

STATE OF NEW YORK        )  
  ) SS.:  
COUNTY OF NEW YORK     )

(1) I make this declaration, under penalty of perjury, in support of plaintiff's motion to deem my report and testimony admissible at the trial in Zarda v. Altitude Express. The report is attached as "Exhibit A." I am familiar with the Zarda case, having reviewed the complaint, most of the depositions, and pertinent electronic recordings. I offered two opinions—first, that Mr. Donald Zarda was subjected to stereotyping on the basis of sex, and second, that Mr. Zarda was subjected to stereotyping on the basis of sexual orientation. Although I am a law professor, I offered these opinions as an expert in gender and sexual orientation identity rather than as an expert in the pertinent law. My report offers no legal analysis or ultimate conclusions—I fully realize that such matters must be left to the Court and the legal process. My c.v. is attached as "Exhibit B."

(2) I have learned through plaintiff's counsel, Mr. Gregory Antollino, that defense counsel Mr. Saul Zabell referred to my report at the last court hearing as "an amicus brief by some eminent law professor." While I am flattered to be referred to as "eminent," I would respectfully observe that Mr. Zabell's statement mischaracterizes my expert report. Having worked on many amicus briefs, I can assure the Court that my report bears no resemblance to any amicus brief to which I have ever contributed. Again, I did not submit the report to urge a legal conclusion on the Court, but rather to highlight the social frameworks through which stereotyping on

the basis of sex or sexual orientation occur. In my view, the general population often overlooks these stereotypes because they remain so deeply engrained in our social life, much as racial stereotypes were deeply engrained before the civil-rights movement (and, to a great extent remain deeply engrained in our social life today).

(3) While relatively new, Gender and Sexuality Studies is now firmly established as a field. For instance, all eight Ivy League colleges offer tracks in this discipline.<sup>1</sup> In his deposition of Mr. Zarda, Mr. Zabell referred to himself as a “Civil Rights Attorney.” Zarda Deposition at 237. I would therefore be surprised if he would assert that these civil-rights subjects are illegitimate subjects of academic inquiry.

(4) Having expertise in the law does not preclude an individual from having expertise in a non-legal field. To the contrary, I would point the Court to the many law professors who are experts in Gender and Sexuality Studies—including Catharine A. MacKinnon, a professor at the University

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<sup>1</sup> (1) Brown, Gender and Sexuality Studies,

<http://pembrokecenter.org/instruction/index.html>;

(2) Columbia, Women’s and Gender Studies, <http://www.gs.columbia.edu/major-title?majorid=1857>;

(3) Cornell, Lesbian, Gay, Bisexual, and Transgender Studies, <http://www.arts.cornell.edu/lgbt/>;

(4) Dartmouth, Lesbian, Gay, Bisexual, and Transgender Studies, [http://www.dartmouth.edu/~wstudies/requirements/wgst\\_requirements.html](http://www.dartmouth.edu/~wstudies/requirements/wgst_requirements.html);

(5) Harvard, Women, Gender, and Sexuality Studies, <http://wgs.fas.harvard.edu/icb/icb.do?keyword=k53419&tabgroupid=icb.tabgroup88762>;

(6) Princeton Gender and Sexuality Studies, <http://www.princeton.edu/~gss/undergraduate/undergraduate.html>;

(7) University of Pennsylvania, Gender, Sexuality, and Women’s Studies, <http://www.sas.upenn.edu/gsws/content/major-gender-sexuality-and-womens-studies>;

(8) Yale, Lesbian, Gay, Bisexual, and Transgender studies track within the Gender Studies major, <http://www.yale.edu/lgbts/undergrad.html>.

of Michigan Law School who is an expert on sexual harassment; Joan C. Williams, a professor at U.C. Hastings who is an expert on how women negotiate work-life balance; and William N. Eskridge, a professor at Yale Law School who is a nationally renowned expert in gay rights. Experts should be excluded for having too little knowledge, not too much. It would be a mistake to declare that Professor MacKinnon is not a major feminist thinker because she is also a lawyer.

(5) Let me now turn to my own background in Gender and Sexuality Studies.

I have written, taught, and spoken on gender and sexuality issues for fourteen years as a professor whose main field is civil rights and liberties. My major work in this discipline was my book Covering: The Hidden Assault on our Civil Rights (2006), which largely focuses on gender and sexuality. Covering won multiple (non-legal) awards, including the Randy Shilts Award for Gay Non-Fiction, the American Library Association's Stonewall Honor Book Award, and the Myers Outstanding Book Award from the Gustavus Myers Center for the Study of Bigotry and Human Rights. I have given sixty lectures on Covering (all listed in my c.v.) to colleges, civic groups, corporations, and other institutions. Covering has also been assigned as the "first-year book" to be read by all incoming students on four campuses (University of North Carolina, Pomona, Virginia Commonwealth University, and Western Connecticut State University).

(5) The thesis of Covering is directly relevant to this case. The term

comes from the sociologist Erving Goffman's work on stigma. See Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963). Goffman states that "persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep that stigma from looming large." Id. at 102. Goffman calls the effort to downplay a known stigmatized identity "covering." "Covering" differs from "passing" in that covering entails the effort to downplay a known identity, while passing entails the effort to mask the identity altogether. I extend and apply Goffman's theory to sexual orientation, noting that even "out" gay individuals often cover along four axes: appearance, affiliation, activism, and association. Yoshino, 79-91. To take a simple and pertinent example, many individuals who are openly gay still do not disclose through speech or actions that they have a same-sex partner. Id. at 102. As such, "covering," like "passing," suppresses gay identity through coerced conformity. I believe that the pressure on gay individuals to cover, like the pressure to pass, often stems from conscious or unconscious anti-gay animus exhibited by those around them.

(6) My opinion that Mr. Zarda was pressured to "tone down" his sexual orientation meets all the factors set forth in Daubert v. Merrell Dow Pharmaceuticals, 509, U.S. 579 (1993). First, I believe the opinion is relevant to the question of whether Mr. Zarda was subjected to a double standard on the basis of sexual orientation. I opine that Mr. Raymond Maynard, the defendant in this case, imposed demands on Mr. Zarda to

downplay his sexual orientation that he did not impose on Mr. Zarda's heterosexual colleagues.

(7) According to one account, Mr. Zarda was terminated simply for self-identifying as gay. If Mr. Zarda was terminated for merely stating that he was gay to Ms. Orellana, Mr. Maynard punished him for failing to pass. Mr. Maynard's heterosexual employees would not be required to pass in this way, as the presumption is that all individuals are heterosexual. I will not spend much time elaborating on this double standard, as I believe it is self-evident. If two groups are defined by the same trait, but only one is permitted to self-identify, that is a paradigm case of differential treatment. If, for instance, an employer permitted Christians to say they were Christians, but prohibited Jews to say they were Jews, that would be a manifest double standard with respect to religion.

(8) According to another account, Mr. Zarda was terminated not for stating that he was gay but for stating that he had just ended a relationship with another man. If Mr. Zarda was terminated not for self-identification but for disclosing his relationship with another man, Mr. Maynard punished him for failing to cover (for failing to downplay a known identity). It appears from my review of the record that this is the account that originated with Ms. Orellana and which reached Mr. Maynard through Ms. Orellana's boyfriend Mr. Kengle.

(9) While slightly more subtle, termination on this ground also represents a double standard. An employer cannot defend himself by saying he knew

of Mr. Zarda's sexual orientation, as the question relates to the differential treatment of two employees whose sexual orientations were both known. Mr. Zarda was punished for what is sometimes called "flaunting" his sexual orientation. For instance, Mr. Maynard characterized Mr. Zarda as having spoken about his "escapades" to Ms. Orellana. However, all Mr. Zarda had done (taking Ms. Orellana's recollection to be true) was to mention that he had just ended a long-term relationship. A straight individual who made a similar statement would not be seen as "flaunting" his sexual orientation; further, the word "escapade," would not be used to describe his long-term relationship. Indeed, Mr. Zarda's straight colleague Mr. Richard Winstock testified that he discussed his marriage with several clients without suffering any negative consequences.

(10) I believe that true equality between gay and straight individuals will not be achieved if gay individuals are forced to downplay aspects of their lives that straight individuals may articulate with impunity. I realize that not everyone takes this view, as shown in this lawsuit. For precisely this reason, I believe my report and testimony would be relevant to the ultimate determination of this point by the Court and by the jury.

(11) Second, my opinions rely "on a reliable foundation." The methodology related to covering is simple. It asks whether individuals in a subordinated group are pressured to downplay their identities in a way that the dominant group is not. To take an example from the sex/gender context, consider how women experience more pressure than men to

downplay their status as parents in employment contexts. As I note in my book, sociologist Arlie Hochschild “describes how women cover by downplaying their child-care responsibilities, by building up stores of goodwill before having a child, or by not displaying photographs of their children at work.” Yoshino, at 151. Men are much less likely to experience this pressure, because men have not traditionally been associated with the care of children. Therefore, a man who discusses his children in the workplace is less likely to be seen as a less committed employee.

(12) Third, the theory of covering—that individuals in stigmatized groups are routinely asked to downplay their identities—meets the Daubert standards of a scientific theory: it is empirically testable, it has been subjected to peer review and publication, it has a known or potential error rate, it has standards and controls concerning its operation, and it has been generally accepted by the relevant community. I will canvas each factor in turn.

(13) The costs of failing to cover or to pass have been subjected to empirical testing. As I observe in Covering:

Economics professors Marianne Bertrand and Sendhil Mullainathan conducted a study in 2002 in which they sent out résumés that were identical except for the names at the top. Half the names were distinctly “white-sounding” names like Emily Walsh or Greg Baker, while the other half were distinctly “African-American-sounding”

names like Lakisha Washington or Jamal Jones. The “white” résumés received 50 percent more callbacks from employers than the “African-American” ones. Yoshino, at 137. In other words, these economists described a hiring penalty for individuals who failed to cover by adopting white-sounding names. The effect was not only quantifiable, but also, at 50 percent fewer callbacks, significant.

(14) The theory of covering has also been subjected to peer review. My book won the awards described above. Moreover, a scholarly version of *Covering* was published in a leading law review. See Kenji Yoshino, *Covering*, 111 Yale L.J. 769 (2002). While students administer law reviews, they routinely ask for faculty review as part of their selection process. The article version of *Covering* was also subjected to peer review when it won the Dukeminier Award for the best article on sexual orientation and gender identity published by a law review that year. See <http://williamsinstitute.law.ucla.edu/dukeminier-awards-past-volumes/>.

(15) The theory’s known or potential error rate is also discernible. I acknowledge that sometimes individuals do not cover, or even experience pressure to “reverse cover”—“to act according to the stereotypes of their group.” Yoshino, at 23. However, as I note in my book, “reverse covering” demands are extremely rare in the sexual orientation context. Yoshino, at 93. Moreover, studies such as the one conducted by Bertrand and Mullainathan show that individuals in minority groups are much more likely, on net, to experience the pressure to cover than to reverse cover.

(16) Standards and controls concerning the operation of this theory exist and are maintained. Again, the theory only requires a pair-wise comparison between the subordinated and the dominant group. In this case, the question would be whether employers who purport to treat individuals equally regardless of sexual orientation nonetheless punish a gay person more than a straight person when both speak about their identity and relationships. That comparison is easy to administer, as evidenced in this case.

(17) This theory and technique are also accepted by a relevant community. Erving Goffman introduced the theory of covering to the sociological community in 1963. See Goffman, at 102. My book expounds on his insight by applying it to groups such as racial minorities, women, gay individuals, individuals with disabilities, and religious minorities. In all these contexts, examples exist where members of these groups experience pressure to “cover” their outsider status. While not always identified as the pressure to “cover,” the demand to downplay a stigmatized trait is well-documented in all these groups. For instance, individuals with disabilities experience pressure to forgo the paraphernalia (wheelchairs, canes) that permit them to function and religious minorities experience pressure to eschew open symbols of their faith.

(18) Therefore, it is more likely than not that my methods are reliable and reliably applied to the facts at hand.

- (19) My report also contends that Mr. Zarda was a victim of sex stereotyping. It maintains that individuals are subjected to sex stereotyping when an individual assumes that an individual's membership in a group (*X* is a man) means that the individual will behave in a certain manner (*X* is more likely to harass a woman). Here, Mr. Maynard engaged in exactly this leap in terminating Mr. Zarda—he credited Mr. Kengle's statement that Mr. Zarda had made inappropriate sexual advances on Ms. Rosana Orellana (advances she described as "sexual harassment") without any intervening investigation.
- (20) The theory of sex stereotyping is relatively more familiar than the covering theory. I therefore will pass it through the Daubert factors in a more abridged fashion. I am confident that this theory also meets the Daubert factors.
- (21) The theory of sex stereotyping is relevant to this case because Mr. Maynard terminated Mr. Zarda in part due to one second-hand allegation of sexual harassment. Mr. Maynard made no attempt to explore or investigate the veracity of this allegation. Moreover, Mr. Maynard's assumption that Mr. Zarda had sexually harassed an individual of the opposite sex was counterintuitive given that Mr. Maynard knew Mr. Zarda was gay. The unwarranted nature of the assumption strongly suggests that Mr. Maynard was influenced by sex stereotyping. The fact that Mr. Zarda was male and that Ms. Orellana was female appeared to overwhelm

all other contrary pieces of evidence. The possibility of sex stereotyping is clearly relevant to this case.

(22) The theory of sex stereotyping is also reliable, given that it only requires a factfinder to ask if the same assumptions would be made of an individual of the opposite sex. Here, the question is whether Mr. Maynard would have credited a female client who argued that a lesbian instructor had sexually harassed her boyfriend without engaging in any serious exploration regarding the veracity of the charge.

(23) Finally, I need not belabor the point that the sex stereotyping theory meets the Daubert standards of a scientific theory: it is empirically testable, it has been subjected to peer review and publication, it has a known or potential error rate, it has standards and controls concerning its operation, and it has been generally accepted by the relevant community. Sex stereotyping is such a common concept that entire journals view it as part of their core mission to publish peer-reviewed, empirical articles on the subject. *See, e.g., Sex Roles: A Journal of Research*, <http://www.springer.com/psychology/personality+%26+sócial+psychology/journal/11199> (noting in mission statement that the journal seeks to illuminate “gender stereotypes”).

(24) In questioning why Mr. Zabell objected to my expert report as “an amicus brief,” I can only assume that he is fixing on my report’s one citation to a legal case regarding the sex stereotyping theory. See

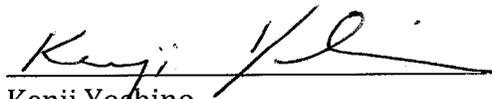
Sassaman v. Gamache, 566 F.3d 307 (2nd Cir. 2009). In that case, the Court found that an employer's termination of a male employee on the basis of a single sexual harassment charge against him could reflect sex stereotyping when the employer had made no attempt to investigate the veracity of the charge. I did not invoke this case as a controlling legal authority, but rather as a sociological example of how pervasive such stereotyping can be. Sex stereotyping can be found in law just as it can be found in psychological or sociological studies.

(25) Therefore, it is more likely than not that my methods are reliable and reliably applied to the facts at hand.

(26) Finally, days after I tendered my report on this case to plaintiff's counsel in late May, I received the subpoena attached hereto as "Exhibit C." The deposition was to occur on July 11, 2012. I was already committed to teach for a week at the European University Institute from July 4 to July 10. Through Mr. Antollino, I attempted to get that day moved forward by one day, but I was informed that Mr. Zabell could not accommodate me. I thereupon immediately began preparing for the deposition. On June 5, Mr. Zabell cancelled the Deposition. I billed the hours that are attached hereto as "Exhibit D." I will leave Mr. Antollino to argue the law as it pertains to compensation of an expert's preparation for a deposition. I am informed that my billing rate of \$400 an hour is reasonable for my level of expertise and in this area of the country. Ultimately, I believe that the defense should compensate me for work that I performed to defend my

expertise, which I would not have done if (a) Mr. Zabell had not made known his desire to depose me; and (b) Mr. Zabell had not further made known his unwillingness to adjourn the deposition from June 11. Because preparation after June 5 was not done in preparation for the proposed Deposition, I have billed those hours to my retaining attorney, Mr. Antollino.

Dated: New York, New York  
July 18, 2012

  
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RE: Zarda v. Altitude Express

May 17, 2012

Dear Mr. Antollino:

You have asked me to render a written opinion with respect to the above-mentioned employment discrimination case. With this report, I enclose my curriculum vita. I have not previously been deposed or testified as an expert. The fee for my services is \$400 per hour.

As my vita indicates, I have done significant research in the field of civil rights, particularly focusing on gay identity and gender identity. One of my contributions to the field is the book *Covering: The Hidden Assault on Our Civil Rights*, published in 2006. This book received numerous awards, including the Randy Shilts Award for Gay Non-Fiction; the Myers Outstanding Book Award from the Gustavus Myers Center for the Study of Bigotry and Human Rights; and the Stonewall Honor Book Award. The book has been assigned as a “first-year common read” book at four campuses, meaning that it has been read by all incoming freshmen at those colleges. My work on civil rights has also been published in the *Columbia Law Review*, the *Harvard Law Review*, the *Stanford Law Review*, and the *Yale Law Journal*. I have also published in more popular venues, such as the *L.A. Times*, the *New York Times*, and the *Washington Post*. One major theme throughout my work is that law’s contribution to civil rights must be complemented by sociological, psychological, and cultural perspectives. I focus a great deal on non-legal disciplines in my work, as my book *Covering* exemplifies.

To prepare this report, I relied on the following materials: (1) the video record of the skydiving jump in question; (2) the audio record of Raymond Maynard’s termination of Donald Zarda; (3) the Amended Response to Demand for Interrogatories, dated April 7, 2011; the deposition transcript of the testimony of Rosana Orellana, dated November 9, 2011; (4) the deposition transcript of the testimony of David Kengle, dated November 9, 2011; (5) the deposition transcript of the testimony of Richard M. Winstock, dated December 8, 2011; (6) the deposition transcript of the testimony of Raymond Maynard, dated December 14, 2011; and (7) the Supplemental Reponse to Demand for Interrogatories, dated January 31, 2012.

## Background

Donald Zarda, a skydiving instructor, was terminated by his employer, Raymond Maynard of Altitude Express, Inc. (doing business as Skydive Long Island). Maynard ended Zarda's employment after receiving a complaint from David Kengle, the boyfriend of one of Zarda's passengers in a tandem jump. The passenger, Rosana Orellana, made two complaints about Zarda to Kengle. She alleged that (1) while preparing for the jump in the plane, Zarda touched her hip and rested his head on her neck in a manner that led her to believe he was "sexually harassing" her, Orellana Deposition at 89; and (2) during the jump, Zarda stated that he was gay and that he had recently ended a relationship with another man. Kengle repeated these complaints to Maynard. Maynard terminated Zarda on these grounds.

## Opinion

Based on my review of the above-mentioned materials, I am of the opinion that the Raymond Maynard's termination of Zarda was based on both sex stereotyping and disparate treatment on the basis of sexual orientation.

1. The immediacy with which Maynard credited the harassment allegation reflects sex stereotyping

As psychology professor Madeline Heilman defines it: "A stereotype is a set of attributes ascribed to a group and believed to characterize its individual members simply because they belong to that group. In the case of sex stereotypes, these are attributes which are imputed to individual men and women simply by virtue of their sex." Madeline E. Heilman, Sex Discrimination and the Affirmative Action Remedy: The Role of Sex Stereotypes, in Women in Corporate Management 877, 879 (1997). Heilman elaborates: "Stereotyping is at its core a categorization process, and can be a work-saving cognitive mechanism . . . . The problem is that stereotypes about groups of people often are inaccurate or they are overgeneralizations which do not apply to the individual group member who is targeted." Id. In those cases, "stereotypes become the basis for faulty reasoning, leading to biased feelings and actions, disadvantaging (or advantaging) others not because of what they are like or what they have done but because of the groups to which they are deemed to belong." Id.

The assumption that all men will be sexually attracted to women, and prone to sexually harassing them, is a sex stereotype. In Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009), the Second Circuit acknowledged that a heterosexual individual terminated for alleged sexual misconduct had a viable claim of discrimination based on sex stereotyping. In that case, the employer David Gamache terminated employee Carl Sassaman after a woman accused Sassaman of sexual harassment. In terminating Sassaman, Gamache stated: "you probably did what she said you did because you're male." Id. at 313 n.3. The court observed that "Gamache appears to have defended his decision to credit [the complainant] Brant's allegations of sexual harassment by pointing to the propensity of men, as a group, to sexually harass women. When employment decisions are based on invidious sex stereotypes, a reasonable jury could infer the existence of

discriminatory intent.” *Id.* at 313. The court also noted that “[t]he allegation that defendants made minimal—if any—efforts to verify Brant’s accusations could be construed by a reasonable jury as further evidence that Sassaman’s forced resignation occurred under circumstances giving rise to an inference of discriminatory intent.” *Id.* at 314.

In this case, employer Maynard terminated Zarda with similarly minimal efforts to assess the accusations against Zarda, raising the inference that he engaged in sex stereotyping. Maynard accepted Kengle’s account of the jump in an uncritical manner.<sup>1</sup> In describing his termination of Zarda, Maynard testified: “We discussed the complaint from the gentleman about his girlfriend and that he made his girlfriend feel very uncomfortable with the way he was touching her on her legs, the way he was putting his head on her shoulder and just the girl was very, very uncomfortable for the entire jump and she even thought that maybe he was hitting on her and he was covering up this stuff by telling her that he was gay.” Maynard Deposition at 196. Yet Maynard made no attempt to investigate this charge either with Orellana or with instructors on the plane who were witnesses to the interchange between Orellana and Zarda. *Id.* at 198-99. For at least three reasons, the claim that Zarda made sexual advances on Orellana is difficult to credit. In light of those reasons, the swiftness with which Maynard jumped to the conclusion that Zarda had made those advances reflects sex stereotyping on Maynard’s part.

First, even assuming that Zarda touched Orellana’s hips and placed his head on her shoulder, such actions were professionally justified by the need to ensure the safety of Orellana and Zarda. Richard M. Winstock, Chief Instructor for Altitude Express, testified that both actions are standard procedures for tandem jumps. Winstock observed: “If I were to ask a tandem student to put a harness on while I held it, they would basically just step into two round circles. I would pull it up to their inner groin or thigh and tighten the straps.” Winstock Deposition at 15. Winstock further testified that skydiving requires the instructors to put their heads very close to the heads of their passengers: “You’re strapped pretty closely. I can say that some instructors prefer the head—the passenger’s head on the left side, some prefer it on the right side.” *Id.* at 50. He continued: “Virtually no instructors that I know of like it right in front of them, and the reason for that is when the parachute opens, the head can literally knock you out or crack your teeth. Usually the passengers’ head is to the right or left. When that happens, it causes you to put it a little closer to their head.” *Id.*

Maynard himself acknowledged that an instructor would have to touch a passenger on the hips and to hold his head close to the passenger’s head. After establishing that an instructor was “attached” to the passenger at the hips, plaintiff’s counsel asked whether safety would require the instructor “to touch the attachments and see that they were in place.” Maynard Deposition at 251. Maynard responded “Correct.” *Id.* After reviewing Winstock’s testimony about head position, plaintiff’s counsel asked: “And so, therefore, would it be a fair statement that the mouth is very close to the ear on a tandem jump with a passenger and an instructor?” Maynard Deposition at 259. Maynard responded: “At times.” *Id.*

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<sup>1</sup> Maynard relied on Kengle’s account of the jump without making any effort to verify Orellana’s accusations. Maynard Deposition at 185. When asked whether Kengle could have been lying to get a refund on his jump, Maynard responded that Kengle had “no reason to lie.” *Id.* However, when asked whether Kengle, then an unemployed waiter, had cashed the refund check that Maynard had sent him, Maynard answered in the affirmative. *Id.* at 185-86.

The video record of the jump also shows no impropriety on Zarda's part. Perhaps for this reason, Maynard refused to release this videotape to Zarda when he requested it. Maynard Deposition at 185. After Maynard was required to surrender the videotape, it was shown during deposition to Kengle, Maynard, Orellana, and Winstock. Kengle and Maynard both alleged that Zarda touched his mouth in a manner that Kengle called "inappropriate" and Maynard alluded to as "creepy." Kengle Deposition at 54; Maynard Deposition at 281. Yet both Kengle and Maynard were tentative in these assessments. Kengle stated that the gesture had to be understood "in context," and Maynard stated: "I don't know what that meant at all." Kengle Deposition at 54; Maynard Deposition at 200. Orellana and Winstock detected no improper behavior. Orellana Deposition at 94; Winstock Deposition at 72. None of the witnesses detected any inappropriate touching whatsoever in the video recording.

Second, Orellana's deposition testimony suggested a susceptibility to misinterpret Zarda's actions. Orellana testified: "I'm claustrophobic, I need my own space." Orellana Deposition at 93. Although he questioned whether she was claustrophobic in a clinical sense, Kengle corroborated that Orellana does not like to feel "boxed in." Kengle Deposition at 58-59. Yet as Winstock testified, tandem skydiving means that "we're violating [the passenger's] personal space to make them safe." Winstock Deposition at 82-83. Orellana, who had never been skydiving before, could well have been particularly sensitive to having her personal space invaded in this manner.

Maynard correctly stated that it is explained to all passengers that "there will be close contact with another person." Maynard Deposition at 18. Paragraph Thirteen of Altitude Express's release form warns passengers that they will be in "close proximity" with their instructors.<sup>2</sup> Orellana signed the entire waiver and initialed Paragraph Thirteen. Orellana Deposition at 36. However, she stated that she "probably didn't read" beyond the first page of the waiver, which did not contain Paragraph Thirteen. *Id.* at 36. Asked why she did not read the full waiver, she answered: "I'm not gonna read a packet when I go skydiving." *Id.* at 37.

Of course, Orellana did not sign away her right to object to inappropriate touching. Yet the record reveals no such contact. What the record does reveal is why Orellana might have viewed professional contact as inappropriate touching—namely, her heightened need for personal space and her failure to acquaint herself with the warning that this personal space would be invaded for her safety. During his deposition, Maynard was asked what he would say to a person who said "I don't like to be touched, do you think I should go up on a skydive?" Maynard Deposition at 17. Maynard responded: "I would say, then maybe you should not skydive." *Id.*

The final reason to question whether Zarda made sexual advances on Orellana is that Zarda is gay. Zarda's sexual orientation was common knowledge at Altitude Express. As Winstock testified: "A good portion of the instructors, if not all of them, and all video guys and coaches and everyone that works there referred to Don as gay Don." Winstock Deposition at 32.

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<sup>2</sup> Paragraph 13 read: "If I'm making a student jump, I understand that I will be wearing a harness which would need to be adjusted by the jump master and my jump is a tandem jump. I understand that the tandem master will attach my harness to his and that this will put my body in close proximity to tandem master. I specifically agree to this physical conduct between the tandem master and myself." Orellana Deposition at 71.

In his deposition, Maynard affirmed that he knew Zarda was gay. Maynard Deposition at 249. When asked whether it was logical, in light of Zarda's sexual orientation, to assume that Zarda was making sexual advances on Orellana, he responded "I don't know." Maynard Deposition at 197. In other words, Maynard credited Kengle's allegation that Zarda had made sexual advances on Orellana over the common knowledge that Zarda was gay.

When confronted with the allegation that Zarda had made sexual advances on a passenger, Maynard seized on that account despite significant evidence to the contrary. This evidence included (a) the fact that Zarda's actions were professionally justified; (b) the fact that Orellana was prone to misconstruing Zarda's actions due to her heightened need for personal space and her inattention to the warning that tandem skydiving would intrude on that space; and (c) the fact that Zarda's sexual orientation was in tension with a sexual advance on an individual of the opposite sex. Maynard's systematic disregard of this evidence suggests that he read Zarda's actions through a frame in which men accused of sexual harassment are presumed to have engaged in it. This is a sex stereotype.

2. Zarda's Disclosure of his Sexual Orientation and Past Relationship Were Treated As Inappropriate, When Similar Disclosures By His Heterosexual Colleagues Were Not.

The second ground on which Maynard terminated Zarda was that Zarda revealed his sexual orientation and, in Maynard's terms, spoke about his "personal life" and "escapades" with Orellana. Maynard Deposition at 236. Maynard stated that he was not terminating Zarda on the basis of sexual orientation. *Id.* However, any examination of what Maynard considered inappropriate behavior demonstrates a double standard on the basis of sexual orientation.

When asked what Zarda had revealed, Orellana clarified: "I remember him telling me, I hope I didn't make you uncomfortable on the plane, I'm gay, and I remember him telling me that he had recently broken up with his boyfriend, and that's all I remember from the conversation." Orellana Deposition at 50. Zarda did not gratuitously disclose his sexual orientation to Orellana. Rather, he stated that he was gay because he perceived that Orellana mistakenly believed that he had "sexually harass[ed]" her. Orellana Deposition at 89. Orellana acknowledged that Zarda connected the disclosure of his sexual orientation to his perception that she was uncomfortable. Orellana Deposition at 51. Moreover, according to Orellana, Zarda did not discuss any of his personal "escapades," but simply stated that he had ended a relationship with another man. Given that Orellana was implicitly calling his sexual orientation into question, this statement about his past relationship may be viewed as an attempt to bolster his statement that he was gay.

Maynard stated that this was not a case of sexual orientation discrimination because "if Richie Winstock was telling some chick of his escapades, he would be in the same situation." Maynard Deposition at 226. However, as demonstrated above, Zarda was not discussing his "escapades," but rather his identity and one past relationship. So the proper question would be whether the heterosexual Winstock would be able to speak about a personal relationship without that relationship being misdescribed as an "escapade." The answer, of course, is yes.

Defendant's attorney asked Winstock whether it was ever appropriate to discuss private relationships with passengers. Winstock testified that he would do so in certain circumstances:

Over the years, I personally find that women, female passengers, usually older, when they're extremely nervous, and [they're] mothers, I have to calm down my passengers, especially when they're extremely nervous I have to, otherwise it's a safety issue, and like I said earlier, our job is to land safely, and I want to home to my three kids. Every passenger is different. So when you're dealing with an older woman who is a mother, I say, I'm married, I have three children, I want to go home to my family, it's okay.

Winstock Deposition at 109-10. In other words, Winstock stated that he would bring up his relationship status only when it would serve a professional purpose—in this case calming the nerves of a passenger in the interests of safety.

Just as Winstock soothed nervous mothers by saying that he had a wife and children, Zarda negated Orellana's fears that he had made a sexual advance on her by saying that he was gay and had recently ended a relationship with another man. Neither instructor introduced his relationship history for gratuitous reasons; both adduced this history to ensure that their passengers' agitation would not become a safety issue. Yet when Zarda used a reassurance strategy analogous to that used by Winstock, Zarda was terminated.

The academic and popular literature on gay identity amply demonstrates that gay individuals are permitted much less leeway than straight individuals to speak of their identity or their relationships. Psychologist Gregory M. Herek notes that “[s]elf-disclosing gay people are likely to be regarded as inappropriately flaunting their sexuality, whereas heterosexuals’ self-disclosures about their sexual orientation are usually considered not noteworthy because everyone is presumed to be heterosexual.” Gregory M. Herek, *Why Tell If You're Not Asked? Self Disclosure, Intergroup Contract, and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, in *Out in Force: Sexual Orientation and the Military* (Gregory M. Herek, Jared B. Jobe, Ralph M. Carney eds. 1996). Bruce Bawer similarly notes: “most heterosexuals are constantly alluding to their personal relationships without even realizing it, let alone considering it inappropriate; they only notice it, and consider it inappropriate, when a homosexual does the same thing.” Bruce Bawer, *A Place at the Table: The Gay Individual in American Society* 21 (1994). When gay people are given less latitude to speak about their identity or their relationships than straight individuals, that is discrimination on the basis of sexual orientation.

### Conclusion

The incidents underlying this case can be described as an unfortunate confluence of sex stereotyping and differential treatment on the basis of sexual orientation. Orellana wrongly believed that Zarda was sexually harassing her. To negate that incorrect belief, Zarda disclosed that he was gay. He was then subjected to disparate treatment because of his sexual orientation.

To permit these interlocking forms of disparate treatment to stand would be to place all gay individuals in an untenable Catch 22. When gay individuals are falsely accused of sexually harassing someone of the opposite sex, their most immediate rejoinder is likely to be a disclosure of their sexual orientation. If that sexual orientation is a separate ground for termination, gay individuals are put to a terrible choice. They must either remain silent and risk termination as sexual harassers or speak up and risk termination because they have "flaunted" their sexual orientation. One purpose of laws against discrimination on the basis of sex and sexual orientation is to ensure that gay individuals need not choose either unconscionable alternative.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenji Yoshino", with a long horizontal flourish extending to the right.

Kenji Yoshino

Chief Justice Earl Warren Professor of Constitutional Law

**KENJI YOSHINO**

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**EMPLOYMENT**

Chief Justice Earl Warren Professor of Constitutional Law, NYU School of Law, 2008-present. Guido Calabresi Professor of Law, Yale Law School, 2006-08. Visiting Professor of Law, NYU School of Law School, 2006-07. Professor of Law, Yale Law School, 2003-06. Deputy Dean for Intellectual Life, Yale Law School, 2005-2006. Samuel L. Rubin Visiting Professor, Columbia Law School, spring 2003. Associate Professor of Law, Yale Law School, 1997-2003. Fields: Constitutional Law; Antidiscrimination Law; Law and Literature. Bar Admission: New York (2008). Law Clerk to Judge Guido Calabresi, Second Circuit Court of Appeals, 1996-97.

**EDUCATION**

Yale Law School, J.D. 1996. Articles Editor, *Yale Law Journal*.

Oxford University, M.Sc. (Management Studies) 1993. Rhodes Scholar.

Harvard University, B.A. (English and American Literature and Language) 1991, *summa cum laude*.

**PUBLICATIONS**

**BOOKS**

A THOUSAND TIMES MORE FAIR: WHAT SHAKESPEARE'S PLAYS TEACH US ABOUT JUSTICE (Ecco Press April 12, 2011).

COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (Random House 2006).

## Articles

*The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

*The Choice of the Three Fathers: Henry IV, Falstaff, and the Lord Chief Justice in The Henriad*, 22 YALE J.L. & HUMAN. 463 (2010).

*On Empathy in Judgment*, 57 CLEVELAND STATE L. REV. 683 (2010) (Baker-Hostetler Lecture).

*The Legislative Altar and the Judicial Closet*, Proceedings of the SELA Conference (2009) (in Spanish).

*Revenge as Revenant: Titus Andronicus and the Rule of Law*, 21 YALE J.L. & HUMAN 203 (2009).

*The City and the Poet*, 114 YALE L.J. 1835 (2005).

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*The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

*Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 487 (1998).

*The Right to Publicity*, Proceedings of the SELA Conference (1998) (in Spanish).

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Note, *What's Past Is Prologue: Precedent in Literature and Law*, 104 YALE L.J. 471 (1994).

## Book Chapters

*Entry on LGBT Rights*, Oxford Handbook of Comparative Constitutional Law (Michel Rosenfeld & Andras Sajo eds., forthcoming 2012).

*Of Stranger Spaces*, in LAW AND THE STRANGER 211 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2010).

## Book Reviews

*The Arguments and Argots of Pleasure*, in *ESSAYS ON PLEASURE* (Peggy Cooper Davis ed., forthcoming 2011) (reviewing CAROL GILLIGAN, *THE BIRTH OF PLEASURE* (2002)).

*The Eclectic Model of Censorship*, 88 CAL. L. REV. 1635 (2000) (reviewing CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION (Robert C. Post ed., 1998)).

*Miranda's Fall?*, 98 MICH. L. REV. 1399 (2000) (reviewing ALBERT CAMUS, *THE FALL* (Justin O'Brien trans., 1956)).

## Symposium Contributions

*The "Civil" Courts: The Case of Same-Sex Marriage*, \_\_\_ ARIZ. L. REV. \_\_\_ (forthcoming 2012).

*The Gay Tipping Point*, 57 UCLA L. Rev. 1537 (2010) (symposium on sexuality and gender law).

*Restrained Ambition in Constitutional Interpretation*, 45 WILLAMETTE L. REV. 557 (2009) (symposium on Presidential power in the 21<sup>st</sup> Century).

*Tribe*, 42 TULSA L. REV. 961 (2008) (legal scholarship symposium on the work of Laurence Tribe).

*Living with Lawrence*, 7 GEO. J. OF GENDER AND L. 299 (2006) (publication of roundtable discussion with Chai Feldblum, Pamela Karlan, William Rubenstein, James Esseks, Darren Hutchinson, Suzanne Goldberg, and Jon Davidson).

## Commentary

*Lose the Baseball Analogy*, SLATE, Dec.21, 2010, available at <http://www.slate.com/id/2278794/>

*The Best Argument Against Same-Sex Marriage: And Why It Fails*, SLATE, Dec.13, 2010, available at <http://www.slate.com/id/2277781/>

*The Military in the Constitution*, post on N.Y. TIMES "Room for Debate" Blog, Oct. 13, 2010, available at <http://www.nytimes.com/roomfordebate/2010/10/13/the-future-of-dont-ask-dont-tell>

*Too Soon to Declare Victory*, post on N.Y. TIMES "Room for Debate" Blog, Aug. 4, 2010, available at <http://www.nytimes.com/roomfordebate/2010/8/4/gay-marriage-and-the-constitution/too-soon-to-declare-victory>

*Lessons from a 1956 Case*, post on N.Y. TIMES “Room for Debate” Blog, Aug. 18, 2009, available at <http://roomfordebate.blogs.nytimes.com/2009/08/18/ted-olson-supreme-court-adventure/?hp>

*Following Souter*, THE NATION, May 6, 2009.

*When A Court Decides Who Can Marry*, post on N.Y. TIMES “Room for Debate” Blog, available at <http://roomfordebate.blogs.nytimes.com/2009/04/03/when-a-court-decides-who-can-marry/>

*Defending Dean Koh*, post on Apr. 1, 2009, available at <http://balkin.blogspot.com/2009/04/defending-dean-koh.html>

*Like a Spider on Its Smooth Line*, SLATE, Mar. 5, 2009 (with Akhil Amar, Dahlia Lithwick, Eric Posner, and Cliff Sloan) (set of posts discussing CLIFF SLOAN & DAVID MCKEAN, THE GREAT DECISION).

*State of the Union: Defining Gay Marriage for the Feds*, SLATE, Mar. 4, 2009.

*Prop 8: Which Way Now?*, THE ADVOCATE, Dec. 3, 2008.

Letter to the President, THE ADVOCATE, Nov. 13, 2008.

Letter to the Editor, *Any Big Change to the Court Will Take a Long Time*, WALL STREET JOURNAL, Nov. 7, 2008, at A16 (one of several letters published under this heading challenging op-ed by Steven Calabresi on Obama Court).

*Left at the Altar: What Happens Now To Gay Marriage in California and Elsewhere?*, SLATE, Nov. 8, 2008.

*Pot Power Play*, L.A. TIMES, Aug. 17, 2008.

*Can California’s Same-Sex Marriages Be Saved?*, L.A. TIMES, June 30, 2008.

*They’re Here, They’re Queer, and They Don’t Need Us . . . Or Do They?*, THE ADVOCATE, July 17, 2008.

*Marriage Partners*, N.Y. TIMES SUNDAY MAGAZINE, June 1, 2008, at 24.

*Magisterial Conviction*, SLATE, May 15, 2008.

*Marriage, Trademarked*, SLATE, June 2, 2007.

*Gay Law for Beginners*, THE ADVOCATE, May 8, 2007 (with Michael Kavey).

*Doubting Thomas*, WASH. POST, Apr. 22, 2007 (reviewing KEVIN A. MERIDA & MICHAEL FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS (2007)).

*For Gays, Read the Fine Print*, N.Y. TIMES, Jan. 29, 2007.

*Happy Birthday, Roe v. Wade*, SLATE, Jan. 18, 2007.

*Sex and the City: New York Bungles Transgender Equality*, SLATE, Dec. 11, 2006.

*Blind Side: An Argument for Voluntary School Integration that Conservatives Should Like*, SLATE, Dec. 7, 2006.

*Gays on a Plane*, THE ADVOCATE, Oct. 21, 2006.

*What Was He Thinking?*, HARTFORD COURANT, Oct. 8, 2006.

*Too Good for Marriage*, N.Y. TIMES, July 14, 2006.

*We Contain Multitudes*, N.Y. TIMES BOOK REVIEW, May 14, 2006 (reviewing AMARTYA SEN, *IDENTITY AND VIOLENCE* (2006)).

*The Myth of the Mainstream*, CHRONICLE OF HIGHER EDUCATION, Feb. 17, 2006.

*The Pressure to Cover*, N.Y. TIMES SUNDAY MAGAZINE, Jan. 15, 2006.

*Secrets Hidden in the Text*, N.Y. TIMES, Jan. 9, 2006.

*Uncovering Muslim Identity*, Towardfreedom.com, Nov. 23, 2005.

*The Irresistible Banality of Same-Sex Marriage*, THE VILLAGE VOICE, June 20, 2005.

*The Law of the Bedroom: When it Comes to Protecting Sexual Privacy, Why Does America Lag so Far Behind?*, BOSTON GLOBE, Mar. 23, 2003.

*When Can the Supreme Court Change Its Mind?*, N.Y. TIMES, Dec. 5, 2002.

*Suspend 'Don't Ask, Don't Tell,'* HARTFORD COURANT, Oct. 13, 2002, at C1.

*Boyscout Loophole*, [http://writ.news.findlaw.com/commentary/20000630\\_yoshino.html](http://writ.news.findlaw.com/commentary/20000630_yoshino.html).

*The Able Judge*, THE NATION, June 28, 1997.

## SELECTED PRESENTATIONS AND APPEARANCES

### Scholarly Presentations

Keynote, Civility, Civil Rights, and the “Civil” Courts, Project Civility, Rutgers University, Newark, NJ, April 16, 2012.

“Political Power and Prop 8,” DOMA and the Future of Marriage, Fordham Law School, New York, NY, March 30, 2012.

Closing Keynote, “Are Gays People Politically Powerless Today?,” Williams Institute Annual Update, UCLA School of Law, Los Angeles, CA, April 13, 2012.

“The ‘Civil’ Courts: The Case of Same-Sex Marriage,” Public Discourse, Civility, and Harm, James E. Rogers College of Law, University of Arizona, Tucson, AZ, January 14, 2012.

“Constitutional Rights / Human Rights: Analogues, Intersections, and Differences,” Panelist, Yale Law School Alumni Weekend, November 1, 2011.

“Same-Sex Marriage on Trial: Reading the Prop 8 Litigation,” William H. Leary Lecture, University of Utah, October 31, 2011.

“Same-Sex Marriage on Trial: Reading the Prop 8 Litigation,” UCLA School of Law, October 25, 2011.

“LGBT Rights, Inc.,” Evolutions in Anti-Discrimination Law in Europe and N. America Conference, Cambridge, MA, May 6, 2011.

“The New Equal Protection,” The Future of Equality, University of Texas Law School, Austin, TX, April 1, 2011.

“*Lawrence* as Ur-Text,” Conference on Gender, Sexuality and Democratic Citizenship, Cardozo Law School, New York, NY, November 14, 2010.

“The New Equal Protection,” American Constitution Society, Harvard Law School, Boston, MA, October 13, 2010.

“The New Equal Protection,” NYU Society of Fellows, October 6, 2010.

“Civil Rights, Inc., Faculty Workshop, NYU School of Law, October 4, 2010.

“Hamlet’s Legal Perfectionism,” Hong Kong University, Hong Kong, June 24, 2010.

“Civil Rights, Inc.,” Microsoft, Redmond, Washington, May 18, 2010.

“Civil Rights, Inc.,” Employment and Welfare Workshop, Buchmann Faculty of Law, Tel Aviv University, Apr. 29, 2010.

“The New Equal Protection,” CEGLA Center, Buchmann Faculty of Law, Tel Aviv University, Apr. 29, 2010.

“The Gay Tipping Point,” UCLA School of Law, Feb. 19, 2010.

“The Choice of the Three Fathers,” Law and Public Affairs Workshop, Princeton, NJ, Feb. 8, 2010.

“The Choice of the Three Fathers,” Section on the Humanities, American Association of Law Schools Annual Meeting, Jan. 9, 2010.

“From Equality to Liberty,” Waseda Institute for Comparative Law, Waseda University, Tokyo, Japan, July 20, 2009.

“Shakespeare and the Law,” Global Center of Excellence Lecture, Waseda University, Tokyo, Japan, July 18, 2009.

“The Judicial Closet and the Legislative Altar,” SELA Conference on “Law and Sexuality,” Asuncion, Paraguay, June 11, 2009.

“The Reluctant Imperialist? Empires of Law and Literature in *The Tempest*,” Conference on “Shakespeare and the Law,” University of Chicago, May 15-16, 2009.

“Lovesick Japan,” Moderator, Japan Society of New York, New York, NY, May 5, 2009 (with Mark West and Dana Goodyear).

“The White Handkerchief and the Black Glove: Factfinding in *Othello* and the O.J. Simpson Trials,” Shakespeare Association of America Annual Meeting Panel on “Theatrical Law,” Washington, D.C. Apr. 11, 2009.

“The Politics of Assimilation from Anti-Miscegenation Statutes to Bans on Same-Sex Marriage,” NYU Center for Multicultural Education and Programs, Feb. 19, 2009.

“A Candid Conversation About Being Out in the Workplace,” Pricewaterhouse Coopers, Houston, TX (Nov. 7, 2008) (panel discussion with Selisse Barry, Neil Giuliano, and Kevin Jennings).

“Restrained Ambition in Separation of Powers,” Conference on Presidential Powers in the 21<sup>st</sup> Century, Willamette School of Law, Salem, OR (Sept. 12, 2008).

Baker & Hostetler Lecture, “The Return of Shakespeare’s Reviled Tragedy: *Titus Andronicus* and the Rule of Law,” Cleveland Marshall School of Law, Cleveland, OH (Sept. 9, 2008).

Master Class on Race and the Constitution, Central Washington University, Ellensburg, WA (May 8, 2008).

Seminar on Shakespearean Procedure (with Bernadette Meyler), Shakespeare Association of America Annual Meeting, Dallas, TX (Mar. 15, 2008).

Reproductive Justice after *Gonzales v. Carhart*, American Association of Law Schools Annual Meeting, New York, NY (Jan. 4, 2008).

William Mitchell Law School, Keynote Speaker, *The New Equal Protection*, St. Paul, MN (Apr. 27, 2007).

Washington State University National Diversity Conference, Keynote Speaker, Seattle, WA (Apr. 26, 2007).

Legal Scholarship Symposium for Laurence H. Tribe, *The Double Helix*, University of Tulsa Law School, Tulsa, OK (Apr. 10, 2007).

James Moffett Lecture, "The End of Civil Rights?," Princeton University, Princeton, NJ (Apr. 5, 2007).

Ohio State University Faculty Workshop, "The New Equal Protection," Columbus, Ohio (Jan. 30, 2007).

Yale Law School Alumni Weekend, Work and Self Panel, Moderator (Oct. 14, 2006).

NYU Faculty Workshop, "Of Stranger Spaces," New York, NY (Sept. 18, 2006).

Panel Discussion, The Vaid Group, Lavender Law, Washington D.C. (Sept. 9, 2006).

Panel, "The Right to Be Openly Different," International Conference on LGBT Rights, Montreal, Quebec (July 28, 2006).

Panel, American Constitution Society National Conference, Washington D.C. (June 17, 2006).

LGBT Family Law, Equality Forum, Philadelphia, Pennsylvania (May 5, 2006).

"The New Equal Protection," Faculty Enrichment Forum, University of Arizona, Tucson, Arizona (Apr. 27, 2006).

"The New Equal Protection," Harvard Public Law Workshop, Cambridge, MA (Apr. 14, 2006).

"Imagining Utopias," Cornell Law School, Ithaca, New York (Apr. 3, 2006).

"Imagining Utopias," Center for Law, History, and Culture, USC Law School (Feb. 23, 2006).

Moderator, *The Roberts Nomination: What's At Stake*, Yale Law School (Sept. 14, 2005).

Participant in Roundtable Discussion on Constitutional Politics in 2020, American Constitution Society Conference, Yale Law School (Apr. 8, 2005).

Participant in Roundtable Discussion on Living With *Lawrence*, Georgetown Law Center (Mar. 17, 2005).

"Synthetic Models of Liberty and Equality," *Breaking with Tradition*, Yale Law School (Mar. 4, 2005).

"Synthetic Models of Liberty and Equality," Law and Philosophy Colloquium, University of Chicago (Apr. 15, 2004).

"Synthetic Models of Liberty and Equality," NYU Law School Faculty Workshop (Apr. 4, 2004).

Comment on Laurence Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, Harvard Constitutional Law Conference (Nov. 15-16, 2003).

*Redressing Hopkins*, Behavioral Analyses of Workplace Discrimination, New York University Law School (Apr. 19, 2002).

*Imagining Utopias*, Amherst College, Amherst, MA (Mar. 27, 2006).

Panelist, Sexual Orientation and the Battles over Custody, Adoption, and Foster Care, American Constitutional Society, National Conference, Washington, D.C. (Aug. 18, 2005).

*An Assault on Assimilation*, Greenfield Intercultural Center, University of Pennsylvania (Mar. 21, 2002).

*Covering*, John Hope Franklin Institute, Duke University (Mar. 19, 2002).

*An Assault on Assimilation*, Race, Values and the American Legal Process, Yale Law School, (Feb. 24, 2002).

*The Mapmaker's Colors: The Case of Gay Rights in Japan*, International Symposium on Globalizing Comparative Literature, Tsinghua University, Beijing, China (Aug. 10-14, 2001).

*The Poet and the City*, Law and Literature: Mutual Negotiations, Tel Aviv University, Tel Aviv, Israel (June 3-5, 2001).

Comment, *Change, Continuity, and Context: Japanese Law in the 21st Century*, University of Michigan Law School (Apr. 6-7, 2001).

*Covering*, Lavender Law, Washington D.C. (Oct. 19, 2000).

*Judicial Performativity*, Cultural Studies and the Law, Yale Law School (Apr. 16, 2000).

*Judicial Performativity*, University of Chicago Law School Faculty Workshop (Apr. 2000).

*Judicial Performativity*, Cornell Law School (Nov. 1999).

*Covering*, Legal Recognition of Same-Sex Partnerships: A Conference on National, European and International Law, King's College, University of London (July 1-3, 1999).

*Covering*, SELA, La Serena, Chile (June 17-20, 1999).

*The Epistemic Contract of Bisexual Erasure*, Columbia Law School Faculty Workshop (Apr. 1999).

*The Scopic Exchange in Law and Literature*, Conference on Law and Literature, Università Roma Tre, Rome, Italy (July 10-12, 1998).

*The Epistemic Contract of Bisexual Erasure*, Fordham Law School Faculty Workshop (Oct. 1998).

*The Right to Publicity*, SELA, Mar del Plata, Argentina (Aug., 6-9, 1998).

*Bisexuality in Sexual Harassment Law*, Sexual Harassment Conference, Yale Law School (Mar. 1, 1998).

***Presentations on A Thousand Times More Fair: What Shakespeare's Plays Teach Us About Justice***

Daniel J. Evan Lecturer, Evergreen State College, September 19, 2011.

Barrett Bookstore, Shakespeare on the Sound Benefit, Greenwich, CT, May 13, 2011.

University of Virginia School of Law, Charlottesville, VA, May 2, 2011.

Dorsey & Whitney, Minneapolis, MN, April 29, 2011.

McNally Jackson Bookstore, New York, NY, April 25, 2011.

USC Center for Law, History and Culture Workshop, USC Gould School of Law, Los Angeles, April 20, 2011.

Marlboro College, Marlboro, VT, April 18, 2011.

Haley Lecture, Phillips Exeter Academy, Exeter, NH, April 17, 2011.

Harvard Coop, Cambridge, Massachusetts, April 15, 2011.

University of California, Berkeley, April 13, 2011.

Speaker, Shakespeare Theatre Company Mock Trial, Washington, D.C., April 11, 2011.

Franklin & Marshall, Lancaster, PA, March 3, 2011.

**Presentations on *Covering: The Hidden Assault on Our Civil Rights***

Endowed Leadership Lecture Series, Bishops School, La Jolla, CA, April 10, 2012.

Day of Human Understanding, Shippensburg University, Lancaster, PA, March 22, 2012.

Harvard Club, New York, NY, November 14, 2011.

Convocation, Evergreen State College, September 19, 2011.

Baldwin Wallace College, Berea, OH, September 14, 2011.

My Home Campus Speaker Series: Facing the Fear of Hate Incident on Campus, University of California, Berkeley, April 13, 2011.

Chautauqua Lecture, Eastern Kentucky University, March 17, 2011.

U.C. Irvine School of Law, Irvine, CA, January 13, 2011.

Noble and Greenough School, Dedham, MA, December 8, 2010.

University of Missouri, Keynote, Mizzou Diversity Summit, October 21, 2010.

Pace Academy, Atlanta, GA, September 29, 2010.

Microsoft, Redmond, WA, May 18, 2010.

Hamilton College, Clinton, NY, Feb. 25, 2010.

Colgate College, Hamilton, NY, Feb. 24, 2010.

HSBC Bank, New York, NY, Dec. 10, 2009.

Keynote, National Association of Independent Schools People of Color Conference, Denver Colorado, Dec. 4, 2009.

The Federal Reserve, New York, New York, Dec. 2, 2009.

Keynote, Out & Equal Summit, Orlando, Florida, Oct. 7, 2009.

Pomona College, Claremont, CA, Aug. 30, 2009.

New Haven Festival of Arts and Ideas, New Haven, CT, June 16, 2009.

Fordham University, New York, NY, Apr. 16, 2009.

Western Connecticut State University, Danbury, CT, Apr. 8, 2009.

Keynote, Out & Equal Executive Forum, San Francisco, CA, Mar. 20, 2009.

University of Richmond, Richmond, VA, Mar. 18, 2009.

Convocation, Virginia Commonwealth University, Richmond, Virginia (Aug. 19, 2008).

University of North Carolina, Raleigh, NC (Aug. 18, 2008).

Sodexo, Dulles, Virginia (May 12, 2008).

Vassar College, Poughkeepsie, NY (Apr. 21, 2008).

Keynote Address for Annual Legal Meeting, Dupont, Wilmington, DE (Apr. 7, 2008).

Keynote Address for The Blackboard Jungle: Navigating Race, Gender, and Sexuality in the New Classroom Culture, Symposium, University of Vermont, Burlington, VT (Mar. 28, 2008).

Johnson & Johnson, New Brunswick, NJ (Mar. 12, 2008).

The Cal Anderson Memorial Lecture, Evergreen State College, Olympia, WA (Mar. 6, 2008).

Keynote Address (with Nan Hunter), Annual Roundup, Williams Institute, Los Angeles, CA (Feb. 22, 2008).

Seattle Human Rights Day, Seattle Office for Civil Rights, Seattle, WA (Dec. 6, 2007).

Paul, Hastings, Janofsky & Walker, New York, NY (June 19, 2007).

E.I. DuPont de Nemours and Company, South Beach, FL (June 14, 2007).

Minnesota State Bar Association, Minneapolis, MN (June 7, 2007).

Princeton University, Princeton, NJ (Apr. 5, 2007).

Colgate University, Hamilton, NY (Mar. 29, 2007).

Westchester University, Westchester, PA (Feb. 22, 2007).

Phillips Academy, Andover, MA (Jan. 15, 2007).

Seattle University, Seattle WA (Jan. 11, 2007).

University of Illinois, Champaign, IL (Oct. 26, 2006).

University of Rhode Island, Kingston, RI (Oct. 12, 2006).

University of Maryland, College Park, MD (Oct. 5, 2006).

University of Connecticut Rainbow Center, Hartford, CT (Oct. 4, 2006).

Legal Aid Society, San Francisco, CA (June 26, 2006).

AOL, Corporate Headquarters, Washington D.C. (July 25, 2006).

Citigroup, New York, NY (June 22, 2006).

Dorsey & Whitney, Minneapolis, Minnesota (June 7, 2006).

Phillips Exeter Academy (June 2, 2006).

Lecture to Planned Parenthood, Orlando Florida (May 31, 2006).

Carroll College, Waukesha, WI (Apr. 26, 2006).

Second Tuesdays Lecture at Gay Community Center, New York, NY (Apr. 11, 2006).

Wesleyan College, Middletown, CT (Apr. 10, 2006).

Saybrook College, Yale University, New Haven, CT (Apr. 5, 2006).

Greenfield Cultural Center, University of Pennsylvania, Philadelphia, PA (Mar. 15, 2006).

National Constitution Center, Philadelphia, PA (Mar. 7, 2006).

Emory Law School, Atlanta, GA (Mar. 2, 2006).

University of Chicago, Chicago, IL (Feb. 28, 2006).

Opening of the New Williams Institute Reading Room, UCLA Law School (Feb. 24, 2006).

## Television

“Gay ‘Cure’ Retraction Undermines Prop 8 Case,” The Rachel Maddow Show, MSNBC, April 27, 2012.

Panelist, The Melissa Harris-Perry Show, MSNBC, April 7, 2012.

Panelist, The Melissa Harris-Perry Show, MSNBC, March 26, 2012.

“Legal Analysis of Obama Health Care,” Fox NY, Dec. 14, 2010, available at, [http://www.myfoxny.com/dpp/good\\_day\\_ny/medical\\_headlines/legal-analysis-of-obama-health-care-20101214](http://www.myfoxny.com/dpp/good_day_ny/medical_headlines/legal-analysis-of-obama-health-care-20101214)

“Prop 8,” Charlie Rose, PBS, Aug. 5, 2010, available at <http://www.charlierose.com/view/interview/11156>

Discussion of Confirmation Hearings of Sonia Sotomayor, NY1, July 13, 2009.

Discussion of Nomination of Sonia Sotomayor, The Rick Sanchez Show, CNN, May 26, 2009.

Discussion of Nomination of Sonia Sotomayor, The Best Defense with Jami Floyd, TruTV, May 26, 2009.

Discussion of *Colorado v. Andrade*, The Best Defense with Jami Floyd, TruTV, Apr. 23, 2009.

Discussion of *Hackley v. Rivera*, The Best Defense with Jami Floyd, TruTV (Court TV), Nov. 17, 2008.

Discussion of Connecticut Marriage, The Best Defense with Jami Floyd, TruTV (Court TV), Nov. 12, 2008.

Panel Discussion, “On Being an American,” This is America with Dennis Wholey, PBS, Sept. 18, 2006 (with Justice Antonin Scalia).

Interview with GLOBO TV, Zeca Camargo show, New York, NY (Aug. 9, 2006).

Books of Our Time, Massachusetts School of Law (May 24, 2006 taping).

“A Conversation with Author Kenji Yoshino,” Charlie Rose, PBS, Apr. 20, 2006, available at <http://www.charlierose.com/view/interview/448>.

GAY USA, New York, NY (Mar. 28, 2006 taping).

Appearance on C-SPAN Washington Journal, Discussion of *Covering: The Hidden Assault on Our Civil Rights* (Feb. 15, 2006).

A Look at the Alito Hearings, The Tavis Smiley Show, Jan. 9, 2006.

“A Discussion About the Supreme Court’s Ruling in *Lawrence v. Texas*,” Charlie Rose (June 26, 2003), available at <http://www.charlirose.com/view/interview/1909>.

### **Radio Interviews**

“Judge Overturns California’s Gay Marriage Ban,” The Takeaway, WNYC, Aug. 5, 2010.

“Prop 8 Fight Goes to Federal Court,” The Takeaway, WNYC, Jan. 11, 2010.

“(Gay) Friends with Benefits,” The Takeaway, WNYC, June 18, 2009.

Discussion of Nomination of Sonia Sotomayor, Morning Edition, NPR, May 26, 2009.

Discussion of Nomination of Sonia Sotomayor, “The Jack Rice Show,” Air America, May 26, 2009.

“A Look at the Docket for the Supreme Court,” The Takeaway, WNYC, Apr. 21, 2009.

Discussion of Iowa and Vermont Marriage Decisions, “Tell Me More,” NPR, Apr. 10, 2009 (with Michel Martin).

“California’s gay marriage battle heats up again,” The Takeaway, WNYC, Mar. 5, 2009.

Discussion of potential retroactive effects of California Proposition 8, CNN-KSRO (local Bay Area radio), Nov. 4, 2008.

Discussion of potential retroactive effects of California Proposition 8, “The Michelangelo Signorile Show,” Sirius 109, Nov. 4, 2008.

Michael Signorile Show, New York, NY (June 1, 2006).

### **Speeches, Addresses, Debates**

National Legal Panel, Equality Forum, Philadelphia, PA, April 28, 2011.

Keynote, Emerging Scholars Symposium, Franklin and Marshall College, Lancaster, PA, March 10, 2011.

Keynote, Multicultural Symposium, Wildwood School, Los Angeles, CA, March 9, 2011.

Keynote, Independent Schools Association of the Central States (ISACS), Chicago, IL, February 18, 2011.

Panelist, Diversity Leadership Conference, The Dalton School, New York, NY, Nov. 12, 2010 (with Bennett Singer and Melissa Harris-Perry).

Address to NYU School of Law Trustees, New York, NY, Dec. 11, 2009.

“Academic Freedom v. Equality: A Debate Inspired by the Dr. Li-Ann Thio Appointment,” The Forum, NYU School of Law, Sept. 30, 2009.

Equality Forum, Announcement of 2009 LGBT History Month Icons, Philadelphia, PA, May 2, 2009.

Debate on Same-Sex Marriage, NYU School of Law, New York, NY, Apr. 16, 2009 (with Amy Wax).

Moderator, CEO/CDO Panel, Greensboro, NC (Mar. 21, 2007).

Address to Freshman Class, Woolsey Hall, Yale University, New Haven, CT (Sept. 3, 2006).

#### **HONORS & MEMBERSHIPS**

Bishops Medal, Bishops School, La Jolla, CA, April 11, 2012.

Wallace S. Fujiyama Distinguished Visiting Professor, William S. Richardson School of Law, January Term, 2012 (course: “Same-Sex Marriage on Trial”).

Selection of *Covering* as First Year Book at Pomona College for Fall 2009 (all first-year students to read book as part of orientation program).

Selection of *Covering* as First Year Book at University of Richmond for 2008-09 (all first-year students read book as part of orientation program).

Selection of *Covering* as First Year Book at Virginia Commonwealth University for Fall 2008 (approximately 3,500 students to read book as part of orientation program).

Selection of *Covering* as First Year Book at University of North Carolina for Fall 2008 (estimated 3,000 students to read book as part of orientation program).

NYU Society of Fellows (2008-10).

Yale Law School Commencement Speaker, "The Generations of Justice" (May 26, 2008).

Contributor to *Slate* Magazine's Law Blog, *Convictions* (Mar. 2008 to present).

Publishing Triangle, 2007 Randy Shilts Award for Gay Non-Fiction (for *Covering: The Hidden Assault on Our Civil Rights*)

American Library Association, 2007 Stonewall Honor Book Award (for *Covering: The Hidden Assault on Our Civil Rights*).

*The End of Civil Rights?*, James Moffett Lecture, Princeton University, Apr. 5, 2007.

GLAAD, 2007 Media Award for "Outstanding Article" (for *The Pressure to Cover*, N.Y. TIMES MAGAZINE)

2006 Myers Outstanding Book Award from the Gustavus Myers Center for the Study of Bigotry and Human Rights (for *Covering: The Hidden Assault on Our Civil Rights*).

LGBT History Month National Co-Chair 2007, 2006 (one of two co-chair responsible for selecting 31 LGBT individuals of distinction).

Fellow, Center for Advanced Studies in the Behavioral Sciences (fellowship for one year between 2006-12) (declined).

2006 American Educational Studies Association Critics' Choice Award (for *Covering: The Hidden Assault on Our Civil Rights*).

Stephen R. Volk Lecture, Dartmouth College Hanover, NH (July 17, 2006).

Selected for Chronicle Magazine's *Youngblood* Series (six people under 40 selected every year).

Nicholas Papadopoulos Lecture, University of San Diego Law School (May 8, 2006).

Yale Law School, Commencement Speaker, "On Ideal Readers" (May 23, 2005).

Member, American Society of Political and Legal Philosophy (2005-present).

Jesse Dukeminier Award for Scholarship on Sexual Orientation (2004).

Samuel L. Rubin Visiting Professorship at Columbia Law School (spring 2003).

Yale Law Women Teaching Award (co-winner 2002; commendations 2004, 2001, 2000).

Fellow, Whitney Humanities Center (2001-03).

## SELECTED PRESS

Michael Luo, "*Whitening*" the Resume, N.Y. Times, Dec. 5, 2009 (discussing *Covering*)

Martha Nussbaum, *The Prohibition Era*, THE NEW REPUBLIC, Mar. 30, 2006.

Terry Hong, *Not Quite Out*, WASH. POST, Feb. 22, 2006.

Judy Coleman, *Uncover Me*, LEGAL AFFAIRS, Jan./Feb. 2006.

Amanda Heller, *Short Takes*, BOSTON GLOBE, Jan. 29, 2006.

Ann Althouse, *The Conformist*, N.Y. TIMES BOOK REVIEW, Jan. 22, 2006.

Austin Considine, *A New Way To Look at Gays and Society*, CHI. SUN-TIMES, Jan. 22, 2006.

Sandip Roy, *Out of the Closet But Still Under Cover*, S.F. CHRONICLE, Jan. 22, 2006.

Robert Ito, *Don't Ask, Don't Tell*, VILLAGE VOICE, Jan. 17, 2006.

Kristin Eliasberg, *Making a Case for the Right To Be Openly Different*, N.Y. TIMES, June 16, 2001.

Carole Bass, *Both Ends Against the Middle*, NEW HAVEN ADVOCATE, June 3, 1999.

## SERVICE

Harvard Board of Overseers (2011-2017)

Harvard Law School Visiting Committee March 29-30, 2012.

Judge for Trailblazer, Champion, Employee Resource Group, Significant Achievement, and Workplace Excellence Awards, Out & Equal (2010)

Gay History Month Selection Co-Chair (2005-2011) (Equality Forum)

Convener, Dean's Workshop Series on LGBT Rights (2009-10) (NYU)

Interim Faculty Director, Root Tilden Kern Scholarship Program (2009-10) (NYU)

Advisor, *NYU Review of Law and Social Change* (2008-present) (NYU)

University Committee on Lesbian and Gay Studies (2005-06, 2007 (fall)) (YLS).

Fellowships Committee Chair (2005-06) (YLS).

Name Lectures Committee Chair (2005-06) (YLS).

Deputy Dean for Intellectual Life (2005-06) (YLS).

Co-convenor, Legal Theory Workshop (2004-06) (YLS).

Admissions Committee Chair (2004-05) (YLS).

Appointments Committee (fall 2003) (YLS).

Dean's Search Committee (fall 2003) (YLS).

University Committee on Lesbian and Gay Studies (fall 2003) (YLS).

Student/Faculty Alliance for Military Equality ("SAME") (ad hoc group resisting Solomon Amendment and "don't ask, don't tell") (2002) (YLS).

Thomas Lecture Committee (2001-02) (YLS).

Admissions Committee Chair (2001-02) (YLS).

Hilles/Griswold Grant Committee (2001-02) (Whitney Humanities Center committee responsible for disbursing grants) (YLS).

Faculty Workshop Chair (2000-01, 1999-2000, 1998-99) (YLS).

*Harvard Blackletter Law Journal* (Board Member) (2000-01).

*Yale Journal of Law and Feminism* (Board Member) (2000-01).

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Saul D. Zabell  
[SZabell@laborlawsny.com](mailto:SZabell@laborlawsny.com)

May 18, 2012

**VIA ELECTRONIC MAIL**

Gregory Antollino, Esq.  
18-20 West 21<sup>st</sup> Street, Suite 802  
New York, NY 10010

**Re: Zarda v. Altitude Express, Inc., et al.**  
**Case No.: CV-10-4334 (JFB)(ARL)**

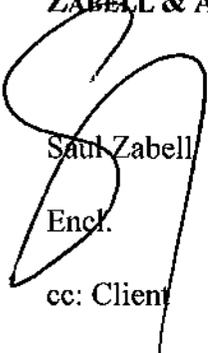
Dear Mr. Antollino:

Pursuant to Fed. R. Civ. P. 45 enclosed please find a subpoena *ad testificandum* which we intend to serve upon Kenji Yoshino on Wednesday May 23, 2012.

Kindly contact me should you have further questions regarding the enclosed.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

  
Saul Zabell

Encl.

cc: Client

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

DONALD ZARDA

Plaintiff

v.

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, and RAY MAYNARD

Defendant

Civil Action No. CV 10-4334 (JFB)(ARL)

(If the action is pending in another district, state where:

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Kenji Yoshino
New York University School of Law, 40 Washington Square South, New York, NY 10012

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Zabell & Associates P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716

Date and Time:
06/11/2012 10:00 am

The deposition will be recorded by this method: Stenographer

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

Any and all documents used and/or referred to in production of the Expert Report of Kenji Yoshino (including fees for services rendered and invoices) generated in connection with the above-referenced matter.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 05/18/2012

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Defendants

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, et al., who issues or requests this subpoena, are:
Saul D. Zabell, Zabell & Associates P.C., 1 Corporate Drive, Suite 103, Bohemia, New York 11716
SZabell@Nylaborlaws.com
(631)-589-7242

## Exhibit D

This Exhibit contains an itemized log of hours spent to prepare for the first deposition Mr. Zabell scheduled for June 11, 2012 for Zarda v. Altitude Express. I received notice from Mr. Antollino over the weekend of May 18 that the deposition would occur on June 11. Because of various obligations, including a teaching obligation at the European University Institute from June 4 to June 10, as well as several other obligations (preparation for teaching at the EUI, the formulation of a book proposal, etc.), I began preparing on the week of May 21, 2012. The chart below represents the hours I logged between receiving notice of the deposition and receiving notice of the cancellation of the deposition on June 5. Because preparation after June 5 was not done in preparation for the Deposition, I have billed those hours to my retaining attorney, Mr. Antollino.

Tuesday, 5/22	1.75 hour	Review of Deposition (Zarda, volume 1)
Wednesday, 5/23	1.0 hour	Review of Deposition (Zarda, volume 2)
Wednesday, 5/23	1.5 hours	Review of Deposition (Maynard)
Wednesday, 5/23	2.0 hours	Review of Depositions (Kengle, Orellana, Winstock)
Wednesday, 5/23	0.75 hours	Research of Universities offering Gender and Sexuality Studies in anticipation of challenge that Gender and Sexuality not a field in which one can have expertise.
Wednesday, 5/23	0.25 hours	Research of Law Professors who are recognized experts in Sexuality and Gender in anticipation of challenge that one cannot be an expert in both fields
Monday, 6/4,	1.5	Application of <u>Daubert</u> factors to covering theory, including review of works cited in <u>Covering</u> to establish reliability
Tuesday, 6/5	Stopped Preparation	Informed of cancellation of deposition scheduled for 6/11/2012 by Greg Antollino.

Total preparation for first scheduled deposition: 8.75 hours

Total fee (at \$400/hr): \$3,500 (Three thousand five hundred dollars)