15-3775

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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

Plaintiffs-Appellants

-against-

ALTITUDE EXPRESS dba SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees

En Banc Rehearing of the Panel Opinion Reported at 855 F. 3d. 76 (2d. Cir. 2017)

APPELLEES' BRIEF

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Filed: July 26, 2017

RULE 26.1 STATEMENT

Pursuant Rule 26.1 of the Federal Rules of Appellate Procedure and to enable Judges of this Court to evaluate possible disqualification or recusal, the undersigned counsel for Defendants states as follows:

Defendant Altitude Express, Inc., d/b/a Skydive Long Island, is a domestic business corporation organized and existing under the laws of the State of New York.

Defendant Altitude Express, Inc., d/b/a Skydive Long Island is not a governmental entity, there are no parent corporations, nor does any publicly held corporation hold 10% of its stock.

Dated: Bohemia, New York
July 28, 2017

ZABELL & ASSOCIATES, P.C.
Attorneys for Appellees

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MELISSA ZARDA & WILLIAM MOORE, EXECUTORS,
ESTATE OF DONALD ZARDA

Plaintiff-Appellant,

-against-

ALTITUDE EXPRESS & RAYMOND MAYNARD,

Defendants-Appellees

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

ISSUE PRESENTED

This *en banc* panel has been convened to address a single question: "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of... sex'?"

The facts of this case are inexorably linked with the legal question presented – facts which establish that, despite this laudable attempt to remedy a long-standing denial of protection to a now recognized and comparatively vulnerable class of its citizens, the Court's inevitable answer in the affirmative results in a decision from which no relief flows. Any

answer in the affirmative to the question presented would be a prohibited advisory opinion.

JURISDICTION

Appellants, Melissa Zarda and William Allen Moore, Jr. as Co-Independent Executors of the Estate of Donald Zarda, ("Appellants"),on behalf of Donald Zarda, who is deceased ("Zarda", or "Appellant"), have been granted *en banc* review of the decision rendered by the United States Court of Appeals for the Second Circuit, August Term, 2016, decided on April 18, 2017. Altitude Express d/b/a Skydive Long Island and Raymond Maynard ("Appellees", "SDLI" or "Maynard") do not contest or otherwise dispute the jurisdiction of the underlying District Court, or the Court of Appeals.

Appellees **do** challenge the jurisdiction of this *en banc* panel to determine a legal question upon which no relief can be granted. Such a challenge to subject matter jurisdiction **must** be considered by this panel, despite the narrow legal question posed. *S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exch. Inc.*, 24 F.3d 427, 430–31 (2d Cir. 1994) ("It is axiomatic that 'in our federal system of limited jurisdiction any party or the court suasponte, at any stage of the proceedings, may raise the question of

whether the court has subject matter jurisdiction'; finding that argument regarding jurisdiction raised for first time on appeal was permissible) (*citing Manway Constr. Co. v. Housing Auth. of the City of Hartford,* 711 F.2d 501, 503 (2d Cir.1983)). As this Court discussed within the last decade:

> "[The Court] ha[s] an independent obligation to consider the presence or absence of subject matter jurisdiction *suasponte." Joseph v. Leavitt,* 465 F.3d 87, 89 (2d Cir.2006), *cert. denied,* 549 U.S. 1282 (2007). **Our inquiry to ascertain whether we have subject matter jurisdiction ordinarily precedes our analysis of the merits.** *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998).

Jennifer Matthew Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs., 607 F.3d 951, 955 (2d. Cir. 2010) (emphasis added). Here, this panel must examine whether its findings as to the legal question posed will result in any actualized relief, or whether rendering a decision constitutes an impermissible advisory opinion. We respectfully submit this panel can reach no conclusion other than: 1) an opinion rendered in this case would be advisory in nature; 2) this panel lacks the constitutional authority to issue such an advisory opinion; and, 3) as such, this appeal must be dismissed, by law, for lack of standing and jurisdiction.

PROCEDURAL HISTORY

On August 6, 2010, Zarda filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") (Appellees' Appendix (hereafter "SA"), SA 001). Zarda's EEOC charge states, in relevant part, that "my claim is because I did not conform my appearance and behavior to sex stereotypes, I suffered adverse employment action, and was discriminated against, at least in part, because of my sex." Within that same paragraph, Zarda stated "I am **not** making this charge on the grounds of my sexual orientation." (SA 003) (emphasis added).

On September 23, 2010, Zarda filed a Complaint, Index #: 10-cv-4334, in the United States Court of the Eastern District of New York. Zarda's original Complaint alleged four (4) separate violations of law: 1) a violation of Title VII, alleging discrimination based on failure to conform to sex stereotypes; 2) a violation of the New York State Human Rights Law, alleging sexual orientation discrimination; 3) a violation of the Fair Labor Standards Act; and 4) a violation of the New York Labor Law. (SA 009)

Zarda filed an Amended Complaint on March 11, 2011. The Amended Complaint added two (2) additional causes of action: 1) gender

discrimination under the New York State Human Rights Law; and, 2) an additional violation under the New York Labor Law. (JA 065)

Between February and May of 2013, Zarda and Appellants submitted various competing Motions for Summary Judgment (both partial and full). On March 28, 2014, Judge Bianco granted Defendants-Appellees' motion as to Zarda's claims of gender stereotype discrimination, hostile work environment, and failure to pay overtime. (SA 007)

On March 28, 2014, Appellant filed his Second Amended Complaint. He again claimed the following violations: 1) sex stereotype discrimination under Title VII; 2) sexual orientation discrimination under the NYSHRL; 3) gender discrimination under the NYSHRL; and, 4) failure to pay minimum wage under the NYLL. (SA 021) Conspicuously absent from the EEOC charge and each filed pleading is an allegation of sexual orientation discrimination under Title VII.

On August 17, 2015, Zarda filed a motion seeking reconsideration of the dismissal of his Title VII claim. Zarda based that motion to reconsider upon the EEOC's decision in *Baldwin v. Foxx*, Appeal No.: 0120133080, in which the agency found that sexual orientation discrimination is sex discrimination. Tellingly, Zarda began his memorandum of support with

the following: "You can be the first judge to hold that Title VII protects sexual orientation discrimination." However, the Title VII claim that the Judge had previously dismissed was a sexual stereotype claim, not a sexual orientation discrimination claim. (JA 716) *Not only did Zarda, in an EEOC charge, a Complaint, an Amended Complaint, and a Second Amended Complaint, fail to allege sexual orientation discrimination under Title VII, he went so far as to expressly disavow such a claim within his EEOC charge.* On October 13, 2015, the District Court Judge denied Plaintiff's motion to reconsider based upon the law as it stood under *Simonton*, without addressing the issue that Plaintiff was attempting to revive a claim that was never plead or charged to the EEOC.(JA 716)

Zarda subsequently appealed on, among other grounds, the basis that *Simonton* and its progeny should be overruled, or, alternatively, be held inconsistent with the current state of the law. The Court declined to revisit *Simonton* and, in the course of doing so, determined an *en banc* review would be necessary to overturn prior Circuit precedent.[1] (JA 718) Zarda then filed a petition for *en banc* review, which was granted.

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[1] The Court found no merit as to the other grounds raised on appeal. (JA 718)

STATEMENT OF FACT

This case, at the time of its original filing, was a straightforward dispute involving discrimination claims arising in the workplace. The central issue at hand was, and remains, whether the Appellant, Donald Zarda, was in fact subject to impermissible discrimination, and whether the basis for the alleged discrimination is protected under Title VII of the Civil Rights Act. The operative facts forming the basis of Zarda's allegations have already been tried before a jury of his peers within the context of the New York State Human Rights Law, NY EXEC. LAW §296, et seq. ("NYSHRL").

Upon the completion of a fair and proper trial, Zarda's claims were ultimately determined to be unfounded. Here, should this Court determine that existing precedent regarding sexual orientation discrimination under Title VII has outlived both the logic and reason from which it was derived, Appellants' arguments must still be rejected by the Court for the following reasons:

1) Zarda presented his allegations of discrimination to a jury of his peers under the corresponding state statute, resulting in no finding against Defendants-Appellees;

2) Zarda expressly disavowed a claim of sexual orientation discrimination under Title VII in his EEOC Charge, and never raised such a claim in his Complaint, his Amended Complaint, or his Second Amended Complaint - *ipso facto*, regardless of this panel's holding, Zarda is precluded from pursuing such a claim; and,

3) Zarda's estate lacks legal standing to raise a new Title VII allegation that was never raised by Zarda prior to his death.

Zarda began this litigation by alleging, in his Amended Complaint, violations of New York State Human Rights Law, Title VII and New York State Labor Law. (JA 0025 - JA 0040) Among those causes of action, Zarda claimed he was discharged because of a homophobic customer. (JA 0025) Specifically, Zarda claimed that he had said to a customer that "You don't have to worry about us being so close because I'm gay." (JA 0029) Zarda alleged that he was terminated for "mentioning the fact that he was gay to a passenger" and that he had touched a passenger inappropriately. (JA 0031 - JA 0032) However, at the time the Amended Complaint was filed, Zarda was unaware of the existence of a customer complaint. (JA 0033) Zarda alleged in his Amended Complaint that he was fired from his

position because his "behavior did not conform to sex stereotypes." (JA 0035)

At summary judgment, Zarda's "gender stereotype discrimination, hostile work environment, and overtime claims" were each summarily dismissed. Zarda's "sexual orientation discrimination claim" based upon his termination under New York State law, and minimum wage claim under New York State law were permitted to go to trial. (JA 0672) Zarda then moved for reconsideration of the dismissal of his gender stereotype discrimination and hostile work environment claims. (JA 0021) By decision dated October 13, 2015, the District Court terminated Zarda's application for reconsideration of the Summary Judgment Decision. (JA 716)

Zarda testified at trial by and through his deposition testimony which was read into evidence. Zarda filed an EEOC charge indicating that "I'm not making this charge based on my sexual orientation." (SA 003) With regard to his suspension and ultimate termination, Zarda testified that he was asked "a lot of questions" about the tandem "jump with Miss Rosanna" and that he did not remember a specific jump at that time to which he was referring. (JA 1164 - 1165, JA 1330, JA 1331) Zarda acknowledged that Maynard, the owner of Skydive Long Island, was

"investigating what I knew about" the complaint. (JA 1166) Zarda acknowledged that his colleagues referred to him as "Gay Don" and that he "wasn't offended by that." Further, he testified that, with regards to the workplace, he was treated "like anybody else." (JA 1167) Zarda testified that his outward appearance lead people to believe that he was heterosexual and that he was frequently mistaken for being straight and that such a mistake did not offend him. (JA 1276 - JA 1277)

Zarda opined about his 2001 termination from SkyDive Long Island, "From the best I can recall, because Ray didn't discuss it with me, it had something to do with a customer being unhappy about not being able to do flips out of the airplane, or something that they wanted me to do out of the aircraft." (JA 1169, JA 1310, JA 1325) Zarda testified that he was rehired in 2009, and that Appellees rehired him with full knowledge of his sexuality and that he had a positive working relationship with his colleagues. (JA 1177) Zarda conceded he got along well with all of his colleagues in 2009. (JA 1174) Zarda enjoyed working at Skydive Long Island until he broke his ankle in 2009, at which point, he stopped working on July 2, 2009. (JA 1175)

In 2010, Zarda confirmed he did not have any negative interactions with any of his coworkers and none of his co-workers brought up his

sexuality with the intent to hurt his feelings, or to be malicious. (JA 1178, JA 1315) Zarda testified that Ray Maynard was taking things out on him because his Workers' Compensation insurance went up drastically as a result of his claim for injury (JA 1312) and that being upset about the Workers' Compensation premium increasing and the complaints about were a possible basis for his termination. (JA 1313, JA 1314, JA 1316, JA 1325) That said, Zarda conceded he did not know what Maynard's motivation was for terminating him in 2010. (JA 1299)

Rosanna Orellana, the female tandem jump student who complained about Zarda's behavior, was called by Appellants to testify. She testified on direct examination that Zarda made a joke about her being strapped to another guy. "He made the joke. He said to my boyfriend, how do you feel that I'm strapped to your girlfriend or something along lines." (JA 1222) Ms. Orellana testified that Zarda whispered in her ear in a sensual manner. (JA 1232) On cross-examination, Orellana testified that the video introduced did not capture the entirety of the jump experience. (JA 1245) She testified that Zarda made her feel uncomfortable by, "whispering in my ear, so close in a sensual way. And after that he kept, you know putting his chin on my shoulder, which I found to be like, inappropriate." She

compared what she experienced to what she observed of her boyfriend's jump and testified that it made her "feel uncomfortable." (JA 1247) She also testified that Zarda put his hands on her legs and no other instructors behaved in such a manner. (JA 1247 - JA 1248) Orellana testified that Zarda made her feel uncomfortable and that his behavior was inappropriate. (JA 1249) Orellana testified that instead of discussing the geography of what they were hovering over under the parachute that Zarda "was talking about his personal life. I can't remember the whole conversation, but something about a break up with his, you know, significant other and how upset he was because they had broken up. That's - - that was the main conversation during that period of time." (JA 1253)

After the jump, Orellana discussed what transpired with her boyfriend. He also jumped on the day in question and they compared their respective experiences. At this point, Orellana expressed disappointment in her jump experience. (JA 1255 – JA 1256) On re-direct, Orellana testified that she expected Zarda "to do his job and talk about what he is supposed to talk about, which is the surrounding area." I'm not really, you know, a therapist, so if he wanted to talk about his personal life and his personal

problems in his life, he should find a more appropriate time to talk about it, not while we are free falling with my life in his hands." (JA 1262 – JA 1263)

David Kengle testified on direct examination that he complained to Maynard about Zarda's behavior with his girlfriend, Orellana. (JA 1405 – JA 1406, JA 1410) Kengle testified, "I don't remember exactly the conversation that we had. I made a complaint based on what I felt was inappropriate and the story that my girlfriend Rosanna gave me at the time. Exactly what I told him, I don't remember the details, but he did refer to his personal life, referenced his personal life in some capacity. I felt that added inappropriateness, and that was my complaint." (JA 1407) Kengle went on to explain that he complained about Zarda acting inappropriately in that he was flirtatious with Orellana, kept his hands on her hips, or thigh area throughout the jump, and was gesturing to his mouth. (JA 1410 – JA 1412)

On direct examination by Appellants' counsel, Maynard testified that Zarda made him aware of his sexual orientation at the time of his original hiring in 2001. (JA 1466). Maynard acknowledged that he received a complaint about Zarda from Kengle. (JA 1476) The complaint included that Orellana experienced touching that made her feel uncomfortable. (JA 1478)

Further, the complaint detailed inappropriate discussions between Zarda and Orellana that occurred during the fall from the plane. (JA 1482, JA 1543) Maynard testified that after he received the complaint, he started his investigation. (JA 1544) As part of his investigation, Maynard asked Zarda questions about the jump which he could not recall. He also testified that Zarda had a history of customer complaints and was spoken to twice before about these issues. (JA 1482) After Maynard viewed the videotape of the jump, its content corroborated the facts forming the basis of Kengle's complaint. (JA 1482, JA 1545)

Wayne Burrell testified that he was employed at Skydive Long Island for twenty-four (24) years as an instructor, and that he had worked with Zarda. (JA 1514) Burrell testified that he observed Zarda "being a little unprofessional, rude not talking to them, not being friendly" with female jumpers and that he had mentioned his observations to Maynard. (JA 1515 - 1516)

Duncan Shaw testified that he worked at Skydive Long Island for fifteen (15) years, and that he worked with Zarda. (JA 1575 - 1576) He testified that Zarda introduced himself to others as, "Gay Don" and frequently discussed his sexual orientation in front of co-workers and, at

times, went into detail about his relationships. (JA 1577, JA 1578 - JA 1580, JA 1586)

Curt Kellinger testified that he had worked at Skydive Long Island since 1992, up until a couple of years before his 2015 testimony. (JA 1626) Kellinger knew Zarda and was instrumental in his hire at Skydive. (JA 1627 - JA 1628) Kellinger testified that Zarda disclosed his sexual orientation to him at their first meeting. (JA 1628, JA 1629)

The trial resulted in a verdict for the Defense, with the jury finding that Zarda's sexual orientation was not the *but-for* cause of his termination.

ARGUMENT

1. TITLE VII DOES NOT EXTEND TO SEXUAL ORIENTATION.

The question of whether Title VII encompasses sexual orientation discrimination was previously addressed, at-length, on appeal. For sake of brevity, Appellees respectfully direct this panel to our arguments raised before the Second Circuit, all of which are attached hereto as SA 049. For all the reasons included therein, based upon the well-reasoned decision - in the face of facts far more compelling than any alleged here - issued in *Simonton*, we respectfully submit that this panel should find, as all of its sister courts (except the Seventh Circuit) have, that Title VII does not

ecompass sexual orientation discrimination. *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000).

2. THIS PANEL LACKS AUTHORITY TO RENDER AN ADVISORY OPINION.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (*citing DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation marks omitted); *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks omitted); *see, e.g., Summers v. Earth Island Institute*, 555 U.S. 488, 492–493 (2009)). To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, at 409 (emphasis added) (*citing Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010); *Summers*, at 493; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

As stated by the Supreme Court in *Chafin*:

> Article III of the Constitution restricts the power of federal courts to "Cases" and "Controversies." Accordingly, "[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the

> defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.*,494 U.S. 472, 477 (1990). Federal courts may not "decide questions that cannot affect the rights of litigants in the case before them" or give "opinion[s] advising what the law would be upon a hypothetical state of facts." *Ibid.* (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (*per curiam*); internal quotation marks omitted). **The "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate."** *Lewis*, 494 U.S., at 477 (emphasis added).

Chafin v. Chafin, 568 U.S. 165, 171–72 (2013).

Here, should the Court answer the question presented in the affirmative, no relief flows to Zarda. An affirmative answer does not revive any allegation contained within the pleadings, entitle Zarda to a new trial, or provide any actionable relief beyond advising that *Simonton* is no longer good law.

i. ADVISORY OPINIONS ARE IMPERMISSIBLE

It is well-settled that "a federal court has neither the power to render advisory opinions nor '**to decide questions that cannot affect the rights of litigants in the case before them**.'" *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (*quoting Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)); *see also U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508

U.S. 439, 446, (1993) ("federal court [lacks] the power to render advisory opinions") (emphasis added).

A decision of the issue presented before this *en banc* panel has no effect on "the rights of litigants in the case before them." *See Prieser*, at 401. Should this panel reach the appropriate conclusion that no relief flows from their finding of the question of law presented, then this panel must dismiss the appeal for lack of subject matter jurisdiction *ipso jure*.*See Jennifer Matthew Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 607 F.3d 951, 957 (2d Cir. 2010) (holding that there was "no basis upon which [the Court] can exercise jurisdiction" where any decision rendered would be advisory). While *Simonton* is undeniably outmoded, this panel cannot reach the merits of the appeal where no underlying jurisdiction exists.

ii. NO RELIEF FLOWS FROM THE COURT'S ANTICIPATED AFFIRMATIVE ANSWER

As stated above, should this panel ultimately rule in the affirmative, Zarda is still not entitled to any relief. Zarda's sexual discrimination claim arising under state law was previously defeated on the merits before a jury, and his purported Title VII sexual orientation discrimination claim was notplead at any time within the seven (7) years this case has been active

and pending: it was not charged within his EEOC filing (indeed, Zarda denied bringing a claim that he was discriminated on the grounds of his sexual orientation), nor plead in his Complaint, Amended Complaint, or Second Amended Complaint. (JA 065; SA 009; SA 021).

The first time a potential putative sexual orientation discrimination claim arising under Title VII materialized was in Zarda's motion for reconsideration of the District Court's dismissal of his gender stereotype discrimination claim. (JA 708; SA 035) It is a fundamental tenet of Federal Practice that motions for reconsideration are not the place for newly raised facts, issues, or arguments - let alone wholly new claims which are not alleged in any pleadings, **and expressly disavowed in an EEOC charge**. *See generally Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Stroh Companies, Inc.*, 265 F.3d 97, 115 (2d Cir. 2001) (*citing Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Corp.*, 948 F.2d 111, 115 (2d Cir.1991) (holding that predecessor to Rule 6.3 "preclud[es] arguments raised for the first time on a motion for reconsideration"), *cert. denied,* 504 U.S. 910, (1992); *Polsby v. St. Martin's Press,* 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) ("On such a [Local Rule 6.3] motion, a party may not advance new facts, issues, or

arguments not previously presented to the Court." (internal quotation marks omitted)).

Even assuming, *arguendo*, that a claim plead for the first time in a motion to reconsider could be properly considered by the District Court, Zarda's purported Title VII sexual orientation claim still fails to satisfy prerequisites necessary to advance such a claim in Federal Court. *Infra*, at 20. Consequently, we maintain that this panel is precluded from allowing Plaintiff-Appellant to bring forth an uncharged and unpled claim some seven (7) years after he expressly disclaimed its existence under penalty of perjury.

a. FILING AN EEOC CHARGE IS A MANDATORY PREREQUISITE TO PURSUING RELIEF UNDER TITLE VII.

It is well-settled that filing a timely EEOC charge is a precondition to filing a Title VII action before a District Court. *Chin v. Port Auth. of N.Y. & New Jersey*, 685 F.3d 135, 146 (2d Cir. 2012) ("As a prerequisite to filing suit under Title VII, a private plaintiff must first file a timely charge with the EEOC.") (*citing* 42 U.S.C. § 2000e–5(e)(1), (f)(1)); *Grimes-Jenkins v. Consol. Edison Co. of N.Y., Inc.*, 2017 WL 2258374, at *4 (S.D.N.Y. May 22, 2017), *report and recommendation adopted sub nom. SHERRY GRIMES-*

JENKINS, Plaintiff, v. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Defendant., 2017 WL 2709747 (S.D.N.Y. June 22, 2017); *see also Williams v. N.Y. City Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) (Exhaustion is ordinarily "an essential element" of a Title VII claim).

While filing an EEOC charge is a prerequisite to filing a claim in Federal Court, the Courts treat the requirement similarly to a statute of limitations; subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.")

However, since a Title VII sexual orientation discrimination claim was never brought by Zarda in the lower court proceedings, the doctrines of waiver, estoppel, and equitable tolling simply cannot apply here. Defendants-Appellees cannot be deemed to have waived their rights or be estopped from asserting a valid defense in response to a claim that, until an inappropriately argued motion for reconsideration, was never raised or plead.

The time in which Zarda can properly file a new or amended EEOC charge related to sexual orientation discrimination cannot be deemed equitably tolled."The doctrine of equitable tolling rests on the assumption that a statute of limitations will not run against a plaintiff unaware of her cause of action." *Semper v. N.Y. Methodist Hosp.*, 786 F. Supp. 2d 566 (E.D.N.Y. 2011) (denying equitable tolling and finding Plaintiff's Title VII claim time-barred for failure to file timely EEOC charge) (*citing Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir.1985) (internal citations omitted)). Here, Zarda was fully aware of his potential cause of action *and expressly denied* the existence of a sexual orientation discrimination claim.

As waiver, estoppel, and equitable tolling do not apply under the current circumstances, Zarda is barred from advancing a sexual orientation claim under Title VII where he has failed to file an EEOC charge alleging same. *Chin*, at 146; *Grimes-Jenkins*, at *4. Should this Court find that *Simonton* must be overturned, and Title VII prohibits sexual orientation discrimination, Zarda still lacks standing to bring his claim in the District Court.

Zarda's failure to properly plead a claim distinguishes the instant case from the facts of *Hively* – the very case upon which Zarda principally relies to support his contentions on appeal. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017). In *Hively*, an important event transpired, wholly distinct from the facts of this case - the Plaintiff properly raised her sexual orientation discrimination claim in her EEOC Charge:

> Believing that Ivy Tech was spurning her because of her sexual orientation, she filed a pro se charge with the Equal Employment Opportunity Commission on December 13, 2013. It was short and to the point:
>
> I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. **I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated.**

Hively, at 341 (emphasis added).

The *Hively* Plaintiff then received a notice of right to sue, filed her complaint in Federal Court, and was subject to a 12(b)(6) motion for dismissal, which was granted. *Hively*, at 345. Plaintiff then appealed her preserved issue of law upon which relief could be properly granted.

By way of contrast, in the instant case, Zarda expressly disavowed a claim of sexual orientation discrimination in his EEOC charge. (SA 003). Following receipt of his notice of right to sue from the EEOC, Zarda filed his complaint in Federal Court, which contained no allegation that he was in any way discriminated against because of his sexual orientation in violation of Title VII. (SA 009). Zarda failed to allege sexual orientation discrimination under Title VII in his Amended Complaint or Second Amended Complaint as well. (JA 065; SA 021). These facts are fatal to Zarda's stated position.

b. WHERE THERE EXISTS AN EXPRESS DENIAL OF A CLAIM WITHIN AN EEOC CHARGE, SUCH A CLAIM CANNOT BE REASONABLY RELATED TO THE CHARGE

When a claim is not raised within the four corners of an EEOC complaint, they may still be brought in in a Second Circuit Court if they are "reasonably related" to the claim filed with the agency. *Williams v. N.Y. City Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) ("Claims not raised in an EEOC complaint, however, may be brought in federal court if they are "reasonably related" to the claim filed with the agency") (*citing Butts v. City of New York Dep't of Hous. Pres. & Dev't*, 990 F.2d 1397, 1402 (2d Cir.1993),

superceded by statute on other grounds, Civ. Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071). Zarda does not qualify for this exception to the rule requiring administrative exhaustion.

Three scenarios exist in which the Second Circuit has recognized uncharged claims to be "reasonably related":

a) "if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made";

b) a claim "alleging retaliation by an employer against an employee for filing an EEOC charge"; and,

c) a claim where the plaintiff "alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge."

Williams, at 70 (2d Cir. 2006) (*citing Fitzgerald v. Henderson*, 251 F.3d 345, 359–60 (2d Cir.2001) (internal quotation marks omitted); *Williams*, at FN 1 (*citing Butts*, at 1402-3). Since Zarda does not allege retaliation or further incidents of discrimination, "b)" and "c)" above cannot apply. Turning the panel's attention to Zarda's sole remaining ground to allege that an uncharged Title VII claim was "reasonably related" to his filed EEOC complaint, "a)" listed above, current case law dictates that Zarda's sexual orientation claim cannot fall within this exception.

In determining "if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made," "[t]he central question is whether the complaint filed with the EEOC gave that agency 'adequate notice to investigate discrimination on both bases.'" *Williams*, at 70 (*citing Fitzgerald*, at 359-60; *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003) (*quoting Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 637 (9th Cir. 2002))) (emphasis added); *see also Carter v. New Venture Gear, Inc.*, 310 F. App'x 454, 458 (2d Cir. 2009) (EEOC charge not "sufficiently related" as "[t]he EEOC was [] not "on notice" of [Plaintiff]'s gender-based complaints).

Importantly, The "reasonably related" exception to the exhaustion requirement " 'is essentially an allowance of loose pleading' and is based on the recognition that 'EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC to the discrimination that a plaintiff claims [he] is suffering.' *Williams*, at 70 (2d Cir. 2006) (*citing Butts*, at 1402). This concern for those acting without the aid of an attorney is inapplicable here. Zarda's

EEOC charge was prepared with the aid of his attorney, Gregory Antollino, who notarized the document. (SA 006).

Zarda's EEOC charge failed to give the agency "adequate notice to investigate discrimination on both bases." *Williams*, at 70; *Deravin*, at 201. Zarda expressly stated that "I am not making this charge on the grounds I was discriminated against on the grounds of my sexual orientation." (SA 003) (emphasis in original); *compare* with *Hively*, at 341 ("I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under Title VII of the Civil Rights Act of 1964 were violated"). Indeed, and perhaps not surprisingly, a review of Second Circuit precedent yields no reported instance of a Plaintiff expressly denying a claim within their EEOC charge and subsequently attempting to plead the very same claim.

The "primary purpose [of EEOC charge] is to alert the EEOC to the discrimination that a plaintiff claims [he] is suffering." *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003) (*citing Butts*, at 1402. Here, and in contrast to *Hively*, Zarda expressly disclaimed a charge of sexual orientation

discrimination in his EEOC charge. It would both defy logic and reason to accept such a denial as placing the EEOC on notice.

We respectfully maintain this panel should be hesitant about setting binding Circuit precedent that Plaintiffs are permitted to expressly deny a claim exists in the content of an EEOC charge, only to reverse course and later allege the same. Such a holding would be incongruous with the legislative mandate of the EEOC and the statutory requirements of Title VII.

c. AN AFFIRMATIVE ANSWER OVERTURNS A DECISION BY THE LOWER COURT WITHOUT CONSEQUENCE

In the unlikely event this panel deems a sexual orientation discrimination claim to be reasonably related to Zarda's EEOC charge - despite the express denial discussed *supra* - the fact remains that Zarda's Complaint, Amended Complaint, and Second Amended Complaint are each devoid of any allegation Zarda was discriminated against based upon his sexual orientation in violation of Title VII. (JA 065; SA 009; SA 021) The first time any allegation of sexual orientation discrimination under Title VII surfaced was within Zarda's motion to reconsider. (JA 708)

Again, Zarda based that motion to reconsider upon the EEOC's decision in *Baldwin v. Foxx*, Appeal No.: 0120133080, in which the agency found that sexual orientation discrimination is sex discrimination. Tellingly, Zarda began his memorandum of law in support with the following: "You can be the first judge to hold that Title VII protects sexual orientation discrimination." However, the Title VII claim that the Judge had previously dismissed was a sexual stereotype claim, not a sexual orientation discrimination claim. (JA 699) On October 13, 2015, the District Court Judge denied Plaintiff's motion to reconsider relying upon the law as it stood under *Simonton*, without addressing the issue that Plaintiff was attempting to revive a claim that was never plead. (JA 716) Should this panel find in the affirmative on the legal question presented, overturning the District Court's denial of Zarda's motion to reconsider, Zarda is still precluded from raising a claim never charged before the EEOC, never plead within any of his three (3) Complaints, and only raised (improperly) within the aforementioned motion.

iii. THE ESTATE LACKS STANDING TO INITIATE A TITLE VII ACTION ON BEHALF OF ZARDA

Absent some specific direction by Congress, whether an action created by federal statutory law survives the death of the plaintiff is a matter of federal common law. *Estwick v. U.S.Air Shuttle*, 950 F. Supp. 493, 498 (E.D.N.Y. 1996) (*citing Asklar v. Honeywell, Inc.*, 95 F.R.D. 419 (D.Conn.1982); *see also Khan v. Grotnes Metalforming Systems, Inc.*, 679 F.Supp. 751 (N.D.Ill.1988); *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407 (7th Cir.1980), rev'd on other grounds sub nom. *Pridegon v. Gates Credit Union*, 683 F.2d 182 (7th Cir.1982); *see also Acebal v. United States*, 60 Fed. Cl. 551, 555 (Fed. Cl. 2004) ("In the absence of a specific statutory provision, courts have looked to federal common law to determine whether an action created by federal statute survives the death of a party").

Federal common law has long recognized that actions which are penal in nature do not survive the death of a party.*Id.* Title VII has been held to be remedial in nature, and therefore an action can survive the death of the Plaintiff. *Id.* (*citing Asklar*, at 423; *Khan*, at 755).

So, a Title VII claim where the Plaintiff later dies during the proceedings may survive. The next logical question is: where, as

applicable here, a Plaintiff *has not* charged a Title VII claim before the EEOC prior to his death[2], does federal common law allow his Estate to pursue such a claim?

The answer is "no." Federal common law contains no such provision allowing an estate to initiate a Title VII claim. The EEOC has held that an Estate is entitled to maintain a previously filed charge, but not initiate one on behalf of the deceased. *Estate of Donnie Powell, Complainant*, EEOC DOC 01991835, 2001 WL 135460, at *1 (Feb. 6, 2001) ("complainant's spouse, as complainant's personal representative, does not have standing to initiate the EEO process on behalf of her deceased husband."); *Estate of Yao Hu, Appellant*, EEOC DOC 01961473, 1996 WL 657792, at *1 (Nov. 6, 1996) ("While... federal employee's EEO complaint survives the death of the complainant in certain instances, the complaint in this case was not initiated by the employee but by his estate") (*comparing Margaret Hanley v. Department of Veterans Affairs*, EEOC Appeal No. 01890296 (April 11, 1989) ([Plaintiff] passed away after the filing of her complaint and the

[2] As noted, *supra*, Zarda expressly disavowed any claim of sexual orientation discrimination in his EEOC Charge. Further, Zarda's Complaint, Amended Complaint, and Second Amended Complaint are each devoid of a sexual orientation discrimination charge under Title VII. (JA 065; SA 003; SA 009; SA 021)

Commission allowed her daughter and other heirs to continue to pursue the complaint on her behalf).

While the issue itself only been sporadically presented, Federal Courts have found that when a Plaintiff passes away during the pendency of a *previously filed* claim, the Title VII action survives. A ***pending***Title VII action may be maintained by a deceased claimant's estate. *Wright ex rel. Wright v. United States*, 914 F. Supp. 2d 837, 841 (S.D. Miss. 2012) (The numerous courts that have considered whether a Title VII cause of action survives the death of the employee have consistently held that a Title VII cause of action that has been ***commenced prior to the employee's death*** survives the employee's death; collecting cases) (emphasis added); *Slade for Estate of Slade v. U.S. Postal Serv.*, 952 F.2d 357, 360 (10th Cir. 1991) (holding that ***pending*** Title VII claim survived the plaintiff's death and substituting the plaintiff's wife as plaintiff) (emphasis added); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 876 (11th Cir.1986) (holding that a ***pending*** action under Title VII survives under both federal common law and state law and that husband was properly substituted as plaintiff for his deceased wife) (emphasis added) (citing *James v. Home Constr. Co. of Mobile*, 621 F.2d 727, 729–30 (5th Cir.1980)); *Bligh–Glover v. Rizzo*, 2012 WL 4506029, *1 (N.D.Ohio

Sept.30, 2012) (finding that plaintiff's ***pending*** Title VII cause of action survived his death) (emphasis added); *Estate of Trivanovich v. Gulfport-Biloxi Regional Airport Auth.*, 2008 WL 2779441, *2 (S.D.Miss. July 14, 2008) (finding that ***pending*** Title VII claim survived under either state or federal law and noting that Estate was substituted as plaintiff) (emphasis added).

In accord with the EEOC findings *supra*, Federal Courts which have considered the issue have found that "a Title VII cause of action survives the employee's death and may be brought by the personal representative of the employee's estate where the employee died ***after initiating***an administrative complaint for discrimination." *Wright ex rel. Wright*, at841 (emphasis added) (*citing Weeg ex rel. Weeg v. Ortiz and Associates, Inc.*, 556 F.Supp.2d 1188 (D.Or.2008) (finding that court had jurisdiction over Title VII cause of action where employee ***died after filing EEOC charge*** but before suit and employee's estate completed exhaustion of administrative remedies begun by employee) (emphasis added); *Estwick v. U.S. Air Shuttle*, 950 F.Supp. 493, 498-99 (E.D.N.Y.1996) (finding that Title VII actions survived and wife had standing to file Title VII action after her husband ***died prior to EEOC's finding on husband's charge of discrimination***) (emphasis added); *Pueschel v. Veneman*, 185 F.Supp.2d 566, 571-572

(D.Md.2002) (holding that Title VII claim pressed by personal representative of deceased former employee may be adjudicated ***if employee effectively exhausted her administrative remedies*** and neither party is unfairly prejudiced by employee's death) (emphasis added).

This brings us to the crux legal principle which applies here: ***no Federal Court, panel, judge, magistrate, administrative law judge, or agency has ever found an Estate may raise a new Title VII claim on behalf of a deceased Complainant which the deceased Complainant did not himself raise.*** *See Wright ex rel. Wright v. United States*, 914 F. Supp. 2d 837, 842 (S.D. Miss. 2012)("While a complaint initiated by a federal employee may survive her death, the estate of that employee has no right to file a complaint") (*quotingPueschel*, at 571); (*citing Estate of Yao Hu v. Marvin T. Runyon, Jr., Postmaster General, United States Postal Agency*, 1996 WL 657792 (E.E.O.C. Nov. 6, 1996) (holding that widow could not file discrimination claim on behalf of deceased husband where employee died before initiating complaint)).

Zarda did not raise a claim of sexual orientation discrimination under Title VII in his EEOC charge, his Complaint, his Amended Complaint, or his Second Amended Complaint. Should this panel find in the affirmative

on the lone question of law presented, Zarda's estate can obtain no relief, because they may not raise a Title VII claim, for the first time, which Zarda himself did not allege.

CONCLUSION

Zarda failed to allege a sexual orientation discrimination claim arising under Title VII in either his EEOC charge or any pleading before the District Court. No Judge issued a decision which in any way precluded Zarda from doing so. These facts distinguish the instant case from *Hively* and are fatal to Zarda's appeal.

Should this *en banc* panel find that *Simonton* and its progeny should be overturned, such a decision will not afford Zarda any relief. As the Supreme Court has repeatedly held in interpreting Article III of the Constitution, Federal courts may not "decide questions that cannot affect the rights of litigants in the case before them" or give "opinion[s] advising what the law would be upon a hypothetical state of facts." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice,* 404 U.S. 244). Since this panel lacks jurisdiction sufficient to render a constitutionally valid decision, this panel must dismiss Zarda's appeal.

Dated: Bohemia, New York
July 28, 2016

ZABELL & ASSOCIATES, P.C.
Counsel for Appellees

By: _____ Digitally signed by Saul D. Zabell Date: 2017.07.28 09:16:33 -04'00'

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CERTIFICATE OF COMPLAINCE PURSUANT TO FRAP 32(a)

Pursuant to Rule 32(a)(7)(B) of the Rules of Appellate Procedure (Second Circuit), the attached brief contains 7,139 words.

Digitally signed by Saul D. Zabell
Date: 2017.07.28 09:16:54 -04'00'

Saul D. Zabell (SZ 2738)
Dated: July 28, 2017