15-3775

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MELISSA ZARDA, co-independent executor 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., d/b/a SKYDIVE LONG ISLAND; and RAYMOND MAYNARD,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of New York
Hon. Joseph Bianco, Judge

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

THE ISSUE MERITING EN BANC CONSIDERATION

Plaintiffs-Appellants Melissa Zarda and William Allen Moore, Jr., Executors of the Estate of Donald Zarda (hereinafter "Zarda") petition this Court under Rule 35(b) of the Federal Rules of Appellate Procedure for rehearing en banc of the Per Curiam decision dated April 18, 2017. *See Zarda v. Altitude Express*, --- F.3d ----, No. 15-3775, 2017 WL 1378932 (2d Cir. Apr. 18, 2017). A copy of the decision is attached as an Addendum and denoted by "Add."

The full Court should decide whether Title VII's bar on sex discrimination prohibits sexual orientation discrimination." *See* 42 U.S.C. §2000e-2(a). The panel found itself constrained by *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005). The en banc Court should overrule both precedents; the plain meaning of the statute so requires. The Supreme Court has repeatedly held that Title VII "treats each of [its] enumerated categories exactly the same." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989). This Court must fulfill its legal obligation to entertain *all* claims that meet the statutory requirements of Title VII that "sex-based considerations" not affect an employee's treatment. *Id.* at 242.

First, the panel's adherence to *Simonton* and *Dawson* conflicts with multiple decisions of this and the United States Supreme Court. Consideration by the full Circuit is therefore necessary to secure and maintain uniformity in the law.

In holding that Title VII allows the firing of men, but not women, who are attracted to men, (and vice versa) the panel relied on *Simonton*—a decision rejecting Title VII's coverage of sexual orientation discrimination without addressing arguments supporting the conclusion that Title VII's prohibition against sex discrimination encompasses anti-gay discrimination. *See Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring and describing these arguments as "persuasive," "none previously addressed by this Court"). *See also* Add. 8 (relief for Zarda "foreclosed by *Simonton*"). The panel's adherence to *Simonton* perpetuates a "longstanding tension in Title VII caselaw," *id.* at 5; it also conflicts with: *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Holcomb v. Iona Coll*., 521 F.3d 130 (2d Cir. 2008); and *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004).

Second, this case involves a question of exceptional importance: Whether—as the Seventh Circuit held en banc, as well as the agency charged with Title VII enforcement—the statute's prohibition on sex discrimination protects all employees from adverse treatment that an employer would not have inflicted had they been of

a different sex. *See Hively v. Ivy Tech Comm. College*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Baldwin v. Foxx*, 2015 WL 4397641 (EEOC July 16, 2015). Reexamination of *Simonton* and *Dawson*—cases carving sexual orientation out of Title VII without a basis in the text—is warranted where a sister circuit went en banc, overruling similar precedents.[1] Perhaps more importantly, it cannot escape notice that the Chief Judge of this Circuit has endorsed *Baldwin's* principal arguments. With District Judge Margo Brodie joining him, Judge Katzmann concurred that a precedent dating from 2000, with so many societal changes hence, warrants reconsideration. *See Christiansen*, 852 F.3d at 207. *See also, Zarda,* Oral Arg. at 11:06 (Sacks, J.), *available at* http://files.eqcf.org/cases/15-3775-oral-argument-audio/.

1 *Hively also* abrogated *Ulane v. E. Airlines,* 742 F.2d 1081 (7th Cir. 1984), upon which *Simonton* relied, at least in part.

ARGUMENT

I. The Question of Title VII's Nondiscrimination Directive, and Its Application to Sexual Orientation Is of Exceptional Importance.

There is increasing recognition among circuit and district judges that difficulties implicating the scope of "sex" under Title VII are of such exceptional importance, affecting the rights of thousands, that they warrant en banc consideration.[2] Indeed, disposition of this petition would decide not only Zarda's rights, but those of similar, countless others, currently without redress under Title VII; they may be freed from discrimination if this Court sends a clear message that sexual orientation bias is not just wrong, but textually unlawful.[3]

This Court's caselaw removing lesbian, gay, and bisexual people from the entire spectrum of protections of sex-based discrimination provided by Title VII sharply contrasts with the upsurge of federal recognition "that discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively*, 2017 WL 1230393, at *1. *See also*, *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F.

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2 This Court has previously granted en banc review in cases involving issues of exceptional importance under federal employment nondiscrimination laws. *See*, *e.g.*, *Buckley v. Consolidated Edison Co.*, 155 F.3d 150 (2d Cir. 1998) (en banc).

3 "[T]itle VII affords greater financial relief, including attorneys' fees, than the [New York State] Human Rights Law." *Margerum v. City of Buffalo*, 24 N.Y.3d 721, 736 (2015). The same is true under Connecticut's Fair Employment Practices Act. *Tomick v. United Parcel Serv., Inc.*, 324 Conn. 470, 476 (2016).

Supp. 3d 1334 (N.D. Fla. 2016); *EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-cv-225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Boutillier v. Hartford Pub. Sch.*, No. 13-cv-1303, 2014 WL 4794527 (D. Conn. Sept. 25, 2014).

Judges on three circuit courts have now expressed views that Title VII's bar on sex discrimination encompasses claims of sexual orientation discrimination. This growing consensus is a factor meriting full Court consideration. For one, here, Chief Judge Katzmann expressed his view that the entire Circuit should "revisit the central legal issue confronted in *Simonton* and *Dawson*, especially in light of the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued." *Christiansen*, 852 F.3d at 202. Judge Sack of this Court declared that "there is no question that this question is ripe for visitation." *Zarda,* Oral Arg. at 11:06 (Sack, J.). (It bears repeating that Judges Katzmann and Sack comprised a majority of the *Simonton* panel.)

Likewise, the Seventh Circuit voted to grant en banc review of a panel decision compelled by existing precedent to hold Title VII inapplicable to sexual orientation discrimination. *See Hively v. Ivy Tech Cmty. Coll. S. Bend*, 830 F.3d 698 (7th Cir. 2016) ("In light of the importance of the issue . . . and to bring

our law into conformity with the Supreme Court's teachings, a majority of the judges in regular active service voted to rehear this case en banc."). *See also id.* 2017 WL 1230393 *17 ("Any case heard by the full court is important. This one is momentous.") (Sykes, J., dissenting). Finally, an Eleventh Circuit judge has urged her court to "rehear [a] case en banc"—one that adhered to existing precedent excluding lesbian, gay, and bisexual people from Title VII's protection from sex-based discrimination, based on line from a 1979 holding. *See Evans v. Georgia Regl. Hosp.,* 850 F.3d 1248, 1271 (11th Cir. 2017) (Rosenbaum, J., dissenting).

Thus, as recognized by many appellate judges—in three circuits within less than a year—this petition presents a question of exceptional importance meriting en banc consideration.

II. En Banc Review Is Warranted. The Modern-Day Panel Reached a Result Dictated by Precedents Dictating that Sexual Orientation Is Not a Form of Sex Discrimination.

In holding that Title VII's sex discrimination prohibition does not cover sexual orientation, the panel held that *Simonton* foreclosed any such claim. Add. 8. Having concluded it lacked authority to overturn *Simonton*, Add. 7, it did not explore the reasons why sexual orientation discrimination is sex discrimination—namely because the former treats people of a certain sex differently, because of the individuals with whom they associate, and because gender stereotyping is a root of this form of sex bias. As such, the panel did not discuss Title VII, nor the multitude

of Supreme Court and Second Circuit precedents that verily abrogate *Simonton* and *Dawson*; as a result, it arrived at an outcome inconsistent with those precedents. This Court needs to reconcile these inconsistencies.

In his *Christiansen* concurrence, Chief Judge Katzmann expressed agreement with each of the three principal arguments presented by counsel, that sexual orientation discrimination violates Title VII's ban on discrimination "because of . . . sex." 852 F.3d at 202. In so doing, he urged the full Court to "consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII," as "[n]either *Simonton* nor *Dawson* had occasion to consider these worthy approaches." *Id.* at 207. He held as such because "three arguments" "reflect the evolving legal landscape since . . . *Simonton* . . . and *Dawson*" and because a faithful application of *Oncale* dictates that "there is 'no justification in the statutory language . . . for a categorical rule excluding'" sexual orientation discrimination from Title VII. *Id*. at 202, 207.

Similarly, in the *Hively* en banc decision, the Seventh Circuit endorsed not only these arguments, *see* 2017 WL 1230393, at **5-7, but noted the flaw in contrary decisions emphasizing language *not* in the statute, rather than "the scope of language . . . already *in* the statute," *id*. at *3 (emphasis added). Focusing on non-statutory considerations contravenes *Oncale*, where Justice Scalia, writing for a unanimous

Court, emphasized that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79.

Chief Judge Katzmann found persuasive these arguments:

First, "sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex." *Christiansen*, 852 F.3d at 202 (Katzmann, concurring). The Chief Judge then suggested a scenario wherein a man and a woman both put pictures of their respective husbands on their desks. To punish one, but not the other, fails *Manhart*'s "simple test" of sex discrimination, as well as *Oncale*'s test as to whether a person is "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 202 (citations and quotations omitted). Similarly, *Hively* ruled that where an employer fires a female employee because the employee is married to (or lives with or dates) a woman but would not fire a male for identical conduct with a woman, the employer has engaged in "paradigmatic sex discrimination." 2017 WL 1230393, at *5.

Second, sexual orientation discrimination is sex discrimination insofar as it treats comparable people differently because of sex, whether viewed apropos of the sex of the individuals with whom they associate (or to whom they are attracted). *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring). Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490

U.S. at 244 n.9. Thus, "to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate." *Hively*, 2017 WL 1230393, at *7; *id*. at *16 (Flaum, J., concurring); *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring). Accordingly, *Zarda's* adherence to *Simonton* creates an fundamental conflict with one of this Court's formative Title VII cases: *Holcomb*, 521 F.3d 130, holding that "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." *Id.* at 139 (emphasis in original).

Third, "sexual orientation discrimination is discrimination 'because of . . . sex' because such discrimination is inherently rooted in gender stereotypes." *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring).[4] Undeniably, an individual's same-sex attraction "represents the ultimate case of" non-conformance to a sex "stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)." *Hively*, 2017 WL 1230393, at *5; *see also Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring) (citation omitted). And both Chief Judge Katzmann and *Hively*

[4] The Chief Judge emphasized how antigay bias fits within the concerns of prevailing gender-stereotyping jurisprudence. *See Hively*, 2017 WL 1230393, at *5; *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring).

concluded that there is no rationale for treating anti-gay bias different from other discrimination based on one's failure to conform to gender norms. *Hively*, 2017 WL 1230393, at *5; *Christiansen*, 852 F.3d at 205; *see also* Add. 5 (noting "longstanding tension" between *Simonton* and *Price Waterhouse*).

Finally, after detailing what he deemed the "persuasive arguments" not addressed in *Simonton*, Chief Judge Katzmann addressed and rejected the infirm argument (invoked with hesitation), in *Simonton*: Congress's inaction on bills that would have provided sexual orientation protections. 232 F.3d at 36. Judge Katzmann cautioned that one should "not rely on the 'hazardous basis' of congressional inaction" for statutory interpretation, *Christiansen*, 852 F.3d at 206 (citation omitted). *See also Hively*, 2017 WL 1230393, at *3. Instead, the correct interpretive approach is not only clear but mandatory: courts focus on "the language that already is in the statute[.]" *Hively*, 2017 WL 1230393, at *3. No argument (including congressional inaction) can defeat a plaintiff who "can demonstrate that he or she was discriminated against 'because of . . . sex'" given *Oncale*'s instruction that Title VII's scope "must extend to [discrimination] *of any kind* that meets the statutory requirements." *Christiansen*, 852 F.3d at 207 (Katzmann, C.J., concurring) (citing *Oncale*, 523 U.S at 80) (changes in original).

III. This Is an Appropriate Case to Decide whether Title VII's Prohibition Against Sex Discrimination Encompasses Sexual Orientation Discrimination.

In *Christiansen*, the Chief Judge urged the full Court to reconsider *Simonton* and *Dawson* in an "appropriate case." 2017 WL 1130183, at *9. This is the case. "Zarda may receive a new trial *only if* Title VII's prohibition on sex discrimination encompasses discrimination based on sexual orientation," a "result . . . foreclosed by *Simonton*." Add. 8 (emphasis added). He may obtain relief only if this Court reviews it en banc and joins the many calls for this Court to overturn *Simonton* and *Dawson*.

Zarda will abandon his evidentiary points to reach this sole question of extraordinary, national importance. He seeks review only as to whether discrimination by sexual orientation is a form of sex discrimination under Title VII. *Zarda* is a case that squarely (and solely) presents the question whether same-sex attraction is sex stereotyping. A denial of the petition would represent not only an injustice to Zarda, but be of disservice to the institutional concerns underlying this Court's principles regarding when to reconsider a case en banc.

IV. This Case Merits En Banc Review under this Court's Standards.

The Court should grant this petition because it fits squarely within the concerns underlying the principles and touchstones regarding en banc review. "En banc review should be limited generally to only those cases that raise issues of

important systemic consequences for the development of the law and the administration of justice." *Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009) (per curiam) (en banc). This is precisely such a case.[5]

The most compelling reason for en banc rehearing is to consider an exceptionally important issue with widespread application; one that depends on overruling existing precedent; one that conflicts with Supreme Court precedent; and one involving precedents repudiated by respected jurists. Each of these considerations is present here, the challenge to existing law comes from a majority of judges that decided the original precedent and from a sister circuit that overruled similar cases from the same era.

Granting this petition does not vary from the Court's reluctance to add another "step on an elongated appellate ladder" for litigants who received a full, if unsatisfying, hearing before a panel of the Court. Irving R. Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?*, 69 Judicature 7, 8 (1985). Zarda should not be regarded as one of the sore "losing litigants" giving insufficient weight to institutional considerations in their quest for "what they regard as the 'correct' decision." Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-*

[5] That two similar petitions are pending regarding this issue underscores its importance in asking this Court for en banc review. *Christiansen*, No. 16-748(2d Cir. Apr. 28, 2017); Pet. for Hearing En Banc, *Cargian v. Breitling USA, Inc.*, No. 16-3592 (2d Cir. Apr. 19, 2017).

1988, 55 Brook. L. J. 355, 370 (1989). To the contrary, the principal arguments in support of Zarda's position under Title VII have never wholly been considered, nor rejected, by *any* panel of this Court—much less been on the merits. *Christiansen*, 852 F.3d at 202 (Katzmann, C.J., concurring).

Zarda's interest in having those positions reconsidered aligns with a proper respect for this Court's organizational customs and concerns. There are no interests served where, as here, *no* panel of the Court has ever had—nor will ever have, in the absence of en banc review—an opportunity to consider them, in the context of a significant provision in an historically vital civil rights statute. *Id.*; Add. 8.

Granting the petition does not disturb this Court's desire to foster collegiality among judges nor to establish respect for the role of panels in establishing jurisprudence. Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 Brook. L. J. 355, 370 (1989). A majority of the judges who decided *Simonton* say it merits revisitation; of those judges, Chief Judge Katzmann, advises a need for critique and reassessment of *Simonton*, given new, convincing arguments and the vast changes in rights afforded the LGBT community in the intervening 17 years. *Christiansen*, 852 F.3d at 202, 206 (Katzmann, C.J., concurring).

Moreover, to adhere to *Simonton*, this Court would, if only by default, be satisfied to have it remain unaligned with the conclusions of other panels. For example, while *Holcomb's* coherent analysis connects with consistent, nationwide

consensus on claims of associational discrimination, it cannot be squared with reaffirmance of *Simonton*. Similarly, adherence to *Simonton* is untenable given *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). The Court cannot afford proper respect to *Windsor*'s holding that sexual orientation classifications are "quasi-suspect," *id.* at 181-82, unless it disavows judicially-crafted rules that disallow viable sex discrimination claims *solely* because they involve sexual orientation bias.[6]

Should the Court reexamine its holdings, it could have a vital effect on the development of the law. Multiple circuits have given significant weight to *Simonton* in assessing whether Title VII's prohibition on sex discrimination reaches claims of sexual orientation discrimination. *See Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (citing *Simonton)*; *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (same). S*ee also Vickers v. Fairfield Med. Ctr.*, 454 F.3d 757, 763-64 (6th Cir. 2006) (*Dawson)*. Evans cited *Simonton.* 850 F.3d at 1256.

Obversely, several district courts within this Circuit have struggled with these cases to apply "the line between a gender nonconformity claim and one based on sexual orientation . . . [because] it does not exist," *Hively*, 2017 WL 1230393, at *5.

[6] *Windsor* did not address whether sexual orientation discrimination constitutes sex discrimination and the plaintiff did not advance such argument. *See generally* Br. of Appellee, *Windsor v. United States*, No. 12-2435 (2d Cir. Aug. 31, 2012).

One court held it was no more than "a lingering and faulty judicial construct." *Videckis*, 150 F. Supp. 3d at 1159. *See also*, *Estate of D.B. v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332–33 (N.D.N.Y. 2016) ("harassment consist[ing] of homophobic slurs directed at a homosexual, [is considered] gender-stereotyping" only by "improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim . . . is possible."); *Maroney v. Waterbury Hosp*., No. 10-CV-1415, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011) ("The Second Circuit['s holdings make] gender stereotyping claims . . . especially difficult for gay plaintiffs to bring.") And while *Christiansen* acknowledged "some confusion . . . about the relationship between gender stereotyping and sexual orientation discrimination claims," it did not clear up the confusion. 2017 WL 1130183, at *3. Because this jurisprudential disarray is attributable, at least in part, to decisions of this Court, this Court should step in to rectify the disorder.[7]

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7 Avoiding the en banc is said to promote collegiality, but strict adherence to this tradition perhaps devalues this goal. *See, e.g.*, the dissents in *Ricci v. Destefano*, 530 F.3d 88, 93 (2d Cir. 2008); *Landell v. Sorrell*, 406 F.3d 159, 167 (2d Cir. 2005); and *Muntaqim v. Coombe*, 385 F.3d 793, 795 (2d Cir. 2004). A concurrence in *Muntaqim* noted a petition for en banc rehearing was denied without prejudice if certiorari were denied. *Id.* at 795. Judge Jacobs lamented that suggestion, *id. at 49,* and noted in *Ricci* that a failure to exercise discretion can "constitute[] an error of law." 530 F.3d at 92 (citation omitted). Judge Cabranes further noted that the phrase "Per Curiam" "is normally reserved for cases that present straight-forward questions[.]" *Muntaqim* 385 F.3d at 93. *Zarda* was Per Curiam, but hardly straight-forward.

CONCLUSION

The panel below was unambiguous: "if Title VII protects against sexual orientation discrimination, then Zarda would be entitled to a new trial," but the "result is foreclosed by *Simonton*." Add. 7, 8. This court should "sit[] en banc to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago." *Hively*, 2017 WL 1230393, at *9.

Accordingly, Plaintiffs-Appellants respectfully request that the Court rehear this case en banc and hold that sexual orientation discrimination is a form of sex discrimination, so that Zarda may enjoy the protections and remedies of Title VII and challenge the sex-based mistreatment he endured.

En banc review was once disfavored because "Supreme Court resolution is inevitable [in hard cases, therefore they should not] tarry . . . for further intermediate action[.]" Green v. Santa Fe Industries, Inc. 533 F.2d 1309, 1310 (2d.Cir.1976). The late Judge Oakes heartily disagreed in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1021 (2d Cir. 1973) ("With all respect I do not know how we can be so prescient about the United States Supreme Court.") In the Green era, the High Court granted 180 petitions. Now, with more petitions, 80 grants are the norm. Ryan J. Owens and David A. Simon, "Explaining the Supreme Court's Shrinking Docket," 53 Wm. & Mary L. Rev. 1219, 1229 (2012). Most significantly, the Circuits created the caselaw we challenge. With a minuscule chance of obtaining a writ, notwithstanding a potential circuit split, the circuits should address this law and it is likely that only an en banc reversal will allow Zarda to vindicate his rights, and in the offing change a body of law that courts routinely apply with displeasure.

Dated this 2nd day of May, 2017.

Respectfully submitted,

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We owe sincere gratitude to Lambda Legal Defense Fund, specifically, attorneys Greg Nevins, Omar Gonzales-Pagan, Michael Kavey and Sharon McGowan, for their substantial contributions in finalizing this brief.

CERTIFICATION UNDER F.R.A.P 32(g)

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

1. This petition complies with the type-volume limitation, as provided in Fed. R. App. P. 35(b)(2), because, exclusive of the exempted portions of the petition, the petition contains 3,894 words.

2. This brief complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated this 2nd day of May, 2017.

/s/ Gregory Antollino

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Petition with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 2nd day of May, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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ADDENDUM TO THE PETITION, *ZARDA V. ALTITUDE EXPRESS*, 15-3775, MAY 2, 2017

15-3775
Zarda v. Altitude Express

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2016

(Argued: January 5, 2017 Decided: April 18, 2017)

Docket No. 15-3775

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MELISSA ZARDA, co-independent executor of the estate of Donald Zarda, and WILLIAM ALLEN MOORE, JR., co-independent executor of the estate of Donald Zarda,

Plaintiffs-Appellants,

- v.-

ALTITUDE EXPRESS, doing business as SKYDIVE LONG ISLAND, and RAY MAYNARD,

Defendants-Appellees.

- -x

Before: JACOBS, SACK, and LYNCH, Circuit Judges.

Donald Zarda, a skydiver, sued his former employer in the United States District Court for the Eastern District of New York (Bianco, J.), asserting (inter alia) sexual-orientation discrimination in violation of New York state law and sex

discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq. The district court, relying on our decision in Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000), declined to hold that discrimination based on sexual orientation constituted discrimination based on sex for purposes of Title VII. The state-law claim for sexual-orientation discrimination went to trial where a jury found for the defendants. On appeal, Zarda argues that Simonton should be overturned. We do not entertain that argument because a panel of this Court could not overturn another panel's decision. Moreover, we reject Zarda's argument that he is entitled to a new trial on his state-law claim because of alleged evidentiary errors, unfair discovery practices, and prejudicial arguments to the jury based on gay stereotypes. Consequently, we **AFFIRM** the judgment of the district court in all respects.

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Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland; Women's Law Project, in support of Plaintiffs-Appellants.

Michael D.B. Kavey, LGBTQ Rights Clinic, New York, NY; Omar Gonzalez-Pagan, Lambda Legal Defense and Education Fund, Inc., New York, NY; Gregory R. Nevins, Lambda Legal Defense and Education Fund, Inc., Atlanta, GA, for Amicus Curiae Lambda Legal, in support of Plaintiffs-Appellants.

PER CURIAM:

Plaintiff Donald Zarda, a skydiver, alleges that he was fired from his job as a skydiving instructor because of his sexual orientation.[1] He sued his former employer, Altitude Express (doing business as Skydive Long Island) and its owner Raymond Maynard (collectively "Altitude Express"), asserting that he was discriminated against in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., and New York law.[2] The United States District Court for the Eastern District of New York (Bianco, J.), found a triable issue of fact as to whether Zarda faced discrimination because of his sexual orientation in violation of New York law, but otherwise granted summary judgment to Altitude Express on Zarda's discrimination claims. In particular, the district court held that the defendants were entitled to summary judgment on Zarda's Title VII claim because Second Circuit precedent holds that Title VII does

[1] Zarda died in a skydiving accident before the case went to trial, and two executors of his estate have replaced him as plaintiff. Zarda and his estate's executors are collectively referred to as "Zarda."

[2] Zarda also alleged violations of state and federal laws relating to overtime and minimum wage. Those claims are not before us on appeal.

not protect against discrimination based on sexual orientation. At trial, the jury found for the defendants on Zarda's state-law claims.

On appeal, Zarda requests that we reconsider our interpretation of Title VII in order to hold that Title VII's prohibition on discrimination based on "sex" encompasses discrimination based on "sexual orientation." Since a three-judge panel of this Court lacks the power to overturn Circuit precedent, we decline Zarda's invitation.

Separately, Zarda asserts that several errors infected the trial on his state-law discrimination claim, warranting a new trial. Finding no abuse of discretion by the district court, we affirm the judgment in all respects.

I

In 2010, Rosanna Orellana and her boyfriend David Kengle went skydiving at Altitude Express. Each purchased tandem skydives, in which the instructor is tied to the back of the client so that the instructor can deploy the parachute and supervise the jump. Zarda was Orellana's instructor.

At some point, Zarda informed Orellana that he was homosexual and he had recently experienced a break-up. Zarda often informed female clients of his sexual orientation--especially when they were accompanied by a husband or boyfriend--in order to mitigate any awkwardness that might arise from the fact that he was strapped tightly to the woman.

When Orellana and Kengle compared notes on their respective skydives, and Kengle learned that Zarda had disclosed his sexual orientation, Kengle called Altitude Express to complain about Zarda's behavior. Zarda was fired shortly thereafter. Predictably, the parties dispute *why* Zarda was terminated. Altitude Express observes that Orellana had various complaints about Zarda's behavior, and the company contends that Zarda was fired because he failed to provide an enjoyable experience for a customer. For his part, Zarda asserts that he acted appropriately at all times and was fired because of his sexuality: either because of

his supervisor's prejudice against homosexuals or because he informed a client about his sexuality.[3]

II

The district court determined that there was a genuine dispute of material fact regarding the reason for Zarda's termination. However, the district court concluded that Zarda was entitled to a trial only with respect to his state-law cause of action. See N.Y. Exec. Law § 296(1)(a) (defining discrimination on the basis of sexual orientation as "an unlawful discriminatory practice"). Zarda's Title VII claim, by contrast, was dismissed at summary judgment.

That outcome ultimately resulted from longstanding tension in Title VII caselaw. While this Court has stated that Title VII does not prohibit discrimination based on sexual orientation, Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000), the Supreme Court has held that Title VII does forbid discrimination based on a failure to conform to "sex stereotypes," Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). See also Dawson v. Bumble & Bumble, 398 F.3d 211, 217-19 (2d Cir. 2005) (reaffirming Simonton). In light of these precedents, Zarda premised his Title VII cause of action on the ground that he had been terminated for failing to conform to sex stereotypes. Specifically, Zarda alleged that his employer "criticized [Zarda's] wearing of the color pink at work" and his practice of painting his toenails pink, notwithstanding Zarda's "typically masculine demeanor." J. App'x at 30. Accordingly, the district court, granted summary judgment in favor of defendants without analyzing whether Zarda could rely on a "sex stereotype" that men should date women. Instead, the district court limited its analysis to the "sex stereotypes" alleged by Zarda, including "what you may wear or how you may behave." Special App'x at 26. Determining that Zarda failed to establish the requisite proximity between his termination and his proffered instances of gender non-conformity (not including the fact that he dated other men), the district court granted summary judgment to defendants on Zarda's Title VII claim.

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[3] Zarda alleged that another skydiving instructor had disclosed that he was heterosexual but was not punished.

During these proceedings, the Equal Employment Opportunity Commission ("EEOC") issued a decision setting forth the agency's view that discrimination based on sexual orientation constitutes sex discrimination in violation of Title VII. See Baldwin v. Foxx, E.E.O.C. Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). Relying on Baldwin, Zarda moved the district court to reconsider its grant of summary judgment on his Title VII claim. The district court denied the motion, holding that Simonton 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.

After his state-law sexual-orientation claim proceeded to trial and a jury found for the defendants, Zarda appealed.

III

Zarda asserts that Simonton's holding that "Title VII does not proscribe discrimination because of sexual orientation" is incorrect and should be overturned. 232 F.3d at 36. As a threshold matter, Altitude Express contends that we need not consider this argument in light of the jury verdict in favor of the defendants on Zarda's state-law discrimination claim. Essentially, Altitude Express argues that the scope of Title VII's protections are irrelevant to Zarda's appeal because the jury found that Altitude Express had not discriminated.

Altitude Express is incorrect; Zarda's sex-discrimination claim is properly before us because the district court held him to a higher standard of causation than required by Title VII. Under Title VII, a plaintiff must demonstrate that sex "was a 'substantial' or 'motivating' factor contributing to the employer's decision to take the [adverse employment] action." Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 85 (2d Cir. 2015). Accordingly, to show causation for sex discrimination under Title VII, "[i]t suffices . . . to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision." Univ. of Tx. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2523 (2013).

At trial, the district court instructed the jury that Zarda could prevail on his state-law sexual-orientation discrimination claim only if he could prove that "he would have continued to work for Altitude Express . . . except for the fact that he was gay."[4] J. App'x at 1771. In other words, the jury charge required Zarda to prove but-for causation, which is a higher standard of causation than is necessary for Title VII sex-discrimination claims. See Vega, 801 F.3d at 86 ("[A] plaintiff in a Title VII case need not allege 'but-for' causation.").

If Zarda is correct that discrimination based on sexual orientation is equivalent to prohibited sex discrimination under Title VII, then he would have been entitled to a jury instruction on the less stringent "motivating-factor" test for causation. See Gordon v. N.Y. City Bd. of Educ., 232 F.3d 111, 116 (2d Cir. 2000) (indicating that an instruction that advises the jury on an erroneously high burden of proof warrants a new trial). It is entirely possible that a jury thought that Zarda's sexual orientation was "one of the employer's motives" (i.e. a "motivating factor") in its termination decision, but was not a "but-for cause" of his firing. In sum, if Title VII protects against sexual-orientation discrimination, then Zarda would be entitled to a new trial.

Zarda's request that we overturn Simonton is therefore not mooted by the jury verdict on his state-law claim. Nonetheless, we decline Zarda's invitation to revisit our precedent. A separate panel of this Court recently held that Simonton can only be overturned by the entire Court sitting in banc, see Christiansen v. Omnicom Grp., No. 16-478, 2017 WL 1130183, at *2 (2d Cir. Mar. 27, 2017), and the same is true in the case at bar, see United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004); cf. Hively v. Ivy Tech Comm. Coll., No. 15-1720, 2017 WL 1230393, at *1-2 (7th Cir. Apr. 4, 2017) (in banc) (overturning, as an in banc court, prior Seventh Circuit precedent holding that Title VII did not prohibit discrimination based on sexual orientation).

In Christiansen, the panel nonetheless remanded to the district court after concluding that the plaintiff had stated a plausible claim of "gender

[4] We express no view as to whether the district court correctly instructed the jury on New York law.

stereotyping," which is actionable under Title VII. 2017 WL 1130183, at *4. That route is unavailable to Zarda, since, as explained above, the district court found that Zarda failed to establish the requisite proximity between his termination and his failure to conform to gender stereotypes, and Zarda did not challenge that determination on appeal. Consequently, Zarda may receive a new trial only if Title VII's prohibition on sex discrimination encompasses discrimination based on sexual orientation--a result foreclosed by Simonton.

IV

Zarda asserts that he is entitled to a new trial on his state-law, sexual-orientation discrimination claim for several reasons. None has merit.

A

Evidentiary Rulings. Zarda contends that the district court improperly admitted two types of prejudicial evidence. He suggests that the probative value of the evidence was substantially outweighed by its resulting prejudice. See Fed. R. Evid. 403. We review the district court's decision to admit this evidence for abuse of discretion. Harris v. O'Hare, 770 F.3d 224, 231 (2d Cir. 2014).

Zarda contends that the district court improperly admitted evidence concerning an occasion, nine years earlier, on which Zarda had been terminated from Altitude Express. As an initial matter, Zarda does not clearly identify the evidence he believes was improperly admitted, or why it was prejudicial. In any event, as the district court observed, evidence relating to the circumstances of an employee's previous termination is relevant to determining the circumstances of the same employee's later termination. Zarda has not shown that any prejudice substantially outweighed the relevance of this evidence. Accordingly, we see no abuse of discretion.

The district court also admitted deposition testimony in which Zarda acknowledged that there was a (small) possibility that the cause of his termination in 2001 was his filing for Worker's Compensation benefits. Assuming that this statement was prejudicial, any prejudice was negligible.

Zarda stated at deposition that Worker's Compensation might have played no more than a minimal role in his firing; moreover, Zarda's supervisor testified that he knew it would be illegal to fire someone for seeking Worker's Compensation benefits, and that he did not fire Zarda for this reason.

B

Witness List. Zarda argues that the defendants hindered Zarda's trial preparation by listing dozens more proposed witnesses in the parties' joint pre-trial order than the defendants intended to call. Zarda apparently argues that the district court should have precluded the defense witnesses from testifying, pursuant to Rules 26 and 37(c)(1) of the Federal Rules of Civil Procedure.

Even when Rule 37(c)(1) allows for witness preclusion, preclusion is not mandatory. Design Strategy, Inc. v. Davis, 469 F.3d 284, 297-98 (2d Cir. 2006). Here the district court had good reason to allow the testimony. The court found that the evidence was important, that Zarda had some notice regarding the potential testimony, and that there was no indication that the defendants had engaged in improper gamesmanship. We review a district court's decision to preclude testimony based on Rule 37(c)(1) for abuse of discretion, and we see none here. Patterson v. Balsamico, 440 F.3d 104, 117 (2d Cir. 2006).

C

Appeals to Prejudice. Zarda contends that defense counsel improperly influenced the jury by appealing to prejudice against homosexuals. On review, we consider whether the district court abused discretion by failing to grant relief. Marcic v. Reinauer Transp. Cos., 397 F.3d 120, 124 (2d Cir. 2005). Zarda is entitled to a new trial "only if [opposing] counsel's conduct created undue prejudice or passion which played upon the sympathy of the jury." Id. at 127 (quoting Matthews v. CTI Container Transp. Int'l, Inc., 871 F.2d 270, 278 (2d Cir. 1989)).

Although Zarda complains of several allegedly offensive remarks, the context of each comment suggests that the statements were not improper

references to stereotypes. For example, Zarda argues that counsel's description of the relationship between Zarda and one of his witnesses as "odd" is prejudicial. However, the witness was testifying in support of Zarda's claim for emotional damages, and defense counsel made this comment while trying to *downplay* the closeness of Zarda's relationship with the witness in order to make the jury skeptical of the witness's knowledge of Zarda's emotional state. The district court held that the characterization of the relationship as "odd" was a fair argument that went to the credibility of the witness. Zarda has not shown that the district court's ruling was an abuse of discretion or an "error[] . . . that w[as] 'clearly prejudicial to the outcome of the trial;'" consequently, he is not entitled to a new trial. Marcic, 397 F.3d at 124 (quoting Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 17 (2d Cir. 1996)).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.