15-3775

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MELISSA ZARDA AND WILLIAM ALLEN MOORE AS CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Plaintiffs-Appellants,

— against —

ALTITUDE EXPRESS dba SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

GREGORY ANTOLLINO, ESQ.
Attorney for Plaintiff-Appellant
725 Seventh Avenue, Suite 705
New York, New York 10001
(212) 334-7397

BERGSTEIN & ULLRICH, LLP,
Stephen Bergstein, Of Counsel
Attorney for Plaintiff-Appellant
12 Railroad Avenue
Chester, New York 10918
(845) 469-1277

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ESTATE OF DONALD ZARDA,

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-against-

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This case brings curious circumstances with questions of immeasurable importance. The defense asks the Court to brush them aside: after all, Simonton v. Runyon, 232 F.3d 33 (2d. Cir. 2000) is the law; after all, Plaintiff lost a trial under New York law with a higher standard of proof. However, not only was that trial was riddled with error, but, more vitally, we believe this Court will recognize the civil rights of gay people as potential victims of *sex discrimination.* We ask you to re-examine earlier jurisprudence to give these unconventional facts the attention they deserve. The lower courts scream for answers to this legal inconsistency: Sexual minorities are protected under the Constitution, but not the Civil Rights Act. To fail – as the defense has failed – to address this inconsistency is intellectually bashful, to put it mildly. The Constitution recognizes equity and fair access to the courts for people of all sexual orientations; a little catching up is required, but this Court need not recognize sexual orientation as a protected class - merely a subset of sex. This is something average Americans don't recognize - noted by amicus in a pending appeal. See Amicus Brief of 128 Members of Congress, June 27, 2016 p.11. The law may so recognize, but if only you agree. (The brief is available on ecf or at http://tinyurl.com/gtp2wpz, visited June 30, 2016.)

The Estate asks for a new trial to demonstrate to a *properly instructed,* uninflamed jury that a discriminatory termination – one that haunted Zarda for the remainder of his life – was a violation of his right to be free from sex discrimination. The district judge denied us the language, and thus the protections, of Title VII. We proceeded under a state statute affording fewer remedies, and requiring a higher standard of proof; the case was defended with surreptitious and blatant homonegativity. The Estate didn't get what Don – and therefore the Estate – deserved. Anticipating this plea to the Circuit – and in the attempt to conserve resources – we offered to allow the jury to consider the federal question in an advisory manner subject to appeal. After the E.E.O.C's holding in Baldwin v. Foxx, 2015 EEOPUB LEXIS 1905 (EEOC July 16, 2015), we intended to bring this appeal. However, both the court and defense rejected this suggestion, SPA.3. See R., entry 203, p.2 and entry 214, p.13.

Heterosexual attraction is the "ultimate sex stereotype," Winstead v. Lafayette Cty. Bd. of Cnty. Comm'r, 2016 U.S. Dist. LEXIS 80036, p*25 (N.D. Fla. June 20, 2016). The vilification of prejudice from a bygone era is part of what the defense used to sway the jury: In the Altitude Express workplace, anything goes - see, e.g., JA319, 633 ("pull your pork" and "get laid" at the office barbecue, and "GAYYYYYYY . . . stop being a vagina and take the cast offf now) – Nevertheless, Zarda was maligned for unmentionable "bedroom activities" from a new witness secretly buried in fifty. What happened at the underlying trial would have been unacceptable in any court vaguely accepting of gay rights. Despite the rhetoric of equality, discrimination exists; it achieves its objectives by marginalizing a minority by blatant, ignorant or surreptitious means; that it was used *at a gay rights trial* underscores the need to disavow the hands-off approach based on distinguishing sex from sexual orientation. Title VII, "in forbidding employers from discriminating against individuals because of their sex, . . . intended to strike at the entire

spectrum of disparate treatment . . . based on sex stereotypes." City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 707, n.13 (1978). Notwithstanding this language, most Circuits allow employers to discriminate against gay people, usually expressing aversion in so doing, but ultimately closing a door available to heterosexuals. Those who don't identify as gay are examined for trickery.[1] Let's forget about the LGBT per se; let's think of people who have suffered adverse action because of sex. Put another way, don't pigeonhole the discrimination sexual minorities suffer into a category not listed specifically – like associational discrimination – into Title VII. Forget about whether men are feminine or women masculine; "[s]ame sex attraction is the ultimately sexual stereotype." Winstead, 2016 U.S. Dist. LEXIS at p*25. Recognize that for a "musclehead" like Zarda JA.277-78 who happened to be gay and we untie the doctrinal knot under Simonton. See Amicus, Members of Congress at 30.

The Court must decide whether to remain conjoined Simonton or move to a nearly uniform, consistent direction of cases decided since. Simonton is inconsistent with protections afforded, for example, in Holcomb v. Iona College, 521 F.3d 130 (2d Cir. 2008), where a white man was discriminated against based on his marriage to a black woman. Why would the sex of his spouse not also be discriminatory treatment as well? Simonton, realistically, has been abrogated already – this Court just needs to say so. The weak pillars on which it stands have crumbled, and the agency charged with interpreting Title VII agrees. Simonton, we contend, is elementally on the other side of Holcomb, Obergefell and Windsor. For these reasons, the Court

[1] See Dawson v. Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) (deriding article "How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation," counselling "gay plaintiffs bringing claims under Title VII [to] emphasize the-gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality". (citing Kristin M. Bovalino, "How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation," 53 Syracuse L. Rev. 1117, 1134 (2003)).

should reverse. Video and audio show no dispute that plaintiff's status as a man attracted to men was a "motivating factor" in his termination – a phrase the jury in this trial never heard.

Minimally, the Estate is entitled to a trial with proper instructions and without a gesture toward the "oddness," or inappropriate difference of sexual orientation. To paraphrase defense counsel in his closing argument, this Court is smart enough to see the blotches brought upon the memory of a good man whom people liked and who did his job as required, with a smile. JA.1691. His termination, caught up in the bias of an employer who espoused ignorant beliefs that being gay is an "escapade" requires no extended inquiry. Ostracism for being gay is ostracism because of sex. Only this Court – or the Justices, whose precedents are consistent with plaintiff's position – can reverse the gerrymander and endorse the contention that Title VII protects discrimination based on sex no matter the plaintiff's sexuality.

I. Simonton, it analysis and progeny have become antiquated.

A. The suggestion that Simonton forever bars plaintiff's Title VII argument is inconsistent with Baldwin, Windsor and Obergefell.

His case examined under Title VII, Zarda – the non-movant at summary judgment – had direct evidence of discrimination: the audiotape of the termination alone plus the happy customers on the visuals who complained – demonstrate that Maynard was resistant to "gayness" to the extent his customers knew a gay man worked for him.[2] The customers at issue, by any reasonable measure, had a fantastic ride, and this charade of "bad customer service" is a pretext for punishment for mentioning same-sex attraction. Even if the defense would have fired him for not pointing out "geography," Def br. at 13, this would entitle the Estate to vindication, plus

[2] This dispenses with the notion that a man who knowingly hired a gay man might fire him later. Maynard was uneasy knowing Don was gay. Plaintiff denied coming out in 2001, JA52 ¶ 17, but Maynard knew of Don's sexuality in 2010. It was a third party's knowledge that bothered Maynard – the customer's veto – to make it such that "it just wasn't working" for Maynard to have Zarda working for him. JA.356; Electronic Appendix Vol I.

costs and attorneys' fees. 42 U.S.C. § 1981a. Our team has been fighting for six years for a finding that being gay is not an "escapade," and that identification as gay is not only legal, but in some circumstances, perfectly sensible. Plaintiff is also entitled to *de novo* review of the Title VII ruling at a lower burden of proof – that is, if he is given access to that law.[3] Defendants' response simply re-invokes Simonton, suggesting not one reason why the Court should reaffirm.

The defense "offers no commentary on whether justice, equity, or morality should dictate" overruling Simonton. Def. Br. at 16. That's dreary, but go with that thought for a moment: Don't even think about justice, equity or morality, even though such intangibles happen to be things that Courts are empaneled to consider. See, e.g., Lawrence, 563 U.S. at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.") We're not begging for liberty: we simply ask that the Court follow the the post-Simonton case law, recognize it as stale, and not gerrymander members of any sexual-orientation out of Title VII. Simply because one is discriminated against on the basis of sex *and* sexual orientation does not negate discrimination on the basis of one or the other. Protected classes overlap: think of race and color or ethnicity and national origin. Simonton, Judge Bianco held, was binding on him because the majority in that case disallowed recognizing sexual orientation as a sex stereotype. But that's only because sex and sexual orientation overlap, and this Court has driven what Judge Katherine Polk Failla called an "artificial line" between the two. Christiansen v. Omnicom, 2016 U.S. Dist. LEXIS 29972 p*14 (S.D.N.Y. Mar. 9, 2016). Ultimately, what these (and other) district courts have done is irrelevant, even though other district courts have

[3] Plaintiff does not advance on appeal that he was subject to a hostile environment. There is evidence of this in the record, see JA.633, but we point it out to underscore the culture of the workplace in the context of the pretext given for plaintiff's termination, like the testimony about the unmentionable "bedroom activities," JA.1542 – veiled behaviors that morphed into "graphic sexual experiences," JA.1683, at summation.

accepted Baldwin as persuasive. This Court's hands are not tied.[4] Simonton was created by this Circuit. The Supreme Court never approved it, nor any similar reasoning, and any doubt as to whether it is still good law should be overcome by Windsor v. United States, 699 F.3d 169 (2d Cir. 2012) and Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015). Extending Equal Protection and marriage rights to people of the same sex under the Constitution creates a new world. This Court would abdicate its duty *not* to re-examine Simonton in this new world, and this was true as early as the decision in Holcomb.

Simonton is not binding on a single panel for reasons the defense doesn't dispute. What Congress meant by sex has changed immeasurably over the years. The phrase "because of sex" was examined, case by case, in Gillian Thomas' Because of Sex, 2016, as well as Amicus NYCLU, onto which Attorney Thomas signed. According to Thomas, history will never know why Representative Howard Smith introduced the "Sex" amendment into the Civil Rights Act. Some say he tried to derail the bill; another interpretation described him as a defender of women's rights. Thomas at 1-2, 116. Consequently, "little legislative history . . . guide[s any court] in interpreting the Act's prohibition against discrimination based on "sex." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986). Likely, no legislator fifty years ago was worried about sexual harassment – let alone when carried out by members of the same-sex; nor discrimination in pension benefits; and likely not even associational discrimination.

Nevertheless, courts have recognized that Title VII's text reaches each of these forms of discrimination. See, e.g., Thomas, at 81-105; Dothard v. Rawlinson, 433 U.S. 321 (1977) (the struggle to limit to BFOQ); Manhart (sex stereotypes even when sex difference are statistically demonstrated); Meritor (sexual harassment). Prospective Amici NYCLU lays this out

[4] Christiansen, 16-748, is also on appeal as of this writing, and various amici including the E.E.O.C., support reversal.

beautifully, noting for years after its passage that 1960's Mad Men-style "office flirtations" were dismissed as non-actionable, natural, interpersonal attractions. NYCLU Amicus Br. at 12. Eventually, these judicial interpretations were rejected, as should be Simonton, and in decisions post-dating Simonton, the Supreme Court has continued to reject narrow interpretations of Title VII's scope that were not grounded in the statute's text. See Lewis v. City of Chicago, 560 U.S. 205, 215, 217 (2010) (court's "charge is to give effect to the law Congress enacted" even if "effect was unintended").

B. Agency Deference under Baldwin and Skidmore.

Congress amended the Civil Rights Act in 1991, but courts have continued to recognize ways plaintiffs may advance claims of discrimination. See, e.g., Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006) (lowering the adverse action standard required for retaliation), and how defendants may protect themselves against these claims; Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (affirmative defense against sexual harassment). Discrimination exists and the manner in which intelligent people may carried it out with plausible deniability is a never-ending story. The EEOC, thus, has the power to interpret the statute, 42 USCS § 2000e-4, and per Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), that agency is entitled to deference when it adopts a reasonable interpretation. The phrase "sexual orientation" has not been added to the regulations, 29 C.F.R. § 1604, but Baldwin has interpreted "sex" to encompass sexual orientation. Thus, the E.E.O.C. is entitled to Chevron deference, abrogating Simonton. In the pending Christiansen, 16-748, the Court accepted an amicus brief from Lambda Legal that speaks entirely and solely to this issue, thoroughly and in sifting manner. See id. at 4-27 (available on ecf and at http://tinyurl.com/joftkrd (visited June 30, 2016).

Baldwin is entitled at least to deference under Skidmore v. Swift & Co., 323 U.S. 134 (1944). The defense admits this, yet it offers nothing suggesting that Baldwin is not persuasive in rejecting Simonton. Defendants simply fall back on Simonton *per se,* pushing aside an evolving society where the LGBT have gained successive rights over the years – including the right to be free from criminal strictures against sexual activity, Lawrence v. Texas, 539 U.S. 558 (2003); the right to marry, Obergefell; the the right to adopt in any state, Campaign for Southern Equality v. Miss. Dep't of Hum. Servs., --- F. Supp. 3d ---, 2016 U.S. Dist. LEXIS 43897 (S.D. Miss. Mar. 31, 2016)[5]; and the Constitutional entitlement to heightened scrutiny. United States v. Windsor, 699 F.3d 169 (2d Cir.2012), aff'd, 133 S. Ct. 2675 (2013). Lesbians and gay men had none of these rights when Simonton was decided; thus, it was difficult for courts to accept the argument that a male employee in a relationship with a man was similarly situated to – and thus be treated the same as – his female coworkers in relationships with men.[6] As noted, a majority of Simonton years later decided Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008) which we contend renders Simonton inconsistent, in and of itself – at least when one considers the availability of gay marriage, there is little of Simonton left. We live in a new society; gay people are still targets

[5] The undersigned checked Mississippi ecf, and no appeal nor post-judgment practice was taken, making Mississippi the last state to forbid gay parental adoption. See Christianity Today, April 5, 2016, available as of July 7, 2016 at http://tinyurl.com/hahpwpl.

[6] Dawson v. Bumble and Bumble, 398 F.3d 213 (2d.Cir. 2005) is more brash in its language, but as Amicus-Movant Lambda Legal notes, Dawson's language that Title VII does not protect "homosexuals" as a class is *dicta:* Dawson affirmed summary judgment under pendant laws because the plaintiff failed to demonstrate a triable issue of fact as to sexual orientation discrimination. Id., 398 F.2d at 224-25. Thus, the discussion that sexual-orientation discrimination is not sex stereotyping, nor not covered by Title VII, is not necessary to the holding. See Lambda's Brief at 7. Gays of a certain generation remember a time that people who proudly identified as queer were used as cannon fodder in political and social discussions. Perhaps that still has not changed, given the chatter about "bathroom laws," but with Obergefell and Baldwin coming a decade later, that time had not arrived by Dawson's issuance in 2005.

of discrimination, but newer laws adapt to changing mores, Whether or not this Court sits as a Court of morality, Courts adjust to a changing society and its evolving principles.[7]

Indeed, the defense recognizes the same point in its argument pertaining to Isaacs v. Felder Servs., LLC, 2015 U.S. Dist. Lexis146663 (M.D. Ala. Oct 29, 2015), Def. br. at 24-25. Isaacs is one of the few cases that *could have* recognized Baldwin's persuasiveness (the Eleventh Circuit is one of the few that has not driven a line between sexual orientation and sex stereotypes) and it did, notwithstanding the result on summary judgment. Id. at *10-11. Baldwin's decision rule was accepted – that's the important thing in this emerging body of law (especially coming out of Alabama). By contrast, defendants still invoke Dawson, arguing that "Appellants could not bring a claim under Title VII for discrimination based on sexual orientation," even though it is undeniable – and the defense doesn't deny – that Dawson's holding on this point was *dicta*. See note 6, *supra*. Moreover, the point is sex, not sexual orientation. Being gay has been punishable by death, and still is in some places. To fall back on Simonton is not to fall back on draconian punishments, but each advancement is incremental. To rely so easily, without analysis, on a case decided over a decade ago with so many legal developments since then would be akin to ignoring the rights the LGBT have acquired incrementally over history.

Defendant argues deference under Chevron is unavailable because legislative history speaks in favor of denying gay rights. Not so. A *lack* of Congressional action is always a weak, counter-intuitive manner in which to divine Congressional intent. The Civil Rights Act passed

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[7] Simonton relied on Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984) involving a transgender woman. Id. at 1082. Ulane is inconsistent with this Court's decision in Fowlkes v. Ironworkers Local 40, 790 F.3d 378 (2d Cir. 2015), which remanded for consideration of the timeliness of a transgender man's claim. Applying Ulane to the facts of Fowlkes *most likely* would have resulted in affirmance in the latter case, and shows that the Circuit is backing away from Simonton.

over fifty years ago. Only a repeal of Title VII would disallow this Court from adopting the reasoning in Baldwin. Defendant's argument that "Title VII lies within" the "purview of the Legislative branch" is true as to matters where the statute is clear, but ignores the interpretive functions of the judiciary. Is it not close to certain that few members of the 88th Congress envisioned a man asserting a claim of sex discrimination in an all-male workplace, or a white worker claiming discrimination after being rejected by a company that hired only whites? But see Oncale v. Sundowner Offshore Servs , 523 U.S. 75 (1978); Parr v. Woodmen of the World Life Ins.Co., 791 F.2d 888 (11th Cir. 1986) (prohibiting discrimination based on interracial marriage for a white man denied a job by a "whites only" company) (relied on in Holcomb, 521 F.3d at 129). Referring to the non-passage (not the legislative history, despite conclusory statements to the contrary) of the Employment Non-Discrimination Act, Def. Br. at 20, the defense insinuates that the legislative history of *Title VII* is "clear."[8] Please do not repeat the mistake of Simonton – recognized by Simonton itself as a poor method of statutory interpretation – in relying on legislative inaction to determine the outcome of this appeal. In an excellent recitation of legal history – as opposed to legal analysis *per se* – William Eskridge wrote in "Interpreting Legislative Inaction," 87 Michigan Law Review 67 (1988) available at http://digitalcommons.law.yale.edu/fss_papers/3826 (seen June 30, 2016) that legislative inaction can be used for *anything*, without limit, and that the Supreme "Court has grappled with such arguments since the nineteenth century, oftentimes finding inaction arguments persuasive

[8] ENDA was a proposed law that overlapped with Title VII and Baldwin, just like the Family and Medical Leave Act, 29 U.S.C.S. § 2601 et seq., overlaps with the Americans with Disabilities Act. 42 U.S.C. § 12101 et seq. See Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 185 n.5 (2d Cir. 2006) (citing 29 C.F.R. § 1630, app. 356 providing that a reasonable accommodation could include "unpaid leave for necessary treatment.") It would be unseemly to look to the legislative history of the FMLA to interpret the ADA. As such, we ask that the Court work with the law before it, and defer to the agency entrusted with its interpretation.

but other times finding them unappealing." Id. at 67. Amicus, 128 Members of Congress in Christiansen also make this point at 6-10. These debates intensified in the 1980's with the appointment of Justice Scalia, the author of Oncale, 523 U.S. 75 (1998). That case is on point with our interpretation of Title VII, and the late Justice Scalia held for a unanimous Court that "statutory prohibitions often go beyond the principal evil [that Congress intended] to cover reasonably comparable evils[.]" Id. at 79.

It is well known, as Lambda points out, br. at 28, that same-sex attraction has not been regarded as illness since 1973. Yet in 1990, Congress engrafted a "gay exception" onto the ADA - 42 U.S.C. § 12211(a) - a statute within a larger Act that has not been cited in a single decision. A year later, an almost identical Congress,[9] amended the Civil Rights Act, repealing part of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) to favor plaintiffs, but not limiting sex-stereotyping in any way, nor amending Title VII to exclude sexual orientation discrimination, *as it had a year earlier in the context of a less applicable statute.* This reflects that a nearly identical Congress, highly cognizant that homosexuality might be raised to claim rights under broadly written nondiscrimination statutes, did not disallow it under a statute that would appear more applicable. In the end, to focus only on the *failure* to enact ENDA – or the Equality Act as it is now referred – is selective history. The bigger transgression is the failure to heed the unanimous Supreme Court mandate that courts should entertain any claim that "meets the statutory requirements" of "'discrimination . . . because of . . . sex' in the 'terms' or 'conditions' of employment," and not just the types of claims with which "Congress was concerned with when it enacted Title VII." Oncale., 523 U.S. at 79-80 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils[.]")

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[9] Daily News, Bowling Green, Kentucky, January 7, 1991. "102nd Congress: Same faces, same problems," available at http://tinyurl.com/gph9ern.

Thus, contrary to Defendant's contention, Congress has not spoken unambiguously about Title VII's coverage of sexual orientation discrimination. Under Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) the decision in Baldwin – whose reasoning is sound and unchallenged – warrants deference. Indeed, Defendant bolsters Baldwin's applicability by noting that it is a "federal sector case." Def. Br. at 28. That justifies Chevron deference, because Congress gave the EEOC the power, in federal sector cases, to issue regulations through rulemaking and orders through adjudications, as it did in Baldwin. 42 U.S.C. 2000e-16(c). Since Simonton is also a federal-sector case (brought under 42 U.S.C. 2000e-16 against Postmaster General Runyon), it is logically no longer good law, because of the confluence of Baldwin – also against the Postmaster – and because Simonton did not base its ruling on the unambiguous language of the statute, but on Congress's inaction. See National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2005). This Court has applied Simonton in subsequent cases in the private sector under 42 USC 2000e-2, in keeping with the recognition that the two discriminatory prohibitions (discrimination based on . . . sex" 42 USC § 2000e-16 and "discrimination because of such [an] individual's . . . sex" 42 USC § 2000e-2) are identical. See Fitzgerald v. Henderson, 251 F.3d 345, 358-59 (2d Cir. 2001) (federal sector case citing 42 U.S.C. § 2000e-2, and its larger body of caselaw, for substantive analysis and 42 USC 2000e-16 for its procedural analysis).

But even if Chevron does not apply, agency interpretation is still entitled to "respect according to its persuasiveness." Skidmore v. Swift & Co., 323 U.S. 134 (1944). The distinction between these various levels is never clear. See United States v. W.R. Grace & Co., 429 F.3d 1224, 1235 (9th Cir. 2005) ("[T]he continuum of agency deference has been fraught with ambiguity."). The defense sets forth the correct standards in which to apply Skidmore, br. at 18,

but goes no further in analyzing why Skidmore would not apply here. Id. Although they are hard to distinguish, the two standards are not supposed to be precisely the same, W.R. Grace & Co., 429 F.3d at 1235, and defendant presents no analysis as to why Skidmore, at least, would not carry the day. Perhaps the only difference between the two standards is that Skidmore would apply to an agency without decision-making powers, like the Copyright Office. Encarnacion ex rel. George v. Astrue, 568 F.3d 72,78 (2d Cir. 2009).[10] As it happens, and as far as we can tell, this Court has never applied Chevron deference without the backup of Skidmore. (Though, in Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008), the Supreme Court extended Chevron to the E.E.O.C. insofar as that agency may interpret its own regulations. 552 U.S. at 397.)

Both standards require reasonableness, and the defense offers not a soupçon of analysis as to why Baldwin would be unreasonable under Skidmore. Invoking an earlier interpretation of Title VII that the EEOC has rejected doesn't amount to an analysis. As such, Baldwin supplants Simonton under either Chevron or Skidmore or both.

C. Holcomb alone renders Simonton null because sex and race are interpreted in the same manner under Title VII.

The Supreme Court is serious about Chevron/Skidmore - a messy pool, though covered by Lambda better than we can. We shudder, however, to remind this Court that it was reversed twice on the Chevron issue in Long Island Care at Home, Ltd. v. Coke, 376 F.3d 118 (2d Cir. 2004), rev'd sub nom Coke v. Long Island Care at Home, Ltd, 546 U.S. 1147 (2006) adhered to on remand, id. at 462 F.3d 48 (2d Cir. 2006) rev'd, 551 U.S. 158 (2007). As Justice Breyer held in the final incarnation of Coke for for a unanimous Court, "an agency's interpretation of its own

[10] Plaintiff did not in his opening brief cite to Roberts v. United Parcel Serv., Inc., 115 F.Supp.3d 344 (E.D.N.Y. 2015) because, while persuasive, the citation to Baldwin is dicta; the case was brought under the New York City Human Rights Law. Id. at 368. Nevertheless, Judge Weinstein was correct historically and the decision is very well-reasoned.

regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted" (citations, inner quotations omitted). Baldwin is not clearly erroneous. The defense, without explication, holds Simonton on high, but does not even quibble with the reasoning provided by the E.E.O.C. It is entitled to *some deference* as defendant admits, so what's wrong with it? The defense doesn't say. The Court can thus decide on Chevron and Skidmore alone.

The Court can avoid the Chevron/Skidmore analysis altogether, however. The simplest way to understand that Simonton is defunct would be to recognize that Holcomb renders it so. Title VII under Holcomb forbids employers from discriminating against their workers based on the race of the worker's spouse. It is logical, therefore, that an employer may not discriminate against an employee based on the *sex* of that employee's spouse. That is in part precisely what happened here, and defendants' closing statement suggested the jury was "smart enough" to recognize the distinction – i.e., the delightfulness in hearing about a man's marriage to a woman versus the repugnance in hearing about a man's marriage to another man. JA.1721-22 ("I know that you guys are smart enough to pick up on that.") We don't believe this Court's precedents allow such an inference of repugnance, nor should they. Holcomb alone annuls Simonton, we contend, and suggest it most certainly does with the addition of Lawrence, Windsor, and Obergefell - the last of which allowed same-sex marriage, something unthinkable in 2005. The Court should thus reject Simonton even if it does not defer to Baldwin, though Baldwin's analysis is at least persuasive.

A three-judge panel may thus recognize the Holcomb inconsistency and dispense with Simonton. See plaintiff's opening brief at Point I(c) (citing Wojchowski v. Daines, 498 F.3d 99 (2d. Cir 2007)). Nearly identical decisional standards apply to both race and sex-based claims

under Title VII, See Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998), thus with gay marriage constitutionally protected, Simonton should be recognized as null.

Intervening Supreme Court decisions under Title VII also undercut Simonton. As Lambda noted, "because Simonton and Dawson relied on non-textual considerations to carve an exception in Title VII, they have been abrogated by the Supreme Court's repudiation" – again – of non-textual interpretations of Title VII. See EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015) (court may not "add words to the law to produce what is thought to be a desirable result"); Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 175 (2011) (preference for different rule "cannot justify departing from statutory text").

II: Harmful Error

The defense does not address our point that the instruction was inapplicable to Title VII, thus rendering the trial under state law an inadequate substitute for one under Title VII. (Again we offered to be held to an advisory verdict.) The judge told the jury that an employment decision, if discriminatory, must be a "determining factor." This requires a new trial under Title VII despite the loss under state law. University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 2526 (2013) (noting "lessened causation standard"). This Court upheld the finding that the error warranted a new trial in Cassotto v. Donahoe, 600 Fed. Appx. 4 (2d Cir. 2015), and noted it with approval Xu-Shen Zhou v. State Univ. of N.Y. Inst. of Tech., 592 F. App'x 41 (2d Cir. 2015) (reversing for incorrect instruction). These cases from the summary docket stand for the principal, consistently applied, that errors in jury instructions, especially going to the standard of proof, are rarely harmless. Plaintiff explained how the jury could easily have been misled given the "determinative factor" or "but for" instruction, as opposed to

"motivating factor" – given especially the colorful bowl of nigiri the defense used in defending Zarda's termination. See plaintiff's opening brief at 44.

Defendants argue that this Court routinely applies the same standards to state and federal law. This is usually true, but as a matter of logic, and assuming state-discrimination law has a higher burden of proof than federal, a decision under federal law is determinative under state law. The obverse, however, is not true. This is why, as example, this Court occasionally remands for determination under the New York City Human Rights Law even if federal law does not carry plaintiff the day. See Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 278-79 (2d Cir. 2009). In these unusual circumstances where the Court instructed the jury under the more restrictive standard, JA.1771, over objection, JA.1667-68, the defendants' suggested rule of thumb does not apply. The defendants' multiple chants of "jury of his peers" Def. Br. at 3, 4, 28, thus mean nothing. The jury of Zarda's peers decided the case under an instruction inapplicable to Title VII.

We do not believe state law requires "but for" causation. The Court wanted to rely on New York Pattern Jury Instructions, JA.1789, but pattern jury instructions have been held to be incorrect. See People v. Missrie, 300 A.D.2d 35, 36 (First Dept. 2002). The PJI is a guide for New York trial judges; federal judges sitting in diversity must apply the law of the state's highest court. New York law has usually followed federal discrimination law, thus we do not see why it would not with respect to this instruction. See Ferrante v. Am. Lung Ass'n, 90 N.Y.2d 623, 631 (1997) (applying federal law in interpreting state law). Researching the matter further, the PJI does advise judges to instruct on McDonnell-Douglas, and perhaps Judge Bianco was not defying circuit law as we previously suggested. Undoubtedly, however, he did not instruct under

anything resembling Title VII as the Circuit recognizes, nor consider what the New York Court of Appeals would have done.

III: Plaintiff's performance was superlative

Performance was never an issue in this case. At the beginning of trial, defense counsel conceded "Don Zarda was an excellent jumper, absolutely," JA919, and Maynard admitted he was "a good skydiver" and a "good guy." JA,1426-27. Maynard said this despite the allegedly outrageous statement Zarda made – tongue held firmly in cheek – that he was gay, something which allegedly he also said in 2001 – when he was barely out of the closet –supposedly bringing women to tears. Id.[11] We moved in limine to keep that information out of evidence – something the judge was supposed to rule on *before* trial, as the language of Fed. Rule Evid. 104(a) reads. ("must rule" before trial). Indeed, the Court was asked to rule twice, JA18-19 (170, 190) but somewhere "terminated" the motion with no decision. JA18, entry of 2/17/15. The Court probably did this for docket control, and didn't resolve the motion until well into trial. See JA.1359, 1433. In so doing, the it defeated the purpose of an in limine motion, which is to allow a party to know in advance what evidence is coming in. The defense felt free to open on the matter of plaintiff's 2001 termination, despite no ruling on that issue. JA.1978. The fact was that, in 2001, an expression of sexual-orientation identity could get you fired in New York; it still can in most places, unless Title VII is clarified as the EEOC believes it should be. This failure to rule prejudiced plaintiff because he had either a reason to believe that the evidence would not come in, or at least that defense counsel hold back, knowing there was a pending motion on the matter. Also, we contend the evidence of an earlier era discrimination in itself – something the defense

[11] Defense counsel then went on in opening about Maynard's warning plaintiff not to reveal his sexual orientation ever again, JA.919-20, a contention that Maynard denied. JA.1460-61.

doesn't deny. Neither assumption – grounded in the rules and fair play – was adhered to, and plaintiff looked like he was hiding something by not mentioning the first termination in his opening statement.

The judge made not a comment about performance at the summary judgment stage, SPA20-38, with the exception of the complaint that Zarda, doing his job, mentioned he was gay when he touched Orellana's hip, strapped to and on the opposite end of it. SPA28.[12] This meager comment was not enough to defeat summary judgment under Title VII when all that is needed is a single motivating factor. Even the owner of Altitude Express said "thousands [are] coming through" SDLI and he "can't have every customer. . . happy[.]" JA1356. Rich Winstock, Maynard's second in command tried to save Zarda from termination and later opined thought it was unfair. JA.399, 413, 591. Though the defense never explained how thoroughly they searched email records, and never used evaluations, we were able to come up with our one missive from a happy customer. JA.592. On videos, the customers are happy. Electronic Appendix Vol I. But this was all before Orellana told her boyfriend that she had received "hip discomfort" from a gay man. JA.481.

Lauren Calllanan, who didn't "want to go to court" testified that she happily hugged Don when she saw him at her deposition, and that Don had the safety and personality and experience that a skydiver needed. JA.1264-66. In cross examination, she testified to hearsay complaints, none documented, JA.151, that were twisted in summation as real. Hearsay "belief" is not a fair comment on the evidence. Certainly these complaints do not come up on the tape of plaintiff's

[12] The judge noted in that decision that we had no female comparators to support a claim of sexual stereotyping claim. SPA23. We appeal on the basis of Baldwin, but we don't need female comparators to prove sex stereotypes. What if the plaintiff in Price Waterhouse were part of an all-female workforce and met with the same evaluations on her application for partnership? Would she have needed female comparators?

termination. All that came up was that "[i]t just [was]n't working" for Maynard to have plaintiff work at Altitude Express. The only specific reason given to support that was talking to a single customer about being gay, a "personal escapade," uninvestigated except to speak to Zarda.

Don Zarda had performed thousands of jumps, where safety is the most important concern, fun being the second. Orellana survived her jump without a scratch, bragged about it to others, JA.1236, and shows not a moment of unhappiness. "Rating the jump in question, Winstock rated Zarda's performance near perfect, as did Maynard: "eight or nine." JA.1485. Not a single passenger was ever injured under Don's care. Although there were deaths at Altitude Express before Don arrived, there were none on his watch. To emphasize this pernicious distortion about plaintiff's performance is to demonstrate the defense strategy never came up until after summary judgment. The genesis of the defense testimony – sex addict, woman hater – is what this case is about: plaintiff's identification as gay. It is like we are in the 1960s, and there are customers who don't want to be served by black workers, a uniformly derided notion under Title VII, then are terminated because they walk and eat in a different manner that we cannot bring ourselves to detail: we hope you get the picture.

Maynard did testify that he had *never* received other complaints in all his years of experience, but that was a lie. Today, angry customers complain on the internet openly. Maynard admitted that you can't have everyone happy and you can't have everyone return. JA.332. Why is it that unhappiness about being told you are with a gay guy who is doing his job grounds for termination? So while Maynard conveniently forgot other complaints made to him, when confronted others at deposition and trial, JA1458-59, he had to admit their truth. He rejected most of them out of hand, JA314-15, referring to a nearly identical complaint as a "bunch of lies." JA618. So let's get this misrepresentation about Mr. Zarda's performance out of the way. It

is pure obfuscation, and, under the Rule 56 portion of this appeal, was never part of the analysis except for "complaint *qua* complaint."

IV: The Defense misunderstands the discrimination it invoked at trial and makes a mockery of discovery and fair pre-trial procedure.

A. Worker's Compensation

The defense does not address the tenor of this argument. Plaintiff was asked at his deposition, where there is wide latitude in questioning, about whether Worker's Compensation might have factored into the decision to terminate him. If anything, here's evidence that helps plaintiff on Point I because it provides another potentially "determinative" factor that would not have been allowed under Title VII. At his deposition, Mr. Zarda *speculated* that Worker's Compensation might have been part of the decision to terminate him. JA.228. The evidence was inadmissible – plaintiff testified to a possibility. He honestly could not deny that Maynard discriminated in more than one way. But this was not only irrelevant, not only speculative, but makes Worker's Compensation a basis upon which an employer can articulate a neutral reason for termination. A neutral articulation must be non-discriminatory, thus the admission if the use of worker's compensation was not only harmful, but flew in the face of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). As the defense doesn't deny, worker's compensation recipients are a protected class.

B. Three witnesses hidden in a pile of fifty.

The defense notes correctly that plaintiff knew of the existence of certain people who testified. Also, the defense gave a thumbnail description as to the testimony of some of these witnesses, though not in compliance with the minimal relief ordered by the Court. What we have a problem with is whom out of the fifty would the defense choose to testify? Fifty new

witnesses? We should not have had to guess – that's what the rules require, and we had no idea that Duncan Shaw hated plaintiff so much that even with him in the grave, Shaw would pay his own flight to New York to testify so against him, and with such relish. The same is true for the others. Had the defense reconsidered its case in a timely manner, and named the three, we could have deposed the new witnesses, and there would be no prejudice. But these witnesses were brought into trial hidden in a Trojan's Horse, and plaintiff was sandbagged in a way that the rules forbid.

C. Appeals to Prejudice.

The defense has not rebutted this contention, and we believe the Court is "smart enough to pick up on" JA 1691, our unrebutted points about defense counsel's summation and the Court's striking plaintiff's response to the "oddness" of his relationship with Ira Helfand.

CONCLUSION

The Estate asks that the Court vacate the judgment, and remand for such relief as may be appropriate.

Dated: New York, New York
July 7, 2016

/s/
GREGORY ANTOLLINO
Attorney for Plaintiff-Appellant

/s/
STEPHEN BERGSTEIN
Attorney for Plaintiff-Appellant

CERTIFICATION PURSUANT TO FRAP 32(a)(7)(C)

Gregory Antollino, an attorney admitted to this Circuit and attorney for plaintiff, hereby certifies pursuant to Federal Rule of Procedure 32(a)(7)(C) that this brief contains 6985 words as computed by the word processing program (Microsoft Word) used to prepare the brief. The brief was scanned and found virus free by MacKeeper.

/s/
GREGORY ANTOLLINO