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

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

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.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 11

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 12

II. Any conflict among the circuits provides no reason to grant review now 17

III. The Second Circuit's decision is correct 19

CONCLUSION 27

APPENDIX

Appendix A, Letter of attorney Gregory Antollino to U.S. District Court Judge Joseph Bianco, dated April 11, 2018 ..... 1a

Appendix B, Skydive Long Island website post, circa February 27, 2018, announcing its support of the district court's ruling 4a

Appendix C, Letter of attorney Saul D. Zabell to U.S. District Court Judge Joseph Bianco, dated April 12, 2018 ..... 6a

Appendix D, Letter of attorney Greg Antollino to U.S. District Court Judge Joseph Bianco, dated April 12, 2018 ..... 8a

Appendix E, Transcript of May 21, 2018 proceedings in *Melissa Zarda v. Altitude Express*, U.S. District Court case no. 10-CV-0334, before Hon. Joseph Bianco 10a

TABLE OF AUTHORITIES

Cases

Baldwin v. Foxx, 2015 WL 4397641 (July 15, 2015)..... 4, 5, 6, 24

Bostock v. Clayton County, Georgia, No. 17-1618 (pet. for cert. filed May 25, 2018)..... 18

Bostock v. Clayton Cty. Bd. of Commissioners, 894 F.3d 1335 (11th Cir. 2018) 18

City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) 19, 20

Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (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)..... 23

Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006) 13

EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974) 15

EEOC v. Northern Star Hospitality, Inc., 777 F.3d 898 (7th Cir. 2015) 13, 15

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) 18

EEOC v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 834 (W.D. Pa. 2016 18

Evans v. Georgia Regional Hosp., 850 F.3d 1248 (11th Cir.), *cert denied*, 138 S. Ct. 557 (2017) 14, 18

Franks v. City of Santa Ana, 2018 WL 2425395 (9th Cir. May 30, 2018) 18

Harris v. Forklift Sys., 510 U.S. 17 (1993) 19

Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017) (en banc) ..... *passim*

Holcomb v. Iona Coll., 521 F.3d 130, 132 (2d Cir. 2008) 20, 23

Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees & Bartenders Int'l Union, AFL-CIO, 417 U.S. 249 (1974) 15

Johnson v. Transp. Agency, 480 U.S. 616 (1987) 26

Lewis v. City of Chicago, 560 U.S. 205 (2010) 25

Loving v. Virginia, 388 U.S. 1 (1967) 20

Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018) 17

Malcolm v. Vicksburg Warren Sch. Dist. Bd. of Trustees, 709 F. App'x 243 (5th Cir. 2017) 12

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018) 16

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) 8

Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014) 26

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) 22

Nieves v. Bartlett, No. 17-1174 (certiorari granted June 28, 2018) 17

Nischan v. Stratosphere Quality, LLC, 865 F.3d 922 (7th Cir. 2017) 12

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) 17, 19

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) 8, 17, 19, 24, 25

Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986) 20, 23

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 26

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990) 25, 26

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) 20

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 7, 17, 21, 23

Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) 22

Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000)..... 5

Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971)..... 20

Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988 (6th Cir. 1999)..... 23

United States Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994)..... 14

United States v. Virginia, 518 U.S. 515 (1996) 22

United States v. Wise, 370 U.S. 405 (1962)..... 25, 26

Univ. of Tx. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013)..... 5

Van Horn v. Best Buy Stores, L.P., 526 F.3d 1144 (8th Cir. 2008)..... 12

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 22

Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018) 26-27

Wrighten v. Glowski, 232 F.3d 119 (2d Cir. 2000) 12

Statutes

42 U.S.C. § 1983 17

42 U.S.C. § 2000e-2 ..... 1, 4, 12, 19

N.Y. Bus. Corp. L. § 1006 ..... 10, 13

N.Y. Exec. L. § 296.1 4

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

---

[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]

[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]

---

[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.

---

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

---

[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,

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.

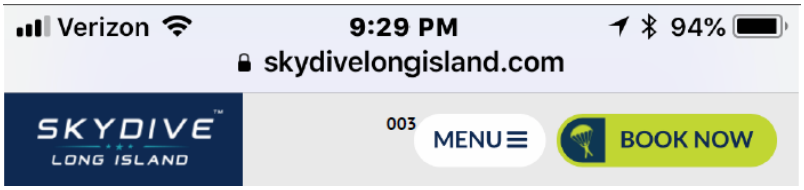
Sincerely,

/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.**

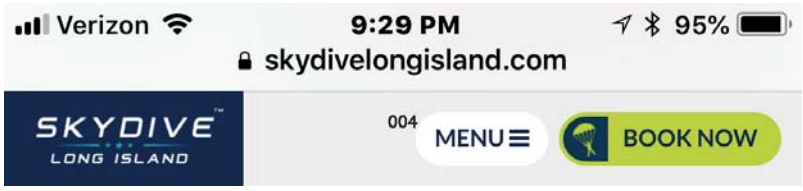
This ruling stems from the alleged 2010 dismissal of Donald Zarda from Altitude Express dba Skydive Long Island. The case of Mr. Zarda has been cited following the Department of Justice's filing of court papers stating that a major federal civil rights law does not protect employees from discrimination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

Saul D. Zabell
Email: SZabell@laborlawsny.com

Zabell & Associates, P.C.
1 Corporate Drive
Suite 103
Bohemia, New York 11716
Tel. 631-589-7242
Fax. 631-563-7475
www.Laborlawsny.com

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
greg@antollino.com
275 Seventh Avenue Suite 705
New York New York 10001
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.)

* * *