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June 30, 2016

Dana Elwood
Case Manager
U.S. Court of Appeals
40 Centre Street
New York, New York 10007

Re: Zarda v. Altitude Express, 15-3775

Dear Judge Torres:

I, with Stephen Bergstein, represent plaintiff-appellant in this case. As we discussed on the phone, my original reply brief will be bounced because of improper thumbnail pagination and lack of an order to file an oversized brief. As such, the motion I made is moot in part. I ask that once the original is bounced, you accept the new one I have redone, pagination only, in its place as compliant with the rules. It is no different than the one I filed this morning, except the cover need not say "corrected" since it is the only reply brief. The only relief I continue to seek is that I be permitted not to file hard copies of the original, non-compliant brief.

Thank you for the consideration, and I will file a compliant brief as soon as you bounce the first one.

Sincerely,

Greg S. Antollino /s/

Gregory Antollino

Cc: all counsel, by ecf

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

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June 2016

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

x----------x

ESTATE OF DONALD ZARDA,

Plaintiff-Appellant,

-against-

ALTITUDE EXPRESS & RAYMOND MAYNARD,

Defendants-Appellees

x----------x

PRELIMINARY STATEMENT

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 still the law; after all, the Estate lost a trial under New York law with an undeniably higher standard of proof. We believe, in contrast, not only that the trial was riddled with error, but, more vitally, that the Court will recognize civil rights of gay people under federal law as potential victims of *sex* discrimination. We implore the Court to re-examine its jurisprudence to give these unconventional facts the attention they deserve. Society and the lower courts scream for answers to this legal inconsistency: Sexual minorities are protected by rights under the Constitution, but not the Civil Rights Act. To fail – as the defense has failed – to address this inconsistency is an intellectually bashful position to take, 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 any sexual orientation as a member of a protected class - merely a subset of "sex." This is something average Americans don't recognize - as noted by amicus in a pending appeal. See Amicus Brief of 128 Members of

Congress, June 27, 2016 p.11. The law may, but if only you say. (The brief is available on ecf or at http://tinyurl.com/gtp2wpz, last 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 Donald Zarda for the remainder of his life – was a violation of Don's 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 New York statute affording fewer remedies, requiring a higher standard of proof; our case was defended with surreptitious and sometimes 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 judicial resources – we offered the judge and the defense an option 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, likely even if we had won the state law claim, given the fees we earned over five years of intense litigation. However, both the court and defense rejected our suggestion that would not have required another trial, SPA.3. See R., entry 203, p.2 and entry 214, p.13). This Court could have considered merely the legal question, and remanded for fees if we had won on the lower standard of proof; but because the defense and the lower-court's rejected this compromise, we must ask for a new trial.

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) (citation omitted). The vilification of prejudice from a bygone era is part of what the defense used to sway the jury: In a workplace where 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) – Zarda was maligned at trial for unmentionable "bedroom activities" from a witness buried in a pile of fifty. What happened at the trial is unacceptable in any court. Despite the belief in equality, discrimination exists and achieves its objectives by marginalizing a hated minority; that it was used in court underscores the need for 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) (emphasis added). Notwithstanding this broad language, this and other Circuits allow employers to discriminate against gay people, usually expressing aversion in so doing, but ultimately closing the door to lesbians and gay men that is available to heterosexuals, or those who do not identify their sexuality, Even then, they are examined for potential trickery when a plaintiff exhibits both a sexual stereotype and is gay.[1] Let's forget about the LGBT per se; let's think of people who have suffered adverse action that wouldn't have happened but for his or her sex. Put another way, don't pigeonhole the discrimination sexual minorities suffer into a category not listed specifically – like associational discrimination – in Title VII; just ask whether this person suffered an adverse action or harassment that wouldn't have happened but for his or her sex. Do that and we untie the doctrinal knot that Simonton poses. See Amicus, Members of Congress at 30.

In this case, the Court must decide whether to remain conjoined to the strictures of Simonton or move to a nearly uniform, consistent direction of cases decided since. Simonton is

[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".

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 on the basis of his race because of his marriage to a black woman. Why would the sex of the spouse not 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; 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 should reverse. Video and audio demonstrate 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 the trial under state law never heard, but underpins Title VII.

Minimally, the Estate is entitled to a trial with proper instructions and without a gesture toward the "oddness," or inappropriate difference of mentioning one's 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 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 arguments – can reverse the gerrymander and endorse the contention that Title VII protects discrimination on the basis of sex no matter the sexuality of the plaintiff.

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 – and in conjunction

with the happy customers on the visuals – demonstrate that Maynard was resistant to "gay" to the extent his customers knew a gay man worked for him.[2] The customers, 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. This would, at a minimum, entitle the Estate to vindication, plus 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 a single reason why the Court should reaffirm that decision.

The defense "offers no commentary on whether justice, equity, or morality should dictate" overruling Simonton. Def. Br. at 16. That seems dreary, but go with it 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 legally 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*

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[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.

[3] Plaintiff does not advance on appeal that he was subject to a hostile environment. There is some 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, and the testimony about the unmentionable "bedroom activities," JA.1542 – veiled behaviors that morphed into "graphic sexual experiences," JA.1683, by summation.

sexual orientation does not negate discrimination on the basis 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. Judge Katherine Polk Failla said the same in Christiansen v. Omnicom, 2016 U.S. Dist. LEXIS 29972 p*14 (S.D.N.Y. Mar. 9, 2016), adding that Simonton's distinctions were artificial. Ultimately, what these (and other) district courts have done is irrelevant, even though other district courts have 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 gay people under the Constitution creates a new world in which this Court would abdicate its duty *not* to re-examine Simonton – and this is especially so especially after 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. Consequently, "little legislative history . . . guide[s any court] in interpreting the Act's prohibition against discrimination based on "sex." Meritor Sav. Bank, FSB

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

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 statistically demonstrated); Meritor (sexual harassment). Prospective Amici NYCLU lays this out beautifully, noting for years after its passage, for example, 1960's Mad Men-style "office flirtations" were dismissed as non-actionable, natural, interpersonal attractions. See 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. See 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 briuef from Lambda that speaks entirely and solely to this issue in a thorough and 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), as the defense admits. Yet it offers nothing suggesting that Baldwin is not persuasive in rejecting Simonton insofar as that case discounts whether sexual orientation falls into the category of discrimination based on sex, and instead focuses on the absence of the phrase "sexual orientation" that had perhaps no presence in non-discrimination law until years later. 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

[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 June 30, 2016 at http://tinyurl.com/hahpwpl.

– 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 renders Simonton inconsistent, in and of itself: when one considers the availability of gay marriage, there is little to Simonton left. We live in a new society; gay people are still targets of discrimination, but newer laws adapt to changing mores, Whether or not this Court sits as a Court of morality, Courts do adjust to a changing society and its evolving mores.[7]

Indeed, the defense recognizes the same principle in its argument regarding 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, and it did, notwithstanding the result on summary judgment. Id. at *10-11. Baldwin's decision rule was accepted – that's the important thing. By contrast, defendants still invoke Dawson to argue "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*. Being gay has been punishable by death, and still is in some places. To fall back on Simonton is not to fall back on this draconian punishment,

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[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 New York and New York City laws because the plaintiff failed even 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, that time had certainly not arrived by the issuance of Dawson's in 2005.

[7] Simonton relied on Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984) which pertained solely to 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 and merits of a transgender man's claim. Applying Ulane to the facts of Fowlkes would have resulted in affirmance; this Court has thus already backed away from the underpinnings of Simonton.

but each advancement is incremental. To rely so easily, without analysis, on a case decided over a decade ago with so many legal developments at its feet 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 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). See also Parr v. Woodmen of the World Life Ins.Co., 791 F.2d 888 (11th Cir. 1986) (prohibiting discrimination based on interracial marriage) (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, outlandishly suggests the legislative history of *Title VII* is "clear."[8] Please do not repeat the mistake of Simonton – recognized by the Simonton as a poor method of statutory interpretation – in relying on legislative inaction to determine the outcome

[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.

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 but other times finding them unappealing." Id. at 67. (Amicus, 128 Members of Congress in Christiansen make this point beautifully 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 statute 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

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

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[.]")

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). Moreover, 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 crystal 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. Id. This is not necessarily so. W.R. Grace & Co., 429 F.3d at 1235. 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 deference.

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 beautifully covered by Lambda and better than we can. We shudder, however, to remind this

[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 is correct historically.

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 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 would seem to admit, so what's wrong with it? We find nothing in the defense brief to suggesting intellectual infirmity.

The Court can avoid the Chevron/Skidmore analysis altogether. 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 we suggest it most certainly does with the addition of Windsor, Obergefell and Lawrence - the last of which disallowed criminalization of gay sexual activity. The Court should 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 thus certainly now with gay marriage constitutionally protected, See Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998) Simonton should be recognized as null.

What is more, intervening Title VII decisions from the Supreme Court 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 repeated repudiation 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) (court's preference for different rule "cannot justify departing from statutory text").

II: Harmful Error

The defense does not address our point that the instruction was error. 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 consistently applied principal that errors in jury instructions, especially going to the standard of proof, are almost always not

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. 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 instruction have occasionally 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). Researching the matter further, the PJI does advise judges to instruct on

McDonnell-Douglas, and perhaps Judge Bianco was not defying circuit law. Undoubtedly, however, he did not instruct under anything resembling Title VII as the Circuit recognizes.

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 that Maynard admitted he was "a good skydiver" and a "good guy." JA1426-27. Maynard said this despite the allegedly outrageous statement he made – tongue held firmly in cheek – that he was gay, something which he allegedly also said in 2001 – when he was barely out of the closet – and supposedly brought 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 (on in limine motions)). 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, but didn't resolve the motion until well into trial. See JA.1359, 1433. In so doing, the district court 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. JA.1978. The fact was that, in 2001, an expression of sexual-orientation identity could get you fired; 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 find the evidence of an earlier era discrimination in itself – something the defense doesn't deny.)

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

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.

The judge made not a single 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 her hip. SPA28.[12] This meager complaint 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 their search of 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 any "hip discomfort" from a gay man. JA.481.

Lauren Calllanan, who didn't "want to go to court" testified that she 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 termination. All that came up was that "[i]t just [was]n't working" for Maynard to have plaintiff

[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?

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 too slow 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, but that was a lie. Today, angry customers complain on the internet, quite openly. Maynard admitted that you can't have everyone happy and you can't have everyone return. JA332. Why is it that unhappiness about being with a gay guy who is doing his job is grounds for termination? So while Maynard could conveniently forget complaints made to him, when confronted him with numerous internet complaints 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 for 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 so speculative as to be inadmissible. This is especially so since it rendered him as part of a protected class, and 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)

B. Three witnesses hidden in a pile of fifty.

The defense notes correctly that plaintiff knew of the existence of certain people who testified. Although the defense gave a thumbnail description as to the testimony of some of these witnesses, they were not in compliance with the minimal relief ordered by the Court. Most importantly, whom out of the fifty would the defense choose? 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 plaintiff in the grave, he would happily pay his own flight to New York to testify so against him with such relish. The same is true for the others. Had the defense reconsidered its case, named three, the Court would have allowed us to depose 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 federal 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
June 30, 2016

/s/
GREGORY ANTOLLINO
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/s/
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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