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Clerk of Court
Second Circuit Court of Appeals
40 Foley Square
New York, NY 10007

Re: Zarda v. Altitude Express, 15-3775

To the Clerk of Court:

Plaintiff writes under F.R.A.P. 28(j) in response to Hively v. Ivy Tech Cmty. Coll., 2016 U.S. App. LEXIS 13746 (7th Cir. July 28, 2016), holding the phrase "because of sex" in Title VII does not encompass sexual-orientation discrimination.

Hively is a plea to Supreme Court intervention; however, this area of jurisprudence was created by the Circuits. Except for cases inconsistent with Simonton v. Runyon, 232 F.3d 33 (2d. Cir. 2000), the Supreme Court's precedents are consistent with our arguments. Hively acknowledges the associational discrimination problem – even citing to Holcomb v. Iona College, 521 F.3d 130 (2d Cir. 2008), which we contend abrogates Simonton – then the majority veritably throws its hands in the air, suggesting we live in a country where "a person can be married on Saturday and then fired on Monday for that act." Hively, 2016 U.S. App. LEXIS at *43. Yet, marriage is a fundamental right, and this Court should not accept such logic. Hively explicitly "sees the writing on the wall," suggesting the holding is weak and will one day be overruled, id. at *55, but doesn't budge from precedents that gerrymander sexual minorities out of Title VII.

Hively is also deficient because, first, it does not address the issue that Windsor v United States, 699 F.3d 169 (2d Cir.2012), aff'd, 133 S. Ct. 2675 (2013) poses: If gay people are entitled to Equal Protection, they are entitled to Equal Protection in the reading of precedent and statute. Same-sex sexual attraction is a sex stereotype, and associational discrimination is illegal. Nevertheless, by reaffirming timeworn precedent, the LGTB are not afforded these sub-protections from discrimination under Title VII. That does not comport with Windsor. Second, Hively gives short-shrift to the deference afforded the EEOC's interpretation of its regulations, br. and reply br. at Argument IC. See also Lambda Legal Amicus Brief in Christiansen v, Omnicom, 16-648, noted in reply brief at 12, and available at http://tinyurl.com/joftkrd.

Finally, Hively cites as precedent Simonton, a case with problems we have noted that is

this Court's province to overrule. This Court need not follow Hively, avowedly unenthusiastic and accepting of inconsistency.

Sincerely,

Greg S. Antollino /s/

Gregory Antollino

cc: Saul Zabell by ecf