James Hochberg, Hawaii Bar No. 3686
JAMES HOCHBERG AAL, LLLC
700 Bishop Street, Suite 2100
Honolulu, HI 96813
Telephone: (808) 256-7382
jim@jameshochberglaw.com

John C. Sullivan*, Texas Bar No. 24083920
S|L LAW PLLC
610 Uptown Boulevard, Suite 2000
Cedar Hill, TX 75104
Telephone: (469) 523-1351
Facsimile: (469) 613-0891
john.sullivan@the-sl-lawfirm.com

Counsel for Plaintiffs
* *Pro hac vice* granted 1/7/22

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RIKI O'HAILPIN, NINA ARIZUMI, ROBERT ESPINOSA, ERWIN YOUNG, PUANANI BADIANG, SABRINA FRANKS, and RONALD LUM on their own behalf and on behalf of all others similarly situated, *Plaintiffs,* v. HAWAIIAN AIRLINES, INC., and HAWAIIAN HOLDINGS, INC. *Defendants*.	Case No. 1:22-cv-00007-JAO-KJM **MEMORANDUM IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** Jury Trial Demanded

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BACKGROUND 2

STANDARD OF REVIEW 5

ARGUMENT 6

I. EEOC Review Does Not Prevent Preliminary Injunctive Relief Here. 6

II. Plaintiffs Satisfy the Conditions for Preliminary Injunctive Relief to Remedy Hawaiian's Ongoing Violation of Federal Law. 8

A. Plaintiffs are likely to succeed on their Title VII claims. 8

B. Plaintiffs are likely to succeed on their ADA claims. 16

C. Plaintiffs will suffer irreparable harm without an injunction. 20

D. Injunctive relief is warranted by the "serious questions" presented along with the balance of hardships tipping toward the Plaintiffs. 23

E. Granting the injunction will serve the public interest. 24

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444 (7th Cir. 2013) 8

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011)..... 6, 24

Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053 (9th Cir. 2014).....20

Bailey v. Delta Air Lines, 722 F.2d 942 (1st Cir. 1983).....7

Bates v. United Parcel Serv., Inc., 511 F.3d 974 (9th Cir. 2007).....17

Berg v. Richmond Unified Sch. Dist., 528 F.2d 1208 (9th Cir. 1975).....6, 7

Boardman v. Pac. Seafood Grp., 822 F.3d 1011 (9th Cir. 2016).....20

Brown v. City of Tucson, 336 F.3d 1181 (9th Cir. 2003) 19

BST Holdings, LLC v. OSHA, 17 F.4th 604 (5th Cir. 2021).....22

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) 9

Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001) 15, 19

Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001) 18

Drew v. Liberty Mutual Ins., 480 F.2d 69 (5th Cir. 1973).....7

Duke v. Langdon, 695 F.2d 1136 (9th Cir. 1983).....2, 6

EEOC v. AutoNation USA Corp., 52 F. App'x 327 (9th Cir. 2002).....10

EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989).....12

Enyart v. Nat'l Conf. of Bar Exam'rs, 630 F.3d 1153 (9th Cir. 2011).....25

FTC v. Dean Foods Co., 384 U.S. 597 (1966) 7

Garcia v. Lawn, 805 F.2d 1400 (9th Cir. 1986) 20

Goldie's Bookstore v. Sup. Ct., 739 F.2d 466 (9th Cir. 1984).....23

Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993).....9

Hilliard v. BellSouth Med. Assistance Plan, 918 F. Supp. 1016 (S.D. Miss. 1995) .7

Holt v. Continental Grp., Inc., 708 F.2d 87 (2d Cir. 1983).....21

Hsiao v. Stewart, 527 F.Supp.3d 1237 (D. Haw. 2021) 21

Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128 (9th Cir. 2001) 17

Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996).....22

Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) 22

McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999)..... 17, 18

Morris v. N. Hawaii Comm. Hosp., 37 F.Supp.2d 1181 (D. Haw. 1999) 20, 23

Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999) 16

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) 9

Pardi v. Kaiser Found. Hospitals, 389 F.3d 840 (9th Cir. 2004).....19

Pimentel v. Dreyfus, 670 F.3d 1096 (9th Cir. 2012).....6

Ramsay v. Nat'l Bd. of Med. Exam'rs, No. 19-CV-2002, 2019 WL 7372508 (E.D. Pa. Dec. 31, 2019).....25

Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972).....22

Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) 25

Sambrano v. United Airlines, 19 F.4th 839 (5th Cir. 2021) 22

Sampson v. Murray, 415 U.S. 61 (1974) 23

Sheehan v. Purolator Courier Corp., 676 F.2d 877 (2d Cir. 1981) 7

Snapp v. United Transportation Union, 889 F.3d 1088 (9th Cir. 2018) 17, 18

Steenmeyer v. Boeing Co., 92 F.Supp.3d 1024 (W.D. Wash. 2015) 19

Sughrim v. New York, 503 F. Supp. 3d 68 (S.D.N.Y. 2020) 7

Summers v. Earth Island Inst., 555 U.S. 488 (2009) 21

Tandon v. Newsom, 141 S. Ct. 1294 (2021) 24–25

Tarin v. County of Los Angeles, 123 F.3d 1259 (9th Cir. 1997) 15

TWA v. Hardison, 432 U.S. 63 (1977)..... 11, 12

Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054 (9th Cir. 2002) 15

Ward v. Walsh, 1 F.3d 873 (9th Cir. 1993).....24

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).....5–6

Yukutake v. Connors, 2021 WL 4342320 (D. Haw. Sept. 23, 2021)..... 22, 25

Statutes

42 U.S.C. § 12203(a) 19

42 U.S.C. § 2000e(j) 9

42 U.S.C. § 2000e-2(a)(1).....8

42 U.S.C. § 2000e-3(a) 15

Americans with Disabilities Act (ADA)..... *passim*

Title VII of the Civil Rights Act of 1964 (Title VII)..... *passim*

Regulations

29 C.F.R. § 1630.2(j)(1)(i) 17

Other Authorities

Hawaii News Now, *As Hawaiian Airlines vaccine deadline looms, industry insiders worry about job losses* (Jan. 4, 2022) https://www.hawaiinewsnow.com/2022/01/05/hawaiian-airlines-vaccine-deadline-looms-industry-insiders-worry-about-job-losses/. 1

Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States: Contraindications and precautions, https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#Contraindications 19

Hawaiian Airlines, Inc. ("Hawaiian") recently announced that employees must receive a COVID-19 vaccine or face termination. Though the company claimed there would be religious exemptions under Title VII of the Civil Rights Act of 1964 ("Title VII") and medical exemptions under the Americans with Disabilities Act ("ADA"), when the time came for Hawaiian to honor such requests, it issued comprehensive denials. Of the 500 to 600 Hawaiian employees who sought a reasonable accommodation, only a handful were granted (at most). While a denial rate approaching 100% evidences discrimination by itself, the canned denial letters used by Hawaiian to rebuff its employees demonstrate that the company did not act in good faith—Hawaiian appears to have never intended to accommodate anyone.

The evidence shows a pattern of discrimination from Hawaiian meant to stop religious or medical accommodations from interfering with its vaccination goals. Indeed, Hawaiian CEO Peter Ingram recently boasted that he expects to have an "active workforce that is 100% vaccinated." Hawaii News Now, *As Hawaiian Airlines vaccine deadline looms, industry insiders worry about job losses* (Jan. 4, 2022) https://www.hawaiinewsnow.com/2022/01/05/hawaiian-airlines-vaccine-deadline-looms-industry-insiders-worry-about-job-losses/. Hawaiian may desire a 100% vaccination rate, but that can only be achieved by violating federal law.

Plaintiffs represent a class of Hawaiian employees entitled to religious and medical exemptions. To be clear: Plaintiffs *do not* challenge Hawaiian's vaccine

mandate—they merely ask that Hawaiian follow federal law and grant reasonable accommodations. After being denied an interactive process and an accommodation, each Plaintiff has filed administrative claims with the Equal Employment Opportunity Commission ("EEOC"). The Court should enjoin Hawaiian's vaccine mandate temporarily to allow the EEOC time to review those claims. *See Duke v. Langdon*, 695 F.2d 1136, 1137 (9th Cir. 1983).

Absent an injunction, Plaintiffs and hundreds of others similarly situated will suffer harms that neither the EEOC nor this Court can remedy. Placed in a no-win situation, many Hawaiian employees may opt to receive the vaccine despite their civil rights—an injury that cannot be undone. And other harms that money damages cannot restore will follow, too, including: a chance to have children, loss of a home, and a lack of medical care. The Court should exercise its equity jurisdiction to temporarily enjoin the enforcement of Hawaiian's vaccine mandate for those seeking accommodations to preserve the Court's ability to later order meaningful relief.

BACKGROUND

By the Spring of 2020, COVID-19 was spreading rapidly around the world. Like other airlines, Hawaiian began implementing certain mitigation procedures on its airplanes such as having Flight Attendants wear masks and gloves, and using special filtration systems in order to make flying safe. *See* O'Hailpin Dec. ¶ 4; Espinosa Dec. ¶ 4. Hawaiian has operated in that fashion for almost two years,

continually informing the flying public that its airline is safe.

On August 9, 2021, Hawaiian announced that all employees would be required to receive a COVID-19 vaccine. *See* O'Hailpin Dec. ¶ 6. Hawaiian's mandate is absolute; there is no alternative for periodic testing, mask wearing, or social distancing, even for employees who have recovered from COVID-19 and possess the antibodies a vaccine would produce. Those unvaccinated by November 1, 2021, were given the option of entering a temporary testing program. O'Hailpin Dec. ¶¶ 6–7. That program, originally set to last through the end of January, ended on January 4, 2022. O'Hailpin Dec. ¶ 7. Employees must now choose vaccination or termination (or a year of unpaid leave followed by termination).

When Hawaiian announced its vaccine mandate, the company stated that employees could request accommodations for religious or health reasons. It quickly became known, however, that Hawaiian was planning on denying most (if not all) requests for accommodations. Complaint ¶ 26. While Hawaiian disputed this contention, the evidence shows that this was indeed the case.

According to Hawaiian, the vaccination mandate is necessary for safety. Complaint ¶ 35. Yet Hawaiian does not require any passenger flying on its planes, or interacting with its staff, to be vaccinated; the same is true of its vendors and "jumpseaters" from other airlines who ride in the cockpit. At the same time, Hawaiian has relaxed cleaning requirements on its planes. Complaint ¶ 36.

Additionally, by not requiring testing for all employees, Hawaiian ignores that the COVID-19 vaccination does not prevent infection and transmission. *See* Statement of Rochelle Walensky, Centers for Disease Control, CNN Interview (Aug. 5, 2021).

Plaintiffs are seven Hawaiian employees in varying positions. Plaintiffs O'Hailpin and Arizumi are Flight Attendants. O'Hailpin Dec. ¶ 2; Arizumi Dec. ¶ 2. Plaintiffs Espinosa and Lum are pilots. Espinosa Dec. ¶ 2; Lum Dec. ¶ 2. Plaintiff Young is an Aircraft Technician. Young Dec. ¶ 2. Plaintiff Badiang is a Corporate Instructor. Badiang Dec. ¶ 2. Plaintiff Franks is a Customer Service Representative. Franks Dec. ¶ 2. Each requested a reasonable accommodation.

Despite the fact that Plaintiffs work in different environments—aircraft, offices, via Microsoft Teams, or in large open spaces—Hawaiian failed to discuss possible accommodations with any of them, responding only with canned denial letters either discounting sincere religious beliefs, fabricating undue hardship, or inserting Hawaiian into the medical decisions of its employees. *See, e.g.*, Espinosa Dec. ¶¶ 11–13; Badiang Dec. ¶¶ 14–17; O'Hailpin Dec. ¶ 20. The result is that employees will be terminated, go on unpaid leave, or take retirement to salvage limited benefits. *See, e.g.*, Arizumi Dec. ¶ 29; Badiang Dec. ¶ 9. The forced leave is a functional termination pending formal termination in 12 months for those Hawaiian cannot starve into submission. Whether terminated or placed on leave, the Plaintiffs lose all of their benefits (including the travel benefits that are especially

valuable for Hawaii residents). *See, e.g.*, O'Hailpin Dec. ¶ 25; Arizumi Dec. ¶ 23.

As discussed in the accompanying declarations, Hawaiian's discriminatory and retaliatory actions impose significant personal and professional harms on the Plaintiffs. Each Plaintiff will suffer immediate financial hardship if they lose their regular income stream. *See*, *e.g.*, Espinosa Dec. ¶ 17. Several will be unable to pay necessary medical expenses, and the specter of losing health insurance is presently impacting major healthcare decisions regarding treatment options. *See, e.g.*, O'Hailpin Dec. ¶ 25; Espinosa Dec. ¶ 14. Moreover, Hawaiian's actions have brought significant stress into Plaintiffs' lives and are disrupting family relationships. *See, e.g.*, Arizumi Dec. ¶ 25; Lum Dec. ¶ 17. Indeed, they will even prevent one Plaintiff's chance to have children. O'Hailpin Dec. ¶ 24. Most of all, Hawaiian's actions—intended to leverage employees' paychecks into a permanent intrusion of those employees' civil rights—are forcing individuals to undergo a crisis of conscience that Hawaiian has no right to invoke. *See, e.g.*, O'Hailpin Dec. ¶ 29; Espinosa Dec. ¶ 17; Lum Dec. ¶ 18. Title VII and the ADA demand better.

STANDARD OF REVIEW

To obtain a temporary restraining order or preliminary injunction, Plaintiffs must establish: (1) a likelihood of success on the merits; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest." *Winter*

v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).[1]

ARGUMENT

I. EEOC Review Does Not Prevent Preliminary Injunctive Relief Here.

Each Plaintiff has a pending inquiry or charge with the EEOC complaining of Hawaiian's discriminatory and retaliatory actions. *See* O'Hailpin Dec. ¶ 31; Arizumi Dec. ¶ 32; Espinosa Dec. ¶ 19; Young Dec. ¶ 19; Badiang Dec. ¶ 22; Franks Dec. ¶ 20; Lum Dec. ¶ 21. EEOC review does not, however, prevent an injunction against Hawaiian's current course of actions. "The law of the [Ninth] circuit is that in a 'limited class of cases' a district court has jurisdiction to grant a preliminary injunction in a Title VII case before the completion of the administrative process in order to maintain the status quo." *Duke*, 695 F.2d at 1137 (citing *Berg v. Richmond Unified Sch. Dist.*, 528 F.2d 1208, 1211 (9th Cir. 1975) (vacated on other grounds, *Richmond Unified Sch. Dist. v. Berg*, 434 U.S. 158 (1977))). Where there is "both a high probability of the claimant's ultimate success on the merits and the threat of irreparable injury of the sort which the Act seeks to avoid, a Title VII claimant may personally bring suit to maintain the status quo pending disposition by the EEOC of

[1] Using the Ninth Circuit's "sliding scale" approach, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam) (citations omitted). "In other words, 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

the underlying charge of discrimination." *Berg*, 528 F.2d at 1212.[2]

Other courts agree. *See, e.g.*, *Bailey v. Delta Air Lines*, 722 F.2d 942, 944 (1st Cir. 1983); *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 884 (2d Cir. 1981); *Drew v. Liberty Mutual Ins.*, 480 F.2d 69, 71–72 (5th Cir. 1973); *see also Sughrim v. New York*, 503 F. Supp. 3d 68, 96 (S.D.N.Y. 2020) ("[T]emporary injunctive relief is available on Title VII claims before a plaintiff receives a right to sue letter from the EEOC[.]"). In such cases, an "individual employee may bring her own suit to maintain the status quo pending the action of the [EEOC] on the basic charge of discrimination." *Drew*, 480 F.2d at 72.

Such a rule makes sense. In some cases, injunctive relief is necessary "to preserve the court's ability to later order meaningful relief." *Id.* at 74. And this conclusion is consistent with the history of Title VII. *See Sheehan*, 676 F.2d at 881. As the Supreme Court has explained, there is "a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels. . . . Such power has been deemed merely incidental to the court's jurisdiction to review final agency action[.]" *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (citation omitted).

Preliminary injunctive relief is imperative to maintain the status quo here.

---

[2] The ADA's exhaustion requirement may be treated similarly. *See, e.g.*, *Hilliard v. BellSouth Med. Assistance Plan*, 918 F. Supp. 1016, 1026 (S.D. Miss. 1995).

Without such relief, the Plaintiffs face a choice with permanent consequences: one for which the EEOC and this Court will have no remedy if Hawaiian's coercion is not stopped now. Plaintiffs must decide daily whether to receive the COVID-19 vaccine at the expense of their religious beliefs or health in order to save their job, their insurance, their opportunity for children, their home, their career, or any other number of benefits. It is understandable that Hawaiian employees may be considering acquiescing to the mandate—as many have already been coerced into doing—thereby risking their health and/or their conscience for their livelihood. That injury cannot be reversed or remedied by a subsequent EEOC decision.

II. Plaintiffs Satisfy the Conditions for Preliminary Injunctive Relief to Remedy Hawaiian's Ongoing Violation of Federal Law.

A. Plaintiffs are likely to succeed on their Title VII claims.

Title VII exists "to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices." *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (7th Cir. 2013). But this is what Hawaiian is demanding of its employees. In order to become a "100% vaccinated" airline—simply a marketing strategy—the company is discarding its employees' Title VII rights.

1. Title VII prohibits an employer from discriminating against an employee "because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). This "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an

employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

To prevail here, Plaintiffs "must first establish a *prima facie* case of religious discrimination." *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). Plaintiffs must show that: (1) they have a bona fide religious belief, the practice of which conflicts with an employment duty; (2) they informed their employer of the belief and conflict; and (3) the employer threatened them with or subjected them to discriminatory treatment, including discharge, because of their inability to fulfill the job requirements. *Id*. Plaintiffs are likely to succeed on each prong.

Plaintiffs informed Hawaiian of their sincerely held religious beliefs and of the conflict Hawaiian's new job requirement of a COVID-19 vaccine created with those beliefs. O'Hailpin Dec. ¶¶ 10–11; Arizumi Dec. ¶¶ 10–12; Espinosa Dec. ¶¶ 8–9; Young Dec. ¶¶ 8–9; Badiang Dec. ¶¶ 10–12; Franks Dec. ¶¶ 10–11; Lum Dec. ¶ 11. Because those beliefs prevent vaccination, each Plaintiff has been threatened with discharge, forced to retire, or taken out of service by the company pending termination (whether presently or at the end of a leave of absence).[3] The statistical data alone establishes the prima facie case here. *Obrey v. Johnson*, 400 F.3d 691, 694–95 (9th Cir. 2005). The burden then shifts to Hawaiian to demonstrate

[3] Just because an employee is "not completely severed" immediately from her employment "does not mean that cutting off [her] paycheck was not an adverse action." *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72 (2006).

that it cannot reasonably accommodate Appellants' needs without undue hardship. 42 U.S.C. § 2000e(j). Hawaiian cannot sustain that burden.

As an initial matter, Hawaiian violated Title VII by failing to engage in an interactive process. *See, e.g.*, *EEOC v. AutoNation USA Corp.*, 52 F. App'x 327, 329 (9th Cir. 2002). In all instances, Hawaiian failed to engage in a meaningful and interactive exchange with Plaintiffs to determine either the sincerity of their religious beliefs and/or a reasonable religious accommodation to the vaccine policy. While the company held brief meetings with some Plaintiffs—to question their beliefs and see if they could be talked into taking the vaccine—others were never contacted at all. *See, e.g.*, O'Hailpin Dec. ¶ 12. Despite the availability of reasonable accommodations, Hawaiian issued blanket denials without an interactive process.

It is unsurprising, though, that Hawaiian did not bother to engage with the requesters—it never had any intention of accommodating the requests. The lack of good faith can be seen in how Hawaiian treated initial requests for accommodations.

For instance, Plaintiff Arizumi detailed her religious objections based on Shinto-related beliefs concerning the spiritual aspects of nature and the body. Arizumi Dec. ¶¶ 10–11. But when Hawaiian denied her request, it claimed that Ms. Arizumi's beliefs about her body being "a temple" merely showed a "personal preference." Arizumi Dec. ¶ 14. Not only was that account of her request false, referring to Ms. Arizumi's body as "a temple" is actually offensive in her religion.

Arizumi Dec. ¶ 16. Likewise, Pastor Espinosa received the same denial letter even though his request went into detail about the sacredness of human life that he believes is devalued through using a product (the COVID-19 vaccines) that has been produced with or tested on fetal stem cell lines. Espinosa Dec. ¶ 8. Hawaiian's treatment of Pastor Espinosa's religious beliefs as merely a "personal preference . . . couched against the context of your religious beliefs," further reveals a bias and antipathy (if not animosity) for religious beliefs. Finally, Ms. O'Hailpin's canned denial letter similarly chided her for referencing her body as a temple of the Holy Spirit, even though that exact belief was later acknowledged by Hawaiian to be a sincerely held religious belief. *Compare* O'Hailpin Dec. ¶ 11, *with* Young Dec. ¶ 8. From the outset, it is clear Hawaiian was uninterested in the accommodation process.

As confirmed later, the substance of the accommodation requests was never the issue. Even individuals the company eventually admitted had sincerely held religious beliefs were summarily denied accommodations. *See, e.g.*, Young Dec. ¶¶ 12–13; Badiang Dec. ¶¶ 14–15; Franks Dec. ¶¶ 13–14; Lum Dec. ¶ 14. This time, though, it was because the company decided it could dodge Title VII by claiming (but not demonstrating) "undue hardship" after conducting its mock testing program for just over a month. Hawaiian will undoubtedly seek to rely on the Supreme Court's decision in *TWA v. Hardison*, 432 U.S. 63 (1977), where the Court held that requiring an employer "to bear more than a de minimis cost" in order to

accommodate an employee "is an undue hardship." *Id.* at 84. But assuming that applies in this case would overread *Hardison*. *See EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir. 1989), overruled on other grounds by *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). And "at a minimum, [Hawaiian] was required to negotiate with the employee[s] in an effort reasonably to accommodate [their] religious beliefs." *Id.* The level of hardship in *Hardison* is not present here and Hawaiian's argument fails for at least three reasons.

First, every major airline company runs a testing program that employees may use in lieu of being vaccinated. Indeed, employers across the country allow their employees to test regularly (one a week in most cases) if they have a reasonable accommodation request. Even hospitals and emergency rooms allow accommodated employees to test and mask instead of terminating them. It cannot be the case that Hawaiian Airlines—the tenth largest air carrier in the United States—is the only business incapable of figuring out a testing option for accommodated employees.

Second, to the extent the testing program established by Hawaiian failed, it is because the company had no desire for it to succeed. It was known from the outset that testing was a temporary measure to allow the unvaccinated more time to decide if they would acquiesce to the company's demands—the company made clear it was

not something permanent. Lum Dec. ¶ 6. To the extent Hawaiian established a system that was administratively difficult, that was by choice.[4]

Though it was never meant to serve as a possible accommodation, each of the Plaintiffs dutifully complied with all of the demands of the program without issue. *See, e.g.*, Espinosa Dec. ¶ 6. Hawaiian may complain of others not following the program, but that cannot be held against those who do follow it and are entitled to a reasonable accommodation. And if Hawaiian believes its testing program was too difficult to manage, the company is free to pick from the myriad of testing programs used by other airlines, medical facilities, or other businesses that must operate at least as safely as Hawaiian. The company could allow employees to test through the Hawaii Department of Health program provided at approved locations. Or it could use the testing program it already has in place for certain destinations that require testing for everyone. What Hawaiian is not free to do is establish an accommodation that is supposedly too hard for it to administer and then call "King's X"—that is not how the interactive process works and it does not demonstrate undue hardship.

Third, Hawaiian failed to assess the individual requests of the Plaintiffs to consider readily available (and costless) accommodations. For instance, almost all

[4] Contrary to the straightforward self-test program Hawaiian uses for vaccinated employees traveling to certain destinations, the temporary testing program was purposely designed to be an onerous process using video-proctored tests taken only at certain times—the testing even had to be done during weeks when employees were not coming to work. *See* O'Hailpin Dec. ¶ 7.

of Ms. Badiang's work could be performed remotely. Badiang Dec. ¶ 4. Likewise, Ms. Franks previously worked in the Hawaiian lounges during the pandemic behind a plexiglass shield, wearing a mask, face shield, and gloves, with her only contact with others being the exchange of documents through a small opening in the bottom of the shield. Contrary to the form letter Ms. Franks received, her work location actually does allow for "maintaining baseline COVID-19 safety protocols, specifically maintaining physical distance and masking." Mr. Young works as a mechanic—primarily outdoors—and has always worn a mask throughout the pandemic with no problem following Hawaiian's safety protocols. Finally, Mr. Lum was also told that it would be an undue hardship to accommodate his beliefs, but he has flown safely throughout the entire pandemic while regularly testing for COVID-19 on his own—prior to the company's mock testing program—to ensure that he does not transmit the virus to either his elderly mother or his girlfriend (both of whom are vaccinated). Lum Dec. ¶ 15. Each of these Plaintiffs could easily be accommodated—and under a testing regime, they would be statistically safer than the vaccinated-but-untested employees currently allowed to work.

Plaintiffs are not asking for any accommodation that places a hardship on Hawaiian. Indeed, there are a host of reasonable accommodations that are not unduly burdensome, including: mask wearing, periodic testing for COVID-19 antibodies, or periodic COVID-19 testing—all at no cost to Hawaiian.

2. Title VII also forbids employers from retaliating against employees who attempt to exercise their rights under the statute. 42 U.S.C. § 2000e-3(a). For this claim, Plaintiffs must establish a *prima facie* case by showing that: (1) they engaged in a protected activity; (2) their employer subjected them to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002).

Here, Hawaiian condemned the unvaccinated and created a hostile work environment for those making requests for religious exemptions. Espinosa Dec. ¶ 18. Unsurprisingly, then, Hawaiian took an adverse employment action against virtually everyone who made a request for an accommodation. Further, temporal proximity shows a causal connection. *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam). Hawaiian issued an initial set of denials within days without inquiring into employees' religious beliefs, and later issued blanket denials without regard to individual circumstances or possible accommodations. Hawaiian's approach is clear: if an employee sought a religious accommodation, the request was to be denied and a heavy penalty exacted from them.

3. Even if Hawaiian had demonstrated any undue hardship, the evidence here shows "that the proffered reasons are pretexts for retaliation or that a discriminatory reason more likely motivated the employer's action." *Tarin v. County of Los Angeles*, 123 F.3d 1259, 1264 (9th Cir. 1997). To the extent Hawaiian suggests that

its decisions were legitimate and necessary for safety purposes, the facts show that as a pretext for the airline's "100% vaccinated" goal. As Hawaiian stated for the past two years, it is safe to fly on their planes with the mitigation measures that are in place. Moreover, the airline allows any number of individuals on its planes every day that are both unvaccinated *and* untested for COVID-19. Complaint ¶ 36. If vaccination were "absolutely necessary" for workplace safety—as Hawaiian claims in its canned denial letters, Complaint ¶ 38—it would require it of the thousands of individuals on its planes each day. The addition of a small number of employees using reasonable accommodations such as masking and testing—viable alternatives throughout nearly two years of the pandemic—would cause no risk and, indeed, would be less of a risk than Hawaiian's vaccinated-but-untested employees. Hawaiian cannot use safety as a pretext for violating Title VII.

B. Plaintiffs are likely to succeed on their ADA claims.

1. To establish an ADA claim, a plaintiff must first demonstrate that: (1) they are disabled within the meaning of the ADA; (2) they are a qualified individual able to perform the essential functions of the job; and (3) they suffered an adverse employment action because of their disability. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999). Three Plaintiffs have a physical disability that substantially limits a major life function: (1) Ms. O'Hailpin has antiphospholipid syndrome affecting her reproductive system; (2) Ms. Arizumi has mitral valve

prolapse affecting her circulatory system; and (3) Mr. Lum has coronary artery disease affecting his circulatory system. O'Hailpin Dec. ¶ 17; Arizumi Dec. ¶ 20; Lum Dec. ¶ 8. Hawaiian did not dispute these claims or the ability of the Plaintiffs to perform the essential functions of their jobs. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 991 (9th Cir. 2007) (en banc); 29 C.F.R. § 1630.2(j)(1)(i).

As an initial matter, Hawaiian is liable—"as a matter of law"—for a breakdown in the interactive process. *See Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001). As part of an interactive process with the Plaintiffs, Hawaiian has "an affirmative duty under the ADA to explore [multiple] methods of accommodation"—it is not enough to try one and call it good. *Id.* at 1138 ("[W]e have held that the duty to accommodate 'is a "continuing" duty that is "not exhausted by one effort."'" (quoting *McAlindin v. County of San Diego*, 192 F.3d 1226, 1237 (9th Cir. 1999))).

As explained by the Plaintiffs, Hawaiian did not engage in *any* interactive process, let alone explore *multiple methods* of accommodation. O'Hailpin Dec. ¶¶ 12, 27; Arizumi Dec. ¶¶ 13, 17, 22, 28; Lum Dec. ¶¶ 13, 15. Yet any number of accommodations would have been reasonable: periodic COVID-19 testing conducted in a manner like every other major airline is just one example. Hawaiian's failure to engage in the interactive process thus triggers liability. *See Snapp v. United Transportation Union*, 889 F.3d 1088, 1095 (9th Cir. 2018).

Hawaiian is also liable for its failure to accommodate employees with disabilities. "The essence of the concept of reasonable accommodation is that, in certain instances, employers must make special adjustments to their policies for individuals with disabilities." *McAlindin*, 192 F.3d at 1237. "The ADA treats the failure to provide a reasonable accommodation as an act of discrimination if the employee is a 'qualified individual,' the employer receives adequate notice, and a reasonable accommodation is available that would not place an undue hardship on the operation of the employer's business." *Snapp*, 889 F.3d at 1095. The question of "undue hardship" does not arise in this case, though, since the Plaintiffs can perform the essential functions of their jobs without an accommodation. *Cripe v. City of San Jose*, 261 F.3d 877, 885 (9th Cir. 2001). Knowing this—but not wanting to change its policy for employees needing medical accommodations—Hawaiian tried the novel approach of informing Plaintiffs that the medical advice from their doctors was flawed because of CDC recommendations about contraindications for the COVID-19 vaccine. O'Hailpin Dec. ¶ 19; Arizumi Dec. ¶ 21; Lum Dec. ¶ 10.

Setting aside the audacity of Hawaiian's approach, it misreads the CDC's Guidance. The webpage on which the company relied for its medical advice was merely providing examples of known contraindications in the context of allergic reactions to vaccines or vaccine ingredients. *See Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United*

States: Contraindications and precautions, https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#Contraindications. It was not intended to override specific physician diagnoses and recommendations—nor could it. *See id. Appendix B* (noting relevant allergy histories for those who have a "Contraindication" to taking the vaccine, who should use "Precaution," when taking it, and those who "May Proceed" without a risk of allergic reaction). Hawaiian failed to grasp that these directions from the CDC apply to *everyone* in the general population—they have nothing to do with the specific needs of individuals with physical disabilities and they are certainly not meant to be an exhaustive list.

2. The ADA also makes it unlawful to retaliate against an employee for seeking an accommodation. *See* 42 U.S.C. § 12203(a). These claims are analyzed like those under Title VII. *Brown v. City of Tucson*, 336 F.3d 1181, 1186 (9th Cir. 2003) (citing cases). "Pursuing one's rights under the ADA constitutes a protected activity." *Pardi v. Kaiser Found. Hospitals*, 389 F.3d 840, 850 (9th Cir. 2004). And there can be no dispute that Hawaiian responded with adverse employment actions. *See Steenmeyer v. Boeing Co.*, 92 F.Supp.3d 1024, 1031 (W.D. Wash. 2015).

Plaintiffs are able to show that their decision to identify a disability and request an accommodation was the reason Hawaiian subjected them to adverse employment actions. Not only are the adverse actions close in time to the protected activity, thereby suggesting a causal connection, *see Breeden*, 532 U.S. at 273, Mr.

Ingram—Hawaiian's CEO—promised that his "active workforce [will be] 100% vaccinated." He could not abide those with medical exemptions frustrating his advertising goal. But without a legitimate, nonretaliatory reason for denying those requests for accommodation, Hawaiian instead tried to shift the blame onto the CDC. As just seen, that excuse is without merit. All that is left is Hawaiian's discrimination, and Plaintiffs are likely to succeed on their ADA retaliation claims.

C. Plaintiffs will suffer irreparable harm without an injunction.

"Irreparable harm is . . . harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). The threat of irreparable harm is sufficiently imminent to warrant preliminary injunctive relief if the plaintiff "is likely to suffer irreparable harm before a decision on the merits can be rendered." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016). This includes harms to both the "physical and psychological well-being" of a plaintiff. *See Morris v. N. Hawaii Comm. Hosp.*, 37 F.Supp.2d 1181, 1188 (D. Haw. 1999). The irreparable harms here are many.

First, as the Ninth Circuit has recognized, a company's retaliatory actions toward employees seeking to exercise Title VII rights constitutes irreparable harm. *Garcia v. Lawn*, 805 F.2d 1400, 1405–06 (9th Cir. 1986). That is because the adverse employment action "carries with it the distinct risk that other employees may be deterred from protecting their rights . . . or from providing testimony for the

plaintiff in her effort to protect her own rights." *Id.* at 1405 (quoting *Holt v. Continental Grp., Inc.*, 708 F.2d 87, 91 (2d Cir. 1983)). Just so here. When employees at Hawaiian see the company callously enforce a no-accommodations policy by getting rid of the dissenting voices that should be protected, it creates a deterrent to anyone else trying to enforce their rights. It also carries with it the risk that employees will be reticent to provide testimony against Hawaiian given what they know about the company's attitude toward those seeking accommodations.

Second, the ADA Plaintiffs will suffer immediately if cut off from their health insurance. While some may be without heart medication or cancer treatment, Plaintiff O'Hailpin's irreparable harm is even more obvious. The disease from which she suffers has made it very difficult to have children. O'Halipin Dec. ¶ 24. Without her insurance this Spring—during the final window in which she can use that insurance for in-vitro fertilization (IVF)—Ms. O'Hailpin will lose the planned opportunity to use IVF to have a child with her husband. Such imminent irreparable harm meets the criteria for injunctive relief. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). While it is unknown whether she would conceive a child through IVF, the harm is Hawaiian's removal of the chance to do so. *See Hsiao v. Stewart*, 527 F.Supp.3d 1237, 1253 (D. Haw. 2021). When a defendant's conduct forecloses the opportunity for a plaintiff to obtain something they seek, that is the immediate injury—it is "irrelevant" whether the thing sought is guaranteed. *Id.*

Third, in a phenomenon unique to the COVID pandemic, Hawaiian is discriminating against hundreds of workers at the same time by putting those entitled to exemptions in a lose-lose position—take the COVID-19 vaccine, at the expense of their conscience and health, or give up their livelihood. *See, e.g.*, O'Hailpin Dec. ¶¶ 29–30. When this coercion is carried out in violation of federal law, it creates an irreparable harm because taking the vaccine cannot be undone. *See BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (finding irreparable harm when employees are illegally put to the choice of "their job[s] or their jab[s]"). And because it pits competing religious values against one another—not taking the vaccine versus feeding one's family, *see* Espinosa Dec. ¶ 17—Hawaiian's coercion of those with sincerely held religious beliefs is "a quintessentially irreparable injury." *Sambrano v. United Airlines*, 19 F.4th 839, 841 (5th Cir. 2021) (Ho, J., dissenting). To put employees to this crisis of conscience and then claim that money damages could remedy it is to "misunderstand the entire nature of religious conviction at its most foundational level." *Id.* at 841–42.

Moreover, Title VII "protect[s] the same rights in private employment as the Constitution protects." *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116–17 (5th Cir. 1972); *see Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). And deprivation of a constitutional right is irreparable. *See Yukutake v. Connors*, 2021 WL 4342320, at *10 (D. Haw. Sept. 23,

2021) (quoting *Goldie's Bookstore v. Sup. Ct.*, 739 F.2d 466, 472 (9th Cir. 1984)).

The irreparable harms Hawaiian is in the process of inflicting continues. For example, if Mr. Lum is placed on unpaid leave, he will miss the once-in-a-lifetime "retirement flight" ceremony that is to take place in August when he turns 65 and can no longer fly for Hawaiian. Lum Dec. ¶ 19. Other employees will miss the chance to "bid" for prestigious routes, positions within the flying community, or future vacation slots. O'Hailpin Dec. ¶ 22; Young Dec. ¶ 15. Ms. Arizumi and Ms. Badiang are set to lose their "Princess Parking." Arizumi Dec. ¶ 26; Badiang Dec. ¶ 21. Moreover, all this does not begin to address the interpersonal harms Hawaiian is causing by pitting employees against each other, Espinosa Dec. ¶ 18, and ripping apart the 'Ohana within the company. O'Hailpin Dec. ¶ 23; Badiang Dec. ¶ 20. No amount of money paid later can make up for Hawaiian's on-going infliction of harm on employees' psychological well-being. *See Morris*, 37 F.Supp.2d at 1188.

Finally, while employment cases do not often merit injunctions, here "the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, . . . so far depart[s] from the normal situation that irreparable injury might be found." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974).

D. Injunctive relief is warranted by the "serious questions" presented along with the balance of hardships tipping toward the Plaintiffs.

Even if there were any doubt that Hawaiian has not met its Title VII and ADA obligations—and there is none—this case presents serious questions warranting an

injunction, especially in light of the irreparable harms that Hawaiian's actions will cause. *See Cottrell*, 632 F.3d at 1135. The risk of Hawaiian forcing employees to forsake their religious beliefs and health far outweighs any delay for Hawaiian in being able to force out workers—especially those who have worked safely throughout the pandemic and who are willing to undergo regular COVID-19 testing. Hawaiian has operated since Spring 2020 without a vaccine mandate and there is no compelling reason why it cannot continue doing so while engaging in the interactive process required by federal law. Requiring Hawaiian to comply with federal law cannot impose a harm that outweighs Plaintiffs' irreparable injury.

As noted above, Hawaiian cannot use broad appeals to "safety" as a hardship for the company—any argument on that score can be rightly seen as a pretext. Thus, even assuming it is appropriate for Hawaiian to require vaccinations, no safety justification can support a blanket policy that fails to take individual situations into account. That is why federal law requires an interactive process in the first place.

E. Granting the injunction will serve the public interest.

A status quo injunction also serves the public interest. First, "[i]t is the right of a human being to respond to what that person's conscience says is the dictate of God." *Ward v. Walsh*, 1 F.3d 873, 876 (9th Cir. 1993). While there is an important public interest in fighting the spread of COVID, religious exercise is to be protected even in the face of competing public health considerations. *See*, *e.g.*, *Tandon v.*

Newsom, 141 S. Ct. 1294 (2021). "Even in a pandemic," it "cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).[5]

Second, "[i]n enacting the ADA, Congress demonstrated its view that the public has an interest in ensuring the eradication of discrimination on the basis of disabilities." *Enyart v. Nat'l Conf. of Bar Exam'rs,* 630 F.3d 1153, 1167 (9th Cir. 2011). Other courts have similarly recognized a public interest in enforcing the ADA. *See, e.g.*, *Ramsay v. Nat'l Bd. of Med. Exam'rs*, No. 19-CV-2002, 2019 WL 7372508, at *19 (E.D. Pa. Dec. 31, 2019), *aff'd*, 968 F.3d 251 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 1517 (2021) ("It is obviously in the public interest that the dictates of the ADA . . . be followed—Congress so decreed by passing [the] statute[].").[6]

While Plaintiffs do not dispute the important goal of stopping COVID-19, Hawaiian could easily further that interest—like other airlines—through masking and testing. These alternative measures are even preferrable given the fact that the vaccine does not prevent the virus' spread. An injunction is in the public interest.[7]

CONCLUSION

To ensure meaningful relief is available later, an injunction should be granted.

---

[5] Because the statutory right here is based in a constitutional right, its protection is also in the public interest. *See Yukutake*, 2021 WL 4342320 at *10.

[6] Additionally, the public is well-served by uninterrupted air traffic. Putting employees out of work will only contribute further to delays and cancelled flights.

[7] Hawaiian's safety rationale is further weakened by the new Omicron variant—a milder form of the virus—infecting individuals regardless of vaccination status.

January 10, 2022

Respectfully submitted,

/s/ James Hochberg
James Hochberg
Hawaii Bar No. 3686
JAMES HOCHBERG LAW
700 Bishop Street, Suite 2100
Honolulu, HI 96813
Telephone: (808) 256-7382
Facsimile:
jim@jameshochberglaw.com

/s/ John C. Sullivan
John C. Sullivan*
Texas Bar No. 24083920
S|L LAW PLLC
610 Uptown Boulevard, Suite 2000
Cedar Hill, TX 75104
Telephone: (469) 523-1351
Facsimile: (469) 613-0891
john.sullivan@the-sl-lawfirm.com
* *Pro hac vice* granted 1/7/22

Counsel for Plaintiffs and the Proposed Class