a *Sabine Pilot* claim only arises where an employee is required to perform an illegal act. Here, Plaintiffs undisputedly failed to allege one.

B. Plaintiffs failed to state a claim for “Violation of At-Will Employment Doctrine/Public Policy Exception.”

Plaintiffs also alleged that the Vaccine Policy violates 21 U.S.C. § 360bbb-3(e)(1)(A) and 45 C.F.R. part 46. ROA.284-85. Specifically, they alleged that Houston Methodist violated federal law by not advising Plaintiffs about the benefits and risks of the COVID vaccine and by not providing the option to refuse the vaccine as a condition of employment. ROA.284-85. This conduct allegedly resulted “in violation of the public policy of this state and is the basis for an exception to the at-will employment doctrine.” ROA.285. These federal laws do not create any rights for plaintiffs to bring claims against employers who mandate vaccines.

1. Plaintiffs pleaded violations of federal laws that do not create a private right of action.

“To raise a claim in federal court, plaintiffs must demonstrate . . . that they (the plaintiffs) have a right of action to initiate that claim.”⁸⁹ Even where parties have Article III standing, they “still have to show that they had a right of action to bring that claim in the first place.”⁹⁰ “[P]rivate rights of action to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001). That has not occurred here.

⁸⁹ *Harris Cnty. v. MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015).

⁹⁰ *Id.*

The Food, Drug, and Cosmetic Act (FDCA), which contains 21 U.S.C. § 360bbb-3, provides that “all such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States.” 21 U.S.C. § 337(a). Both the U.S. Supreme Court and this Court have held that the “FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance” *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 n.4. (2001); *Morris v. PLIVA, Inc.*, 713 F.3d 774, 778 (5th Cir. 2013) (FDCA “provides no private right of action for these violations.”).

The district court correctly agreed. ROA.608 (21 U.S.C. § 360bbb-3 “does not confer a private opportunity to sue the . . . employer”). Several other courts have cited the district court in agreement.⁹¹ Likewise, a litany of courts have held that the regulations under 45 C.F.R. part 46 provide no private right of action.⁹²

⁹¹ See *Navy Seal 1 v. Biden*, 2021 WL 5448970, at *3 (M.D. Fla. 2021) (“But this statutory option to accept or refuse an emergency vaccine confers no private right of action” (alteration and quotation marks omitted)); *Doe v. Franklin Square Union Free Sch. Dist.*, 2021 WL 4957893, at *20 (E.D.N.Y. 2021) (“Section 564 [§ 360bbb-3] does not include a private right of action. . . . Nor is a private right of action separately supplied by the Supremacy Clause.”); *Valdez v. Grisham*, 2021 WL 4145746, at *5 (D.N.M. 2021).

⁹² *Thomas v. Catlin*, 141 F. App’x 673, 674 (9th Cir. 2005) (“The district court properly held Thomas failed to state a claim under 45 C.F.R. §§ 46.101, *et seq.*, the federal statute regulating research involving human subjects, because the statute does not confer a private right of action.”); *Robinett v. United States*, 62 F.3d 1433, 1995 WL 473105, at *1 (Fed. Cir. 1995) (“We note that 45 C.F.R. part 46 and OSHA do not create any private right of action to recover damages.”); *Elansari v. Univ. of Pennsylvania*, 779 Fed. Appx. 1006, 1008 (3d Cir. 2019) (district court had “further noted that § 46.116 does not provide a private cause of action”); *U.S. ex rel. Hartwig v. Medtronic, Inc.*, 2014 WL 1324339, at *14 n.16 (S.D. Miss. 2014) (same)).

2. The federal statutes do not apply to Houston Methodist.

The district court correctly concluded that 21 U.S.C. § 360bbb-3(e)(1)(A) only applies to the Secretary of Health and Human Services, not private employers: “It neither expands nor restricts the responsibilities of private employers; in fact, it does not apply at all to private employers like the hospital in this case.” ROA.608. The plain text of the provision confirms this conclusion, expressly issuing directives only to the Secretary.⁹³

The U.S. Department of Justice’s Office of Legal Counsel has issued a memorandum opinion directly on point.⁹⁴ It concluded that 21 U.S.C. § 360bbb-3, section 564 of the FDCA, “does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an emergency use authorization.”⁹⁵ This thorough and well-reasoned DOJ opinion, written specifically to address litigation challenging COVID-19 vaccine mandates while the vaccine was subject to emergency use authorization, squarely rejects Plaintiffs’ theory.

⁹³ See, e.g., 21 U.S.C. § 360bbb-3(e)(1)(A) (“the Secretary . . . shall . . . establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health”); 21 U.S.C. § 360bbb-3(a)(1) (“the Secretary may authorize”); *id.* § 360bbb-3(b)(1) (“The Secretary may make a declaration”); *id.* § 360bbb-3(c) (“The Secretary may issue an authorization”); *id.* § 360bbb-3(d)(2)-(3) (requiring “the Secretary’s conclusions”).

⁹⁴ Dep’t of Justice, *Whether Section 564 of the Food, Drug and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* at 18 (July 6, 2021), <https://www.justice.gov/olc/file/1415446/download>.

⁹⁵ *Id.*

Several courts have recently agreed that 21 U.S.C. § 360bbb-3 does not apply to private employers.⁹⁶

The district court also correctly concluded that 45 C.F.R. part 46 does not apply. ROA.608-09. Those provisions set forth HHS policy on the “Protection of Human Subjects,” and apply only to “research involving human subjects.”⁹⁷ The district court correctly concluded that Plaintiffs failed to allege any facts that Houston Methodist is engaged in “research involving human subjects”:

The hospital’s employees are not participants in a human trial. . . . The hospital has not applied to test the COVID-19 vaccines on its employees, it has not been approved by an institutional review board, and it has not been certified to proceed with clinical trials.

ROA.608-09. The relationship here was only employer-employee.⁹⁸

⁹⁶ *Ciraci v. J.M. Smucker Co.*, 2021 WL 6064748, at *2 n.1 (N.D. Ohio 2021) (“As the EUA statute does not apply to private actors, such a claim is similarly likely to fail.”); *McCutcheon v. Enlivant ES, LLC*, 2021 WL 5234787, at *3 (S.D. W. Va. 2021) (“The provision outlines the rights and responsibilities of the Secretary of Health and Human Services in an emergency; it has no impact upon the rights and responsibilities of private employers.”); *Rhoades v. Savannah River Nuclear Sols., LLC*, 2021 WL 5761761, at *17 (D.S.C. 2021) (“The statutory provisions cited by Plaintiffs do not prevent private employers . . . from requiring employees to be vaccinated against COVID-19. Instead, the statute requires that, for medical products under an EUA, HHS must establish conditions to facilitate informed consent.”) (quotation marks omitted).

⁹⁷ 45 C.F.R. § 46.101(a). “Research means a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge.” *Id.* § 46.102(l). “Human subject means a living individual about whom an investigator (whether professional or student) conducting research” obtains information or biospecimens. *Id.* § 46.102(e)(1).

⁹⁸ *See Hayes v. Univ. Health Shreveport, LLC*, 2022 WL 71607, at *5 (La. Jan. 7, 2022) (concluding hospital employees had not alleged cause of action based on medical consent laws: “Employees have not alleged that Employer is their healthcare provider or that they are patients of Employer. Instead, their cause of action is based on an employer-employee relationship.”).

The district court's dismissal of claims for violation of public policy based on the FDCA and a federal regulation was therefore correct.

C. Plaintiffs failed to state a claim for declaratory relief.

Last, Plaintiffs sought declarations that:

- (a) [21 U.S.C § 360bbb-3(e)(1)(A)] does not permit Defendants to coerce an employee to accept an FDA unapproved vaccine on penalty of termination or other sanctions.
- (b) The doctrine of federal preemption invalidates and voids the 'Mandatory COVID-19 Vaccination Directive' of Defendants. Accordingly, Plaintiffs request a declaration that Defendants' above-described COVID-19 employment policy is invalid.
- (c) Defendants['] mandatory vaccination policy violates 4[5] C.F.R. 46.101, 46.102, 46.116 et seq.

ROA.285-86.

The claim is “viewed as brought under the federal Declaratory Judgment Act.”⁹⁹ Federal Rule of Civil Procedure 57 and the federal Declaratory Judgment Act create no private right of action.¹⁰⁰ “Rule 57, like the Declaratory Judgment Act itself, do[es] not create a substantive right to pursue relief in federal court.”¹⁰¹

⁹⁹ *Edionwe v. Bailey*, 860 F.3d 287, 294 n.2 (5th Cir. 2017) (alteration and quotation marks omitted).

¹⁰⁰ *Harris Cnty.*, 791 F.3d at 552-53.

¹⁰¹ *Id.* at 553.

“[A]lthough the Declaratory Judgment Act provides a *remedy* different from an injunction—it does not provide an additional cause of action with respect to the underlying claim.” *Okpalobi v. Foster*, 244 F.3d 405, 423 n.31 (5th Cir. 2001).

Thus, for all the reasons argued above, these requests for relief also fail. They duplicate the claims that fail under federal law, and the district court correctly addressed them and rejected them together. ROA.607-09.¹⁰²

On appeal, Plaintiffs address their request for declaratory relief in two sentences and merely state that they have “standing to seek declaratory relief.” Br. 28. Otherwise, they do not defend their declaratory judgment claims at all. This Court could hold any issue about the declaratory judgment claims waived.¹⁰³ They have no citation to legal authority, and they do not address the myriad reasons that their declaratory judgment claims failed. *See* ROA.389-94, 607-09.

¹⁰² Plaintiffs’ second request for a preemption declaration was nonsensical and deserved to be dismissed. “The doctrine of preemption, which derives from the Supremacy Clause of the U.S. Constitution, operates to render *only state or local laws* ‘without effect’ if in conflict with federal law.” *Roache v. Long Island R.R.*, 487 F. Supp. 3d 154, 166 (E.D.N.Y. 2020) (emphasis added). The “Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action.” *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) (citations and quotation marks omitted). It merely “instructs courts what to do when state and federal law clash.” *Armstrong*, 575 U.S. at 325. Thus, the “doctrine of federal preemption” only applies to conflicts between federal law and state law, not a private business policy.

¹⁰³ *See* Fed. R. App. P. 28(a); *See JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 601 (5th Cir. 2016) (concluding “claims inadequately briefed and therefore waived”).

CONCLUSION

Plaintiffs argue that vaccine mandates in the workplace are inherently coercive, yet they are completely free to refuse to be vaccinated and find a different employer. That the healthcare industry has widely embraced the COVID-19 vaccine as critical to employment does not alter what is fundamentally a personal choice.

The district court correctly deconstructed this argument:

Although her claims fail as a matter of law, it is also necessary to clarify that Bridges has not been coerced. Bridges says that she is being forced to be injected with a vaccine or be fired. This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.¹⁰⁴

The judgment should be affirmed. The Houston Methodist defendants respectfully pray for any further relief to which they may be entitled.

¹⁰⁴ RE.36; ROA.609. Other courts have since agreed. *See Together Emps. v. Mass Gen. Brigham Inc.*, 19 F.4th 1, 8 (1st Cir. 2021) (“[A]s the deadline for being vaccinated has passed, the appellants cannot point to an ‘impossible choice’ as a special factor here; they have already made their choices.”); *McCutcheon*, 2021 WL 5234787, at *3 (“Ms. McCutcheon is free to accept or refuse the COVID-19 vaccine. If she refuses, she need only to pursue employment elsewhere.”); *Beckerich v. St. Elizabeth Med. Ctr.*, 2021 WL 4398027, at *9 (E.D. Ky. 2021) (“If an employee believes his or her individual liberties are more important than legally permissible conditions on his or her employment, that employee can and should choose to exercise another individual liberty, no less significant – the right to seek other employment.”); *Klaassen v. Trustees of Ind. Univ.*, 7 F.4th 592, 593-94 (7th Cir. 2021) (Easterbrook, J.) (“People who do not want to be vaccinated may go elsewhere.”).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document was filed with the Court via the court's electronic filing system, on the 28th day of January, 2022, and an electronic copy of the document was served on all counsel of record, as listed below, via the court's electronic filing system on the same date:

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Date: January 28, 2022

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