UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MELISSA ZARDA and WILLIAM MOORE, co-independent executors second of the estate of DONALD ZARDA

10-CV-04334 (SJF) (AYS)

Plaintiffs,

- against –

RAYMOND MAYNARD as the predecessor in interest, the sole shareholder and alter ego to ALTITUDE EXPRESS, INC., and RAYMOND MAYNARD, individually,

Defendants.
----------X

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) & IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF JUDGMENT, SANCTIONS, AND THE POSTING OF A BOND

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I. PRELIMINARY STATEMENT

Defendant, Raymond Maynard, by and through his attorneys, Zabell & Collotta, P.C., respectfully submits the instant Reply Memorandum of Law: (1) in further support of his application seeking dismissal of, in their entirety and with prejudice, all claims pending against him contained in the Second Amended Complaint [ECF Doc. No. 280]; and (2) in opposition to the putative application[1] of Plaintiffs Melissa Zarda and William Moore, co-independent executors of the estate of Donald Zarda ("Plaintiffs"), seeking:

1. Enforcement of the judgments of the Second Circuit Court of Appeals and the United States Supreme Court "as a matter of law and ordering Raymond Maynard to pay these judgments";

2. Sanctions in the form of attorneys' fees under 28 U.S.C. § 1927 imposed against the undersigned;

3. Requiring Mr. Maynard and his counsel to post a bond not less than two hundred thousand dollars ($200,000.00); and

4. Striking Mr. Maynard's "points of law as an additional sanction if the judgments remain unpaid."

See Zabell Decl. at Exhibit "H".

Plaintiffs posit no valid argument in opposition to Mr. Maynard's pending application brought pursuant to Fed. R. Civ. P. 12(b). Rather, what Plaintiffs postulate is premised on theoretical scenarios and personal slights, assumptions concerning prior litigation strategy, and unsupported inferences made concerning the decision-making of the U.S. Supreme Court. Their positions are unsupportable. By no metric have Plaintiffs been denied due process. Nor did the U.S. Supreme Court "vindicate[] plaintiffs' cause."

[1] We maintain than Plaintiffs' application is procedurally improper as the direction set forth by virtue of Rule 4 of Your Honor's rules of practice were not followed. However, out of an abundance of caution, we address the substantive points raised by Plaintiffs' opposition to Mr. Maynard's pending application [ECF Doc. No. 289] and his putative "cross-motion".

In reality, Plaintiffs fail to submit valid claims sufficient to garner the relief they request through their Second Amended Complaint. They fail to provide any legitimate argument in support of the same. They fail to properly move this Court through their "cross-motion" and, to that end, submit sufficient grounds for the relief requested. For the reasons addressed in Mr. Maynard's moving Memorandum of Law and below, we respectfully submit that Plaintiffs' subject Second Amended Complaint should be dismissed, it its entirety and with prejudice, together with such other relief as the Court deems just, proper, and equitable, together with the complete denial of Plaintiffs' "cross-motion".

II. ARGUMENT

In opposition to Mr. Maynard's pending application for the complete dismissal of Plaintiffs' Second Amended Complaint [ECF Doc. No. 280], Plaintiffs fail to submit any argument in support of both their Second Cause of Action (collection of costs)[2] and Fourth Cause of Action (alleged fraudulent or voidable transfer pursuant to the New York Voidable Transfer Act). Instead, Plaintiffs focus upon their First Cause of Action (unlawful discrimination premised on sex in violation of Title VII) and Third Cause of Action (alter ego liability pursuant to New York's Business Corporation Law ("BCL") § 1006(b)).

To the extent Plaintiffs did not to provide a valid argument to their remaining claims, we respectfully submit the same should be considered abandoned. *Dudek v. Nassau Cnty. Sheriff's Dep't*, 991 F. Supp. 2d 402, 410 (E.D.N.Y. 2013) (in the context of a motion to dismiss, "Dudek does not address Defendants' argument in his opposition brief and has therefore abandoned all objections to it") (citing *Anti-Monopoly v. Hasbro, Inc.*, 958 F. Supp. 895, 907 n.11 (S.D.N.Y.)

[2] Under the auspices of a "cross-motion", Plaintiffs do argue for, *inter alia*, a summary decision concerning the collection of costs. *See* Zabell Decl. at Exhibit "H". Should the Court decide to entertain this application despite its procedural deficiencies, an argument in opposition to said application is addressed in Section "B", *infra*, as well as the other relief requested by Plaintiffs therein.

("[T]he failure to provide argument on a point at issue constitutes abandonment of the issue"), *aff'd*, 130 F.3d 1101 (2d Cir. 1997) (per curiam)).

A. Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint Should be Granted in its Entirety

1. Mr. Maynard Cannot Face Liability under Title VII

Plaintiffs do not dispute the fact that Mr. Maynard cannot be found individually liable under Title VII. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317-19 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). Rather, Plaintiffs attempt to salvage claims against Altitude Express by arguing that Mr. Zarda's sexual orientation may have factored into his termination. This, ultimately, is immaterial to the claims now pending before the Court.

In moving for the dismissal of Plaintiffs' pending claims, Mr. Maynard recites the procedural history of this matter to underscore the frivolity of a Title VII action against Mr. Maynard individually. As concerns claims of unlawful discrimination, the only available remedy against Mr. Maynard as an individual rested upon the NYSHRL – claims that were dismissed on the merits by a jury following the completion of a fair and proper trial [ECF Doc. Nos. 246-47]. *See also* Zabell Decl. at Exhibits "B" and "C". Plaintiffs named neither Altitude Express nor its presumed successor, Sky Dive Long Island, as parties within the subject Second Amended Complaint. Only Mr. Maynard is the subject of Plaintiffs' Title VII allegations. *See* [ECF Doc. No. 280]; Zabell Decl. at Exhibit "F". In no manner can Mr. Maynard face liability on the only federal claim now before the Court.

Plaintiffs are not ignorant to this axiom. The same was argued before the U.S. Supreme Court in opposition to the petition for writ of certiorari. *See* Zabell Decl., Exhibit "G" at pp. 12-13. In fact, Plaintiffs acknowledged the position now advanced by Mr. Maynard. *Id.* . To that end,

the reply brief submitted in response to said opposition (Pl. Exhibit "A", at pp. 3-6) addresses Plaintiffs' counterpoints concerning Mr. Maynard's argued lack of standing to petition the Court. *See* Zabell Decl. at Exhibit "G", p. 3. Plaintiffs' reliance upon this argument is therefore misplaced. The arguments posed therein concerned the "live" nature of the action before the Court and not an acknowledgement of Mr. Maynard's alleged liability. *See* Section "B", *infra*, for a fuller discussion on this point. Plaintiffs' inability to grasp the hypothetical nature of the arguments submitted before the Court – and using the same as a proverbial roadmap to the subject pleadings – are irrelevant to the legal viability of their pending claims.

Accordingly, for these reasons and those addressed in Mr. Maynard's moving Memorandum of Law, we respectfully submit that Plaintiffs' First Cause of Action should be dismissed in its entirety and with prejudice. Mr. Maynard cannot be held liable as an individual under Title VII, be it as an "alter ego" or otherwise.

We further submit that since Plaintiffs' sole federal claim is factually and legally deficient, the Court should refrain from exercising pendent jurisdiction over their remaining claims. *See Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986) ("absent exceptional circumstances," where federal claims can be disposed of pursuant to Fed. R. Civ. P. 12(b)(6) or summary judgment grounds, courts should "abstain from exercising pendent jurisdiction"); *Klein & Co. Futures, Inc. v. Bd. of Trade, 464* F.3d 255, 262 (2d Cir. 2006) (where federal claims are eliminated in the early stages of litigation courts should generally decline to exercise supplemental jurisdiction over remaining state claims) (citing Kola*ri v. N.Y.-Presbyterian Hosp., 455* F.3d 118, 122 (2d Cir. 2006)).

2. Plaintiffs' "Predecessor Liability" Theory Should not be Entertained by the Court

Plaintiffs expend much ink in their attempt to manufacture a cause of action against Mr. Maynard under the guise of "predecessor liability". As was thoroughly addressed in Mr. Maynard's moving Memorandum of Law, such a legal standard is nonexistent and is subsumed by traditional notions of liability, to which Mr. Maynard has none.

Plaintiffs focus on language within the reply brief submitted before the U.S. Supreme Court in connection to the writ of certiorari. *See* Plaintiff Exhibit "A". The arguments submitted before the Court addressed the *potential* ongoing nature of a controversy. This position is not inconsistent with Mr. Maynard's instant argument; it addresses a completely separate issue than those currently at bar, to wit, possible grounds for individual liability should Altitude Express have been found liable under Title VII. This has never occurred. Plaintiffs appear to miss the fact that that these are hypotheticals and not "all the remedies plaintiffs would have upon remand." Pl. Br. At 7. Indeed, Plaintiffs misconstrue the basis of, at the time, potential claims against Mr. Maynard which were premised upon the theoretical event of Altitude Express *first* being found liable under Title VII. *See* Plaintiffs' Exhibit "A", at p. 3 ("if Altitude Express is ultimately found liable for violating Title VII, [Plaintiffs] could argue that the corporate veil be pierced, that Maynard is the "alter ego" of Altitude Express, or that Maynard is otherwise vicariously liable for the company's wrongful acts…"). Plaintiffs, however, did not name Altitude Express as a party to their current allegations.

Moreover, in no manner is Mr. Maynard estopped from taking the position he now does concerning Plaintiffs' Third Cause of Action (alter ego liability pursuant to N.Y. Bus. Corp. Law ("BCL") § 1006(b)) – be it premised upon theories of veil-piercing or alter ego liability – for their failure to state a plausible claim pursuant to Fed. R. Civ. P. 12(b)(6). As set forth in Mr. Maynard's moving Memorandum of Law, BCL § 1006 does not provide any independent or additional rights

or remedies to creditors of a dissolved corporation. Rather, the statute provides that dissolution of a corporation does not affect a creditor's rights or claims existing before such dissolution. Plaintiffs fail to address this point of law.

Altitude Express is no longer a named party to this action. Plaintiffs ignore the corporate form in their attempt to shoehorn Mr. Maynard as the *de facto* "predecessor" of Altitude Express without any valid basis, legal or factual, for doing so. Not only do Plaintiffs fail to adequately allege facts to disregard the corporate entity and hold Mr. Maynard liable in place of Altitude Express; they also fail to interpose any cogent argument to the contrary. This is fatal to their pending claims. *See NYKCool A.B. v. Pac. Fruit, Inc.*, No. 10-CV-3867 (LAK) (AJP), 2012 U.S. Dist. LEXIS 52690, at *17-18 (S.D.N.Y. Apr. 16, 2012) ("The relief sought by NYKCool [veil-piercing and "alter ego" liability] is unavailable in this action. None of these entities are named defendants in this action. NYKCool must bring a separate action in which these other entities are named defendants in order to pierce the corporate veil and find alter ego and/or successor liability").

In any event, Plaintiffs fail to plead facts sufficient to support their request to "pierce the corporate veil" and hold Mr. Maynard as the alter ego of Altitude Express. The pleadings are premised upon "information and belief", the source material for which – "public records … statements by Maynard … and various search tools" (Pl. Br. At 5-6) – Plaintiffs fail put before this Court.

Taken together, we respectfully submit that Plaintiffs have failed to allege facts sufficient to hold Mr. Maynard liable in place of Altitude Express' potential for liability. Plaintiffs' Third Cause of Action should be dismissed, in its entirety, and with prejudice.

B. Plaintiffs' Motion to Enforce Judgments, Sanction, and the Posting of a Bond Should be Denied in its Entirety

As a threshold matter, to the extent that Plaintiffs' rely in the "Declaration in Support of Motion for Payment of Appellate Judgments and Sanctions" submitted by counsel Gregory Antollino, we respectfully submit the same should be disregarded by the Court by virtue of its attempts to convey legal arguments under the guise of factual background. A comparison of Plaintiff's "Memorandum of Law in Support of Motion for Payment of Appellate Judgments and for Sanctions" and Mr. Antollino's Declaration reveal that the latter contains completely separate legal and factual arguments than that contained in Plaintiff's brief. "[D]eclarations of counsel are generally properly used only to describe the documents attached to them as exhibits for the Court's consideration, [] not to advance factual averments or legal arguments." *Curran v. Aetna Life Ins. Co.*, No. 13-CV-00289 (NSR), 2016 U.S. Dist. LEXIS 90383, at *24-28, *7 (S.D.N.Y. July 11, 2016), *aff'd*, 619 F. App'x 34 (2d Cir. 2015). The inclusion of legal arguments in an attorney declaration is improper. *See Genometrica Rsch. Inc. v. Gorbovitski*, No. 11-CV-05802 (ADS)(AKT), 2013 U.S. Dist. LEXIS 13512, 2013 WL 394892, at *4 (E.D.N.Y. Jan. 31, 2013) (holding that the court will not consider any legal arguments contained in attorney declarations because inclusion of legal arguments in declarations is improper).

1. Plaintiffs' Motion for the Enforcement of Costs Should be Denied and the Second Cause of Action Seeking the Same Should be Dismissed

The Second Cause of Action within Plaintiffs' Second Amended Complaint seeks the collection of costs "personally and as predecessor-interest" to Altitude Express [ECF Doc. No. 280, at ¶ 80] (emphasis original). Through their "cross-motion", Plaintiffs seek this Court to summarily decide this issue without addressing the points made in Mr. Maynard's moving

Memorandum of Law. However, as set forth therein, Plaintiffs are not entitled to collect these costs from Mr. Maynard.

First, through their "predecessor in interest" theory, Plaintiffs now seek to hold Mr. Maynard personally responsible for the costs associated with the appeals of this matter. This premise is legally nonexistent and not a means by which to hold Mr. Maynard responsible for the debts and liabilities of the former corporate entity. Second, the fact that Mr. Maynard's name remained in the caption as a procedural formality is not, standing alone, a proper basis for claiming liability for the remedy now sought. *See* Fed. R. App. P. 12(a); Sup. Ct. R. 14(1)(b)(i). Mr. Maynard's involvement in this matter ended when, following the jury trial, judgment was entered in Mr. Maynard's favor [ECF Doc. No. 247]. *See* Zabell Decl. at Exhibits "B" and "C". Indeed, as Plaintiffs readily conceded to the U.S. Supreme Court in quoting the undersigned's April 12, 2018 correspondence to this Court, "there [was] no active matter currently pending before Raymond Maynard" [ECF Doc. No. 259] (emphasis added). *See also* Zabell Decl. Exhibit "G", at p. 13. Plaintiffs could, *arguendo*, have named Altitude Express in this action. Instead, they attempt, through argumentative gymnastics, to recover from an induvial who is not liable for appellate costs.

Accordingly, we respectfully submit that Plaintiffs' Second Cause of Action be dismissed, in its entirety and with prejudice, inclusive of its attempt to recover "double costs" and undefined sanctions. We further submit that Plaintiffs' pending application, to the extent it is properly before the Court, be denied.

2. Plaintiffs' Request for Sanctions Should be Denied

Pursuant to 29 U.S.C. § 1927, "[a] court may sanction an attorney who 'multiplies the proceedings in any case unreasonably and vexatiously.'" *Knopf v. Esposito*, 803 F. App'x 448, 456 (2d Cir. 2020) (citing 28 U.S.C. § 1927). The Second Circuit has consistently held that the purpose of sanctioning an attorney for bad faith conduct under 28 U.S.C. § 1927 "is to deter unnecessary delays in litigation." Oliveri at 1273. "[T]o impose sanctions … the trial court must find clear evidence that (1) the offending party's claims were entirely meritless, and (2) the party acted for improper purposes." *Revson v. Cinque & Cinque*, 221 F.3d 71, 78 (2d Cir. 2000).

Here, the undersigned does not advance arguments concerning the collection of costs to deter this matter. Nor are the arguments submitted in bad faith. As addressed in Mr. Maynard's moving Memorandum of Law and above, Mr. Maynard was absolved from all liability following a fair and proper trial. That his name remained in the caption of the appellate proceedings was a matter of procedural formality. In no manner whatsoever has the undersigned posited a meritless or improper position. Plaintiffs – or more accurately, their counsel's – inability to seek costs properly should not be impugned against the undersigned or this office.

Plaintiffs' anger aside, there exists no valid basis for the imposition of sanctions. As such, we respectfully submit that aspect of Plaintiffs' "cross-motion" should be denied.

3. Plaintiffs' Request for the Posting of a Bond Should be Denied

Plaintiffs advance no legal or factual argument in support of their request for Mr. Maynard or the undersigned to "post a bond to prevent further vexatious litigation." In fact, Plaintiffs readily concede "[t]here is no point in a bond here." Pl. Br. At 2.

Local Rule 54.2 governs security for costs and provides, in pertinent part:

> The Court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate…

Local Civ. R. 54.2. A motion to post a bond in this Court is left to the discretion of the court. *Lee v. W Architecture & Landscape Architecture, L.L.C.*, No. 18-CV-05820 (PKC) (CLP), 2019 U.S. Dist. LEXIS 89335, at *3 (E.D.N.Y. May 28, 2019) (citing *Lee v. W Architecture & Landscape Architecture, L.L.C.*, No. 18-CV-05820 (PKC) (CLP), 2013 U.S. Dist. LEXIS 4140, 2013 WL 132660, at *2 (E.D.N.Y. May 28, 2019) (stating that "[c]ourts have broad discretion in deciding whether a party should be required to post . . . a bond") (citation omitted)). Courts consider the following factors in determining whether a bond should be posted: (1) the financial condition and ability to pay of the party who would post the bond; (2) whether that party is a resident or foreign corporation; (3) the merits of the underlying claims; (4) the extent and scope of discovery; (5) the legal costs expected to be incurred; and (6) compliance with past court orders. *Id.* (citations and internal quotation marks omitted). *Id.*

Rather than posit any ground whatsoever for the imposition of a bond, Plaintiffs instead submit *ad hominem* attacks against the undersigned. Regardless, Mr. Maynard is a resident of Colorado. Discovery concluded years ago and no new evidence exists, nor can it: Mr. Zarda is deceased. Neither Mr. Maynard, Altitude Express, nor the undesigned has failed to comply with any Order of this Court concerning the pending action or its prior incantations. Grounds do not exists for the posting of a bond.

Accordingly, we respectfully submit that aspect of Plaintiffs' "cross-motion" which seeks the posting of a bond should be denied.

III. CONCLUSION

For the foregoing reasons and those addressed in Mr. Maynard's moving Memorandum of law, we respectfully request his pending application, made pursuant to Fed. R. Civ. P. 12(b)(6), be granted in its entirety and Plaintiffs' Second Amended Complaint be dismissed. We further respectfully request Plaintiffs' "cross-motion" be denied in its entirety.

Dated: March 5, 2021
Bohemia, New York

Respectfully Submitted,

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Raymond Maynard

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

MELISSA ZARDA and WILLIAM MOORE, co-independent executors second of the estate of DONALD ZARDA

10-CV-04334 (SJF) (AYS)

Plaintiffs,

- against –

RAYMOND MAYNARD as the predecessor in interest, the sole shareholder and alter ego to ALTITUDE EXPRESS, INC., and RAYMOND MAYNARD, individually,

Defendants.
----------X

DECLARATION OF SAUL D. ZABELL, ESQ., IN FURTHER SUPPORT OF RAYMOND MAYNARD'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6) AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF JUDGMENT, SANCTIONS, AND THE POSTING OF A BOND

Saul D. Zabell, Esq., declares under penalty of perjury and in accordance with 28 U.S.C. § 1746, as follows:

1. I am the managing principal of Zabell & Collotta, P.C., counsel for Defendant, Raymond Maynard, in the above-captioned action. I am familiar with the facts and circumstances set forth herein based upon the file maintained by this office.
2. I submit this Declaration in further support of Mr. Maynard's pending application, made pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") Rule 12(b)(6), which seeks dismissal, with prejudice, of all claims pending against him contained in the Second Amended Complaint [ECF Doc. No. 280], interposed by Plaintiffs Melissa Zarda and William Moore, co-independent executors of the estate of Donald Zarda ("Plaintiffs").

3. I further submit this Declaration in opposition to what purports to by Plaintiffs' "cross-motion" for a summary decision on Plaintiff's Second Cause of Action, as well as for sanctions and the posting of a bond.
4. I further submit this Declaration to introduce certain exhibits referenced within Plaintiff's opposition.
5. Annexed hereto as Exhibit "G" is a true and accurate copy of Plaintiffs' Brief in Opposition to a writ of certiorari, submitted to the U.S. Supreme Court.
6. Annexed hereto as Exhibit "H" is a true and accurate copy of what purports to be Plaintiffs' cross-motion, dated February 12, 2021, inclusive of: (1) Notice of Motion; (2) Memorandum in Support of Motion for Payment of Appellate Judgments and for Sanctions; (3) Declaration of Motion for Payment of Appellate Judgments and Sanctions; and the unmarked Exhibit "A" ("Declaration in Support of Bill of Costs"); unmarked Exhibit "B" ("Defendant-Appellees' Opposition to Plaintiff-Appellant's Bill of Costs", dated march 22, 2018); unmarked Exhibit "C" (Statement of Costs", dated May 14, 2018); unmarked Exhibit "D" (amended costs award of the U.S. Supreme Court, dated August 6, 2020); unmarked Exhibit "E" (Plaintiffs' "Brief in Opposition" to the writ of certiorari submitted before the U.S. Supreme Court); and unmarked Exhibit "F" (the "Reply Brief for Petitioners" seeking a writ of certiorari submitted before the U.S. Supreme Court).

7. For the reasons set forth more fully in the accompanying Reply Memorandum of Law and Mr. Maynard's moving Memorandum of Law, it is respectfully submitted that Plaintiffs' Second Amended Complaint [ECF Doc. No. 280] be dismissed, with prejudice, in its entirety, as well as the denial, in its entirety, of Plaintiffs' cross-motion.

Dated: March 5, 2021
Bohemia, New York

Respectfully Submitted,

ZABELL & COLLOTTA, P.C.
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No. 17-1623

IN THE

Supreme Court of the United States

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be granted on a petition involving construction of Title VII of the Civil Rights Act of 1964 when one petitioner faces no liability under that statute and the other is a defunct corporation whose only known assets have been acquired by a successor that is not seeking review?

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are Altitude Express, Inc., a dissolved New York corporation, and Ray Maynard.

Respondents, plaintiffs below, are Melissa Zarda and William Allen Moore, Jr., co-independent executors of the Estate of Donald Zarda, duly appointed by the Dallas County Probate Court and substituted as plaintiffs after Donald Zarda's death.

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BRIEF IN OPPOSITION

Donald Zarda, a gay man, was employed as a skydiving instructor by Altitude Express, Inc. ("Altitude"), a New York corporation. He alleged that Altitude fired him because he "failed to conform to male sex stereotypes by referring to his sexual orientation." Pet. App. 8. Among other things, he claimed that his termination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), which prohibits covered employers like Altitude from "discharg[ing] any individual . . . because of such individual's . . . sex." The court of appeals held *en banc* that this claim is "cognizable under Title VII," Pet. App. 61, and remanded the case for trial.[1]

As petitioners acknowledge, Altitude Express, Inc., no longer exists. Pet. ii. The corporation "was dissolved." BIO App. 14a.[2]

Despite respondents' best efforts to obtain discovery, they have not yet been able to determine who faces successor liability for Zarda's Title VII claim against Altitude. *See* BIO App. 2a-3a; 8a-9a; 13a.[3] If it

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[1] Zarda died after the district court had granted summary judgment on his Title VII claim, but prior to trial on his state-law claim. The executors of his estate were substituted as plaintiffs, Pet. App. 8 n.1, and are respondents here. For ease of exposition, they will be referred to interchangeably as "Zarda" and "respondents."

[2] "BIO App." refers to the Appendix to this Brief in Opposition.

[3] On remand before the district court after the *en banc* ruling, respondents sought discovery on the issue of successor liability. The district court denied the request because of petitioners' statement that they intended to seek Supreme Court review. *See* BIO App. 14a.

is Skydive Long Island, Inc., a corporation that purchased some (if not all) of Altitude's assets, that corporation has announced that it "fully support[s]" the Second Circuit's decision in this case. *Id.* 4a.

Under the circumstances, it is unclear whether either petitioner now before this Court is an appropriate party to seek this Court's review. This Court should therefore deny the petition.

STATEMENT OF THE CASE

1. Petitioner Altitude Express, Inc., a New York corporation, operated a business called Skydive Long Island that provided "tandem skydives" to customers. In a tandem skydive, the customer is "strapped hip-to-hip and shoulder-to-shoulder" to an instructor who is responsible for ensuring the customer's safety. Pet. App. 11. Petitioner Ray Maynard owned Altitude Express. *Id.* at 143. Donald Zarda worked as an instructor for Altitude.[4]

"In an environment where close physical proximity was common, Zarda's co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive." Pet. App. 11; *see also id.* at 180-81 (providing examples of these comments).

In the summer of 2010, Altitude sold a pair of tandem skydives to a young couple, Rosanna Orellana

[4] Because of the procedural posture of this case—the district court held that the Title VII claim was foreclosed as a matter of law—petitioners' attempt to shade the facts in their favor regarding plaintiff's termination, Pet. 2-3, are misplaced.

and David Kengle. Pet. App. 11, 144-45. Zarda was Orellana's instructor and disclosed his sexual orientation to her as they prepared to dive. Zarda and Orellana successfully completed the jump. *Id.* at 12.

Several days later, Kengle contacted Altitude Express. He claimed that Orellana had told him that Zarda had touched her inappropriately while strapped together; he accused Zarda of discussing his sexual orientation with Orellana as a pretext for his behavior. Pet. App. 12. Zarda denied that he had engaged in any misconduct, but Altitude Express fired him shortly thereafter. *Id.* When Zarda sought unemployment benefits, Altitude Express responded to the New York Department of Labor only that Zarda had been discharged "for shar[ing] inappropriate information with [customers] regarding his personal life." C.A. Jt. App. 626. It did not assert any physical misconduct on Zarda's part. *See also* Pet. App. 167.

2. Zarda filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission. *See* Pet. App. 177-81. In that charge, he asserted that "in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." *Id.* at 178. In particular, Zarda charged that "[a]ll of the men at Altitude made light of the intimate nature of being strapped to a member of the opposite sex," but that he was fired because he "honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." *Id.* at 180.

3. After receiving a right-to-sue letter, Zarda filed suit in the United States District Court for the Eastern District of New York. As is relevant here, he alleged

that his termination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), which prohibits an employer from discharging any individual "because of such individual's . . . sex." He also alleged that his termination violated N.Y. Exec. L. § 296.1(a), which forbids employers from discharging an individual on a number of bases, including an individual's "sexual orientation" or "sex."

The district court denied Altitude's motion for summary judgment on Zarda's state-law claim, Pet. App. 167, finding enough evidence in the record from which a jury could conclude that Altitude fired Zarda because of his sexual orientation, *see id.* at 165-68. But it granted Altitude's motion for summary judgment on Zarda's Title VII claim, rejecting his claim that he had been subject to prohibited sex stereotyping. *See id.* at 161.

Before Zarda's case could go to trial, the EEOC issued a decision in *Baldwin v. Foxx,* 2015 WL 4397641 (July 15, 2015). *Baldwin* sets forth the EEOC's position that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Id.* at *5. In addition, the EEOC explained that "[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex." *Id.* at 6. Finally, the EEOC declared that "[s]exual orientation discrimination also is sex

discrimination because it necessarily involves discrimination based on gender stereotypes" about appropriate behavior for men and women. *Id.* at 7.

Immediately upon learning of *Baldwin*, Zarda moved to reopen the district court's grant of summary judgment on his Title VII claim. The district court denied the motion, holding that the Second Circuit's decision in *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000), "was contrary to the EEOC's decision, and that it barred Zarda from recovering on a theory that discrimination based on sexual orientation violated Title VII." Pet. App. 147 (description provided by the court of appeals).

At trial on Zarda's state-law claim, the jury returned a verdict for Altitude.

4. On appeal, a panel of the Second Circuit agreed with respondents that Zarda's Title VII claim was not barred by the jury verdict in Altitude's favor on the state-law claim. The district court's instruction to the jury on causation had required respondents to prove that Zarda's sexual orientation was the but-for cause for his termination. Pet. App. 148. But under Title VII, he would have needed to show only that "discriminat[ion] was 'one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.'" *Id.* (quoting *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2523 (2013)).

Nonetheless, the panel held that Zarda's Title VII claim was barred by *Simonton*, which could "only be overturned by the entire Court sitting in banc." Pet. App. 149.

5. The court of appeals granted respondent's petition for rehearing en banc and directed the parties to address the 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'?" Pet. App. 157. After oral argument, the court ruled 10-3 that it does.

Chief Judge Katzman's majority opinion explained that "sexual orientation discrimination is properly understood as 'a subset of actions taken on the basis of sex." Pet. App. 19-20. Aligning itself with the EEOC's decision in *Baldwin,* as well as a recent en banc decision from the Seventh Circuit's, *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), it identified three bases for this conclusion.

First, sexual orientation is "[l]ogically" a function of an individual's sex. Pet. App. 21. To "identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted." *Id.* An individual's sex is the but-for cause of discrimination on the basis of sexual orientation: for example, "a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination." *Id.* at 34.[5]

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[5] In so holding, and as discussed below, the Second Circuit relied upon Seventh Circuit Judge Joel Flaum's concurrence in *Hively,* which focused solely on the text. 853 F.3d at 357-59.

The Second Circuit identified "yet another basis for concluding that sexual orientation discrimination is a subset of sex discrimination" in this Court's sex stereotyping jurisprudence, Pet. App. 35. Quoting from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), the Second Circuit "conclude[d] that when, for example, 'an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who are attracted to men, the employer 'has acted on the basis of gender.'" Pet. App. 37 (interpolations and ellipses supplied by the Second Circuit). "[S]exual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination." *Id.* at 40.

Finally, the Second Circuit concluded that discrimination on the basis of sexual orientation constitutes forbidden "associational discrimination." The court described the widespread consensus among the courts of appeals that Title VII forbids associational discrimination—that is, discriminating against an individual because of the relationship between the individual's protected characteristic and the protected characteristics of others with whom the individual associates. *See* Pet. App. 45. The court saw "no principled basis for recognizing a violation of Title VII for associational discrimination based on race but not on sex." *Id.* at 53. The general "notion that employees should not be discriminated against because of their association with persons of a particular sex is not controversial." *Id.* at 47 (internal quotation marks omitted). Just as an employer could not fire a female employee because of her close

relationships with men, so too, an employer cannot fire a male employee for having such relationships.

Relying on this Court's decisions recognizing both that sexual harassment and same-sex sexual harassment are actionable under Title VII, *see Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), the Second Circuit declared it irrelevant that the Congress that enacted the Civil Rights Act of 1964 did not foresee this application of Title VII's prohibition of sex discrimination. The clear language trumped any contrary arguments from legislative intent. *See id.* at 23-27. Nor did "subsequent legislative developments," Pet. App. 53, undermine treating sexual orientation discrimination as a subset of sex discrimination.

Judges Hall, Chin, Carney, and Droney, joined Chief Judge Katzmann's opinion in full. Judge Pooler joined all of the opinion except its discussion of but-for causation.

Judges Cabranes concurred in the judgment, noting in three paragraphs that this question is "a straightforward case of statutory construction." Pet. App. 68. "Zarda's sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore *is* discrimination because of his sex, and is prohibited by Title VII. That should be the end of the analysis" *Id.* Judge Lohier, noted that one could end with Judge Cabranes' concurrence, and endorsed Chief Judge Katzmann's "textualist's approach." Pet. App. 71. He also agreed with respondents that the "associational discrimination rationale" might properly be "appl[ied] to Zarda's particular case." *Id.*

Two other concurring judges—Judges Jacobs and Sack—each joined Chief Judge Katzmann's explanation that sexual orientation discrimination constitutes forbidden associational discrimination on the basis of sex. *See* Pet. App. 62-65 (Judge Jacobs); *id.* at 69 (Judge Sack). Judge Jacob was "unconvinced" with the sex-stereotyping reasoning, *id.* at 62, while Judge Sack thought it unnecessary to reach it, viewing it as wiser to "stop" with the "simpler and less fraught theory of associational discrimination." *Id.* at 70.

Judges Lynch, Livingston, and Raggi each dissented.

6. Zarda's case was remanded for further proceedings before the district court on the Title VII claim. Respondents learned by happenstance, after the en banc decision, that Altitude Express had been dissolved. BIO App. 14a. They sought to discover who has "assume[d] liability for Altitude Express' liabilities." *Id.* at 2a. That information, they told the court, was relevant to their decisions about how to proceed. In particular, respondents sought information about whether Skydive Long Island, Inc. ("SDLI"), which had purchased naming rights from the now-dissolved Altitude, *id.* at 4a, had also assumed its potential liability to respondents, or whether Maynard, when he sold the naming rights, had contractually agreed to successor liability. *See id.* at 2a, 8a.

Counsel for petitioners responded, first, that "there is no active matter currently pending [involving] Raymond Maynard." BIO App. 6a. As for Altitude Express, counsel argued that discovery should not be reopened. *Id.* at 7a. Counsel declined to

provide the documents reflecting the sale of Altitude's assets.

At a hearing before the district court, counsel for petitioners did not dispute respondents' assertion that Maynard faced no direct liability under Title VII, although he might be contractually liable to Altitude Express or some other party for any liability which that party faced, BIO App. 12a. Counsel for petitioners did announce an intention to seek review in this Court on behalf of Altitude Express. *See id.* at 12a, 14a.

In response to the request for discovery because it was unclear whether Altitude as a dissolved corporation was still an appropriate party to the lawsuit, *see* BIO App. 12a-14a, the district court replied that "I don't think it makes any sense to address that right now while the petition is pending. If in fact the Supreme Court doesn't want to hear the case because the company is dissolved, then that's up to them I guess." *Id.* at 14a. The district court then issued a brief docket entry stating in its entirety that "With respect to the issue discussed at today's conference, the Court notes that New York Business Corporation Law Section 1006 provides that a dissolved corporation may participate in all court proceedings against it." *Zarda v. Altitude Express, Inc. et al.*, No. 2:10-cv-04334 (E.D.N.Y. May 21, 2018).[6]

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[6] N.Y. Bus. Corp. L. § 1006 provides, in pertinent part that:

> (a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court

REASONS FOR DENYING THE PETITION

Petitioners are unequivocally wrong in claiming that "[t]his case is in the perfect posture for the Court to decide whether Title VII's prohibitions on discrimination 'because of . . . sex' encompass discrimination based on sexual orientation." Pet. 30. To the contrary, this case is a distinctively *bad* vehicle for answering the question presented. One of the two petitioners—Ray Maynard—was not Zarda's "employer" for purposes of Title VII liability. And it is unclear whether the other—the now-dissolved Altitude Express, Inc.—remains liable or whether some successor, who has not sought review from this Court, is now responsible for defending against Zarda's claims. Moreover, respondents' claim is atypical in ways that militate against review. Petitioners themselves acknowledge that "[i]t is inevitable that this issue will come before the Court" again. *Id.* at 31. If this Court decides it is necessary to resolve the question presented, it should await an appropriate vehicle and deny certiorari here.

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order. In particular, and without limiting the generality of the foregoing:

. . . .

(4) The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it.

(b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution . . . .

I. This case is the wrong vehicle for resolving whether discrimination on the basis of an individual's sexual orientation falls within Title VII's prohibition on "sex" discrimination in employment.

There are three reasons why this case – notwithstanding the Second Circuit's thorough, persuasive analysis – is a bad vehicle for resolving the question presented.

1. This Court has no jurisdiction to hear a petition on behalf of petitioner Maynard. Since the Second Circuit's holding does not affect his legal rights, he lacks standing to seek review in this Court.

Title VII authorizes an aggrieved individual to bring suit only against his "employer," an "employment agency," or a "labor organization." 42 U.S.C. § 2000e-2(a), (b), (c). Maynard is none of these. Rather, respondents have alleged that he was the chief executive officer and sole shareholder of the *corporation*—Altitude Express, Inc.—that employed Zarda. It is black letter law that Title VII "does not provide for an action against an individual supervisor." *Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1147 (8th Cir. 2008); *see also, e.g.*, *Wrighten v. Glowski,* 232 F.3d 119, 120 (2d Cir. 2000); *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 930 (7th Cir. 2017) ("there is no individual liability under Title VII"); *Malcolm v. Vicksburg Warren Sch. Dist. Bd. of Trustees*, 709 F. App'x 243, 247 (5th Cir. 2017) ("Individuals are not liable under Title VII in either their individual or official capacities").

"[I]t is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of

corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006). Thus, the fact that Maynard may have owned and managed Altitude Express, Inc., does not expose him to direct liability under Title VII. He therefore cannot seek review of a decision permitting respondents to sue the corporation.

Indeed, Maynard himself took that position only a few months ago, writing to the district court that, with Zarda's non-Title VII claims having been resolved, "there is no active matter currently pending before Raymond Maynard." BIO App. 6a. Because he faces no liability, he is not a proper party to this proceeding. His mere name on the petition, given both sides' agreement on this point, should instantly give pause: An individual with no potential legal obligation to respondents asks for space on this Court's limited docket? Behind this could lie either a riddle or a ruse.

2. The standing of the second petitioner, Altitude Express, Inc., to seek further review is questionable at best. To be sure, as a matter of state law, dissolved corporations may remain subject to liability. *See* N.Y. Bus. L. § 1006(a)(4), (b). But even assuming that state law is controlling for liability under a federal statute,[7] respondents may be entitled instead to substitute as the proper defendant an ongoing (and solvent) successor. In that circumstance, Altitude would also no longer face any direct consequences from Zarda's

[7] *But see EEOC v. Northern Star Hospitality, Inc.*, 777 F.3d 898, 901-03 (7th Cir. 2015) (addressing the issue of successor liability under Title VII as a matter of federal common law).

Title VII claim, and thus would also lack standing to invoke this Court's jurisdiction.[8]

Respondents learned – again, after the decision from which review is sought – that Skydive Long Island, Inc. (SDLI) purchased some (if not all) of the assets of Altitude before Altitude dissolved. BIO App. 14a. But despite their best efforts, respondents have been unable to determine whether SDLI took on Altitude's liabilities, in whole or in part. *See supra* pp. 9-10.

SDLI is not a party before this Court, or in the courts below. BIO App. 4a. And to the extent that SDLI is Altitude's successor, it has issued a public statement, posted on its website after the Second Circuit's en banc decision, announcing that it "fully support[s] this ruling." *Id.* While it remains possible, should respondents succeed in substituting it as a party defendant, that SDLI might decide to dispute whether in fact Altitude discharged Zarda because of his sexual orientation, SDLI has repudiated the

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[8] The Court might also wonder whether a dissolved corporation, with at best an uncertain concrete interest in the outcome of the litigation, is an appropriate party to litigate the question presented. *Cf.* Pet. 31 (pointing to the lack of employer "involvement" as a reason for the denial of certiorari on this question in *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248 (11th Cir.), *cert denied,* 138 S. Ct. 557 (2017)).

That being said, there is no question of mootness. *Respondents* have a live claim. And because they are responsible for the corporate dissolution, neither Maynard nor Altitude can obtain vacatur of the decision below. *See United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994).

position taken in the petition that Title VII does not cover sexual orientation discrimination.

In any event, because the issue goes to standing and thus this Court's jurisdiction, the Court would have to address the question of successor liability and whether Altitude is still an appropriate defendant before it could reach the merits of any Title VII issue raised in the petition. The question of successor liability is fact-bound and turns on considerations that are not well developed in the existing record. As this Court observed in *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees & Bartenders Int'l Union, AFL-CIO*, 417 U.S. 249 (1974), determining successor liability "requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue." *Id.* at 262 n.9. Thus, "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context." *Id.*

Under Title VII, courts decide successor liability as a matter of federal common law under a multi-part test that turns on factual issues such as whether the successor company was on notice of the suit and whether the predecessor company could provide adequate relief to the plaintiff. *See, e.g.*, *EEOC v. Northern Star Hospitality, Inc.*, 777 F.3d 898, 902 (7th Cir. 2015) (describing that court's "five-factor test for successor liability in the federal employment-law context"); *EEOC v. MacMillan Bloedel Containers, Inc.,* 503 F.2d 1086, 1094 (6th Cir. 1974) (stating that "[c]ourts that have considered the successorship

question" find "a multiplicity of factors to be relevant" and identifying nine relevant factors).

In this case, as respondents have already explained, it is not even precisely clear as to what the successorship facts *are*. Under these circumstances, it makes no sense for the Court to grant review.

3. The factual atypicality of Zarda's case provides yet another reason to deny review. In the mine run of sexual orientation discrimination claims, a plaintiff asserts that he or she suffered an adverse employment action when the employer learned of the plaintiff's sexual orientation or because the employer disapproved of the plaintiff's sexual orientation.

Zarda's case is different. He alleged he was fired not simply because he was gay, but because he revealed his sexual orientation to a customer of the firm. And he did so in the context of an unusual job—one in which he was intimately "strapped hip-to-hip and shoulder-to-shoulder" to that customer. Pet. App. 11.

In the encounter that led to Zarda's termination, he was strapped to a woman. But for his sex, and hers, he would not have revealed his sexual orientation. Thus, the facts of Zarda's case depend on sex in a way that is distinctive to his job function. That means that the Court could resolve Zarda's case without reaching the broad question on which petitioners seek review: whether discrimination on the basis of sexual orientation is *necessarily* discrimination "because of . . . sex."

Last Term provides two powerful illustrations of how this Court can find itself unable to resolve fully the question presented when it grants review on

idiosyncratic facts. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), this Court did not reach the question presented—whether the Free Speech or Free Exercise Clauses of the First Amendment provide a business that is open to the public with a defense to a claim that it engaged in discriminatory conduct prohibited by a state law. Statements made during an administrative hearing compromised "neutral and respectful consideration" of the petitioners' claims. *Id.* at 1729. Thus, the Court issued an opinion that left open the question of general applicability. And in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the petitioner's claim was sufficiently "far afield from the typical retaliatory arrest claim," *id.* at 1954, that the Court has apparently found it necessary to grant yet another case to decide whether probable cause defeats a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983. *See Nieves v. Bartlett*, No. 17-1174 (certiorari granted June 28, 2018). Granting review here could well result in the same kind of inability to provide guidance on the general construction of Title VII's prohibition on sex discrimination.

Particularly given petitioners' acknowledgment that it is "inevitable" that this Court will have other chances to address the question presented, Pet. 31, the Court should take a pass on this deeply flawed vehicle.

II. Any conflict among the circuits provides no reason to grant review now.

Petitioner points to the recent en banc decisions by the Second Circuit here and the Seventh Circuit in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), as reasons for this Court to grant

review. Pet. 11-12. In reality, these decisions provide a reason for this Court to let the issue percolate. Each of the en banc decisions "overrule[d] earlier decisions" in order "to bring our law into conformity with the Supreme Court's teachings" in cases like *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Hively*, 853 F.3d at 343.

Other courts are grappling with the same question that the Second and Seventh Circuits confronted, and are coming to similar conclusions. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018) (citing *Zarda* in deciding a sex stereotyping decision for plaintiff); *Franks v. City of Santa Ana,* 2018 WL 2425395 (9th Cir. May 30, 2018) (remanding to allow a sexual orientation discrimination claim under Title VII); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."). This Court's consideration of the question presented will benefit from watching how the issue plays out in a variety of factual circumstances.

Indeed, even the Eleventh Circuit, which recently declined to revisit its precedent en banc, *see Bostock v. Clayton Cty. Bd. of Commissioners,* 894 F.3d 1335, 1335 (11th Cir. 2018),[9] is not wholly in conflict with

[9] The plaintiff in that case did not seek rehearing en banc, but instead filed a petition seeking review in this Court. *Bostock v. Clayton County, Georgia*, No. 17-1618 (filed May 25, 2018). Apparently, the Eleventh Circuit did not address the question

the Second and Seventh Circuits. In *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248 (11th Cir.), *cert denied,* 138 S. Ct. 557 (2017), although the court adhered to its precedent holding that sexual orientation claims are not categorically actionable under Title VII, it also recognized that discrimination "because of gender-nonconformity [can be] sex discrimination," and remanded a lesbian plaintiff's claims for further proceedings. *Id.* at 1254-55.

In short, there is analytic and doctrinal movement occurring among the lower courts. This Court should not short-circuit that process.

III. The Second Circuit's decision is correct.

Title VII of the Civil Rights Act of 1964 enacted a "broad rule of workplace equality." *Harris v. Forklift Sys.,* 510 U.S. 17, 22 (1993). In prohibiting employment discrimination "because of" an individual's "sex," 42 U.S.C. § 2000e-2(a)(1), Title VII reaches forms of gender discrimination beyond those that animated Congress "when it enacted Title VII," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). And "recogniz[ing] that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged," this Court has applied concepts of nondiscrimination to

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whether it should revisit the construction of Title VII en banc until after the petition was filed. *See Bostock*, 894 F.3d at 1338 n.8. Without taking a position on *Bostock*, respondents suggest that a post-petition sua sponte request for rehearing en banc with a dissent shows that lower courts are engaging this question. That is the way it should be. There is no need to grant this defective petition.

lesbian, gay, and bisexual individuals. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

Title VII's prohibition on discrimination "because of" an individual's "sex" encompasses three related concepts. First, Title VII forbids "treatment of a person in a manner which but for that person's sex would be different." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted). Second, Title VII forbids adverse employment actions based on "sex stereotypes." *Manhart*, 435 U.S. at 707 n.13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). Third, Title VII prohibits discrimination against an employee based on the interaction of a protected aspect of the employee's identity with the identity of a person with whom the employee associates. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *cf. Loving v. Virginia*, 388 U.S. 1, 11 (1967) (punishing a person for marrying someone of a different race constitutes race discrimination).

Discrimination against individuals because of their sexual orientation runs afoul of all three prohibitions.

1. As Judge Lohier suitably noted, "[t]ime and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation." Pet. App. 72. Discriminating against lesbian, gay, or bisexual employees inherently involves treating them adversely based on their sex. For more than forty years, it has been settled that Title VII forbids an employer from having "one hiring

policy for women and another for men." *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam). One way to articulate this "simple test" is that it forbids any "treatment of a person in a manner which but for that person's sex would be different." *Manhart*, 435 U.S. at 711 (citation omitted).

It is undemanding to appreciate how discrimination against a gay man like Donald Zarda fails this but-for test. If an employer would not fire women who are attracted to men, then it cannot fire men who are attracted to men. As Chief Judge Wood explained in *Hively*, "[i]t would require considerable calisthenics to remove the 'sex' from "sexual orientation." *Hively v. Ivy Tech Community College*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc). That is why, after all, Judge Cabranes thought this entire question could be resolved in three paragraphs. Pet. App. 68.

2. Discrimination based on sexual orientation also rests on impermissible sex stereotyping. This Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), makes clear that Title VII does not permit employers to "evaluate employees by assuming or insisting that they match[] the stereotype associated with their group." *Id.* at 251 (plurality opinion). Such assumptions and demands, when they result in adverse employment consequences for workers who do not fit the stereotypes, constitute discrimination because of sex.

Discrimination on the basis of sexual orientation is rooted in stereotypes about what it means to be a man or a woman and about how men and women should conduct their lives. It rests on the idea that men should not be attracted to men. Aligning itself

with the Seventh Circuit's statement in *Hively* that same-sex orientation "represents the ultimate case of failure to conform" to gender stereotypes, 853 F.3d at 346, *see* Pet. App. 38, the Second Circuit agreed "that stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women." *Id.* (internal quotation marks and citations omitted. As this Court recently explained, "[f]or close to a half century" it has been the law that "overbroad generalizations about the different talents, capacities, or preferences of males and females" constitute sex discrimination. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996), and citing *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)). Discrimination on the basis of sexual orientation suffers from exactly those generalizations.

3. Discrimination on the basis of sexual orientation constitutes "associational" discrimination forbidden by Title VII. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), this Court held that an employment practice premised on the sex of an employee's spouse can constitute sex discrimination. The practice at issue there was the denial of spousal pregnancy benefits in an employer's healthcare plan. Title VII had, years earlier, been amended to provide that discrimination on the basis of pregnancy is discrimination "because of sex." As such, at the time "the sex of the spouse [was] always the opposite of the sex of the employee," and male employees were subject to discrimination because they had female spouses. *Id.* at 684.

In a similar vein, every circuit to have addressed the question has held that discrimination against

employees because they have interracial relationships constitutes a form of discrimination "because of . . . race" prohibited by Title VII. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *opinion reinstated on reh'g en banc sub nom. Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999); *Parr v. Woodmen of the World Life Insurance Co.*, 791 F.2d 888 (11th Cir. 1986). "The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Holcomb*, 521 F.3d at 139. Several circuits and numerous district courts have found associational discrimination on the basis of other protected actionable characteristics as well. *See* Pet. App. 46 n.25 (citing cases).

The logic of these cases carries to sex discrimination, and therefore sexual orientation discrimination: treating an employee differently because the employer disapproves of same-sex relationships depends on the employee's sex. Again, discrimination under Title VII need merely be "motivated by" consideration of an employee's protected class, as Judge Flaum noted in his succinct concurrence in *Hively,* 853 F.3d at 358, which *Zarda* adopted, Pet. App. 21, 23. Further, Title VII "treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion). Thus, "the prohibition on associational discrimination applies with equal force to all the

classes protected by Title VII, including sex." Pet. App. 46. As the Second Circuit explained, "if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because 'the fact that the employee is a man instead of a woman motivated the employer's discrimination against him.'" Pet. App. 47 (quoting *Baldwin v. Foxx,* 2015 WL 4397641 at *6 (EEOC July 15, 2015).

4. Neither the absence of the explicit phrase "sexual orientation" in Title VII nor congressional inaction after enactment of Title VII can provide a basis for excluding sexual orientation discrimination from the prohibition on discrimination "because of . . . sex." Title VII does not remove lesbians, gay men and bisexual people from its categorical protection against sex discrimination.

Judge Lynch was mistaken to use the proposition that "[d]iscrimination against gay women and men. . . was not on the table for public debate" in 1964 as a basis for denying them protection under Title VII. Pet. App. 79 (Lynch, J., dissenting). It is regrettably true that in 1964 gay men and lesbians, if they had any place at the table, held their secrets under the tablecloth. But "we are governed" by "the provisions of our laws rather than the principal concerns of our legislators." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Regardless of the personal views of members of Congress in 1964, the *statutory text* enacted into law provides gay men and lesbians with a seat at the table by affording them the same protections against discrimination "on the basis of sex" as heterosexual men and women. That was true of the

language of Title VII as originally enacted. And it is even clearer in light of the 1991 amendments to Title VII, which impose liability if sex was even a "motivating factor" in an adverse employment action.

This Court's decision in *Oncale* shows the right way to interpret the statute. In 1964, it was equally implausible to think that any member of Congress was concerned with prohibiting male-on-male sexual harassment. But as this Court explained, "statutory prohibitions often go beyond the principal evil" targeted by the Congress that enacted them "to cover reasonably comparable evils." 523 U.S. at 79. Discrimination against individuals on the basis of their sexual orientation, like the same-sex sexual harassment at issue in *Oncale*, "meets the statutory requirements" for sex discrimination prohibited by Title VII, *id.* at 80. Courts cannot "rewrite the statute so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). They must instead apply the statute as written.

Nor, as the Second Circuit explained, Pet. App. 56, can congressional inaction support excluding claims of discrimination on the basis of sexual orientation. As this Court has repeatedly cautioned, "subsequent legislative history" provides "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Given the multitude of reasons the various proposals to add "sexual orientation" to Title VII might not have been adopted, the congressional inaction over the years here has "no persuasive significance." *United States v. Wise*, 370

U.S. 405, 411 (1962). It "is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval" of a particular statutory interpretation. *Patterson v. McLean Credit Union,* 491 U.S. 164, 175 n.1 (1989). "There are many reasons Congress might not act" in response to a decision even by this Court, "and most of them have nothing at all to do with Congress' desire to preserve the decision." *Michigan v. Bay Mills Indian Community,* 134 S. Ct. 2024, 2052 (2014). (Thomas, J., dissenting). Congress may be indifferent to the status quo, or unable to agree on how to alter it. *Johnson v. Transp. Agency,* 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

It is impossible to choose among the various inferences that a court should take "from [congressional] inaction." *LTV,* 496 U.S. at 650. Silence and nothingness lack persuasive significance; a court may draw "several equally tenable inferences . . . from such inaction, including the inference that the existing legislation already [includes] the offered change." *Id.* The lessons of *LTV* date back at least to the 1960's. *See id.* (quoting *United States v. Wise,* 370 U.S. 405, 411 (1962). This Court has frequently cautioned against giving unenacted legislation such jurisprudential weight, and it certainly should not depart from that guidance to decide an issue of profound importance in such a backhanded manner. As this Court recently reiterated, "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd. v.*

United States, 138 S. Ct. 2067, 2074 (2018) (emphasis in original).[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Gregory Antollino
Counsel of Record
Antollino PLLC
275 Seventh Avenue
Suite 705
New York, NY 10001
(212) 334-7397
Gregory10011@icloud.com

August 16, 2018

[10] Indeed, as Chief Judge Katzmann pointed out in his analysis of the acquiescence theory—which presupposes a majority of Congress has accepted any particular judicial interpretation—"when the statute was amended in 1991, only three of the thirteen courts of appeals had considered whether Title VII prohibited sexual orientation discrimination." Pet. App. 55.

APPENDIX

APPENDIX A

Gregory Antollino
Attorney at Law
greg@antollino.com
275 Seventh Avenue Suite 705
New York New York 10001
Tel (212) 334-7397
Fax (212) 334-7399

April 11, 2018

Judge Joseph F. Bianco U.S. District Judge
100 Federal Plaza
Central Islip, NY 11722

Dear Judge Bianco,

Hello again. I write with great humility. Winning the en banc is probably the greatest gift ever conferred on me in my career.

The week after I filed a request for a bill of reproduction costs with the Circuit, it was met with strong opposition from the defense in which Mr. Zabell also noted an intention to file a petition for certiorari.

Mr. Zabell and Skydive Long Island, Inc.[1] have both publicly supported the legal conclusion of the en banc court – SDLI has on its website and Mr. Zabell has said to the press. We know, however, that in the prac-

[1] SDLI, Inc. is the successor in interest to Altitude Express, which changed is location to Shirley New York before this case went to trial, then after the appeal was filed. SDLI distanced itself from Altitude Express on its website after the ruling (took the pages down), but some screenshots I took are attached. Altitude Express moved to Shirley, NY before trial – 2014 or 2015. Altitude Express dis-incorporated, and Skydive Long Island registered as a corporation in 2016.

tice of Supreme Court litigation, there are lawyers who are dying to appear before the high court who are willing to take a case up for a losing party at no cost. I am speculating, but my suspicion is that where we are now.

The day after the costs petition (opposition and reply) was fully submitted, Mr. Zabell solicited from me a demand, suggesting there was little money to go around. I asked what SDLI's liability for this debt could be – and have asked repeatedly – but Mr. Zabell has remained mum. I nevertheless made the demand and was told that (after 7+ years of litigation) it was out of range. I don't know if the defense was willing to pay anything, but plaintiff deserves to know who is paying the bill. Is it just Ray Maynard or – as I suspect – did SDLI assume liability for Altitude Express' liabilities. We deserve to know this information just as much as we deserve to know if there is were an insurance policy.

The mandate has issued and there is no stay. We are not asking for a trial date. What we ask for is simply the unredacted sales document that either disavows or assumes liability on Altitude Express. We will keep it confidential. You might also want to refer this to Magistrate Shields.

If our demand was too big, then perhaps we were wrongly assuming successor liability. This is an important question; I have taken cases to trial where there is no money to be taken and don't intend to do so here. The most important question in discussing settlement – and this would be a question that we should explore before certiorari is granted or denied – is the question of successor liability. There is certainly a document that addresses this question in the sale of Altitude Express, Inc. to Skydive Long Island, Inc.

This document is not publicly available. If Mr. Zabell believes we are asking for too much, we need the sales document to know in what area settlement should be explored. Mr. Zabell is trying to hide behind Mr. Maynard as the sole defendant, but he refuses to tender the sales document.

I ask that it be tendered now. I need to advise my clients what money might be obtained at a new trial if cert if denied (or we win on the merits). At a new trial, compensation would include seven years of attorney's fees, punitive damages, a lower standard of proof (a single motivating factor under Title VII) plus the new rule of law announced in *Vasquez v. Empress Ambulance Serv.*, 835 F.3d 267 (2d Cir. 2016).

The defense has announced an intention to petition for certiorari, but it also solicited a demand. We will not be pushing this case to trial until the certiorari petition is filed, but there is no reason there cannot be limited discovery on this minor issue. You don't want to have this case on your docket for another seven years, and there is no reason not to use the time as we wait to explore this discrete issue.

Maybe a phone conference should be scheduled, and I am free until Friday except for Friday morning. Monday I must report for jury duty, but can confer during the lunch hour, 1-2:15.

Thank you for your consideration.

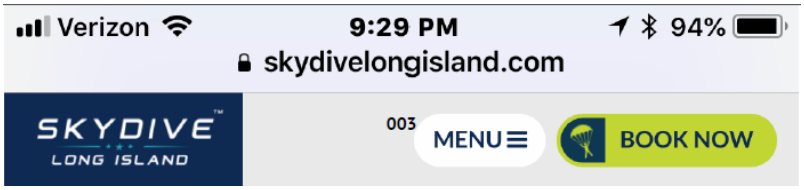
Sincerely,

/s/ Greg S. Antoffino

Gregory Antollino

Cc: Saul Zabell, Stephen Bergstein

APPENDIX B



Long Island NY – On February 26th, 2018, a federal appeals court in New York has ruled that employers cannot discriminate against workers based on their sexual orientation. **We fully support this ruling.**

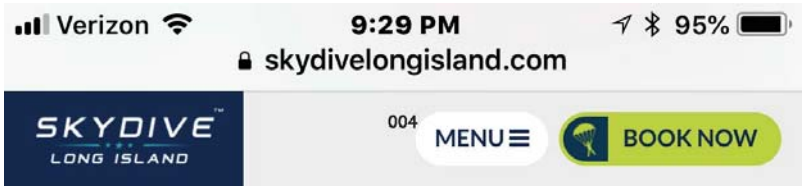
This ruling stems from the alleged 2010 dismissal of Donald Zarda from Altitude Express dba Skydive Long Island. The case of Mr. Zarda has been cited following the Department of Justice's filing of court papers stating that a major federal civil rights law does not protect employees from discrimination based on sexual orientation.

As a result of this report, our business has received several messages and phone calls expressing anger over the dismissal of Mr. Zarda. We feel it's important to add clarity to this story. ***We have no affiliation to this case or the dismissal of Mr. Zarda.***

In 2016, the naming rights of Skydive Long Island was purchased from Altitude Express and has been under new ownership at an entirely different location (Altitude Express was located in Calverton, NY). We are located in Shirley, NY.

Skydive Long Island and it's ownership wish to be clear in our expression of support for gay rights and the LGBTQ community.

Skydive Long Island's owner, Brian Erler states, "We hire our staff based on qualifications related to aviation, skydiving, and hospitality. We do not discriminate based on sexual orientation, race, gender or religious affiliation. Personally, I * * *



to convince your mom skydiving is safe, what the skydiving age is, and how to find a safe dropzone.

SKYDIVE LONG ISLAND SUPPORTS GAY RIGHTS AND THE LGBTQ COMMUNITY

"We hire our staff based on qualifications related to skydiving and hospitality. We do not discriminate based on sexual orientation, race, gender or religious affiliation. Personally, I have family members who are gay and it has always been my position to be supportive of gay rights and the LGBTQ community. We are all the same and we do not tolerate discrimination."

-Owner, Brian Erler

APPENDIX C

EMPLOYMENT COUNSELING, LITIGATION,
LABOR & BENEFITS LAW

Counseling and Advising Clients
Exclusively on Laws of the Workplace

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April 12, 2018

VIA ELECTRONIC CASE FILING

The Honorable Joseph F. Bianco
United States District Court Judge
United States District Court
Eastern District of New York
00 Federal Plaza
Central Islip, NY 11722

Re: Donald Zarda v. Altitude Express, Inc. and Raymond Maynard
Case No.: 10-CV-04334 (JFB) (GRB)

Your Honor:

We are counsel for Defendants in the above referenced matter, though note that there is no active matter currently pending before Raymond Maynard. We write in response to Mr. Antolino's April 11, 2018,

missive seeking discovery to assist counsel in determining if a party and/or third party can satisfy a potential judgement. Initially, we must point out that it is factually inaccurate and no attempt has been made to meet and confer regarding the relief requested. Beyond that and putting all histrionics aside, Mr. Antollino's letter seeks relief for which he has no legal basis to seek. Discovery has long been completed. Pleas for additional information to assist Plaintiff is determining the feasibility in litigation or references to settlement discussion should not be a basis for reopening discovery. In fact, Mr. Antollino's references to settlement conversations in his application are inappropriate.

As a final basis for denying Mr. Antollino's the entire application is premature as the time for Altitude Express to exhaust an appeal has yet to run.

We thank the Court for its consideration of this application.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.

/s/ Saul D. Zabell

Saul D. Zabell

cc: Gregory Antollino, Esq. *(via* Electronic Case Filing) Client

APPENDIX D

Gregory Antollino
Attorney at Law
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275 Seventh Avenue Suite 705
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Tel (212) 334-7397
Fax (212) 334-7399

April 12, 2018

Judge Joseph F. Bianco
U.S. District Judge
100 Federal Plaza
Central Islip, NY 11722

RE; Zarda v. Altitude Express, et al.

Dear Judge Bianco,

Mr. Zabell indicates there is no action pending against Mr. Maynard. This may or may not be true; there are limitations on individual liability under Title VII, but Maynard owned and transferred his major asset that is still a defendant. Further, we should use this hiatus for limited discovery. Mr. Zabell came to me to ask for a demand. The case could settle before certiorari is filed, as he apparently anticipated. The mandate is not stayed, nor has the defense moved for one (which would have to be made to the Circuit Justice). Moreover, if there is a certiorari petition, and the case returns to this court, we would certainly be entitled to discover the proper defendant, even if discovery is over. The transfer of Altitude Express, Inc. to Skydive Long Island, Inc. occurred after discovery was closed, thus there are new and extraordinary circumstances for plaintiff to seek discovery on this limited question, which is based on a multi-part test.

EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974), cited by *Battino v. Cornelia Fifth Ave., LLC*, 861 F. Supp. 2d 392, 404 (S.D.N.Y. 2012) (Oetken, J.).

Plaintiff is not asking for a trial date, just to know who is the proper defendant. We are entitled to know this, especially in a civil rights case. *See generally MacMillan*. We should not be held in the dark just because the date for a petition for certiorari has not expired. Proportionally, we are not asking for much, and with no stay, the equities are on plaintiff's side.

Sincerely,

/s/ Greg S. Antollino

Gregory Antollino

Cc: Saul Zabell, Stephen Bergstein

APPENDIX E

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

10-CV-0334 (JFB)

MELISSA ZARDA,

Plaintiff,

v.

ALTITUDE EXPRESS, INC., et al.,

Defendants.

May 21, 2018
Central Islip, New York

TRANSCRIPT OF CIVIL CAUSE
FOR CONFERENCE
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

GREGORY S. ANTOLLINO, ESQ.
375 Seventh Avenue, Suite 705
New York, New York 10001

For the Defendants:

SAUL D. ZABELL, ESQ.
Zabell & Associates, PC
4875 Sunrise Highway, Suite 300
Bohemia, New York 11716

Court Transcriber:

MARY GRECO
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

Proceedings recorded by electronic sound recording, transcript produced by transcription service

[2] (Proceedings began at 11:37 a.m.)

THE CLERK: Calling case 10-CV-4334, Zarda v. Altitude Express. Counsel, please state your appearance for the record.

MR. ANTOLLINO: Greg Antollino appearing by phone as arranged for plaintiff.

MR. ZABELL: Saul Zabell with the law firm of Zabell & Associates for the defendants.

THE COURT: Good morning. Can you hear Mr. Zabell okay?

MR. ANTOLLINO: Yes.

THE COURT: As you know, I scheduled this because I had received Mr. Antollino's letter back in April asking for a conference to address the issues that he raised in that letter. I have seen the back and forth letters since the initial letter.

So the first issue I want to address is whether or not – has a sur petition been filed? I haven't seen anything.

MR. ZABELL: It has not been filed yet. It is in the process of being filed. I believe we have another week.

THE COURT: The deadline of 90 days is next week?

MR. ZABELL: Correct. Yes.

THE COURT: Okay.

MR. ZABELL: And it will be filed.

[3]

THE COURT: So Mr. Antollino, in light of that, I know you have two others suggestions in your letter. One was some type of settlement conference, the other one related to discovery on successor liability. But if Mr. Zabell is not nterested in trying to resolve the case while the sur petition is pending, I don't know, what's your position on that?

MR. ZABELL: We have reached a –

MR. ANTOLLINO: Well –

THE COURT: Hold on. Let me just ask Mr. Zabell. Go ahead.

MR. ZABELL: We have reached out to Mr. Antollino before we started drafting the sur petition. It did not seem that we were – that we had the same view, and therefore we started the sur petition. So at this point there's no interest in pursuing settlement.

THE COURT: Go ahead, Mr. Antollino.

MR. ANTOLLINO: Well, if there's no interest, there's no interest. But there is the issue of the caption. There's no Altitude Express anymore. So the caption has to be amended. And Mr. Maynard, as Mr. Zabell has pointed out, is not liable although he might be liable under some contractual basis and that would be addressed later. He can't send the Supreme Court a case where there are no parties, the parties don't exist.

[4]

THE COURT: Well, I don't think anything should be done while the sur petition is pending. You know, obviously there is a new company apparently from the letters. Whether or not that's a successor company or not under the law obviously is something that would have to be determined. But I don't think there's any basis at this point simply to just amend the caption to put in a new defendant. The case is still being litigated. What would that accomplish at this point to have discovery on whether or not it is a successor company or not, and if so, to amend the caption? What would that accomplish?

MR. ANTOLLINO: Well, my strength in appeal is that – and I've done two or three sur petitions in my career, they want to know who's the party. And if Altitude Express, Inc. is a defunct corporation and Maynard is not liable under Title 7, the Supreme Court is going to want to know that I think.

THE COURT: I don't know whether they –

MR. ANTOLLINO: I usually don't -- I don't usually represent companies but I know that Rule 7.1, or whatever it is, corporate disclosure and whatnot, there's no entity that can appeal. What's the entity?

THE COURT: Well, I think, Mr. Zabell, correct me if I'm wrong, but you're still representing Altitude Express, correct?

MR. ZABELL: That's correct.

[5]

THE COURT: I mean he's saying it's defunct.

MR. ANTOLLINO: It doesn't exist.

THE COURT: He's saying it doesn't exist.

MR. ZABELL: I'm saying that the corporation has closed up and I'm still employed by them to represent their interests here if for no other –

MR. ANTOLLINO: It's been dissolved by the Secretary of State.

THE COURT: Has it been dissolved?

MR. ZABELL: I believe it has, yes.

THE COURT: Well, I haven't looked at that issue before but if the corporation, he's still retained by the corporation. How long was it dissolved?

MR. ZABELL: I believe it was dissolved at or around the time that the trial was going on.

THE COURT: Right. So it –

MR. ANTOLLINO: No, it was dissolved in 2016.

THE COURT: Okay. So at the time of the en banc decision it was dissolved, right? So I don't know. You're suggesting this is a new issue that has to be resolved here because the Supreme Court is going to want to know. But apparently, the Second Circuit, it didn't affect their disposition of the case, right? They still went forward.

MR. ANTOLLINO: I didn't know about it, frankly. I think there is an affirmative responsibility when appellants [6] go up and they say who is who. But if Your Honor doesn't want to address it, that's your ruling.

THE COURT: Yes. I don't think it makes any sense to address that right now while the petition is pending. If in fact the Supreme Court doesn't want to hear the case because the company is dissolved, then that's up to them I guess. But this is where the case is at, this is where it's been at for years. To start substituting in

parties while a sur petition is pending seems to me to be an unwise thing to do and doesn't make any sense from a cost standpoint to start having discovery would make any sense. I don't know how long it will take for the sur petition to get resolved but I don't know what the timeframe – do you have any idea what the timeframe for that is? No.

MR. ZABELL: Virgin territory to me, Your Honor.

THE COURT: Yes. All right. But –

MR. ANTOLLINO: All right. So –

THE COURT: If you want to research it and put in a letter to me on that issue, Mr. Antollino, I'm always willing to look at it. You're raising issues I hadn't really thought about. So my instincts are that I should not be changing the parties while there is a sur petition pending. But if you want to show me case law that says otherwise, I'm happy to look at it.

MR. ANTOLLINO: I don't think it's my [7] responsibility. I'm just raising the issue. This is the first time that Mr. Zabell is concerned that he's going to petition for sur. So I raised the issue and it's been confirmed that the corporation is dissolved. That's all we have to say until the last day that sur can be filed arise –

THE COURT: All right. And Mr. Zabell, I would obviously make the [indiscernible] to you. If you think that the petition would be moot because the company is dissolved, obviously let me know. I'm happy to look at amending the caption if either side suggests that it's something I should do at this point in the case while the petition is pending. Okay?

MR. ZABELL: Yes.

THE COURT: But I don't think given what I heard, I don't think a settlement conference would be useful. So I'll just await the resolution of the petition and then obviously we'll have another conference depending on the outcome. Either way we'll have a conference.

MR. ANTOLLINO: Or maybe not.

THE COURT: Maybe not.

MR. ANTOLLINO: All right. Thank you, Judge.

THE COURT: All right. Have a good day.

MR. ANTOLLINO: Bye.

(Proceedings concluded at 11:45 a.m.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

MELISSA ZARDA, et al.,

Plaintiffs,

-against-

RAYMOND MAYNARD, as predecessor in interest, sole shareholder and alter ego of ALTITUDE EXPRESS, INC., and RAYMOND MAYNARD, individually,

Defendants.
----------X

NOTICE OF MOTION

10-4334-CV (SJF) (AYS)

PLEASE TAKE NOTICE that on such date as the parties have agreed or will agree and Court that the Court has will allow, the undersigned will move before the Honorable Sandra J. Feuerstein (Magistrate Judge Anne Y. Shields, for report and recommendation) at the United States District Court, Eastern District of New York, 100 Federal Plaza, Central Islip, NY 11722, for the following orders:

1. Enforcing the judgments of the Second Circuit Court of Appeals and the United States Supreme Court in this matter as a matter of law and ordering Raymond Maynard to pay these judgments;

2. Granting sanctions in the form of attorneys' fees under 28 U.S.C. § 1927 against Saul Zabell for his vexatious refusal to recognize the correctly entered judgments against Raymond Maynard (individually) of the Second Circuit and United States Supreme Court;

3. Requiring Raymond Maynard and Saul Zabell (or Zabell & Collata) to post a bond to prevent further vexatious litigation, including the cost of expected attorneys' fees, as

plaintiffs expect on the issue of costs; or

4. Striking the defendant's points of law as an additional sanction if the judgments remain unpaid; and

5. Such other relief as may be just and proper.

Dated: New York, New York
February 12, 2021

Yours, Etc.,

/s/

GREGORY ANTOLLINO
Attorney for Plaintiffs
275 Seventh Avenue, 7th Floor
New York, New York 10001
(212) 334-7397
gregory@antollino.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

MELISSA ZARDA, et al.,

Plaintiffs,

-against-

RAYMOND MAYNARD, as predecessor in interest, sole shareholder and alter ego of ALTITUDE EXPRESS, INC., and RAYMOND MAYNARD, individually,

Defendants.
----------X

MEMORANDUM IN SUPPORT OF MOTION FOR PAYMENT OF APPELLATE JUDGMENTS AND FOR SANCTIONS

10-4334-CV (SJF) (AYS)

I. MAYNARD MUST PAY COSTS ON APPEAL

Rule 39 of the Federal Rules of Appellate Procedure 39 states that costs on appeal may be assessed in either the circuit or district court. Plaintiffs chose to request that costs be set at the appellate level. FRPA 39(a)(4) states that "if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only *as the court orders*." Here, the parties had a full opportunity to litigate the costs issue, and the plaintiffs won. These are costs on appeal, *not* costs available under Title VII as the defense suggests. Attorneys' fees are not recoverable as part of an award of costs to the prevailing party under Rule 39, and we never asked for fees in any case. *Vasquez v. Fleming*, 617 F.2d 334 (3d Cir. 1980). Say the Supreme Court were to have reversed the Circuit decision, which included an award of costs. In that case, the plaintiff would be liable for expenses at the Supreme Court, and the defense could either move to vacate the Circuit costs. *Furman v. Cirrito*, 782 F.2d 353 (2d Cir. 1986). If plaintiffs had lost at the Supreme Court, they would have been liable for both the Circuit and the Supreme Court costs. Indeed, in good faith, we awaited the outcome plaintiffs won. Maynard was a party to both

appeals, and the high court awarded costs against him. Zabell didn't move for reconsideration, though he fought the issue. Defendants lost. Maynard is a defendant, and he is liable for costs. It's straightforward.

As the Second Circuit held, "[t]he award of costs against the losing party is a normal incident of civil litigation and is the rule rather than the exception." *Mercy v. County of Suffolk,* 748 F.2d 52, 54 (2d Cir. 1984). There is a presumption that the prevailing party will be awarded costs and that presumption cannot be overcome unless the unsuccessful party shows good cause for doing so." *Id.* (citing *Baez v. the United States Dept. of Justice,* 684 F.2d 999, 1004 (D.C. Cir. 1982).

If a losing plaintiff refuses to pay costs, it may result in the Court's exercise of discretion to stay the litigation. The corollary proposition is that a defendant – who has had the means to take a case to the Supreme Court and lose – would be for the Court to strike the defense if the defendant refuses to pay. There are several factors a court considers in exercising this discretion: Whether the party requested a stay at Supreme Court or Circuit level to "stay the assessment of costs pending further proceedings in the trial court." That's not true here. We told the Circuit that if defendants petitioned for certiorari, we would not seek to enforce costs until the Supreme Court decided the case. We waited, but now the costs are due.

The second factor is whether the losing party on the question of costs has made any "pa[yment of] the appeal costs. Here, the defense frivolously wastes time and defies court orders. It should shock the conscience and is not only frivolous but willfully contumacious. Another factor is "indigency and [an] inability to pay the costs[.]" The defendant has not so claimed here. The Court in *Falcon v. Gen. Tel. Co. of Sw.*, 611 F. Supp. 707, 723-24 (N.D. Tex. 1985) arrived at these factors. The district court ordered the case dismissed against the plaintiff unless he paid the costs or the defense posted a bond. There is no point in a bond here, which could lead to further litigation. Indeed, Mr. Zabell could post a bond, thinking he will

win on appeal. Zabell just wants to prove a point: That plaintiffs get nothing from this case. In another case, my experience is that a bonding company will allow a bonded party to defend an appeal on its behalf. Zabell is on a mission to deny court orders just as a demagogue, say, would prohibit the results of a free and fair election or attempt a coup in a third-world country. That would never happen in this country, or at least the Courts would push back if the demagogue so tried. Mr. Zabell thought he would win at the Supreme Court but cannot accept that he lost. Appealing was a wrong move, strategically for his client. He decided to place his pure desire to win over the rights of gay LGBT+ Americans. His strategy, it turns out, was sorely misguided. He lost, and his client, a party to both appeals, must now pay costs. To allow him to post a bond would lead to tremendous further litigation, so if there is a bond, it should cover attorneys' fees for plaintiffs to defending such an appeal. The amount of that bond should be no less than $200,000 because Zabell will not accept defeat, even if it means defying a court order.

In another case, a counterclaim plaintiff did not pay the costs, and the court stayed the case until he paid the expenses. *Comprehensive Care Corp. v. Katzman*, 2013 U.S. Dist. LEXIS 113261, at *3-4 (M.D. Fla. Aug. 12, 2013). To stay in this case would be to inflict a burden on plaintiffs, who are the aggrieved parties. A stay would not coerce the payment of costs. Striking the defense would. A small bond would serve no purpose not only because appellate orders are not subject to review in the District Court. If only a tiny bond is posted, it will result in an appeal and cost perhaps another thousand or so attorney hours, which will not deter further vexatious conduct. There comes the point where overzealousness is an insult to the entire process. Seeking to refute appellate judgments is an example of over-zealousness.

The Supreme Court's award of costs may not be appealed. The time for reargument at the Circuit has expired. The only way to enforce these orders is to strike the defense if the defendant does not pay.

II: A DISTRICT COURT DOES NOT HAVE JURISDICTION TO MODIFY AN APPELLATE COURT ORDER

This is an elementary proposition, so evident that no District Court has had the grit modify an appellate order. The only case reasonably on point (at least that I could find) is *Gonzales v. Fairfax-Brewster Sch., Inc*., 569 F.2d 1294 (4th Cir. 1978), where, after an appeal to the Fourth Circuit, then to the Supreme Court, the plaintiff won on the law. The District Court denied the request for attorneys' fees on the merits – and we do not make such an application at this time. On remand to the District Court, the plaintiff petitioned for appellate costs, proper under both FRAP 39 and 28 U.S.C. § 1920. The district court, with no compelling explanation, decided to dispense with costs. The Fourth Circuit held.

> [W]e think the district court acted improperly in directing that each party should bear its own costs in that Court. In its order of July 27, 1973, the Court had awarded such costs to the plaintiffs, and none of the parties had appealed from that aspect of the initial judgment order. Since the award of such costs had become a finality, the district court had no authority to alter it in any way in carrying out the judgment of the Supreme Court of the United States. Accordingly, we reverse the action of the district court in this respect and remand the case with directions to reinstate the taxation of costs under 28 U.S.C. § 1920 against the defendants.

Gonzales v. Fairfax-Brewster Sch., Inc., 569 F.2d 1294, 1297 (4th Cir. 1978)

III: THE COURT SHOULD SANCTION MR. ZABELL UNDER 28 U.S.C. § 1927

New York Business Corporation Law § 1006 holds that a defunct corporation may sue or be sued. Judge Bianco held as much in denying the plaintiffs' request for discovery after winning at the Circuit. Plaintiffs will get to that in their response. We don't intend to move for sanctions, but we intend to make our case that Maynard is liable as a predecessor in interest – not successor in interest – to Altitude Express.

But the questions of costs on appeal awarded against both defendants is not worthy of debate. These are not, as the defense suggests, costs under 42 U.S.C. § 1988. They are orders of higher courts that cannot be further appealed and cannot be modified by any district court. Zabell's actions in making plaintiffs defend against the Zabell's frivolous refusal to pay the

costs – and even to insist that *plaintiffs* would have to file an extraordinary writ is an insult to the 12:55 AM U.S. Supreme and Circuit Courts. This Court should clarify that Mr. Zabell's contempt in refusing to abide by appellate orders and judgments is vexatious and dilatory conduct that may not be tolerated. This District – no district – can afford to waste time relitigating motions that this Court has no jurisdiction to entertain; that are res judicata; that the defense could have, but did not reargue; or consider new arguments not made on appeal. Plaintiffs do not say that such arguments would have been successful, but to relitigate motions at the district court level is an insult to due process.

Maynard was a party to the appellate proceedings, and he lost. Zabell miscalculated his strategy and thought he would win but did not. The 6-3 decision was a clear win for plaintiffs. Justice Alito dissented vigorously, but he would not hold that these costs may be quietly forgotten. Zabell's attempt now is born from his unalloyed anger at his loss in such a big case. Anger should not govern any litigation, not this one, nor another. Zabell's tactics are an insult to this Court, this District, and to the practice of law. The Court should sanction him for wasting attorney and court time.

Moreover, a conditional order awarding sanctions unless the defense pays the costs is like giving the defense snow in winter. Plaintiffs are entitled to these costs. They should not have to move for what is right already theirs to have.

IV: CONCLUSION

For these reasons, the Court should grant the motion, and plaintiffs' counsel be permitted to submit the hours spent on this issue for the waste of time.

Yours, Etc.,

/s/

GREGORY ANTOLLINO
Attorney for Plaintiffs
275 7th Avenue
New York, NY 10001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

MELISSA ZARDA, et al.,

DECLARATION IN SUPPORT OF MOTION FOR PAYMENT OF APPELLATE JUDGMENTS AND SANCTIONS

Plaintiffs,

-against-

10-4334-CV (SJF) (AYS)

RAYMOND MAYNARD, as predecessor in interest, sole shareholder and alter ego of ALTITUDE EXPRESS, INC., and RAYMOND MAYNARD, individually,

Defendants.
----------X

Gregory Antollino, an attorney admitted in this district, does now declare under penalty of perjury of the United States as follows:

1. I represent plaintiffs in this matter. I represented them in this Court after Donald Zarda died, then at the trial on the New York cause of action, then at the Second Circuit Court of Appeals, then, with others, at the United States Supreme Court.

2. This motion concerns only the affirmative enforcement of the judgment and sanctions against Saul Zabell for his vexatious conduct in refusing to recognize plaintiffs' right to collect the judgments entered by the appellate courts against Raymond Maynard individually – at least. We know Maynard won the trial on the state cause of action. We don't need to see the jury verdict sheet yet another time. Congratulations to the defense on the trial, under a higher standard of proof, but the case went further than the trial, and Maynard remained a party – a strategy the defense might not have adopted, but it did. The appellate courts entered the

judgments, and the defense cannot controvert them at the lower court as a matter of elementary federal and appellate jurisdiction.

3. Plaintiffs make this motion before the deadline to respond to the defendants' motion to dismiss to give thought proper time to the defendants to answer this affirmative motion.[1] This motion is affirmative and does not purport to respond to the defendants' motion.

APPELLATE PROCEDURAL HISTORY

4. THE SECOND CIRCUIT. Plaintiffs never asked for costs on the three-judge panel appeal, even after the en banc. But after the full Circuit granted our petition to the en banc, Maynard remained on the caption. The issues were limited to Title VII. There was no attempt by Maynard or his attorneys to extricate him from the case. This might have been a strategy; I assume it was. After the plaintiffs won the en banc, they moved, through the undersigned, for costs. Exhibit A.

5. Saul Zabell ("Zabell") opposed the entry of a judgment of costs, as demonstrated by his memorandum. Exhibit B. He never sought to limit the cost as to Maynard.

6. In his opposition, Zabell wrote, "[O]nly the appellate court retains discretion to award or not award costs." (citing *Essex Ins. Co. v. Zota*, 2008 WL 11333322, at *2 (S.D. Fla. Dec. 3, 2008).) *See id*, p. 2. Now Zabell turns this proposition on its head, suggesting this Court has discretion – let alone jurisdiction – *not* to enforce the costs awarded, or to modify them. Zabell's argument is facially frivolous. A district court cannot change or reverse an appellate court judgment. Zabell, an experienced attorney, must know he is skating on water.

[1] We contend that Maynard is responsible on these claims as the predecessor in interest to the underlying claim, but we make this motion on Maynard's personal liability for the costs as a party to the appellate proceedings. The corporate predecessor liability issues need not be reached to determine this motion.

7. Zabell argued to each of the higher courts that plaintiffs should not get costs. Not only did he lose his arguments, but he didn't even discuss the points he's arguing now. That constitutes waiver. It is elementary that a district court has no jurisdiction to modify the Circuit Mandate or the Supreme Court Judgment. The Mandate is attached as Exhibit C, the Supreme Court judgment is attached as Exhibit D.

8. Zabell was correct when he briefed the Circuit, at least on the point quoted above. Exhibit B. His attempt to backtrack on his contention – which is a legal admission – fails, even if it were not evident that a District Court has no jurisdiction to alter any appellate courts' order.

9. He argued that the Circuit Court could award as it saw fit, he argued that the initial appeal did allow for the award of costs, he argued that plaintiffs had to prevail on the merits (for mere appellate printing costs). Not so. While the Mandate is facially explicit on the award of costs, the plaintiff did not seek printing costs before the initial panel. *See* statement of costs, attached as Exhibit A. These costs were in the mid-four figures, but plaintiffs tried to be fair by not asking for the panel costs. We were granted less than we asked for. Exhibit C, order on costs.

10. Zabell could have, but did not, move to stay execution of enforcement of costs. He did not seek to reargue; he did not argue Maynard was not personally liable. His argument that this Court should – or can – nullify the orders of the higher courts is a passenger on ship with nowhere to disembark. Zabell knows this.

11. Zabell did not inform the Circuit that Maynard had sold his corporation. Perhaps Zabell wanted to keep the information a secret. It is a reasonable assumption that he did; but, if not, Plaintiffs themselves unaware that Altitude Express had been sold until the Mandate issued and as we prepared to return to the District Court.

12. Soon, Zabell sought a monetary demand from plaintiffs and hinted that there was a sale. Upon further research, I learned a sale had occurred, though the sale dates, in planning or execution, was – and remains – fuzzy.

13. Zabell could, but did not, argue to the Circuit that because Altitude Express, Inc., had disincorporated, Maynard was not liable for costs. He remained mute on this point, which, again, has been waived.

14. THE SUPREME COURT: In their Brief in Opposition to certiorari, plaintiffs opposed the grant because Maynard personally – though not as a matter of his being a successor in interest, which is a different question – had no liability under Title VII. (Again, this does not mean that Maynard is not liable as a predecessor in interest, etcetera, for claims against Altitude Express.) The Brief in Opposition is attached as Exhibit E. *See* pp.12-13.

15. The reply, wherein, Zabell argued that, as a party to the lower court proceedings, Maynard had a right to be a party at the Supreme Court. *See* relevant portions, Exhibit F.

16. In the attempt to win the grant of certiorari, his reply was correct on the Supreme Court rules, and he made precisely the points we make in the second amended complaint, to wit

> There is no riddle nor ruse in Maynard seeking review of the decision below; he was a Defendant-Appellee. See generally Pet. App. 1. Pursuant to the Rules of the Court, Maynard is entitled to seek review of the Second Circuit decision. Whether he may ultimately face personal liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), has no relevance to the question presented by Petitioners or the Court's review of the same.
>
> Notably, it has not yet been decided whether Maynard may face Title VII liability for the acts of his company. Respondents assert that the Second Circuit's decision "permit[ed] respondents to sue the corporation." Br. in Opp. 13. But the Second Circuit actually held that "Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation" without specifying which defendant or defendants could be held liable. Pet. App. 61a. Nowhere in the decision does the Second Circuit categorically decide that question of who might be liable.

> In addition, and consistent with Rule 12(6), there are multiple theories by which Maynard could be held responsible if Altitude Express is ultimately found liable for violating Title VII. Respondents could argue that the corporate veil be pierced, that Maynard is a mere "alter ego" of Altitude Express, or that Maynard is otherwise vicariously liable for his company's wrongful acts. E.g., Milliner v. Enck, 1998 WL 303725, *2 (E.D. Pa. 1998) ("[E]xempting owner liability from Title VII does not permit owners who discriminate to\ escape unscathed. Owners will necessarily feel the pinch of the employing entity's liability if plaintiffs successfully 'pierce the corporate veil' and demonstrate that the owner is actually the 'alter ego' of the employer."). Respondents could also pursue a theory of respondeat superior.

See Exhibit F, pp. 2-4

17. Now Maynard makes a different argument altogether. Predecessor liability aside for now, was a strategic choice that Zabell did not have to adopt but did. Perhaps he wanted to put a "face" on the petition. Arguably, his strategy succeeded insofar as the Court granted certiorari.

18. After the Supreme Court's published opinion, there were arguments back and forth to Scott Harris, the Clerk of the Supreme Court, regarding whether Zabell's clients were liable for costs. After plaintiffs clarified confusion about whether the Supreme Court rules allowed plaintiffs cost, the final judgment awarded these plaintiffs their costs. Exhibit D. During the exchange of emails – even if it mattered now – at no point did Zabell argue that Maynard was immune from costs.

19. When the Supreme Court ordered judgment for costs, the undersigned tried to have them paid without further litigation. We could have moved into this stage of the case without Zabell's meritless argument leading the dispute. Zabell, in response to the demand, took (and take) exactly the opposite position it took in seeking the writ. This reversal of reality is of demagogic proportions masked in a corporate shell game, denying that Maynard did not have to be a petitioner. His counsel decided he would do so any way, and his client lost. No arguments can change that now.

SANCTIONS

20. Zabell's steadfast refusal to abide by the appellate court orders – and, instead, argue them to the district court – is a textbook example of obstruction and the promotion of vexatious litigation. Zabell has waived the arguments he makes on behalf of Maynard and the Court should sanction him. If a refusal to abide by a judgment – by an "appeal" to a court without jurisdiction –is not sanctionable, then what is? To be sure, there are many other things, but not abiding by a Supreme Court order, or a Circuit order is high on the list of frivolity and vexatiousness. Zabell not only impedes plaintiff's rights but requires an extraordinary waste of time. Plaintiffs will respond to the Zabell's argument as to Maynard's liability for the corporation. But the costs on appeal – the undersigned has spent hours on this and Zabell has not only wasted my time, but the Court's. Plaintiffs should not have to waste otherwise uncompensated attorney time on his attempt to controvert appellate orders.

21. Because Zabell's position is frivolous and vexatious, the Court should sanction him in the amount of time and attorneys' fees it takes to make this motion and further enforce the judgment. Another appropriate sanction, in addition to the fees, could be to make Zabell and his firm liable for the costs.

22. Finally, if the costs remain unpaid, in addition to attorneys' fees, Maynard or his lawyers should be required to post a bond. The cases discussed in the attached memorandum indicate this is a proper remedy. Zabell has shown outright contempt for the appellate process by threatening not to comply with payment unless plaintiffs file an extraordinary writ. That is extreme, unwarranted and brings up issues that have been waived and that are res judicata. Zabell's disappointment that his strategy to petition for certiorari is not a basis for his client not to pay the costs. If the client is angry, he must pay the costs, he should have been advised that his personal liability for costs was one potential outcome. Most people thought the

employees would lose at the Supreme Court, but we won by a considerable margin. The chips fall as they may.

23. For these reasons and those outlined in the accompanying memorandum, the Court should be ordered costs paid. The Court should sanction Zabell for patently frivolous, vexatious conduct. The idea that a district court can vacate an order of an appellate court has never been argued in any court – at least as my research shows – and for good reason.

Dated: New York, New York
February 15, 2021

/s/ Greg S. Antollino
Gregory Antollino
Attorney for Plaintiffs

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
----------)(
ESTATE OF ZARDA,

Plaintiff-Appellant,

-against-

ALTITUDE EXPRESS, et ano.

Defendants-Appellees
----------)(

DECLARATION IN SUPPORT OF BILL OF COSTS

15-3775

GREGORY ANTOLLINO, an attorney admitted to this court who represents, with Steven Bergstein, on appeal and en banc review, does hereby declare under penalty of perjury of the United States as follows:

1. This was an appeal of a federal summary judgment motion under Title VII (and, at the panel stage, a trial under the New York State Human Rights Law). Insofar as the plaintiff estate obtained no relief under its state claim from the panel appeal, it will not seek any costs for the panel appeal. We ask that costs for plaintiff-appellant be included in the Mandate in the amount of $3600.80 as described below, merely for the en banc portion, and ask for a small additional amount for color copies.

2. Federal Rule of Appellate Procedure 39(a)(4) allows the Court to decide whether costs are taxable if there is an affirmance in part and reversal in part. We believe it would be fair to tax defendants the Executor's costs for the en banc portion of this appeal. This would be reasonable because costs for the en banc review were not insubstantial, and appellants prevailed on a question of law allowing us a new trial under Title VII, with substantially more relief available to plaintiff (and to other similarly situated plaintiffs). We expended the following in order to reach the result in Zarda v.

Altitude Express, 15-3775 (en banc, February 26, 2018): 15 copies of the brief; 15 copies of three volumes of the Appendix; and 2 copies of the reply brief; plus the filing fee.

3. Plaintiff used Fedex/Kinko's for 13 of the reply briefs, whose cost was nominal, and we will waive it. We ask only for the 2 reply briefs that were printed by Cockle Briefs, whose statement is attached as an Exhibit.[1] Cockle is the most cost-effective appellate printer in the country, I have found. We could not have used Fedex/Kinko's to complete the initial round of briefing.

4. The Exhibit includes a compendium of each document that Cockle charged, and we paid for this printing. We have calculated the rate under the Court's Fee Schedule, but we ask for the actual amount expended because color copies increased the cost by about $500.

5. For clarification purposes, the reason Cockle, in the first bill, bills only 6 copies, then 6 more, then 2 more is that, first, someone unnamed from the Clerk's office originally said we needed only 6 briefs. This seemed too good to be true, and it was; the case manager was on vacation, the information incorrect, and we were told to file an additional 7 of everything to make 13. We did that. Then, again, the clerk requested an additional two copies of everything in or about the end of June/early July 2017. Additionally, although the Cockle bill says "Brief (Corrected)" only the corrected Opening Brief was published since the case manager bounced the original electronic brief for incorrect pagination printing. Cockle did not bill us for nor do we ask costs of the uncorrected brief.

[1] At the conclusion of briefing, the Clerk requested two extra copies of every document, which explains why only two of fifteen reply briefs were done by Cockle.

6. I used my own FedEx shipping number for shipping, thus the entry on the exhibit for "proofs and postage" charges are only for proofs.

7. Because these documents came in three waves, and were billed by date, it is difficult to extricate how much the Opening Brief and special appendix cost specifically, and the appendices, and the reply, but they are supported by receipts and calculated using the Court's Fee Schedule.

8. The filing fee of $505 is set by statute, and we could not have obtained the result we did without paying it. There were no other charges from the Court.

9. For these reasons, plaintiff-appellant asks for costs solely for en banc rehearing and not the panel appeal insofar as we did not seek en banc review of the trial determination, which obviated the need for all but a few pages of the trial transcript on the en banc.

10. We think this is fair and reasonable and hope the Court will enter costs in the amount of at least $3,600.80, which includes (1) the filing fee; (2) the 15 copies of the Opening brief (with Special Appendix); (3) the Joint Appendices from Cockle Briefs; and (4) 2 copies of the reply brief from Cockle. The divisions on the verified bill, plus the known filing fee, add up to this amount, although we spent more as indicated by the receipt attached.

11. I separated on the verified bill of costs as follows:

- Brief and special appendix, 15 copies of a 97-page document, 1 binding and one cover;
- The Joint Appendix Volumes I and II: 15 of these volumes of 300 pages each (plus 5 pages table of contents), 1 binding each and one cover each. Two hundred

eighty-eight of these pages of one of these volumes were printed in color, at a total cost of $720. We believed it important if not essential to include color copies of the specific events that led to plaintiff's termination, and spent this money wisely, whether or not there is an objection. We ask for this additional expense if the Court allows it.

- Joint Appendix Volume III: 15 copies of 15 of these volumes of 119 pages each (plus 5 pages table of contents), 1 binding each and two covers each.
- Reply brief: Only two of the fifteen volumes filed are billed: 27 pages, 1 covers; 2 bindings.

12. Plaintiff-Appellant asks for the entire amount expended at Cockle but waives the 13 printed by Kinko's. However, if the Fee Schedule is used, it should come to $494 for the Brief and Special Appendix; $2402 for the Joint Appendices (not including color); and $199.80 for the reply brief. With the filing fee of $505, plaintiff-appellant would be entitled to $3,600.80, which is somewhat less than what was actually billed. We ask for the total amount of $4,102.60, however, which is more than the fee schedule because of the color copies in the record.

13. For these reasons, plaintiff asks that the Court tax costs that the Court finds reasonable under the circumstances.

Dated: New York, New York
N.B.: *Date automatically updates to present, but this was filed in 2018*

Greg S. Antollino

GREGORY ANTOLLINO, ESQ.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------)(

ESTATE OF ZARDA,

Plaintiff-Appellant, **15-3775**

-against-

ALTITUDE EXPRESS, Inc., et ano.

Defendants-Appellees

----------)(

DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFF-APPELLANT'S BILL OF COSTS

ZABELL & ASSOCIATES, P.C.
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I. PRELIMINARY STATEMENT

Defendants-Appellees, ALTITUDE EXPRESS, INC., doing business as Skydive Long Island, and RAY MAYNARD (collectively "Defendants-Appellees"), respectfully submit this Memorandum of Law in opposition to the application of Plaintiff-Appellant, Estate of Zarda ("Plaintiff-Appellant"), for a Bill of Costs, pursuant to Federal Rule of Appellate Procedure ("Fed .R. App. P.") 39(d)(2).

For the reasons set forth below, Plaintiff-Appellant is not entitled to the costs that it asks to Court to tax upon Defendants-Appellees. As such, Plaintiff-Appellant's instant application must be denied. However, should the Court find that Plaintiff-Appellant is entitled to certain costs, we ask that the amount awarded be reduced to conform with Fed. R. App. P. 39 and the fee schedule adopted by the Second Circuit, which does not allow for the additional sums that Plaintiff-Appellant now seeks.

II. PLAINTIFF-APPELLANT IS NOT ENTITLED TO COSTS

Fed. R. App. P Rule 39(a), entitled "Costs", reads in pertinent part:

> The following rules apply unless the law provides or the court orders otherwise:
>
> (1) If an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
>
> (2) If a judgment is affirmed, costs are taxed against the appellant;

> (3) If a judgment is reversed, costs are taxed against the appellee;
>
> (4) If a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

Fed. R. App. 39.

Thus, "[w]here a judgment is affirmed in part, reversed in part, modified, or vacated,' costs must be ordered before a party filing a bill of costs under [F.R.A.P.] 39(d) is entitled to receive them." *Lafaro v. New York Cardiothoracic Grp., PLLC*, 576 F.3d 128 (2d Cir. 2009) (quotations omitted). As a result, only the appellate court retains discretion to award or not award costs. *Essex Ins. Co. v. Zota*, No. 04-60619-CIV, 2008 WL 11333322, at *2 (S.D. Fla. Dec. 3, 2008).

Said another way, "an appellate court operating under Rule 39(a)(4) may "tax the costs of [the] appeal as [it] see[s] fit … That is, in a situation in which Rule 39(a)(4) applies, the appellate court may award all costs to one party, *see, e.g., Feingold v. New York,* 366 F.3d 138, 161 (2d Cir.2004) ('Pursuant to Federal Rule of Appellate Procedure 39(a)(4), costs of this appeal are awarded to the plaintiff.'); may award costs to no party, *see, e.g., M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.,* 226 F.3d 60, 69 (2d Cir.2000) ('We decline to award costs of this appeal to either party. *See* Fed. R. App. P. 39(a)(4).'); or may award costs in whatever combination it sees fit." *L-3 Commc'ns Corp. v. OSI Sys., Inc.*, 607 F.3d

24, 29 (2d Cir. 2010). Thus, "[w]here 'a judgment is affirmed in part, reversed in part, modified, or vacated,' Fed. R. App. P. 39(a)(4), costs must be ordered before a party filing a bill of costs under [Fed. R. App. P.] 39(d) is entitled to receive them." *Lafaro v. New York Cardiothoracic Grp., PLLC*, 576 F.3d 128 (2d Cir. 2009).

To begin, we note that on February 26, 2018, this Court: (1) vacated the district court's judgment on Plaintiff-Appellant's Title VII claim; (2) remanded the matter back to the district court for further proceedings consistent with the February 26, 2018 decision; and (3) affirmed the judgment of the district court in all other respects. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018).

Importantly, this Court's February 26, 2018 decision did not award costs to either party. *See id.*

Equally significant, the February 26, 2018 decision held that Plaintiff-Appellant is "entitled to bring a Title VII claim for discrimination based on sexual orientation." *Id.* at 132. Thus, the applicable law in regard to Plaintiff-Appellant's claim and appeal is Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. 2000e *et seq.*

As stated above, Fed. R. App. P Rule 39(a) provides, in pertinent part, that its provisions on costs apply "unless the law provides … otherwise." Fed. R. App. P Rule 39; *see also id.* advisory committee's note ("Subdivision (a) ... A few statutes contain specific provisions in derogation of these general provisions. ... These

statutes are controlling in cases to which they apply."); *Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Serv.*, 382 F.3d 1159, 1161 (9th Cir. 2004) ("When the federal statute forming the basis for the action has an express provision governing costs, however, that provision controls over the federal rules.").

42 U.S.C.A. § 2000e-5(g)(2)(B) – the provision of Title VII entitled "Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders" (i.e., the provision pertinent to costs) – provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –
>
> (i) May grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title.

42 U.S.C. § 2000e-5(g)(2)(B)(i).

42 U.S.C. § 2000e-2(m) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

Thus, as per the provisions of Title VII, Plaintiff-Appellant's entitlement to costs occurs once he proves a violation pursuant to 42 U.S.C. § 2000e-2(m). Plaintiff-Appellant has not done so.

As such, we submit that Plaintiff-Appellant is not within the category of prevailing parties entitled to costs as enumerated under Fed. R. App. P. 39(a)(1)-(4). Indeed, the status of Plaintiff-Appellant is more akin to the taxing of fees, to which Judge Posner has opined:

> A procedural victory that may be a way station to utter substantive defeat creates no right to fees. It makes no difference whether the procedural victory is the denial of a motion to dismiss, the denial of summary judgment, the denial of a motion for a directed verdict, appellate reversal of the grant of such a motion (as in *Hanrahan*), or, as in this case, appellate reversal of the grant of summary judgment – for that is the equivalent of a denial of summary judgment and leaves the plaintiff still having to prove his case at trial.

Richardson v. Penfold, 900 F.2d 116, 119 (7th Cir. 1990).

Here, Plaintiff-Appellant has not obtained a victory as regards the merits of its Title VII claim. We respectfully submit that Plaintiff-Appellant has merely obtained a procedural victory, and is thus far from proving a violation under section 2000e-2(m) to recover the costs it seeks.

Again, we note that the February 26, 2018 decision did not award costs to either party, but rather vacated the district court's judgment on Plaintiff-Appellant's Title VII claim; (2) remanded the matter back to the district court for further

proceedings consistent with the February 26, 2018 decision; and (3) affirmed the judgment of the district court in all other respects. *Zarda*, 883 F.3d at 108.

We also note that Defendant-Appellee will file a *writ of certiorari* with the United States Supreme Court to petition for the review of this Court's February 26, 2018 decision. This is further evidence that the matter has not been resolved, nor has Plaintiff-Appellant in any way prevailed on the merits of its Title VII claim.

Accordingly, Plaintiff-Appellant is not a prevailing party and not statutorily entitled to costs. Plaintiff-Appellant's instant application must be denied in its entirety.

III. IN THE ALTERNATIVE, PLAINTIFF-APPELLANT IS NOT ENTITLED TO THE SUMS IT SEEKS

In the event this Court finds that Plaintiff-Appellant may recover costs, we request the amount taxed reflect a sum aligned with the costs enumerated under Fed. R. App. P. 39 and this Court's local Fee Schedule.

Fed. R. App. P. 39(c) provides that "[e]ach court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix." Consistent with that requirement, this Court's Local Rule 39.1 provides that the "cost of reproducing necessary copies of briefs or appendices is taxable at the lesser of the actual cost or the maximum rate set by the court and posted on the court's website under Fee Schedule." Rule 39 of the United States Circuit Court of Appeals for the Second Circuit. (emphasis added). The Fee

Schedule, in turn, provides for reproduction costs at the taxable rate of the lesser of the actual costs or twenty cents (.20¢) per page; one hundred twenty-five dollars ($125.00) per cover; and five dollars ($5.00) per binding.

Plaintiff-Appellant requests this Court grant costs amounting to the total amount specified in the "Cockle invoices". ECF Doc 521-2 at ¶ 12. Although Plaintiff-Appellant fails to specify the actual amount it seeks, a review and calculation of the invoices [ECF Docs 521-3] shows that the amount to be three thousand five hundred ninety-seven dollars and sixty cents ($3,597.60). However, the request does not incorporate the Court's Fee Schedule and must therefore be summarily denied.

In the alternative, Plaintiff-Appellant requests costs in the amount of three thousand six hundred dollars and eighty cents ($3,600.80). *Id.* Plaintiff-Appellant claims this amount incorporates the Court's Fee Schedule for the costs of briefs and appendices, as well as the docketing fee of five hundred five dollars ($505.00). *Id.* Despite Plaintiff-Appellant's claim, this request, too, does not properly incorporate this Court's Fee Schedule.

Fed. R. App. P. 39 enumerates four (4) costs which are taxable: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedes bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal. And,

as stated above, this Court's Fee Schedule sets the specific maximum amount a party may be taxed for certain costs.

Simply put, Plaintiff-Appellant's alleged actual costs exceed the maximum costs allowable under this Court's Fee Schedule.

To begin, this Court's Fee Schedule grants reimbursement of reproduction costs up to twenty cents ($.20) per page. It also grants reimbursement for binding up to five dollars ($5.00) per copy. However, Local Rule 39 directs costs to be taxed at the lesser of these rates or the actual cost.

"Cockle" charged Plaintiff-Appellant approximately $0.10 per page for the brief with special appendix and the joint appendix, and approximately $0.15 per page for the reply brief. "Cockle" further charged $1.00 per copy for each binding of the briefs and appendices. *See* ECF Doc. No. 521-3 at pages 4, 6, 8, and 10.

Therefore – and momentarily putting aside Plaintiff-Appellant's request for addition sums for color copies – the actual taxable amounts for reproduction and bindings are as follows:

Description of Cost	Quantity	Price per Unit	Total Amount
Printing of Brief and Special Appendix (97 Pages)	15	$9.80 (or approx. $0.10 per page)	$147.00
Printing of Volume I of Joint Appendix (305 pages, which includes the 5-page Table of Contents)	15	$30.70 (or approx. $0.10 per page)	$460.50
Printing of Volume II of Joint Appendix (305 pages, which includes the 5-page Table of Contents)	15	$30.70 (or approx. $0.10 per page)	$460.50
Printing of Volume III of Joint Appendix (124 pages, which includes the 5-page Table of Contents)	15	$12.60 (or approx. $0.10 per page)	$189.00
Printing of Reply Brief (27 Pages)	2	$4.00 (or approx. $0.15 per page)	$8.00
Binding for all Copies	62	$1.00	$62.00
		TOTAL	$1,327.00

Thus, pursuant to Local Rule 39 and this Court's Fee Schedule, the total taxable amount for reproduction and bindings is one thousand three hundred twenty-seven dollars ($1,327.00).

As for color copies, Plaintiff-Appellant fails to posit why these specific reproductions were "necessary" as per Fed. R. App. P. 39(c). Indeed, in accordance with Fed. R. App. P. 39(c), costs are only accorded to "'necessary copies' of briefs and appendices and at rates not higher than those generally charged for such work in the area where the Clerk's office is located.... Reproduction costs for the appendix

are limited by Local Rule 39 to a maximum of $.20 per page." *Furman v. Cirrito*, 782 F.2d 353, 356 (2d Cir. 1986).

Apart from the self-serving description these copies as "important if not essential", Plaintiff-Appellant offers no further justification as to why color copies were, in any way, necessary. *See generally* ECF Doc. 521-2 at ¶ 11. This Court made no mention of these color copies in its February 26, 2018 decision to justify Plaintiff-Appellant's position. *See generally Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018). We respectfully submit that these copies were not "necessary" and, accordingly, should be taxed – if at all – at the rates identified in the table, above, wherein they were incorporated in the "Total" cost.

Moreover, it remains uncertain from the content of Plaintiff-Appellant's application how many "covers" they request to be taxed. In any event, the "Cockle invoices" do not delineate how much Plaintiff-Appellant was charged for covers or whether they were incorporated in another fee within the itemized charges. Given the impossibility in ascertaining this figure, the absence of proof submitted by Plaintiff-Appellant in its request for this specific cost, and the speculation required to even "ballpark" the amount expended, we submit said costs should not be taxed.

Further, Plaintiff-Appellant appears to have incurred fees identified as a "base cost" amounting to two hundred dollars ($200.00) per transaction with "Cockle". *See* ECF Doc. 521-3, pages 4, 6, 8, and 10. Plaintiff-Appellant blames

these costs on incorrect information obtained from the Clerk's office. *See* ECF Doc. No. 521-2 at ¶ 5.

Plaintiff-Appellant is not entitled to reimbursement of any amount associated with this "base cost" because neither Fed. R. App. P. 39 or Local Rule 39.1 specify this as a taxable cost. However, should this Court disagree with this position, we note that it would be prejudicial to tax Defendant-Appellee eight hundred dollars ($800.00) – or two hundred dollars ($200.00) per "Cockle" invoice – that arose from Plaintiff-Appellant use of "Cockle's" services on four (4) separate occasions, regardless of whether the need for this repeat patronage was due to Plaintiff-Appellant, the Clerk, or "Cockle".

Plaintiff-Appellant claims to have incurred other fees, associated with "Cockle," and identified as "Additional Proofs," "Alterations," "PDF File," "Typeset TOC," and "Proofs and Postage." *See* ECF Doc. No. 521-3, Pages 3 and 4. These additional fees amount to a total of four hundred fifteen dollars ($415.00). Any request by Plaintiff-Appellant in regard to these amounts must also be denied, since Fed. R. App. P. 39 or Local Rule 39.1

Therefore, should this Court grant Plaintiff-Appellant's application for costs – sums that we submit it is not entitled – Defendant-Appellee must only be taxed those amount specifically allowed under Fed. R. App. P. 39 and Local Rule 39.1. Pursuant to that authority, the actual taxable costs related to Plaintiff-Appellant's

application total one thousand eight hundred thirty-two dollars ($1,832.00), said amount being the costs associated with reproduction and binding the briefs and appendices (as reflected in the table above) and the docketing fee of five hundred five dollars ($505.00).

IV. CONCLUSION

For the reasons set forth above, we submit that Plaintiff-Appellants application for costs must be denied. Pursuant to Fed. R. App. P Rule 39(a)(4), costs are taxed only as ordered by the court. In it February 26, 2018 decision, this Court did not order costs to either party. Moreover, Plaintiff-Appellant is not otherwise statutorily entitled to costs, but rather must succeed on the merits of its Title VII claim to become eligible for such sums.

In the alternative, we further submit that in the event this Court does award costs to Plaintiff-Appellant, the amount taxed upon Defendant-Appellee accord with Fed. R. App. P. 39 and the local rules and Fee Schedule adopted by this Court. Indeed, using the parameters therein, the amounts taxable are one thousand eight hundred thirty-two dollars ($1,832.00).

Dated: March 22, 2018
Bohemia, New York

Respectfully submitted,
ZABELL & ASSOCIATES, P.C.
Attorneys for Defendant-Appellee

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of May, two thousand eighteen.

Melissa Zarda, co-independent executors of the estate of Donald Zarda, William Allen Moore,Jr, co-independent executor of the estate of Donald Zarda,

Plaintiffs - Appellants,

v.

Altitude Express, Inc, doing business as Skydive Long Island, Ray Maynard,

Defendants - Appellees.

STATEMENT OF COSTS

Docket No. 15-3775

IT IS HEREBY ORDERED that costs are taxed in favor of the Appellants in the amount of $3,693.80.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

AMENDED
8/6/2020

Supreme Court of the United States

No. 17-1623

ALTITUDE EXPRESS, INC., ET AL.,

Petitioners

v.

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

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is affirmed with costs.

IT IS FURTHER ORDERED that the respondents Melissa Zarda and William Allen Moore, Jr., Co-Independent Executors of the Estate of Donald Zarda recover from Altitude Express, Inc., et al., Two Thousand Five Hundred and Thirty Dollars and Fifty Cents ($2,530.50) for costs herein expended.

June 15, 2020

Printing of record: $2,530.50

No. 17-1623

IN THE

Supreme Court of the United States

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be granted on a petition involving construction of Title VII of the Civil Rights Act of 1964 when one petitioner faces no liability under that statute and the other is a defunct corporation whose only known assets have been acquired by a successor that is not seeking review?

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are Altitude Express, Inc., a dissolved New York corporation, and Ray Maynard.

Respondents, plaintiffs below, are Melissa Zarda and William Allen Moore, Jr., co-independent executors of the Estate of Donald Zarda, duly appointed by the Dallas County Probate Court and substituted as plaintiffs after Donald Zarda's death.

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BRIEF IN OPPOSITION

Donald Zarda, a gay man, was employed as a skydiving instructor by Altitude Express, Inc. ("Altitude"), a New York corporation. He alleged that Altitude fired him because he "failed to conform to male sex stereotypes by referring to his sexual orientation." Pet. App. 8. Among other things, he claimed that his termination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), which prohibits covered employers like Altitude from "discharg[ing] any individual . . . because of such individual's . . . sex." The court of appeals held *en banc* that this claim is "cognizable under Title VII," Pet. App. 61, and remanded the case for trial.[1]

As petitioners acknowledge, Altitude Express, Inc., no longer exists. Pet. ii. The corporation "was dissolved." BIO App. 14a.[2]

Despite respondents' best efforts to obtain discovery, they have not yet been able to determine who faces successor liability for Zarda's Title VII claim against Altitude. *See* BIO App. 2a-3a; 8a-9a; 13a.[3] If it

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[1] Zarda died after the district court had granted summary judgment on his Title VII claim, but prior to trial on his state-law claim. The executors of his estate were substituted as plaintiffs, Pet. App. 8 n.1, and are respondents here. For ease of exposition, they will be referred to interchangeably as "Zarda" and "respondents."

[2] "BIO App." refers to the Appendix to this Brief in Opposition.

[3] On remand before the district court after the *en banc* ruling, respondents sought discovery on the issue of successor liability. The district court denied the request because of petitioners' statement that they intended to seek Supreme Court review. *See* BIO App. 14a.

is Skydive Long Island, Inc., a corporation that purchased some (if not all) of Altitude's assets, that corporation has announced that it "fully support[s]" the Second Circuit's decision in this case. *Id.* 4a.

Under the circumstances, it is unclear whether either petitioner now before this Court is an appropriate party to seek this Court's review. This Court should therefore deny the petition.

STATEMENT OF THE CASE

1. Petitioner Altitude Express, Inc., a New York corporation, operated a business called Skydive Long Island that provided "tandem skydives" to customers. In a tandem skydive, the customer is "strapped hip-to-hip and shoulder-to-shoulder" to an instructor who is responsible for ensuring the customer's safety. Pet. App. 11. Petitioner Ray Maynard owned Altitude Express. *Id.* at 143. Donald Zarda worked as an instructor for Altitude.[4]

"In an environment where close physical proximity was common, Zarda's co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive." Pet. App. 11; *see also id.* at 180-81 (providing examples of these comments).

In the summer of 2010, Altitude sold a pair of tandem skydives to a young couple, Rosanna Orellana

[4] Because of the procedural posture of this case—the district court held that the Title VII claim was foreclosed as a matter of law—petitioners' attempt to shade the facts in their favor regarding plaintiff's termination, Pet. 2-3, are misplaced.

and David Kengle. Pet. App. 11, 144-45. Zarda was Orellana's instructor and disclosed his sexual orientation to her as they prepared to dive. Zarda and Orellana successfully completed the jump. *Id.* at 12.

Several days later, Kengle contacted Altitude Express. He claimed that Orellana had told him that Zarda had touched her inappropriately while strapped together; he accused Zarda of discussing his sexual orientation with Orellana as a pretext for his behavior. Pet. App. 12. Zarda denied that he had engaged in any misconduct, but Altitude Express fired him shortly thereafter. *Id.* When Zarda sought unemployment benefits, Altitude Express responded to the New York Department of Labor only that Zarda had been discharged "for shar[ing] inappropriate information with [customers] regarding his personal life." C.A. Jt. App. 626. It did not assert any physical misconduct on Zarda's part. *See also* Pet. App. 167.

2. Zarda filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission. *See* Pet. App. 177-81. In that charge, he asserted that "in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." *Id.* at 178. In particular, Zarda charged that "[a]ll of the men at Altitude made light of the intimate nature of being strapped to a member of the opposite sex," but that he was fired because he "honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." *Id.* at 180.

3. After receiving a right-to-sue letter, Zarda filed suit in the United States District Court for the Eastern District of New York. As is relevant here, he alleged

that his termination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), which prohibits an employer from discharging any individual "because of such individual's . . . sex." He also alleged that his termination violated N.Y. Exec. L. § 296.1(a), which forbids employers from discharging an individual on a number of bases, including an individual's "sexual orientation" or "sex."

The district court denied Altitude's motion for summary judgment on Zarda's state-law claim, Pet. App. 167, finding enough evidence in the record from which a jury could conclude that Altitude fired Zarda because of his sexual orientation, *see id.* at 165-68. But it granted Altitude's motion for summary judgment on Zarda's Title VII claim, rejecting his claim that he had been subject to prohibited sex stereotyping. *See id.* at 161.

Before Zarda's case could go to trial, the EEOC issued a decision in *Baldwin v. Foxx,* 2015 WL 4397641 (July 15, 2015). *Baldwin* sets forth the EEOC's position that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Id.* at *5. In addition, the EEOC explained that "[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex." *Id.* at 6. Finally, the EEOC declared that "[s]exual orientation discrimination also is sex

discrimination because it necessarily involves discrimination based on gender stereotypes" about appropriate behavior for men and women. *Id.* at 7.

Immediately upon learning of *Baldwin*, Zarda moved to reopen the district court's grant of summary judgment on his Title VII claim. The district court denied the motion, holding that the Second Circuit's decision in *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000), "was contrary to the EEOC's decision, and that it barred Zarda from recovering on a theory that discrimination based on sexual orientation violated Title VII." Pet. App. 147 (description provided by the court of appeals).

At trial on Zarda's state-law claim, the jury returned a verdict for Altitude.

4. On appeal, a panel of the Second Circuit agreed with respondents that Zarda's Title VII claim was not barred by the jury verdict in Altitude's favor on the state-law claim. The district court's instruction to the jury on causation had required respondents to prove that Zarda's sexual orientation was the but-for cause for his termination. Pet. App. 148. But under Title VII, he would have needed to show only that "discriminat[ion] was 'one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.'" *Id.* (quoting *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2523 (2013)).

Nonetheless, the panel held that Zarda's Title VII claim was barred by *Simonton*, which could "only be overturned by the entire Court sitting in banc." Pet. App. 149.

5. The court of appeals granted respondent's petition for rehearing en banc and directed the parties to address the 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'?" Pet. App. 157. After oral argument, the court ruled 10-3 that it does.

Chief Judge Katzman's majority opinion explained that "sexual orientation discrimination is properly understood as 'a subset of actions taken on the basis of sex." Pet. App. 19-20. Aligning itself with the EEOC's decision in *Baldwin,* as well as a recent en banc decision from the Seventh Circuit's, *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), it identified three bases for this conclusion.

First, sexual orientation is "[l]ogically" a function of an individual's sex. Pet. App. 21. To "identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted." *Id.* An individual's sex is the but-for cause of discrimination on the basis of sexual orientation: for example, "a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination." *Id.* at 34.[5]

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[5] In so holding, and as discussed below, the Second Circuit relied upon Seventh Circuit Judge Joel Flaum's concurrence in *Hively,* which focused solely on the text. 853 F.3d at 357-59.

The Second Circuit identified "yet another basis for concluding that sexual orientation discrimination is a subset of sex discrimination" in this Court's sex stereotyping jurisprudence, Pet. App. 35. Quoting from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), the Second Circuit "conclude[d] that when, for example, 'an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who are attracted to men, the employer 'has acted on the basis of gender.'" Pet. App. 37 (interpolations and ellipses supplied by the Second Circuit). "[S]exual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination." *Id.* at 40.

Finally, the Second Circuit concluded that discrimination on the basis of sexual orientation constitutes forbidden "associational discrimination." The court described the widespread consensus among the courts of appeals that Title VII forbids associational discrimination—that is, discriminating against an individual because of the relationship between the individual's protected characteristic and the protected characteristics of others with whom the individual associates. *See* Pet. App. 45. The court saw "no principled basis for recognizing a violation of Title VII for associational discrimination based on race but not on sex." *Id.* at 53. The general "notion that employees should not be discriminated against because of their association with persons of a particular sex is not controversial." *Id.* at 47 (internal quotation marks omitted). Just as an employer could not fire a female employee because of her close

relationships with men, so too, an employer cannot fire a male employee for having such relationships.

Relying on this Court's decisions recognizing both that sexual harassment and same-sex sexual harassment are actionable under Title VII, *see Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), the Second Circuit declared it irrelevant that the Congress that enacted the Civil Rights Act of 1964 did not foresee this application of Title VII's prohibition of sex discrimination. The clear language trumped any contrary arguments from legislative intent. *See id.* at 23-27. Nor did "subsequent legislative developments," Pet. App. 53, undermine treating sexual orientation discrimination as a subset of sex discrimination.

Judges Hall, Chin, Carney, and Droney, joined Chief Judge Katzmann's opinion in full. Judge Pooler joined all of the opinion except its discussion of but-for causation.

Judges Cabranes concurred in the judgment, noting in three paragraphs that this question is "a straightforward case of statutory construction." Pet. App. 68. "Zarda's sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore *is* discrimination because of his sex, and is prohibited by Title VII. That should be the end of the analysis" *Id.* Judge Lohier, noted that one could end with Judge Cabranes' concurrence, and endorsed Chief Judge Katzmann's "textualist's approach." Pet. App. 71. He also agreed with respondents that the "associational discrimination rationale" might properly be "appl[ied] to Zarda's particular case." *Id.*

Two other concurring judges—Judges Jacobs and Sack—each joined Chief Judge Katzmann's explanation that sexual orientation discrimination constitutes forbidden associational discrimination on the basis of sex. *See* Pet. App. 62-65 (Judge Jacobs); *id.* at 69 (Judge Sack). Judge Jacob was "unconvinced" with the sex-stereotyping reasoning, *id.* at 62, while Judge Sack thought it unnecessary to reach it, viewing it as wiser to "stop" with the "simpler and less fraught theory of associational discrimination." *Id.* at 70.

Judges Lynch, Livingston, and Raggi each dissented.

6. Zarda's case was remanded for further proceedings before the district court on the Title VII claim. Respondents learned by happenstance, after the en banc decision, that Altitude Express had been dissolved. BIO App. 14a. They sought to discover who has "assume[d] liability for Altitude Express' liabilities." *Id.* at 2a. That information, they told the court, was relevant to their decisions about how to proceed. In particular, respondents sought information about whether Skydive Long Island, Inc. ("SDLI"), which had purchased naming rights from the now-dissolved Altitude, *id.* at 4a, had also assumed its potential liability to respondents, or whether Maynard, when he sold the naming rights, had contractually agreed to successor liability. *See id.* at 2a, 8a.

Counsel for petitioners responded, first, that "there is no active matter currently pending [involving] Raymond Maynard." BIO App. 6a. As for Altitude Express, counsel argued that discovery should not be reopened. *Id.* at 7a. Counsel declined to

provide the documents reflecting the sale of Altitude's assets.

At a hearing before the district court, counsel for petitioners did not dispute respondents' assertion that Maynard faced no direct liability under Title VII, although he might be contractually liable to Altitude Express or some other party for any liability which that party faced, BIO App. 12a. Counsel for petitioners did announce an intention to seek review in this Court on behalf of Altitude Express. *See id.* at 12a, 14a.

In response to the request for discovery because it was unclear whether Altitude as a dissolved corporation was still an appropriate party to the lawsuit, *see* BIO App. 12a-14a, the district court replied that "I don't think it makes any sense to address that right now while the petition is pending. If in fact the Supreme Court doesn't want to hear the case because the company is dissolved, then that's up to them I guess." *Id.* at 14a. The district court then issued a brief docket entry stating in its entirety that "With respect to the issue discussed at today's conference, the Court notes that New York Business Corporation Law Section 1006 provides that a dissolved corporation may participate in all court proceedings against it." *Zarda v. Altitude Express, Inc. et al.*, No. 2:10-cv-04334 (E.D.N.Y. May 21, 2018).[6]

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[6] N.Y. Bus. Corp. L. § 1006 provides, in pertinent part that:

> (a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court

REASONS FOR DENYING THE PETITION

Petitioners are unequivocally wrong in claiming that "[t]his case is in the perfect posture for the Court to decide whether Title VII's prohibitions on discrimination 'because of . . . sex' encompass discrimination based on sexual orientation." Pet. 30. To the contrary, this case is a distinctively *bad* vehicle for answering the question presented. One of the two petitioners—Ray Maynard—was not Zarda's "employer" for purposes of Title VII liability. And it is unclear whether the other—the now-dissolved Altitude Express, Inc.—remains liable or whether some successor, who has not sought review from this Court, is now responsible for defending against Zarda's claims. Moreover, respondents' claim is atypical in ways that militate against review. Petitioners themselves acknowledge that "[i]t is inevitable that this issue will come before the Court" again. *Id.* at 31. If this Court decides it is necessary to resolve the question presented, it should await an appropriate vehicle and deny certiorari here.

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order. In particular, and without limiting the generality of the foregoing:

. . . .

(4) The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it.

(b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution . . . .

I. This case is the wrong vehicle for resolving whether discrimination on the basis of an individual's sexual orientation falls within Title VII's prohibition on "sex" discrimination in employment.

There are three reasons why this case – notwithstanding the Second Circuit's thorough, persuasive analysis – is a bad vehicle for resolving the question presented.

1. This Court has no jurisdiction to hear a petition on behalf of petitioner Maynard. Since the Second Circuit's holding does not affect his legal rights, he lacks standing to seek review in this Court.

Title VII authorizes an aggrieved individual to bring suit only against his "employer," an "employment agency," or a "labor organization." 42 U.S.C. § 2000e-2(a), (b), (c). Maynard is none of these. Rather, respondents have alleged that he was the chief executive officer and sole shareholder of the *corporation*—Altitude Express, Inc.—that employed Zarda. It is black letter law that Title VII "does not provide for an action against an individual supervisor." *Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1147 (8th Cir. 2008); *see also, e.g.*, *Wrighten v. Glowski,* 232 F.3d 119, 120 (2d Cir. 2000); *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 930 (7th Cir. 2017) ("there is no individual liability under Title VII"); *Malcolm v. Vicksburg Warren Sch. Dist. Bd. of Trustees*, 709 F. App'x 243, 247 (5th Cir. 2017) ("Individuals are not liable under Title VII in either their individual or official capacities").

"[I]t is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of

corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006). Thus, the fact that Maynard may have owned and managed Altitude Express, Inc., does not expose him to direct liability under Title VII. He therefore cannot seek review of a decision permitting respondents to sue the corporation.

Indeed, Maynard himself took that position only a few months ago, writing to the district court that, with Zarda's non-Title VII claims having been resolved, "there is no active matter currently pending before Raymond Maynard." BIO App. 6a. Because he faces no liability, he is not a proper party to this proceeding. His mere name on the petition, given both sides' agreement on this point, should instantly give pause: An individual with no potential legal obligation to respondents asks for space on this Court's limited docket? Behind this could lie either a riddle or a ruse.

2. The standing of the second petitioner, Altitude Express, Inc., to seek further review is questionable at best. To be sure, as a matter of state law, dissolved corporations may remain subject to liability. *See* N.Y. Bus. L. § 1006(a)(4), (b). But even assuming that state law is controlling for liability under a federal statute,[7] respondents may be entitled instead to substitute as the proper defendant an ongoing (and solvent) successor. In that circumstance, Altitude would also no longer face any direct consequences from Zarda's

[7] *But see EEOC v. Northern Star Hospitality, Inc.*, 777 F.3d 898, 901-03 (7th Cir. 2015) (addressing the issue of successor liability under Title VII as a matter of federal common law).

Title VII claim, and thus would also lack standing to invoke this Court's jurisdiction.[8]

Respondents learned – again, after the decision from which review is sought – that Skydive Long Island, Inc. (SDLI) purchased some (if not all) of the assets of Altitude before Altitude dissolved. BIO App. 14a. But despite their best efforts, respondents have been unable to determine whether SDLI took on Altitude's liabilities, in whole or in part. *See supra* pp. 9-10.

SDLI is not a party before this Court, or in the courts below. BIO App. 4a. And to the extent that SDLI is Altitude's successor, it has issued a public statement, posted on its website after the Second Circuit's en banc decision, announcing that it "fully support[s] this ruling." *Id.* While it remains possible, should respondents succeed in substituting it as a party defendant, that SDLI might decide to dispute whether in fact Altitude discharged Zarda because of his sexual orientation, SDLI has repudiated the

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[8] The Court might also wonder whether a dissolved corporation, with at best an uncertain concrete interest in the outcome of the litigation, is an appropriate party to litigate the question presented. *Cf.* Pet. 31 (pointing to the lack of employer "involvement" as a reason for the denial of certiorari on this question in *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248 (11th Cir.), *cert denied,* 138 S. Ct. 557 (2017)).

That being said, there is no question of mootness. *Respondents* have a live claim. And because they are responsible for the corporate dissolution, neither Maynard nor Altitude can obtain vacatur of the decision below. *See United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994).

position taken in the petition that Title VII does not cover sexual orientation discrimination.

In any event, because the issue goes to standing and thus this Court's jurisdiction, the Court would have to address the question of successor liability and whether Altitude is still an appropriate defendant before it could reach the merits of any Title VII issue raised in the petition. The question of successor liability is fact-bound and turns on considerations that are not well developed in the existing record. As this Court observed in *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees & Bartenders Int'l Union, AFL-CIO*, 417 U.S. 249 (1974), determining successor liability "requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue." *Id.* at 262 n.9. Thus, "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context." *Id.*

Under Title VII, courts decide successor liability as a matter of federal common law under a multi-part test that turns on factual issues such as whether the successor company was on notice of the suit and whether the predecessor company could provide adequate relief to the plaintiff. *See, e.g.*, *EEOC v. Northern Star Hospitality, Inc.*, 777 F.3d 898, 902 (7th Cir. 2015) (describing that court's "five-factor test for successor liability in the federal employment-law context"); *EEOC v. MacMillan Bloedel Containers, Inc.,* 503 F.2d 1086, 1094 (6th Cir. 1974) (stating that "[c]ourts that have considered the successorship

question" find "a multiplicity of factors to be relevant" and identifying nine relevant factors).

In this case, as respondents have already explained, it is not even precisely clear as to what the successorship facts *are*. Under these circumstances, it makes no sense for the Court to grant review.

3. The factual atypicality of Zarda's case provides yet another reason to deny review. In the mine run of sexual orientation discrimination claims, a plaintiff asserts that he or she suffered an adverse employment action when the employer learned of the plaintiff's sexual orientation or because the employer disapproved of the plaintiff's sexual orientation.

Zarda's case is different. He alleged he was fired not simply because he was gay, but because he revealed his sexual orientation to a customer of the firm. And he did so in the context of an unusual job—one in which he was intimately "strapped hip-to-hip and shoulder-to-shoulder" to that customer. Pet. App. 11.

In the encounter that led to Zarda's termination, he was strapped to a woman. But for his sex, and hers, he would not have revealed his sexual orientation. Thus, the facts of Zarda's case depend on sex in a way that is distinctive to his job function. That means that the Court could resolve Zarda's case without reaching the broad question on which petitioners seek review: whether discrimination on the basis of sexual orientation is *necessarily* discrimination "because of . . . sex."

Last Term provides two powerful illustrations of how this Court can find itself unable to resolve fully the question presented when it grants review on

idiosyncratic facts. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), this Court did not reach the question presented—whether the Free Speech or Free Exercise Clauses of the First Amendment provide a business that is open to the public with a defense to a claim that it engaged in discriminatory conduct prohibited by a state law. Statements made during an administrative hearing compromised "neutral and respectful consideration" of the petitioners' claims. *Id.* at 1729. Thus, the Court issued an opinion that left open the question of general applicability. And in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the petitioner's claim was sufficiently "far afield from the typical retaliatory arrest claim," *id.* at 1954, that the Court has apparently found it necessary to grant yet another case to decide whether probable cause defeats a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983. *See Nieves v. Bartlett*, No. 17-1174 (certiorari granted June 28, 2018). Granting review here could well result in the same kind of inability to provide guidance on the general construction of Title VII's prohibition on sex discrimination.

Particularly given petitioners' acknowledgment that it is "inevitable" that this Court will have other chances to address the question presented, Pet. 31, the Court should take a pass on this deeply flawed vehicle.

II. Any conflict among the circuits provides no reason to grant review now.

Petitioner points to the recent en banc decisions by the Second Circuit here and the Seventh Circuit in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), as reasons for this Court to grant

review. Pet. 11-12. In reality, these decisions provide a reason for this Court to let the issue percolate. Each of the en banc decisions "overrule[d] earlier decisions" in order "to bring our law into conformity with the Supreme Court's teachings" in cases like *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Hively*, 853 F.3d at 343.

Other courts are grappling with the same question that the Second and Seventh Circuits confronted, and are coming to similar conclusions. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018) (citing *Zarda* in deciding a sex stereotyping decision for plaintiff); *Franks v. City of Santa Ana,* 2018 WL 2425395 (9th Cir. May 30, 2018) (remanding to allow a sexual orientation discrimination claim under Title VII); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."). This Court's consideration of the question presented will benefit from watching how the issue plays out in a variety of factual circumstances.

Indeed, even the Eleventh Circuit, which recently declined to revisit its precedent en banc, *see Bostock v. Clayton Cty. Bd. of Commissioners,* 894 F.3d 1335, 1335 (11th Cir. 2018),[9] is not wholly in conflict with

[9] The plaintiff in that case did not seek rehearing en banc, but instead filed a petition seeking review in this Court. *Bostock v. Clayton County, Georgia*, No. 17-1618 (filed May 25, 2018). Apparently, the Eleventh Circuit did not address the question

the Second and Seventh Circuits. In *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248 (11th Cir.), *cert denied,* 138 S. Ct. 557 (2017), although the court adhered to its precedent holding that sexual orientation claims are not categorically actionable under Title VII, it also recognized that discrimination "because of gender-nonconformity [can be] sex discrimination," and remanded a lesbian plaintiff's claims for further proceedings. *Id.* at 1254-55.

In short, there is analytic and doctrinal movement occurring among the lower courts. This Court should not short-circuit that process.

III. The Second Circuit's decision is correct.

Title VII of the Civil Rights Act of 1964 enacted a "broad rule of workplace equality." *Harris v. Forklift Sys.,* 510 U.S. 17, 22 (1993). In prohibiting employment discrimination "because of" an individual's "sex," 42 U.S.C. § 2000e-2(a)(1), Title VII reaches forms of gender discrimination beyond those that animated Congress "when it enacted Title VII," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). And "recogniz[ing] that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged," this Court has applied concepts of nondiscrimination to

---

whether it should revisit the construction of Title VII en banc until after the petition was filed. *See Bostock*, 894 F.3d at 1338 n.8. Without taking a position on *Bostock*, respondents suggest that a post-petition sua sponte request for rehearing en banc with a dissent shows that lower courts are engaging this question. That is the way it should be. There is no need to grant this defective petition.

lesbian, gay, and bisexual individuals. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

Title VII's prohibition on discrimination "because of" an individual's "sex" encompasses three related concepts. First, Title VII forbids "treatment of a person in a manner which but for that person's sex would be different." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted). Second, Title VII forbids adverse employment actions based on "sex stereotypes." *Manhart*, 435 U.S. at 707 n.13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). Third, Title VII prohibits discrimination against an employee based on the interaction of a protected aspect of the employee's identity with the identity of a person with whom the employee associates. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *cf. Loving v. Virginia*, 388 U.S. 1, 11 (1967) (punishing a person for marrying someone of a different race constitutes race discrimination).

Discrimination against individuals because of their sexual orientation runs afoul of all three prohibitions.

1. As Judge Lohier suitably noted, "[t]ime and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation." Pet. App. 72. Discriminating against lesbian, gay, or bisexual employees inherently involves treating them adversely based on their sex. For more than forty years, it has been settled that Title VII forbids an employer from having "one hiring

policy for women and another for men." *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam). One way to articulate this "simple test" is that it forbids any "treatment of a person in a manner which but for that person's sex would be different." *Manhart*, 435 U.S. at 711 (citation omitted).

It is undemanding to appreciate how discrimination against a gay man like Donald Zarda fails this but-for test. If an employer would not fire women who are attracted to men, then it cannot fire men who are attracted to men. As Chief Judge Wood explained in *Hively*, "[i]t would require considerable calisthenics to remove the 'sex' from "sexual orientation." *Hively v. Ivy Tech Community College*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc). That is why, after all, Judge Cabranes thought this entire question could be resolved in three paragraphs. Pet. App. 68.

2. Discrimination based on sexual orientation also rests on impermissible sex stereotyping. This Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), makes clear that Title VII does not permit employers to "evaluate employees by assuming or insisting that they match[] the stereotype associated with their group." *Id.* at 251 (plurality opinion). Such assumptions and demands, when they result in adverse employment consequences for workers who do not fit the stereotypes, constitute discrimination because of sex.

Discrimination on the basis of sexual orientation is rooted in stereotypes about what it means to be a man or a woman and about how men and women should conduct their lives. It rests on the idea that men should not be attracted to men. Aligning itself

with the Seventh Circuit's statement in *Hively* that same-sex orientation "represents the ultimate case of failure to conform" to gender stereotypes, 853 F.3d at 346, *see* Pet. App. 38, the Second Circuit agreed "that stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women." *Id.* (internal quotation marks and citations omitted. As this Court recently explained, "[f]or close to a half century" it has been the law that "overbroad generalizations about the different talents, capacities, or preferences of males and females" constitute sex discrimination. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996), and citing *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)). Discrimination on the basis of sexual orientation suffers from exactly those generalizations.

3. Discrimination on the basis of sexual orientation constitutes "associational" discrimination forbidden by Title VII. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), this Court held that an employment practice premised on the sex of an employee's spouse can constitute sex discrimination. The practice at issue there was the denial of spousal pregnancy benefits in an employer's healthcare plan. Title VII had, years earlier, been amended to provide that discrimination on the basis of pregnancy is discrimination "because of sex." As such, at the time "the sex of the spouse [was] always the opposite of the sex of the employee," and male employees were subject to discrimination because they had female spouses. *Id.* at 684.

In a similar vein, every circuit to have addressed the question has held that discrimination against

employees because they have interracial relationships constitutes a form of discrimination "because of . . . race" prohibited by Title VII. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *opinion reinstated on reh'g en banc sub nom. Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999); *Parr v. Woodmen of the World Life Insurance Co.*, 791 F.2d 888 (11th Cir. 1986). "The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Holcomb*, 521 F.3d at 139. Several circuits and numerous district courts have found associational discrimination on the basis of other protected actionable characteristics as well. *See* Pet. App. 46 n.25 (citing cases).

The logic of these cases carries to sex discrimination, and therefore sexual orientation discrimination: treating an employee differently because the employer disapproves of same-sex relationships depends on the employee's sex. Again, discrimination under Title VII need merely be "motivated by" consideration of an employee's protected class, as Judge Flaum noted in his succinct concurrence in *Hively,* 853 F.3d at 358, which *Zarda* adopted, Pet. App. 21, 23. Further, Title VII "treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion). Thus, "the prohibition on associational discrimination applies with equal force to all the

classes protected by Title VII, including sex." Pet. App. 46. As the Second Circuit explained, "if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because 'the fact that the employee is a man instead of a woman motivated the employer's discrimination against him.'" Pet. App. 47 (quoting *Baldwin v. Foxx,* 2015 WL 4397641 at *6 (EEOC July 15, 2015).

4. Neither the absence of the explicit phrase "sexual orientation" in Title VII nor congressional inaction after enactment of Title VII can provide a basis for excluding sexual orientation discrimination from the prohibition on discrimination "because of . . . sex." Title VII does not remove lesbians, gay men and bisexual people from its categorical protection against sex discrimination.

Judge Lynch was mistaken to use the proposition that "[d]iscrimination against gay women and men. . . was not on the table for public debate" in 1964 as a basis for denying them protection under Title VII. Pet. App. 79 (Lynch, J., dissenting). It is regrettably true that in 1964 gay men and lesbians, if they had any place at the table, held their secrets under the tablecloth. But "we are governed" by "the provisions of our laws rather than the principal concerns of our legislators." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Regardless of the personal views of members of Congress in 1964, the *statutory text* enacted into law provides gay men and lesbians with a seat at the table by affording them the same protections against discrimination "on the basis of sex" as heterosexual men and women. That was true of the

language of Title VII as originally enacted. And it is even clearer in light of the 1991 amendments to Title VII, which impose liability if sex was even a "motivating factor" in an adverse employment action.

This Court's decision in *Oncale* shows the right way to interpret the statute. In 1964, it was equally implausible to think that any member of Congress was concerned with prohibiting male-on-male sexual harassment. But as this Court explained, "statutory prohibitions often go beyond the principal evil" targeted by the Congress that enacted them "to cover reasonably comparable evils." 523 U.S. at 79. Discrimination against individuals on the basis of their sexual orientation, like the same-sex sexual harassment at issue in *Oncale*, "meets the statutory requirements" for sex discrimination prohibited by Title VII, *id.* at 80. Courts cannot "rewrite the statute so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). They must instead apply the statute as written.

Nor, as the Second Circuit explained, Pet. App. 56, can congressional inaction support excluding claims of discrimination on the basis of sexual orientation. As this Court has repeatedly cautioned, "subsequent legislative history" provides "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Given the multitude of reasons the various proposals to add "sexual orientation" to Title VII might not have been adopted, the congressional inaction over the years here has "no persuasive significance." *United States v. Wise*, 370

U.S. 405, 411 (1962). It "is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval" of a particular statutory interpretation. *Patterson v. McLean Credit Union,* 491 U.S. 164, 175 n.1 (1989). "There are many reasons Congress might not act" in response to a decision even by this Court, "and most of them have nothing at all to do with Congress' desire to preserve the decision." *Michigan v. Bay Mills Indian Community,* 134 S. Ct. 2024, 2052 (2014). (Thomas, J., dissenting). Congress may be indifferent to the status quo, or unable to agree on how to alter it. *Johnson v. Transp. Agency,* 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

It is impossible to choose among the various inferences that a court should take "from [congressional] inaction." *LTV,* 496 U.S. at 650. Silence and nothingness lack persuasive significance; a court may draw "several equally tenable inferences . . . from such inaction, including the inference that the existing legislation already [includes] the offered change." *Id.* The lessons of *LTV* date back at least to the 1960's. *See id.* (quoting *United States v. Wise,* 370 U.S. 405, 411 (1962). This Court has frequently cautioned against giving unenacted legislation such jurisprudential weight, and it certainly should not depart from that guidance to decide an issue of profound importance in such a backhanded manner. As this Court recently reiterated, "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd. v.*

United States, 138 S. Ct. 2067, 2074 (2018) (emphasis in original).[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(212) 334-7397
Gregory10011@icloud.com

August 16, 2018

[10] Indeed, as Chief Judge Katzmann pointed out in his analysis of the acquiescence theory—which presupposes a majority of Congress has accepted any particular judicial interpretation—"when the statute was amended in 1991, only three of the thirteen courts of appeals had considered whether Title VII prohibited sexual orientation discrimination." Pet. App. 55.

APPENDIX

APPENDIX A

Gregory Antollino
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April 11, 2018

Judge Joseph F. Bianco U.S. District Judge
100 Federal Plaza
Central Islip, NY 11722

Dear Judge Bianco,

Hello again. I write with great humility. Winning the en banc is probably the greatest gift ever conferred on me in my career.

The week after I filed a request for a bill of reproduction costs with the Circuit, it was met with strong opposition from the defense in which Mr. Zabell also noted an intention to file a petition for certiorari.

Mr. Zabell and Skydive Long Island, Inc.[1] have both publicly supported the legal conclusion of the en banc court – SDLI has on its website and Mr. Zabell has said to the press. We know, however, that in the prac-

[1] SDLI, Inc. is the successor in interest to Altitude Express, which changed is location to Shirley New York before this case went to trial, then after the appeal was filed. SDLI distanced itself from Altitude Express on its website after the ruling (took the pages down), but some screenshots I took are attached. Altitude Express moved to Shirley, NY before trial – 2014 or 2015. Altitude Express dis-incorporated, and Skydive Long Island registered as a corporation in 2016.

tice of Supreme Court litigation, there are lawyers who are dying to appear before the high court who are willing to take a case up for a losing party at no cost. I am speculating, but my suspicion is that where we are now.

The day after the costs petition (opposition and reply) was fully submitted, Mr. Zabell solicited from me a demand, suggesting there was little money to go around. I asked what SDLI's liability for this debt could be – and have asked repeatedly – but Mr. Zabell has remained mum. I nevertheless made the demand and was told that (after 7+ years of litigation) it was out of range. I don't know if the defense was willing to pay anything, but plaintiff deserves to know who is paying the bill. Is it just Ray Maynard or – as I suspect – did SDLI assume liability for Altitude Express' liabilities. We deserve to know this information just as much as we deserve to know if there is were an insurance policy.

The mandate has issued and there is no stay. We are not asking for a trial date. What we ask for is simply the unredacted sales document that either disavows or assumes liability on Altitude Express. We will keep it confidential. You might also want to refer this to Magistrate Shields.

If our demand was too big, then perhaps we were wrongly assuming successor liability. This is an important question; I have taken cases to trial where there is no money to be taken and don't intend to do so here. The most important question in discussing settlement – and this would be a question that we should explore before certiorari is granted or denied – is the question of successor liability. There is certainly a document that addresses this question in the sale of Altitude Express, Inc. to Skydive Long Island, Inc.

This document is not publicly available. If Mr. Zabell believes we are asking for too much, we need the sales document to know in what area settlement should be explored. Mr. Zabell is trying to hide behind Mr. Maynard as the sole defendant, but he refuses to tender the sales document.

I ask that it be tendered now. I need to advise my clients what money might be obtained at a new trial if cert if denied (or we win on the merits). At a new trial, compensation would include seven years of attorney's fees, punitive damages, a lower standard of proof (a single motivating factor under Title VII) plus the new rule of law announced in *Vasquez v. Empress Ambulance Serv.*, 835 F.3d 267 (2d Cir. 2016).

The defense has announced an intention to petition for certiorari, but it also solicited a demand. We will not be pushing this case to trial until the certiorari petition is filed, but there is no reason there cannot be limited discovery on this minor issue. You don't want to have this case on your docket for another seven years, and there is no reason not to use the time as we wait to explore this discrete issue.

Maybe a phone conference should be scheduled, and I am free until Friday except for Friday morning. Monday I must report for jury duty, but can confer during the lunch hour, 1-2:15.

Thank you for your consideration.

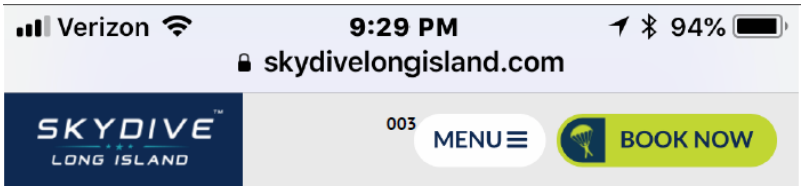
Sincerely,

/s/ Greg S. Antoffino

Gregory Antollino

Cc: Saul Zabell, Stephen Bergstein

APPENDIX B



Long Island NY – On February 26th, 2018, a federal appeals court in New York has ruled that employers cannot discriminate against workers based on their sexual orientation. **We fully support this ruling.**

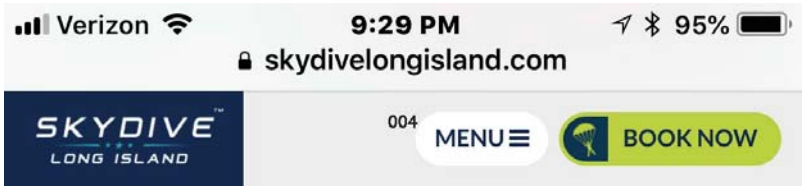
This ruling stems from the alleged 2010 dismissal of Donald Zarda from Altitude Express dba Skydive Long Island. The case of Mr. Zarda has been cited following the Department of Justice's filing of court papers stating that a major federal civil rights law does not protect employees from discrimination based on sexual orientation.

As a result of this report, our business has received several messages and phone calls expressing anger over the dismissal of Mr. Zarda. We feel it's important to add clarity to this story. ***We have no affiliation to this case or the dismissal of Mr. Zarda.***

In 2016, the naming rights of Skydive Long Island was purchased from Altitude Express and has been under new ownership at an entirely different location (Altitude Express was located in Calverton, NY). We are located in Shirley, NY.

Skydive Long Island and it's ownership wish to be clear in our expression of support for gay rights and the LGBTQ community.

Skydive Long Island's owner, Brian Erler states, "We hire our staff based on qualifications related to aviation, skydiving, and hospitality. We do not discriminate based on sexual orientation, race, gender or religious affiliation. Personally, I * * *



to convince your mom skydiving is safe, what the skydiving age is, and how to find a safe dropzone.

SKYDIVE LONG ISLAND SUPPORTS GAY RIGHTS AND THE LGBTQ COMMUNITY

"We hire our staff based on qualifications related to skydiving and hospitality. We do not discriminate based on sexual orientation, race, gender or religious affiliation. Personally, I have family members who are gay and it has always been my position to be supportive of gay rights and the LGBTQ community. We are all the same and we do not tolerate discrimination."

-Owner, Brian Erler

APPENDIX C

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April 12, 2018

VIA ELECTRONIC CASE FILING

The Honorable Joseph F. Bianco
United States District Court Judge
United States District Court
Eastern District of New York
00 Federal Plaza
Central Islip, NY 11722

Re: Donald Zarda v. Altitude Express, Inc. and Raymond Maynard
Case No.: 10-CV-04334 (JFB) (GRB)

Your Honor:

We are counsel for Defendants in the above referenced matter, though note that there is no active matter currently pending before Raymond Maynard. We write in response to Mr. Antolino's April 11, 2018,

missive seeking discovery to assist counsel in determining if a party and/or third party can satisfy a potential judgement. Initially, we must point out that it is factually inaccurate and no attempt has been made to meet and confer regarding the relief requested. Beyond that and putting all histrionics aside, Mr. Antollino's letter seeks relief for which he has no legal basis to seek. Discovery has long been completed. Pleas for additional information to assist Plaintiff is determining the feasibility in litigation or references to settlement discussion should not be a basis for reopening discovery. In fact, Mr. Antollino's references to settlement conversations in his application are inappropriate.

As a final basis for denying Mr. Antollino's the entire application is premature as the time for Altitude Express to exhaust an appeal has yet to run.

We thank the Court for its consideration of this application.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.

/s/ Saul D. Zabell

Saul D. Zabell

cc: Gregory Antollino, Esq. *(via* Electronic Case Filing) Client

APPENDIX D

Gregory Antollino
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April 12, 2018

Judge Joseph F. Bianco
U.S. District Judge
100 Federal Plaza
Central Islip, NY 11722

RE; Zarda v. Altitude Express, et al.

Dear Judge Bianco,

Mr. Zabell indicates there is no action pending against Mr. Maynard. This may or may not be true; there are limitations on individual liability under Title VII, but Maynard owned and transferred his major asset that is still a defendant. Further, we should use this hiatus for limited discovery. Mr. Zabell came to me to ask for a demand. The case could settle before certiorari is filed, as he apparently anticipated. The mandate is not stayed, nor has the defense moved for one (which would have to be made to the Circuit Justice). Moreover, if there is a certiorari petition, and the case returns to this court, we would certainly be entitled to discover the proper defendant, even if discovery is over. The transfer of Altitude Express, Inc. to Skydive Long Island, Inc. occurred after discovery was closed, thus there are new and extraordinary circumstances for plaintiff to seek discovery on this limited question, which is based on a multi-part test.

EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974), cited by *Battino v. Cornelia Fifth Ave., LLC*, 861 F. Supp. 2d 392, 404 (S.D.N.Y. 2012) (Oetken, J.).

Plaintiff is not asking for a trial date, just to know who is the proper defendant. We are entitled to know this, especially in a civil rights case. *See generally MacMillan*. We should not be held in the dark just because the date for a petition for certiorari has not expired. Proportionally, we are not asking for much, and with no stay, the equities are on plaintiff's side.

Sincerely,

/s/ Greg S. Antollino

Gregory Antollino

Cc: Saul Zabell, Stephen Bergstein

APPENDIX E

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

10-CV-0334 (JFB)

MELISSA ZARDA,

Plaintiff,

v.

ALTITUDE EXPRESS, INC., et al.,

Defendants.

May 21, 2018
Central Islip, New York

TRANSCRIPT OF CIVIL CAUSE
FOR CONFERENCE
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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[2] (Proceedings began at 11:37 a.m.)

THE CLERK: Calling case 10-CV-4334, Zarda v. Altitude Express. Counsel, please state your appearance for the record.

MR. ANTOLLINO: Greg Antollino appearing by phone as arranged for plaintiff.

MR. ZABELL: Saul Zabell with the law firm of Zabell & Associates for the defendants.

THE COURT: Good morning. Can you hear Mr. Zabell okay?

MR. ANTOLLINO: Yes.

THE COURT: As you know, I scheduled this because I had received Mr. Antollino's letter back in April asking for a conference to address the issues that he raised in that letter. I have seen the back and forth letters since the initial letter.

So the first issue I want to address is whether or not – has a sur petition been filed? I haven't seen anything.

MR. ZABELL: It has not been filed yet. It is in the process of being filed. I believe we have another week.

THE COURT: The deadline of 90 days is next week?

MR. ZABELL: Correct. Yes.

THE COURT: Okay.

MR. ZABELL: And it will be filed.

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THE COURT: So Mr. Antollino, in light of that, I know you have two others suggestions in your letter. One was some type of settlement conference, the other one related to discovery on successor liability. But if Mr. Zabell is not nterested in trying to resolve the case while the sur petition is pending, I don't know, what's your position on that?

MR. ZABELL: We have reached a –

MR. ANTOLLINO: Well –

THE COURT: Hold on. Let me just ask Mr. Zabell. Go ahead.

MR. ZABELL: We have reached out to Mr. Antollino before we started drafting the sur petition. It did not seem that we were – that we had the same view, and therefore we started the sur petition. So at this point there's no interest in pursuing settlement.

THE COURT: Go ahead, Mr. Antollino.

MR. ANTOLLINO: Well, if there's no interest, there's no interest. But there is the issue of the caption. There's no Altitude Express anymore. So the caption has to be amended. And Mr. Maynard, as Mr. Zabell has pointed out, is not liable although he might be liable under some contractual basis and that would be addressed later. He can't send the Supreme Court a case where there are no parties, the parties don't exist.

[4]

THE COURT: Well, I don't think anything should be done while the sur petition is pending. You know, obviously there is a new company apparently from the letters. Whether or not that's a successor company or not under the law obviously is something that would have to be determined. But I don't think there's any basis at this point simply to just amend the caption to put in a new defendant. The case is still being litigated. What would that accomplish at this point to have discovery on whether or not it is a successor company or not, and if so, to amend the caption? What would that accomplish?

MR. ANTOLLINO: Well, my strength in appeal is that – and I've done two or three sur petitions in my career, they want to know who's the party. And if Altitude Express, Inc. is a defunct corporation and Maynard is not liable under Title 7, the Supreme Court is going to want to know that I think.

THE COURT: I don't know whether they –

MR. ANTOLLINO: I usually don't -- I don't usually represent companies but I know that Rule 7.1, or whatever it is, corporate disclosure and whatnot, there's no entity that can appeal. What's the entity?

THE COURT: Well, I think, Mr. Zabell, correct me if I'm wrong, but you're still representing Altitude Express, correct?

MR. ZABELL: That's correct.

[5]

THE COURT: I mean he's saying it's defunct.

MR. ANTOLLINO: It doesn't exist.

THE COURT: He's saying it doesn't exist.

MR. ZABELL: I'm saying that the corporation has closed up and I'm still employed by them to represent their interests here if for no other –

MR. ANTOLLINO: It's been dissolved by the Secretary of State.

THE COURT: Has it been dissolved?

MR. ZABELL: I believe it has, yes.

THE COURT: Well, I haven't looked at that issue before but if the corporation, he's still retained by the corporation. How long was it dissolved?

MR. ZABELL: I believe it was dissolved at or around the time that the trial was going on.

THE COURT: Right. So it –

MR. ANTOLLINO: No, it was dissolved in 2016.

THE COURT: Okay. So at the time of the en banc decision it was dissolved, right? So I don't know. You're suggesting this is a new issue that has to be resolved here because the Supreme Court is going to want to know. But apparently, the Second Circuit, it didn't affect their disposition of the case, right? They still went forward.

MR. ANTOLLINO: I didn't know about it, frankly. I think there is an affirmative responsibility when appellants [6] go up and they say who is who. But if Your Honor doesn't want to address it, that's your ruling.

THE COURT: Yes. I don't think it makes any sense to address that right now while the petition is pending. If in fact the Supreme Court doesn't want to hear the case because the company is dissolved, then that's up to them I guess. But this is where the case is at, this is where it's been at for years. To start substituting in

parties while a sur petition is pending seems to me to be an unwise thing to do and doesn't make any sense from a cost standpoint to start having discovery would make any sense. I don't know how long it will take for the sur petition to get resolved but I don't know what the timeframe – do you have any idea what the timeframe for that is? No.

MR. ZABELL: Virgin territory to me, Your Honor.

THE COURT: Yes. All right. But –

MR. ANTOLLINO: All right. So –

THE COURT: If you want to research it and put in a letter to me on that issue, Mr. Antollino, I'm always willing to look at it. You're raising issues I hadn't really thought about. So my instincts are that I should not be changing the parties while there is a sur petition pending. But if you want to show me case law that says otherwise, I'm happy to look at it.

MR. ANTOLLINO: I don't think it's my [7] responsibility. I'm just raising the issue. This is the first time that Mr. Zabell is concerned that he's going to petition for sur. So I raised the issue and it's been confirmed that the corporation is dissolved. That's all we have to say until the last day that sur can be filed arise –

THE COURT: All right. And Mr. Zabell, I would obviously make the [indiscernible] to you. If you think that the petition would be moot because the company is dissolved, obviously let me know. I'm happy to look at amending the caption if either side suggests that it's something I should do at this point in the case while the petition is pending. Okay?

MR. ZABELL: Yes.

THE COURT: But I don't think given what I heard, I don't think a settlement conference would be useful. So I'll just await the resolution of the petition and then obviously we'll have another conference depending on the outcome. Either way we'll have a conference.

MR. ANTOLLINO: Or maybe not.

THE COURT: Maybe not.

MR. ANTOLLINO: All right. Thank you, Judge.

THE COURT: All right. Have a good day.

MR. ANTOLLINO: Bye.

(Proceedings concluded at 11:45 a.m.)

* * *

No. 17-1623

In the Supreme Court of the United States

ALTITUDE EXPRESS, INC., *et al.*,
Petitioners,
v.

MELISSA ZARDA,
AS EXECUTOR OF THE ESTATE OF DONALD ZARDA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

As explained in the petition and reiterated in Respondents' brief in opposition, there is a deep and mature circuit split over whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a)(1), included "sexual orientation" when Congress enacted Title VII in 1964. The natural result of this deep division is that plaintiffs and defendants in employment-discrimination actions are receiving divergent results based solely on the circuit where they happen to be litigating. In such circumstances, there is no good reason to allow this important issue to "percolate" any further. Contra Br. in Opp. 18.

Implicitly acknowledging the need for review on the merits, Respondents try to demean the petition as a bad vehicle and spend substantial pages arguing why the Second Circuit decision below was correctly decided. But Petitioners are wrong about their vehicle objections, and their merits discussion only highlights the need for this Court's immediate review. The petition should be granted.

ARGUMENT

I. Respondents wrongly criticize this case as a vehicle to decide the question presented.

Respondents' primary argument for denying the petition is that this case is purportedly the "wrong vehicle" for resolving the jurisprudentially significant and time-sensitive question presented. Br. in Opp. 12-16. This argument is without merit and fails as a matter of law and procedure.

1. Respondents first contend that the Court has no jurisdiction to hear a petition on behalf of Petitioner Ray Maynard, the owner of Petitioner Altitude Express. Br. in Opp. 12-13. Not so. Maynard's inclusion as a Petitioner comes directly from Supreme Court Rule 12(6), "Review on Certiorari: How Sought; Parties," which provides in relevant part:

> All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition.

There is no riddle nor ruse in Maynard seeking review of the decision below; he was a Defendant-Appellee. *See generally* Pet. App. 1. Pursuant to the Rules of the Court, Maynard is entitled to seek review of the Second Circuit decision. Whether he may ultimately face personal liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), has no relevance to the question presented by Petitioners or the Court's review of the same.

Notably, it has not yet been decided whether Maynard may face Title VII liability for the acts of his company. Respondents assert that the Second Circuit's decision "permit[ed] respondents to sue the corporation." Br. in Opp. 13. But the Second Circuit actually held that "Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation" without specifying which defendant or defendants could be held liable. Pet. App. 61a. Nowhere in the

decision does the Second Circuit categorically decide that question of who might be liable.

In addition, and consistent with Rule 12(6), there are multiple theories by which Maynard could be held responsible if Altitude Express is ultimately found liable for violating Title VII. Respondents could argue that the corporate veil be pierced, that Maynard is a mere "alter ego" of Altitude Express, or that Maynard is otherwise vicariously liable for his company's wrongful acts. *E.g.*, *Milliner v. Enck*, 1998 WL 303725, *2 (E.D. Pa. 1998) ("[E]xempting owner liability from Title VII does not permit owners who discriminate to escape unscathed. Owners will necessarily feel the pinch of the employing entity's liability if plaintiffs successfully 'pierce the corporate veil' and demonstrate that the owner is actually the 'alter ego' of the employer."). Respondents could also pursue a theory of *respondeat superior*.

It is true that Maynard told the district court that "there is no active matter currently pending" against him. Br. in Opp. 13. But that does not change the fact that Respondents could turn on Maynard if they prevail on their Title VII claim against Altitude Express. Indeed, given Respondents' reliance on the fact that Altitude Express is a dissolved corporation, such a pivot would appear inevitable.

In sum, Respondents' arguments regarding Maynard are wrong as a matter of law and under this Court's procedure. They do not present a barrier to granting the petition.

2. Respondents next say that the standing of Petitioner Altitude Express "is questionable at best." Br. in Opp. 13. It is not. Altitude Express was a New York corporation. Thus, New York law continues to apply to all claims available to or against it as an entity, regardless of its current status.

The New York law that governs this proceeding is Section 1006 of the New York Business Corporation Law, which provides, in pertinent part:

> (a) A dissolved corporation, its directors, officers and shareholders *may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place*, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing:
>
> …
>
> (4) *The corporation may* sue or *be sued* in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served upon it.
>
> (b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution…. [N.Y. Bus. Corp. Law § 1006 (emphasis added).]

Thus, under New York law – which Respondents concede applies – a corporation no longer in existence remains responsible for its liabilities "until its affairs are fully adjusted." *Flute v. Rubel*, 682 F. Supp. 184, 187 (S.D.N.Y. 1988). So not only does Altitude Express have proper standing pursuant to Supreme Court Rule 12(6), it also has standing as a matter of New York law.

Moreover, the legal theory that Respondents advance – successor liability – does not compromise Altitude Express' position concerning its entitlement to petition this Court or any potential proceedings that may follow if certiorari is denied. Altitude Express, along with Maynard, have defended against Respondents' claims since the charges of discrimination were initially filed with the Equal Employment Opportunity Commission in July 2010. Pet. App. 178f-81f. As an entity, Altitude Express was dissolved in March 2017. Altitude Express argued at trial in October 2015; it argued before the Second Circuit in January 2017, and again before an *en banc* panel after dissolution in September 2017. Both Maynard and Altitude Express were active parties in all proceedings before the District and Appellate Courts. Altitude Express has, is, and will continue to defend its interests with regard to Respondents' surviving claims and allegations because, as a matter of New York law, Altitude Express can be held liable as though it were never dissolved.

As Respondents point out, the first instance in which any potential for successor liability was brought up in this litigation was after the underlying decision by the Second Circuit was issued and only eight days before the petition was filed. Opp. App. 10a-15a. Said

another way, no lower court has determined the issue of successor liability. Respondents never pled or otherwise moved to include the putative successor to Altitude Express, despite the alleged succession having occurred approximately a year before the *per curiam* panel of the Second Circuit affirmed the District Court's dismissal of the Title VII claim and approximately two years before the filing of the petition. Pet. App. 4a-6a; Opp. App. 14a.

That Respondents have chosen to address successor liability for the very first time in opposition to the petition is highly improper. Essentially, what Respondents ask of the Court is to deny certiorari based on a hypothetical. This argument is based not on facts or a record, but on assumptions and possibilities. This Court should not deny the petition based on such speculation and disregard of New York law. Altitude Express remains, as it always has been, the "employer" defending this action. Respondents' argument is without merit and must be rejected.

3. Alternatively, say Respondents, the petition is a bad vehicle for resolving the question presented because of the case's "factual atypicality." Br. in Opp. 16. But it makes no difference to resolving the question whether Zarda was fired "because he was gay" or "because he revealed his sexual orientation to a customer of the firm." Contra *id.* Nor does it matter that Zarda was strapped to a woman when he revealed this information. Contra *id.*

The circumstances in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), and *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), are quite different. Br. in Opp. 17. The Court

did not reach the questions presented in *Masterpiece* because it found an alternative ground (pervasive religious hostility) that superseded the Free Speech and Free Exercise claims that the petitioner had advanced. And *Lozman* in fact addressed the question presented in part: the Court made clear that probable cause does not *invariably* defeat a First Amendment retaliatory arrest claim, though it chose not to decide the circumstances when such a defeat will occur. In contrast here, the "distinguishing" facts to which Respondents point will not prevent this Court from deciding whether "sex" discrimination included "sexual-orientation" discrimination when Congress enacted Title VII.

II. The chaos among the circuits over Title VII's meaning warrants a grant, not a denial.

According to Respondents, the fact that the circuits are "grappling" with the question presented means this Court should not step in but wait for further percolation. Br. in Opp. 17-19. That argument is baseless. The lower courts have spilled more than enough ink on the issue. As the petition explains, the Second and Seventh Circuits are now in conflict with every other Circuit that has addressed the important issue of whether Title VII covers sexual-orientation discrimination. Pet. 12-13.

There is no indication that the conflict will resolve itself given enough time. And there is nothing more the lower courts could possibly write that would further inform this Court before it considers and resolves the question presented. Granting Respondents' request for delay will only perpetuate the acknowledged conflict

and confusion, which is a reason to grant review, not to deny it.

III. The Second Circuit's decision is wrong.

Lacking a persuasive procedural reason for denying a grant, Respondents spend several pages arguing that the Second Circuit's analysis is correct. That issue is largely irrelevant to the propriety of granting the petition, particularly where there is a mature circuit split on an issue of such great importance.

Respondents are wrong about the merits in any event. As the petition explains, federal statutes—particularly those imposing substantial financial liability—must be interpreted by reference to their original public meaning, not by contemporary standards or definitions, and certainly not with the aid of judicial updating. Pet. 14 (citing *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014)). As Judge Posner candidly conceded in his concurrence to the Seventh Circuit's rewriting of Title VII, a "broader understanding of the word 'sex' in Title VII than the original understanding is . . . required in order to be able to classify the discrimination of which *Hively* complains [i.e., sexual-orientation discrimination] as a form of sex discrimination." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring).

This Court may decide to judicially update Title VII, as did the Second and Seventh Circuits, but it may not. Either way, lower courts and litigants across the country are entitled to this Court's definitive ruling and a uniform rule. It is untenable that employers and employees alike cannot manage their employment

relationships without consulting conflicting and irreconcilable circuit-court decisions. This Court's review is warranted.

IV. At a minimum, the Court should hold the petition pending decisions in other, similar cases.

Lastly, Petitioners note that there are two additional petitions for writ of certiorari pending before the Court that present a similar, if not the same, question raised here. Petition for Writ of Certiorari, *Bostock v. Clayton County, Georgia*, No. 17-1618 (presenting the same sexual-orientation question raised in this case), and Petition for Writ of Certiorari, *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107 (asking whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex" meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964). At a bare minimum, Respondents respectfully request that the Court hold this case in the event one of these analogous petitions is granted.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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