

MOTION INFORMATION STATEMENT

Docket Number(s): 16-748 Caption [use short title]

Motion for: consolidation of this case with Christiansen (Anonymous)
Zarda v. Altitude Express, 16-748, and allowing
Zarda to intervene and petition en banc.

Set forth below precise, complete statement of relief sought:
Zarda and Christiansen were heard in January 2017
with one identical issue pertaining to the continuing viability of Simonton v. Runyon.

Christiansen was decided on March 27, without overruling
Simonton, for lack of an en banc decision.

Appellant in Christiansen is not petitioning
for en banc consideration, which affects appellant's rights
I separately move in Christiansen to intervene and combine and here simply to combine given the common question.

MOVING PARTY: Melissa Zarda and Donald Moore, co-Executors in Zarda OPPOSING PARTY: Presumably all parties, definitely Appellant in Christiansen
 Plaintiff Defendant proposed intervenor
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Gregory Antollino OPPOSING ATTORNEY: SUSAN CHANA LASK
[name of attorney, with firm, address, phone number and e-mail]
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Court-Judge/Agency appealed from: SDNY, Polk-Failla, J.

Please check appropriate boxes:
Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency: _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know
Does opposing counsel intend to file a response:
 Yes No Don't Know

Appellees have not responded. Appellant has responded and opposes.

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)
Has argument date of appeal been set? Yes No If yes, enter date: not applicable

Signature of Moving Attorney: *Gregory Antollino* Date: 3/27/17 Service by: CM/ECF Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----)(
CHRISTIANSSEN (Anonymous),

Plaintiff-Appellant,

-against-

OMNICOM GROUP, INC. et al.,

Defendants-Appellees
-----)(

**MEMORANDUM
IN SUPPORT OF
MOTION TO
INTERVENE**

16-748

Appellants Melissa Zarda and Donald Moore, Co-Executors of the Estate of Donald Zarda ("Zarda Appellants"), do hereby move to intervene herein for the purpose of requesting either or both of (a) combining this case with Zarda v. Altitude Express, 15-3775; or, at a minimum, allowing the Zarda Appellants to intervene into the Christiansen v. Omnicom matter for the purpose of petitioning for a rehearing *en banc*.¹

¹ The undersigned acknowledges the assistance of the writings of both Aaron S. Bayer in a July 14, 2008 article published in the National Law Journal as well as Lambda Legal Defense Fund, various authors, including Greg Nevins; Rebecca Glenberg of the ACLU of Virginia; and the appellate group at Jenner & Block, LLP in its motion to intervene in Bostic v. Schaefer, Nos. 14-1167, 14-1169, 14-1173 (4th Cir. 2014).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 2015 and 2016, Zarda and Christiansen were filed in respective order. The undersigned intended to brief an appeal the issue reached by today's panel, and was not aware of Christiansen's incarnation until the very day Zarda's opening brief was filed. Consolidation did cross my mind, but, the Zarda appellants had filed ahead of Christiansen. While there was a major legal issue binding the cases, there were some major procedural and factual differences: (1) Zarda had a state law trial that we contended was flawed on grounds unrelated to a pleading; and (2) Zarda's chief claim of sex stereotyping was his attraction to men - he painted his toenails pink for attention, but at its heart, his claim was one of sexual orientation and association, plus the accusation that, as a man, he had touched a woman he was entrusted to physically protect. Mr. Christiansen's stereotyping claim went beyond that, and need not rely on either his sexual orientation or association with men on an affectional or romantic basis, as the Per Curiam decision makes clear.

The concurrence (Katzmann, J., and Brodie, J.) (also labeled with the "dissent") suggested as follows:

[Appellants] argue that sexual orientation discrimination is discrimination “because of . . . sex” because gay, lesbian, and bisexual individuals are treated less favorably because they do not conform to

gender stereotypes, particularly stereotypes about the proper roles of men and women in romantic relationships. I find persuasive these arguments, which reflect the evolving legal landscape since our Court's decisions in Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000), and Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005), holding that sexual orientation discrimination claims are not cognizable under Title VII. Concluding that it was constrained by the law as it then was, the Simonton Court expressly decried the "appalling persecution," 232 F.3d at 35, that Simonton endured because of his sexual orientation, stating that such persecution was "morally reprehensible whenever and in whatever context it occurs." Id. For the reasons that follow, I write separately to express my view that when the appropriate occasion presents itself, it would make sense for the Court to revisit the central legal issue confronted in Simonton and Dawson, especially in light of the changing legal landscape that has taken shape in the nearly two decades since Simonton issued.

Christiansen, Concurrence at 2. I was hopeful that with the decision in either Zarda or Christiansen - or both - that "the appropriate occasion" would have arrived with either decision. But today should be no surprise to me. Rights are not given; they are only fought for and won. Perhaps the decision in Zarda will be "the appropriate occasion," but I am not going to take that chance. Here we have reached a bend in the river in which the Circuit can dock the boat, consider the question *en banc* and reconsider whether Simonton and its progeny, amply summarized by the concurrence/dissent should continue to guide us down these choppy legal waters.

ARGUMENT

A. Applicable Standards for Intervention

“Post-judgment intervention is often permitted...where the prospective intervenor’s interest did not arise until the appellate stage” and where “intervention would not unduly prejudice the existing parties.” Acree v. Republic of Iraq, 370 F.3d 41, 50 (D.C. Cir. 2004). The clearest example is intervention to take an appeal “where no existing party chooses to appeal the judgment of the trial court.” Id., at 50. Intervention in this situation is often granted as of right under Rule 24(a). Though any intervention must be “timely” under Rule 24, courts “should be more reluctant to deny an intervention motion on grounds of timeliness if it is intervention as of right than if it is permissive intervention.” U.S. v. American Tel. & Tel. Co., 642 F.2d 1285, 1295 (D.C. Cir. 1980). See also Wright & Miller, § 1916, at 531. A motion to intervene is generally deemed to be “timely” if the person seeking to intervene in order to take an appeal acted promptly when it became clear that his interests were no longer protected and moved within the time period allowed for taking an appeal.

In United Airlines Inc. v. McDonald, 432 U.S. 385 (1977), for example, final judgment was entered in favor of the plaintiffs, who decided not to appeal the court’s earlier denial of class certification. The Supreme Court allowed class members to intervene in order to appeal the denial of class certification because,

“in view of all the circumstances,” they moved “promptly after the entry of final judgment.” Id. at 396. Although McDonald involved class members, the court noted that “[p]ost-judgment intervention for the purpose of appeal has been found to be timely even in litigation that is not representative in nature.” Id. at 396 n.16.

Often cited is the Fifth Circuit's opinion in Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977), rejecting any “‘absolute’ measures of timeliness,” noting that “whether the request for intervention came before or after the entry of judgment was of limited significance,” and focus[ing] instead on whether intervention would “prejudice the rights of the existing parties” or “substantially interfere with the orderly processes of the court.” Id. at 266.

Using that analysis, the court found a timely intervention motion filed by employees a few weeks after entry of a consent judgment that affected their employment rights. Id. at 267-69. Similarly, in Smoke v. Norton, 252 F.3d 468, 471 (D.C. Cir. 2001), the court allowed tribal officers to intervene when the U.S. government had been representing their interests but decided not to appeal an adverse judgment. “Prior to the entry of judgment, the appellants[’]...interests were adequately represented by the Government” and the “ ‘potential inadequacy of representation came into existence only at the appellate stage.’ ” Id. at 471. See Acree, 370 F.3d at 50 (allowing U.S. government to intervene two weeks after judgment where it caused no prejudice and the government’s interest in appealing

the court's jurisdiction over claims against Iraq raised important foreign policy concerns).

In Bates v. Jones, 127 F.3d 870, 873-74 (9th Cir. 1997), for example, the 9th Circuit allowed 20 state legislators and voters to intervene on appeal as plaintiff-appellees in order to defend a judgment holding California's legislative term limits unconstitutional. The court emphasized that the "need for uniformity" in upcoming elections warranted intervention to allow "as many parties as possible who seek to run for office contrary to the term limits provision of Proposition 140 to be bound by [the Court's] decision." Id. at 872. In Hurd v. Illinois Bell Tel. Co., 234 F.2d 942, 944 (7th Cir. 1956), the 7th Circuit allowed a member of a "spurious" class to intervene on appeal during oral argument, explaining that permissive intervention was warranted and it would not "in any way prejudice [the defendants'] rights." See also Drywall Tapers & Pointers of Greater New York, Local Union 1974 of I.U.P.A.T., AFLCIO v. Nastasi & Assocs. Inc., 488 F.3d 88, 94 (2d Cir. 2007) (recognizing "authority for granting a motion to intervene in the Court of Appeals").

A failure to grant intervention (or timely intervene) can create unusual procedural thickets. In Drywall, for example, the parties settled the case and the district court entered judgment while a motion to intervene was pending. The party seeking to intervene then filed an appeal, depriving the district court of

jurisdiction to act on the motion to intervene. This Circuit felt compelled to dismiss the appeal because the would-be intervenor had not yet intervened and therefore was not a party. But then the Court “cut through this appellate Catch-22” by remanding to the district court to rule on the intervention motion, making it clear that it could reinstate the appeal if intervention was granted. 488 F.3d at 95.

In related procedural contexts, courts have relied on the same principles—judicial economy and the absence of prejudice to other parties—to add or remove parties on appeal in order to cure a jurisdictional defect. The Supreme Court in Mullaney v. Anderson, 342 U.S. 415 (1952), allowed two new plaintiffs to be added under Rule 21, while the appeal was before the Supreme Court, when it became clear that the original plaintiffs lacked standing to maintain the suit. Noting that “Rule 21 will rarely come into play at this stage of a litigation,” the court held that requiring the new plaintiffs to start over “would entail needless waste and runs counter to effective judicial administration.” Id. at 417. The court acknowledged that practicalities sometimes warranted permitting such corrections on appeal. Id. at 836-37. The driving force in cases involving jurisdictional repair on appeal, whether it be intervention under Rule 24 or joinder under Rule 21, seems to be the courts’ willingness to focus on “practicalities” and to avoid compelling parties to relitigate a case that has already been adjudicated.

B. Why This Matters Here

Here, the only difference between the aforementioned cases and this one is that the judgment has entered after argument and briefing on appeal. But this is a special case, involving an issue of great consternation to the Circuits and of national importance to a group afforded constitutional protections in other ways. Zarda is sub judice: who knows how the Zarda Panel will rule in its nearly identical (first) question?² I had expected that either panel would see either case for what it stood for, and did not think I could game the system by joining the appeals. But neither can I now sit idly by and wait for the result in Zarda and expect to prevail. There is a question that merits *en banc* review now, especially in a Circuit that avoids such review, and whose tradition is to follow the Panel Rule. I'm not going to wait. Zarda might follow the Panel Rule and I'll be right where I started. Judgment has just entered on appeal, and this motion is thus no timelier than it could otherwise be.

The appellant Mr. Christiansen opposes this relief and is satisfied to obtain a remand on the basis of the Per Curiam decision. (The Appellees' positions have been sought and have not answered as of this writing.) I do not question Mr.

² Zarda presents three questions, the second two having to do with the trial on the New York State law. The first is exactly 75 words, my having been taught that the answer should be contained in the question (and limited to that number). See Hon. Aldisert Ruggero, Winning on Appeal. For the purposes of this motion, and any petition I should be allowed to file, the question would be simply, "Should Simonton v. Runyon be overruled?"

Christiansen's strategy, but consider what panels of this Court have held in cases where questions of public policy affecting many others have held:

Although these issues were not addressed below or on appeal, the concerns regarding protection of the attorney-client relationship are of sufficient public importance that this Court raises them *sua sponte*.

Baker v. David A. Dorfman, PLLC 232 F.3d 121, 122-23 (2d Cir. 2000) (citing Cohen v. West Haven Bd. of Police Comm'rs, 638 F.2d 496, 500 & n.6 (2d Cir. 1980) (even when "not addressed by the parties or the district court" there are occasions "where questions of public importance are involved [such that] appellate courts may *sua sponte* decide purely legal issues that are necessary to a just decision").

Here we are not dealing merely with the attorney-client relationship, but with what Judges Katzmann Brodie referred to as "morally reprehensible. . . persecution." Concurrence at 2. Mr. Christiansen's case might be delayed if this motion is granted, and if an *en banc* rehearing is granted³ But he will not be prejudiced, certainly not in comparison to the rights of the many others which will be heard and addressed. We are not asking to take down the walls of the Per Curiam decision, merely push them outward a bit further and re-examine a precedent that is inconsistent with the mores of society and allow non-effeminate gay men, or effeminate gay women, the protections of Title VII.

³ The Court is free to call for an *en banc* rehearing *sua sponte*. Policano v. Herbert, 453 F.3d 75, 78 n.5 (2d Cir. 2006)

Not incidentally, the panel that read the voluminous record in Zarda should participate, and a motion was filed this morning for this relief from that Panel.

Dated: New York, New York
27 March 2017

CONCLUSION

The relief sought in this motion should be granted, the cases combined for consideration of the federal question, and the Zarda appellants allowed to intervene and file a petition for en banc review by a certain date if this Court does not on its own order an en banc rehearing sua sponte.

Dated: New York, New York
27 March 2017

/s/
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16-748

Christiansen v. Omnicom Group, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2016

(Argued: January 20, 2017 Decided: March 27, 2017)

Docket No. 16-748

ANONYMOUS,

Plaintiff,

MATTHEW CHRISTIANSEN,

Plaintiff-Appellant,

– v. –

OMNICOM GROUP, INCORPORATED, DDB WORLDWIDE COMMUNICATIONS GROUP
INCORPORATED, JOE CIANCOTTO, PETER HEMPEL, AND CHRIS BROWN,

Defendants-Appellees.

B e f o r e:

ROBERT A. KATZMANN, *Chief Judge*, DEBRA ANN LIVINGSTON, *Circuit Judge*, and
MARGO K. BRODIE, *District Judge*.*

* Judge Margo K. Brodie, of the United States District Court for the Eastern District of New York, sitting by designation.

Plaintiff-appellant Matthew Christiansen brought this action against his employer under, *inter alia*, Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.*, alleging that he was subjected to various forms of workplace discrimination due to his failure to conform to gender stereotypes. The United States District Court for the Southern District of New York (Failla, J.) construed Christiansen’s Title VII claim as an impermissible sexual orientation discrimination claim and dismissed it pursuant to *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000). On appeal, Christiansen argues that we should reconsider our decision in *Simonton* and hold that Title VII prohibits discrimination on the basis of sexual orientation. This panel lacks the authority to reconsider *Simonton*, which is binding precedent. However, we hold that Christiansen’s complaint plausibly alleges a gender stereotyping claim cognizable under the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Therefore, we **REVERSE** the district court’s dismissal of Christiansen’s Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

KATZMANN, *Chief Judge*, concurs in a separate opinion, in which BRODIE, *District Judge*, joins.

SUSAN CHANA LASK, Law Offices of Susan Chana Lask, New York, NY, *for Plaintiff-Appellant* Matthew Christiansen.

HOWARD J. RUBIN (Shira Franco and Judith Kong, *on the brief*), Davis & Gilbert LLP, New York, NY, *for Defendants-Appellees* Omnicom Group Incorporated, DDB Worldwide Communications Group Incorporated, Peter Hempel, and Chris Brown.

RICK OSTROVE, Leeds Brown Law, P.C., Carle Place, NY, *for Defendant-Appellee* Joe Cianciotto.

BARBARA L. SLOAN, Attorney, Equal Employment Opportunity Commission, Office of General Counsel, Washington, D.C. (P. David Lopez, General Counsel; Jennifer S. Goldstein,

Associate General Counsel; and Margo Pave, Assistant General Counsel, Equal Employment Opportunity Commission, Office of General Counsel, Washington, D.C., *on the brief*), for *Amicus Curiae* Equal Employment Opportunity Commission, *in support of Plaintiff-Appellant*.

Lenora M. Lapidus, Gillian L. Thomas, Ria Tabacco Mar, and Leslie Cooper, American Civil Liberties Union Foundation, New York, NY; Erin Beth Harrist, Robert Hodgson and Christopher Dunn, New York Civil Liberties Union Foundation, New York, NY, for *Amici Curiae* American Civil Liberties Union; New York Civil Liberties Union; 9to5, National Association of Working Women; A Better Balance; American Association of University Women; California Women’s Law Center; Coalition of Labor Union Women; Equal Rights Advocates; Gender Justice; Legal Momentum; Legal Voice; National Association of Women Lawyers; National Partnership for Women and Families; National Women’s Law Center; Southwest Women’s Law Center; Women Employed; Women’s Law Center of Maryland; Women’s Law Project, *in support of Plaintiff-Appellant*.

Peter T. Barbur, Cravath, Swaine & Moore LLP, New York, NY, for *Amici Curiae* 128 Members of Congress, *in support of Plaintiff-Appellant*.

Shannon P. Minter and Christopher F. Stoll, National Center for Lesbian Rights, San Francisco, CA, for *Amicus Curiae* National Center for Lesbian Rights, *in support of Plaintiff-Appellant*.

Michael D.B. Kavey, Brooklyn, NY; Omar Gonzalez-Pagan, Lambda Legal Defense and Education Fund, Inc., New York, NY; Gregory R. Nevins, Lambda Legal Defense and Education Fund, Inc., Atlanta, GA, for *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc., *in support of Plaintiff-Appellant*.

PER CURIAM:

Plaintiff-appellant Matthew Christiansen sued his employer, supervisor, and others affiliated with his company (collectively, “defendants”) under the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12101 *et seq.*, Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.*, and state and local law alleging that he was discriminated against at his workplace due to, *inter alia*, his HIV-positive status and his failure to conform to gender stereotypes. The United States District Court for the Southern District of New York (Failla, J.) dismissed Christiansen’s federal claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and declined to exercise supplemental jurisdiction over his state and local claims. *See Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 612, 616–18, 622 (S.D.N.Y. 2016). In its decision, the district court concluded that *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), holding that Title VII does not prohibit discrimination on the basis of sexual orientation, precluded Christiansen’s Title VII claim. *Christiansen*, 167 F. Supp. 3d at 618, 622.

Christiansen primarily appeals this aspect of the district court's decision.¹

I. BACKGROUND

Christiansen, an openly gay man who is HIV-positive, worked as an associate creative director and later creative director at DDB Worldwide Communications Group, Inc., an international advertising agency and subsidiary of Omnicom Group, Inc. Christiansen's complaint alleged that his direct supervisor engaged in a pattern of humiliating harassment targeting his effeminacy and sexual orientation. According to Christiansen, in the spring and summer of 2011, his supervisor drew multiple sexually suggestive and explicit drawings of Christiansen on an office whiteboard. The most graphic of the images depicted a naked, muscular Christiansen with an erect penis, holding a manual air pump and accompanied by a text bubble reading, "I'm so pumped for marriage equality." J.A. at 16 ¶ 34.C; J.A. at 42. Another depicted Christiansen in tights and a low-cut shirt "prancing around." J.A. at 16 ¶ 34.A; J.A. at 40. A

¹ Christiansen also purports to challenge the district court's dismissal of his ADA claim for failure to comply with the statute of limitations. The district court, however, did not dismiss the ADA claim on this basis and instead concluded that Christiansen did not allege facts constituting discrimination under the ADA. *Christiansen*, 167 F. Supp. 3d at 613–17. We thus need not consider Christiansen's statute of limitations argument, and we affirm the district court's dismissal of Christiansen's ADA claim.

third depicted Christiansen's torso on the body of "a four legged animal with a tail and penis, urinating and defecating." J.A. at 16 ¶ 34.B; J.A. at 41. Later in 2011, Christiansen's supervisor circulated at work and posted to Facebook a "Muscle Beach Party" poster that depicted various employees' heads on the bodies of people in beach attire. J.A. at 13 ¶ 30. Christiansen's head was attached to a female body clad in a bikini, lying on the ground with her legs upright in the air in a manner that one coworker thought depicted Christiansen as "a submissive sissy." J.A. at 13 ¶ 30; J.A. at 43.

Christiansen's supervisor also made remarks about the connection between effeminacy, sexual orientation, and HIV status. The supervisor allegedly told other employees that Christiansen "was effeminate and gay so he must have AID[S]." J.A. at 15 ¶ 30. Additionally, in May 2013, in a meeting of about 20 people, the supervisor allegedly told everyone in the room that he felt sick and then said to Christiansen, "It feels like I have AIDS. Sorry, you know what that's like." J.A. at 17 ¶ 38. At that time, Christiansen kept private the fact that he was HIV-positive.

On October 19, 2014, Christiansen submitted a complaint to the Equal Employment Opportunity Commission ("EEOC") detailing the harassment

described above. After receiving a “Notice of Right to Sue” from the EEOC, Christiansen filed this lawsuit in the United States District Court for the Southern District of New York on May 4, 2015. Shortly thereafter, defendants moved to dismiss the complaint. In their motion to dismiss, defendants argued, *inter alia*, that Christiansen’s claim under Title VII was a sexual orientation discrimination claim rather than a gender stereotyping claim and was thus not cognizable under *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

The district court agreed. In its decision, the district court described at length difficulties in distinguishing sexual orientation discrimination claims from gender stereotyping claims, specifically noting that negative views people hold of those with certain sexual orientations may be based on stereotypes about appropriate romantic associations between men and women. *See Christiansen*, 167 F. Supp. 3d at 619–20. Having reviewed the decisions of other district courts addressing this issue in the wake of *Simonton* and *Dawson*, the district court concluded that “no coherent line can be drawn between these two sorts of claims.” *Id.* at 620. Nevertheless, the district court recognized that “the prevailing law in this Circuit—and, indeed, every Circuit to consider the question—is that

such a line must be drawn.” *Id.* Although the district court considered several references to effeminacy in the complaint, it concluded that, as a whole, Christiansen’s complaint did not allege that he was discriminated against because he did not conform to gender stereotypes, but because he was gay. *Id.* at 620–22. As a result, the district court held that Christiansen’s claim was a sexual orientation discrimination claim that was not cognizable under Title VII pursuant to *Simonton* and *Dawson* and dismissed the claim under Rule 12(b)(6). *Id.* at 622.

II. DISCUSSION

“We review a District Court’s grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim *de novo*, accepting the complaint’s factual allegations as true and drawing all reasonable inferences in the plaintiff’s favor.” *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232 (2d Cir. 2014) (internal quotation marks omitted). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet this standard, a plaintiff must “plead[] factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged.”

Id.

Title VII makes it “an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C.

§ 2000e-2(a)(1). On appeal, Christiansen argues, supported by various *amici*, that we should reconsider our decisions in *Simonton* and *Dawson* in light of a changed legal landscape and hold that Title VII’s prohibition of discrimination “because of . . . sex” encompasses discrimination on the basis of sexual orientation.

Because we are “bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court,” *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004), “it [is] ordinarily . . . neither appropriate nor possible for [a panel] to reverse an existing Circuit precedent,” *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009). We thus lack the power to reconsider *Simonton* and *Dawson*.

However, we disagree with the district court’s conclusion that Christiansen failed to plausibly allege a Title VII claim based on the gender

stereotyping theory of sex discrimination articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which is also binding on this panel. In *Price Waterhouse*, the female plaintiff, a senior manager at an accounting firm, was described as “macho” and “masculine” and informed that “to improve her chances for partnership, . . . [she] should walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 490 U.S. at 231–32, 235 (internal quotation marks omitted). After her office declined to nominate her for partnership, she sued under Title VII alleging sex discrimination. *Id.* at 231–33. Six members of the Supreme Court held that adverse employment action rooted in “sex stereotyping” or “gender stereotyping” was actionable sex discrimination. *Id.* at 250–52 (plurality); *see also id.* at 258 (White, J., concurring); *id.* at 272–73 (O’Connor, J., concurring).

Here, as noted above, Christiansen’s complaint identifies multiple instances of gender stereotyping discrimination. His complaint alleges that his supervisor described him as “effeminate” to others in the office, J.A. at 15 ¶ 30, and depicted him in tights and a low-cut shirt “prancing around,” J.A. at 16 ¶ 34.A; J.A. at 40. The complaint further alleges that the “Muscle Beach Party” party poster, depicting Christiansen’s head attached to a bikini-clad female body

lying on the ground with her legs in the air, was seen by at least one coworker as portraying Christiansen “as a submissive sissy.” J.A. 13 ¶ 30. The district court acknowledged these facts but concluded that because Christiansen’s complaint contained fewer allegations about his effeminacy than about his sexual orientation, the allegations about his effeminacy did not “transform a claim for discrimination that Plaintiff plainly interpreted—and the facts support—as stemming from sexual orientation animus into one for sexual stereotyping.” *Christiansen*, 167 F. Supp. 3d at 621. The district court also opined that permitting Christiansen’s Title VII claim to proceed “would obliterate the line the Second Circuit has drawn, rightly or wrongly, between sexual orientation and sex-based claims.” *Id.* at 622.

The district court’s decision draws attention to some confusion in our Circuit about the relationship between gender stereotyping and sexual orientation discrimination claims. Some district courts in this Circuit have viewed *Simonton* and *Dawson* as making it “especially difficult for gay plaintiffs to bring” gender stereotyping claims. *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011); *see also Estate of D.B. v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332–33 (N.D.N.Y.

2016) (“The critical fact under the circumstances is the actual sexual orientation of the harassed person.”). Such cases misapprehend the nature of our rulings in *Simonton* and *Dawson*. While *Simonton* observed that the gender stereotyping theory articulated in *Price Waterhouse* “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine,” 232 F.3d at 38, it acknowledged that, at a minimum, “stereotypically feminine” gay men *could* pursue a gender stereotyping claim under Title VII (and the same principle would apply to “stereotypically masculine” lesbian women). *Simonton* and *Dawson* do not suggest that a “masculine” woman like the plaintiff in *Price Waterhouse*, 490 U.S. at 235, has an actionable Title VII claim unless she is a lesbian; to the contrary, the sexual orientation of the plaintiff in *Price Waterhouse* was of no consequence. In sum, gay, lesbian, and bisexual individuals do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals. *Simonton* and *Dawson* merely hold that being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim.

The gender stereotyping allegations in Christiansen’s complaint are cognizable under *Price Waterhouse* and our precedents. Christiansen alleges that he was perceived by his supervisor as effeminate and submissive and that he was harassed for these reasons. Furthermore, the harassment to which he was subjected, particularly the “Muscle Beach Party” poster, is alleged to have specifically invoked these “stereotypically feminine” traits. *Simonton*, 232 F.3d at 38. The district court commented that much more of the complaint was devoted to sexual orientation discrimination allegations than gender stereotyping discrimination allegations² and that it thus might be difficult for Christiansen to withstand summary judgment or prove at trial that he was harassed because of his perceived effeminacy and flouting of gender stereotypes rather than because of his sexual orientation. Even if that were Christiansen’s burden at summary judgment or at trial—and we do not hold here that it is—it is not our task at the

² This highlights an issue that may arise when a plaintiff alleges discrimination under Title VII as well as under state and local laws that *do* prohibit sexual orientation discrimination. *See, e.g.*, N.Y. Exec. Law § 296(1)(a); N.Y.C. Admin. Code § 8-107(1)(a). In such a case, one would expect a plaintiff to detail alleged instances of sexual orientation discrimination in violation of state and local law alongside alleged instances of gender stereotyping discrimination in violation of federal law. When evaluating such a complaint, courts should not rely on the mere fact that a complaint alleges sexual orientation discrimination to find that a plaintiff fails to state a separate claim for gender stereotyping discrimination, but should instead independently evaluate the allegations of gender stereotyping.

motion to dismiss stage to weigh the evidence and evaluate the likelihood that Christiansen would prevail on his Title VII gender stereotyping claim. Instead, we assess whether he has “state[d] a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). We hold that he has.³

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court’s dismissal of Christiansen’s Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

³ Defendants argue on appeal that Christiansen’s Title VII claim is time-barred. Christiansen responds that the continuing violation doctrine and equitable estoppel apply to his claims. Because the district court did not reach the time-bar issue below, we will not decide it here in the first instance. Instead, we leave it to the district court to determine, on remand, whether Christiansen’s claims are time-barred.

KATZMANN, *Chief Judge*, with whom BRODIE, *District Judge*, joins,
concurring:

To ascertain whether Title VII of the Civil Rights Act of 1964 prohibits sexual orientation discrimination, we begin with the text:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex

42 U.S.C. § 2000e-2(a)(1). Christiansen and *amici* advance three arguments, none previously addressed by this Court, that sexual orientation discrimination is, almost by definition, discrimination “because of . . . sex.” They argue first that sexual orientation discrimination is discrimination “because of . . . sex” because gay, lesbian, and bisexual individuals are treated in a way that would be different “but for” their sex. Second, they argue that sexual orientation discrimination is discrimination “because of . . . sex” because gay, lesbian, and bisexual individuals are treated less favorably based on the sex of their associates. Finally, they argue that sexual orientation discrimination is discrimination “because of . . . sex” because gay, lesbian, and bisexual individuals are treated less favorably because they do not conform to gender

stereotypes, particularly stereotypes about the proper roles of men and women in romantic relationships. I find persuasive these arguments, which reflect the evolving legal landscape since our Court's decisions in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), holding that sexual orientation discrimination claims are not cognizable under Title VII. Concluding that it was constrained by the law as it then was, the *Simonton* Court expressly decried the "appalling persecution," 232 F.3d at 35, that Simonton endured because of his sexual orientation, stating that such persecution was "morally reprehensible whenever and in whatever context it occurs." *Id.* For the reasons that follow, I write separately to express my view that when the appropriate occasion presents itself, it would make sense for the Court to revisit the central legal issue confronted in *Simonton* and *Dawson*, especially in light of the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued.

I. Sexual Orientation Discrimination As Traditional Sex Discrimination

First, sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex. A person is discriminated against "because

of . . . sex” if that person is “exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). As the Supreme Court has alternatively explained, an action constitutes sex discrimination under Title VII if “the evidence shows treatment of a person in a manner which *but for that person’s sex* would be different.” *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (emphasis added) (internal quotation marks omitted). “Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because of . . . sex,’” *Oncala*, 523 U.S. at 81 (emphasis omitted), and Title VII’s prohibition “must extend to [discrimination] *of any kind* that meets the statutory requirements,” *id.* at 80 (emphasis added).

Sexual orientation discrimination meets this test. As the Equal Employment Opportunity Commission (“EEOC”) has observed, sexual orientation “cannot be defined or understood without reference to sex,” *Baldwin v. Foxx*, E.E.O.C. Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015),

because sexual orientation is defined by whether a person is attracted to people of the same sex or opposite sex (or both, or neither). For this reason, the EEOC has concluded that “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.” *Id.* To illustrate, the EEOC gives an example:

[A]ssume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

Id. (citation omitted). Under this framework, “but for [the employee’s] sex,” the employee’s treatment would have been different. *Manhart*, 435 U.S. at 711.

Because this situation “meets the statutory requirements” of Title VII, the statute “must extend” to prohibit it. *Oncale*, 523 U.S. at 80.

One could argue in response that a man married to a man is not similarly situated to a man married to a woman, but is instead similarly situated to a woman married to a woman. In other words, one might contend that, for comparative purposes, a gay man is not married to a man; he is married to someone of the same sex, and it is other people married (or otherwise attracted) to the same sex who are similarly situated for the purpose of Title VII. In my view, this counterargument, which attempts to define “similarly situated” at a different level of generality, fails to demonstrate that sexual orientation discrimination is not “but for” sex discrimination. The Supreme Court rejected an analogous argument on interracial marriage—“that members of each race [were] punished to the same degree”—in *Loving v. Virginia* and held that treating all members of interracial relationships the same, but less favorably than members of intraracial relationships, was a race-based classification violating the Equal Protection Clause. *See* 388 U.S. 1, 7–8 (1967). The same logic suggests that it is sex discrimination to treat all individuals in same-sex relationships the same, but less favorably than individuals in opposite-sex relationships. Similarly, *Manhart* tells us that sex discrimination is treating someone “in a manner which *but for* that person’s sex would be different,” 435 U.S. at 711 (emphasis added)

(internal quotation marks omitted), suggesting that when evaluating a comparator for a gay, lesbian, or bisexual plaintiff, we must hold every fact except the sex of the plaintiff constant—changing the sex of *both* the plaintiff and his or her partner would no longer be a “but-for-the-sex-of-the-plaintiff” test.

Thus in my view, if gay, lesbian, or bisexual plaintiffs can show that “but for” their sex, *Manhart*, 435 U.S. at 711, they would not have been discriminated against for being attracted to men (or being attracted to women), they have made out a cognizable sex discrimination claim. In such a case, then, traditional sex discrimination would encompass discrimination on the basis of sexual orientation. Neither *Simonton* nor *Dawson* addressed this argument.

II. Sexual Orientation Discrimination As Associational Sex Discrimination

Next, sexual orientation discrimination is discrimination “because of . . . sex” because it treats people differently due to the sex of their associates. The associational discrimination theory, which we articulated with respect to racial discrimination eight years after our decision in *Simonton*, provides that “an employer may violate Title VII if it takes action against an employee because of the employee’s association with a person of another race.” *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008). As we explained, “[t]he reason [for this holding]

is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race" in relation to the race of his or her associate. *Id.* at 139 (emphasis in original).

As the Supreme Court has observed, Title VII "on its face treats each of the enumerated categories exactly the same,"¹ and for that reason "the principles . . . announce[d]" with respect to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin," and vice versa. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989). Thus, the associational theory of race discrimination applies also to sex discrimination. Putting aside romantic associations, this principle is not controversial. If a white employee fired or subjected to a hostile work environment after friendly association with black coworkers has a claim under Title VII, *see Drake v. Minnesota Min. & Mfg. Co.*, 134 F.3d 878, 881, 883-84 (7th Cir. 1998) (finding no categorical bar to the application of the associational theory of race discrimination to interracial friendships), then a female employee fired or subjected to a hostile work environment after friendly

¹ The only exception, not relevant here, is for a "bona fide occupational qualification" ("BFOQ"), which is a justification for some differential treatment based on religion, sex, or national origin but not based on race. *See* 42 U.S.C. § 2000e-2(e); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989).

association with male coworkers should have a claim under Title VII. Once we accept this premise, it makes little sense to carve out same-sex relationships as an association to which these protections do not apply, particularly where, in the constitutional context, the Supreme Court has held that same-sex couples cannot be “lock[ed] . . . out of a central institution of the Nation’s society.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015); see also *United States v. Windsor*, 133 S. Ct. 2675, 2693-94 (2013) (explaining that differentiation between opposite-sex and same-sex couples in the Defense of Marriage Act “demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify” (citation omitted)). In sum, if it is race discrimination to discriminate against interracial couples, it is sex discrimination to discriminate against same-sex couples.

Therefore, I conclude that if gay, lesbian, or bisexual plaintiffs can show that they would not have been discriminated against but for the sex of their associates, they have made out a cognizable sex discrimination claim. In such a case, the associational theory of sex discrimination would encompass discrimination on the basis of sexual orientation. Because *Simonton* and *Dawson* were decided before *Holcomb*, we have had no opportunity to address the

associational theory of sex discrimination as applied to sexual orientation discrimination.

III. Sexual Orientation Discrimination As Gender Stereotyping

Finally, sexual orientation discrimination is discrimination “because of . . . sex” because such discrimination is inherently rooted in gender stereotypes. In *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004), we considered “a crucial question: What constitutes a gender-based stereotype?” *Id.* at 119-20. While we did not definitively answer that question, we invoked the Seventh Circuit’s observation that whether there has been improper “reliance upon stereotypical notions about how men and women should appear and behave” can sometimes be resolved by “consider[ing] . . . whether [the plaintiff’s] gender would have been questioned for [engaging in the relevant activity] if he were a woman rather than a man.” *Id.* at 120 n.10 (quoting *Doe ex rel. Doe v. City of Belleville, Ill.*, 119 F.3d 563, 581–82 (7th Cir. 1997), *vacated on other grounds by* 523 U.S. 1001 (1998) (remanding the case in light of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998))).

Relying on common sense and intuition rather than any “special training,” *see Back*, 365 F.3d at 120 (quoting *Price Waterhouse*, 490 U.S. at 256), courts have

explained that sexual orientation discrimination “is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. . . . The gender stereotype at work here is that ‘real’ men should date women, and not other men,” *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *see also Boutillier v. Hartford Pub. Sch.*, No. 3:13-CV-01303-WWE, 2016 WL 6818348 (D. Conn. Nov. 17, 2016) (“[H]omosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus.”). Indeed, we recognized as much in *Dawson* when we observed that “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” 398 F.3d at 218 (alteration in original) (internal quotation marks omitted). Having conceded this, it is logically untenable for us to insist that this particular gender stereotype is outside of the gender stereotype discrimination prohibition articulated in *Price Waterhouse*.

Numerous district courts throughout the country have also found this approach to gender stereotype claims unworkable. *See, e.g., Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (collecting cases) (“Simply put,

the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”). The binary distinction that *Simonton* and *Dawson* establish between permissible gender stereotype discrimination claims and impermissible sexual orientation discrimination claims requires the factfinder, when evaluating adverse employment action taken against an effeminate gay man, to decide whether his perceived effeminacy or his sexual orientation was the true cause of his disparate treatment. See *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. 2016). This is likely to be an exceptionally difficult task in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender. More fundamentally, carving out gender stereotypes related to sexual orientation ignores the fact that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any.

Thus, in my view, if gay, lesbian, or bisexual plaintiffs can show that they were discriminated against for failing to comply with some gender stereotype, including the stereotype that men should be exclusively attracted to women and

women should be exclusively attracted to men, they have made out a cognizable sex discrimination claim. In such a case, the gender stereotype theory of discrimination would encompass discrimination on the basis of sexual orientation. In neither *Simonton* nor *Dawson* did we consider this articulation of the gender stereotype at play in sexual orientation discrimination.

IV. Congressional Inaction

Our decision in *Simonton* was understandably influenced by “Congress’s refusal to expand the reach of Title VII” in the wake of “consistent judicial decisions refusing to interpret ‘sex’ to include sexual orientation,” which we viewed as “strong evidence of congressional intent.” 232 F.3d at 35. The Supreme Court has indicated, however, that:

[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted).

As several *amici* point out, there are idiosyncratic reasons that many bills do not become law, and those reasons may be wholly unrelated to the particular provision of a bill that a court is assessing. In light of the force of the arguments as to why discrimination “because of . . . sex” encompasses sexual orientation discrimination and *Oncale*’s admonition that “it is ultimately the provisions of our laws . . . by which we are governed,” 523 U.S. at 79, we should not rely on the “hazardous basis” of subsequent congressional inaction, *LTV Corp.*, 496 U.S. at 650, to exclude sexual orientation discrimination from Title VII’s coverage.

V. Conclusion

When *Simonton* was decided, this Court reached the same conclusion as every other circuit court that had considered the issue: that discrimination “because of . . . sex” did not encompass discrimination on the basis of sexual orientation, a view then shared by the EEOC. But in the years since, the legal landscape has substantially changed, with the Supreme Court’s decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), affording greater legal protection to gay, lesbian, and bisexual individuals. During the same period, societal understanding of same-sex relationships has evolved considerably.

There is no doubt that sexual orientation discrimination “was assuredly not the principal evil Congress was concerned with when it enacted Title VII.” *Oncale*, 523 U.S. at 79. However, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws . . . by which we are governed.” *Id.* Title VII prohibits all “discriminat[ion] . . . because of . . . sex” and its protections “must extend to [discrimination] of any kind that meets the statutory requirements.” *Id.* at 80 (emphasis added). Despite recent congressional inaction in the face of judicial decisions excluding sexual orientation discrimination from Title VII’s coverage, there is “no justification in the statutory language . . . for a categorical rule excluding” such claims so long as a plaintiff can demonstrate that he or she was discriminated against “because of . . . sex.” *Id.*

Taking a fresh look at existing cases, the EEOC and other advocates have articulated three ways that gay, lesbian, or bisexual plaintiffs could make this showing. First, plaintiffs could demonstrate that if they had engaged in identical conduct but been of the opposite sex, they would not have been discriminated against. Second, plaintiffs could demonstrate that they were discriminated against due to the sex of their associates. Finally, plaintiffs could demonstrate

that they were discriminated against because they do not conform to some gender stereotype, including the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men. Neither *Simonton* nor *Dawson* had occasion to consider these worthy approaches. I respectfully think that in the context of an appropriate case our Court should consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII. Other federal courts are also grappling with this question, and it well may be that the Supreme Court will ultimately address it.

Gregory Antollino, an attorney of this Court, does hereby declare that he served a copy of these motion intervention papers on Saul Zabell, attorney for appellee in ZARDA V/]. ALTITUDE EXPRESS, 15-3775, by email to szabell@laborlawsny.com on 27 March 2017

Dated: New York, New York
27 March 2017

_____/s/_____
Gregory Antollino