No. 17-1623

IN THE
# Supreme Court of the United States

ALTITUDE EXPRESS, INC., *ET AL.*, *Petitioners*,

v.

MELISSA ZARDA, AS EXECUTOR OF THE ESTATE OF DONALD ZARDA, *ET AL.*, *Respondents*.

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

## Brief *Amicus Curiae* of Public Advocate of the United States, Conservative Legal Defense and Education Fund, One Nation Under God Foundation, Center for Morality, Policy Analysis Center, and Restoring Liberty Action Committee in Support of Petitioners


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Some of these *amici* filed an *amicus* brief in this case in the U.S. Court of Appeals for the Second Circuit on July 26, 2017 during that court's *en banc* review.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

The Second Circuit *en banc* decision reversed its established interpretation of Title VII's scope, even though the statute was unambiguous. The Second Circuit's decision is not a statement of the law as it is written, but an amendment to a statute by judicial fiat. The court below abandoned traditional rules of statutory interpretation and disregarded *stare decisis*.

The *en banc* Court's major claim is that "but for" Zarda being a male, his employer would not have fired him for having a sexual attraction to another male and, therefore, Zarda's employer dismissed him "because of his sex." This claim is nonsense. Even if Zarda's sex was a condition to explain the reason for Zarda's employer's action, the action taken by his employer was not "because" of Zarda's sex. Rather, the action allegedly was taken "because" of Zarda's sexual orientation towards sex with other males. The Court's "but for" test is clearly unavailing, in that it does not distinguish the legal or moral "cause" for Zarda's firing — his sexual orientation — from a necessary "condition," his being a member of the male sex.

This is the common sense of the matter, but the *en banc* Court has also abandoned the ordinary-meaning canon, admittedly in open disregard of the fact that, in 1964, when Title VII was enacted into law, it was commonly, perhaps universally, understood that sex did not comprehend sexual orientation. In further flagrant disregard of the ordinary-meaning rule, the Court made up its own definition of "sex" without making the requisite effort that, if a "technical

meaning" is adopted, it must mirror the nomenclature of a recognized field of study, such as human sexuality. Instead, the Court just created its own "term of art," expanding the meaning of sex to include sexual orientation.

The Second Circuit's consideration below was also faulty because it ignored the record evidence that this case does not involve sexual orientation discrimination at all. Rather Zarda was fired because of his inappropriate behavior, regardless of his sex or orientation.

## ARGUMENT

### I. THE SECOND CIRCUIT'S DECISION CONSTITUTES A REVOLUTIONARY CHANGE IN THE MEANING OF AN UNAMBIGUOUS FEDERAL LAW, BASED ON THE POLITICAL VIEWS OF JUDGES.

Fifty-four years ago, Congress enacted what is often described as the most significant piece of civil rights legislation in the 20th century — the Civil Rights Act of 1964. Section 703 of Title VII of that law could have not been more clear and direct in the language which it employed to limit the employment practices of certain covered employers in hiring and discharging employees:

> It shall be an unlawful employment practice for an employer —
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate**

> against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's race, color, religion, **sex**, or national origin.... [now codified at 42 U.S.C. § 2000e-1 (emphasis added).]

### A. The Second Circuit's Dramatic Reversal of Settled Law.

With its *en banc* decision in Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), the Second Circuit flatly contradicted and overruled two of its recent decisions that "sex" discrimination does not comprehend "sexual orientation": Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000) and Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005). Even Chief Judge Katzmann's opinion in Zarda for the *en banc* Court admits how those prior Circuit decisions were completely "consistent with the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission...." Zarda at 107.

In Simonton, the Second Circuit dismissed a claim made by a homosexual for Title VII employment protection. Although the Court panel disdained the cruel treatment of the plaintiff employee in the workplace, it nevertheless (with then-Judge Katzmann's concurrence) concluded:

> as the First Circuit recently explained in a similar context, "**we are called upon** here to construe a statute as glossed by the Supreme

> Court, **not to make a moral judgment**." Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999). When interpreting a statute, the role of a court is limited to **discerning and adhering to legislative meaning**. The law is **well-settled** in **this circuit** and in **all others** to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of **sexual orientation**. [*Id*. at 35 (footnote omitted) (emphasis added).]

Although Chief Judge Katzmann was not on the panel which decided the Dawson case in 2005, all three judges on that panel quoted Simonton to reaffirm that:

> "the law is well-settled in this circuit and in all others to have reached the question that ... **Title VII does not prohibit harassment or discrimination because of sexual orientation**." Thus, to the extent that [Dawson] is alleging discrimination based upon her lesbianism, Dawson cannot satisfy the first element of a prima facie case under Title VII because **the statute does not recognize homosexuals as a protected class**. [Dawson at 217-18 (emphasis added) (citations omitted).]

As in this case, Dawson had attempted to supplement her complaint with an allegation of "gender stereotyping" under Price Waterhouse v.

Hopkins, 490 U.S. 228, 251 (1989). The court carefully considered and then rejected this effort to fit homosexuals under the Price Waterhouse decision:

> When utilized by an avowedly homosexual plaintiff ... **gender stereotyping claims** can easily present problems for an adjudicator. This is for the simple reason that "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." Like other courts, we have therefore recognized that a gender stereotyping claim **should not be used to "bootstrap protection for sexual orientation** into Title VII." [Dawson at 218 (emphasis added) (citations omitted).]

With the Second Circuit having already rejected this tactic in Simonton, the Dawson court took the same approach, relying upon a treatise on employment discrimination which exposed the hoax repeatedly being perpetuated by plaintiff attorneys to try to squeeze homosexuality under Title VII's protections:

> It is not uncommon for plaintiffs to fall short in their Title VII pursuits because courts find their arguments to be **sexual orientation** (or other unprotected) allegations **masquerading as gender stereotyping** claims. [Dawson at 218 (emphasis added) (citation and internal quotation omitted).]

Thus, in sum, in 2000, then-Judge Katzmann concluded that "Title VII **does not prohibit** ... discrimination because of sexual orientation." Simonton at 35. Then, in February 2018, now-Chief Judge Katzman concluded that "Title VII **prohibits** discrimination on the basis of sexual orientation...." Zarda at 108. Judge Katzmann claims that the law has "evolved" (Zarda at 131), but in reality it is Judge Katzmann who has evolved the law. Professor Fred Cahill's observation regarding judicial activism in the 20th century in constitutional interpretation increasingly can be seen infecting the courts engaged in statutory interpretation in the 21st century:

> Originally our constitutions were based upon the view that judges merely apply the law, but do not create it. In the last seventy or eighty years, however, there has grown up an increasingly important body of legal theory that holds that judges not only can legislate, but also ought consciously to do so. Legal writers who hold these views urge in effect that judges should cease to be merely dispassionate oracles of the law and should assume an active role in the creation of the legal rules themselves. [F. Cahill, Judicial Legislation at 3 (Ronald Press: 1952).]

In his *en banc* decision in Zarda, Chief Judge Katzmann emancipated himself and his majority colleagues to do justice, rather than just decide the

case before the court.[2] Indeed, the Chief Judge reversed himself not just on whether Title VII prohibits discrimination based on sexual orientation, but also on both of the important judicial principles identified as providing the basis for the Simonton decision. First, he decided that it is indeed his role as a federal judge to make a "moral judgment" as to what employment practices should be lawful, thus usurping the role of the Congress. Simonton at 35. And second, he decided that, when responding to the call of their own personal morality, federal judges are not limited to "discerning and adhering to legislative meaning." *Id.* at 35.

With all of the legal issues having been well settled, the question now becomes why Chief Judge Katzmann, along with nine of his colleagues, chose to overrule these established Circuit precedents — including one in which the Chief Judge himself had joined? Indeed, this case involves statutory construction, where the applicable canons are well-known and well-established. *See generally* A. Scalia & B. Garner, Reading Law at 38-57 (West: 2012). It is a reasonably rare event for judges to discover entirely new meanings in 50-plus year-old laws.[3]

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[2] As Justice Sandra Day O'Connor observed in Allen v. Wright, 468 U.S. 737, 750 (1984), "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'"

[3] This is not a constitutional case where the doctrine of *stare decisis* may have less reason to be followed. Yet, the *en banc* Court chose to skip over any of the contextual challenges to support its opinion. *See generally* B. Kalt, "Three Levels of Stare

The answer to the question "What happened?" was partially revealed in the court's *en banc* opinion, and partially can be inferred from it. Chief Judge Katzmann provided the central justification for overturning the meaning of Congress's three words "because of ... sex," with his own three words:

> "[L]egal doctrine **evolves**...." [*Id*. at 107 (emphasis added).]

Chief Judge Katzmann cited three extrinsic events which have accelerated this "evolution." The first event cited was a 2015 change in policy by the Obama Administration's Equal Employment Opportunity Commission ("EEOC"), extending Title VII protection to sexual orientation.[4] *Id*. However, there is no known rule of law by which a court would be required to deny the authorial intent of Congress and its own established precedents, simply because a politically

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Decisis: Distinguishing Common-law, Constitutional, and Statutory Cases," 8 TEX. REV. L. & POL. 277, 280 (2003-2004). ("[T]here is a 'super-strong' weight attached to precedent and statutory interpretation.... [A] decision of statutory interpretation becomes part of the fabric of the statute, and so **overruling the earlier opinion is almost like repealing and rewriting the statute**, which is something that only the legislature is supposed to do." *Id*. at 279) (emphasis added)).

[4] *See* Baldwin v. Foxx, 2015 EEOPUB LEXIS 1905, *13 (2015) ("Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. 'Sexual orientation' as a concept cannot be defined or understood without reference to sex.") The EEOC's decision reflects the same mistake of law and logic made by the *en banc* court. *See* Section II, *infra*.

motivated agency changed its mind as to the scope of a statute which Congress repeatedly had refused to expand. *See* E.D. Hirsch, Validity in Interpretation at 24-25, 124-26, 212-16 (Yale Univ. Press: 1967). The only legal principle on which such a change possibly could be predicated would be an expansion of the notion of deference to EEOC's change in interpretation under Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). But there was no ambiguity in the relevant terms of the statute, the requisite predicate for applying the Chevron deference rule. Further, such a vast expansion of the Chevron doctrine would be curious indeed, in view of the increasing criticism of that doctrine both by commentators and by Justices of this Court (*e.g.,* Pereira v. Sessions, 585 U.S. ___, 2018 U.S. LEXIS 3838, *33-34 (June 21, 2018), (Kennedy, J., concurring) citing earlier opinions questioning Chevron by Justice Thomas and then-Tenth Circuit Judge Gorsuch). *See also* P. Hamburger, "Chevron Bias," 84 GEO. WASH. L. REV. 1187 (2016).

The second event cited was the Eleventh Circuit's split-panel nature of the decision to follow established precedent, and **not** to re-interpret Title VII to cover a claim by a homosexual in Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir.) *cert. denied* 138 S. Ct. 557 (2017). Zarda at 108. However, a decision to follow established precedent (even if the panel was split on the issue) ill serves the Second Circuit's radical change in the law.

The third event cited was the Seventh Circuit's decision in Hively v. Ivy Tech, 853 F.3d 339 (7th Cir.

2017) (*en banc*), which radically reinterpreted Title VII to encompass claims by homosexuals. Zarda at 108. In that case, concurring Judge Posner actually chided the *en banc* majority for lacking candor, vainly attempting to justify its decision based on law, when it was really based on policy or political considerations with virtually no support in law. Judge Posner explained how such a revolutionary decision legitimately could be reached by a court: changing the meaning of an unambiguous statute. Nevertheless, using antitrust law as an illustration, Judge Posner came out forthrightly in support of a judicial power to rewrite laws as the courts feel necessary.

> Finally and most controversially, interpretation can mean giving a **fresh meaning** to a statement (which can be a statement found in a constitutional or statutory text) — a meaning that infuses the statement with vitality and significance today.... **Times have changed**.... the form of interpretation that consists **of making old law satisfy modern needs** and understandings. And a common form of interpretation it is, despite its flouting "original meaning." Statutes and constitutional provisions frequently are interpreted on the basis of **present need** and **present understanding rather than original meaning** — constitutional provisions even more frequently, because most of them are older than most statutes. [Hively at 352-53 (emphasis added) (Posner, J., concurring).]

Judge Posner's willingness to substitute his views for the language chosen by Congress was further revealed in his exit interview upon retiring from the bench.

> "**I pay very little attention to** legal rules, **statutes**, constitutional provisions," Judge Posner said. "A case is just a dispute. The first thing you do is ask yourself — forget about the law — what is a sensible resolution of this dispute?"
>
> The next thing, he said, was to see if a recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favor of that sensible resolution. "And the answer is that's actually rarely the case," he said. "When you have a Supreme Court case or something similar, they're **often extremely easy to get around**." [A. Liptak, "An Exit Interview with Richard Posner, Judicial Provocateur," *NY Times* (Sept. 11, 2017) (emphasis added).]

Thus, former Judge Posner admitted that he viewed his role as a federal judge to include part-time, *ad hoc* service as the personification of legislative power vested in Congress. He used that power to reach what he believed to be "a sensible resolution of this dispute," instead of saying what the law is and applying the law in an impartial manner. This apparently is the same judicial school of thought to which Chief Judge Katzmann belongs. This is not the

rule of law, it is the rule of judges.[5] Judge Posner simply follows in the footsteps of his hero[6] Justice Oliver Wendell Holmes, Jr. *See* Cahill, Judicial Legislation, 37-45.

### B. Abandonment of *Stare Decisis* and the Rules of Statutory Interpretation.

In overruling its earlier precedents holding that Title VII does not prohibit discrimination on the basis of sexual orientation, the court below did not even pause to consider whether *stare decisis* played any role whatsoever. Recently, Justice Kagan took the opportunity to discuss "reliance interests" as an important reason for *stare decisis* in constitutional cases:

> *Stare decisis*—"the idea that today's Court should stand by yesterday's decisions"—is "a foundation stone of the rule of law." It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. It fosters respect for and reliance on judicial decisions. See *ibid.* And it "contributes to the

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[5] *See* Osborn v. Bank of the United States, 22 U.S. 738, 866 (1824) ("Judicial power is never exercised for the purpose of giving effect to the will of the Judge," but "always for the purpose of giving effect ... to the will of the law."). *See also* Exodus 18:16 ("When they have a matter, they come unto me; and I [Moses] judge between one and another, and I do make them know the statutes of God, and his laws.").

[6] *See* A. Mendenhall, "Richard Posner is a Monster," *Los Angeles Review of Books* (Dec. 1, 2016).

> actual and perceived integrity of the judicial process," *ibid.*, by ensuring that decisions are "founded in the law rather than in the **proclivities of individuals**." [Janus v. American Federation of State, County, and Municipal Employees, 585 U.S. ___, 2018 U.S. LEXIS 4028 (June 27, 2018) (Kagan, J., dissenting), at *97 (emphasis added) (citations omitted).]

It is generally understood that *stare decisis* is even more important in the interpretation of statutes, where a "strong presumption of continued validity ... adheres in the judicial interpretation of a statute." Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 (1986). This Court clearly stated that "*stare decisis* carries **enhanced force** when a decision ... interprets a **statute**. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and **Congress can correct any mistake it sees**." Kimble v. Marvel Entm't, LLC, 576 U.S. ___, 135 S.Ct. 2401, 2409 (2015) (emphasis added).

In addition, the Second Circuit's *en banc* decision in this case joins the Seventh Circuit's in Hively to commit at least the three errors in established principles of statutory construction:

> [1.] The false notion that the spirit of a statute should prevail over its letter[; 2.] The false notion that the quest in statutory interpretation is to do justice[; and 3.] The false notion that when a situation is not quite

> covered by a statute, the court should reconstruct what the legislature would have done had it confronted the issue. [Reading Law at 343-351.]

Should this Court wish to advise the lower courts that they are no longer bound by the language of statutes, then a denial of certiorari in this case would be the best possible method to communicate that message. However, to vindicate the rule of law, certiorari should be granted, as the requirements of Rule 10 of the Rules of this Court are met both because the Second Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"[7] and, for the reasons set out herein, "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power...."

## II. THE SECOND CIRCUIT'S "BUT FOR" ARGUMENT IS BOGUS.

Notwithstanding that, on two previous occasions, the U.S. Court of Appeals for the Second Circuit ruled that Title VII of the Civil Rights Act of 1964's prohibition against discrimination "because of ... sex" does not prohibit discrimination because of "sexual orientation," the Chief Judge of the Circuit nevertheless advised that the court *en banc* decided to take up the question in light of the "'changing legal

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[7] *See* Pet. Cert. at 11-13 for a list of the other circuits which have reached the opposite conclusion from the Zarda *en banc* decision.

landscape.'" Zarda at 108. Among the asserted shortfalls of the court's prior precedents, the Chief Judge noted that the court had not "'addressed [the but-for] argument.'" *Id.* This time, the *en banc* court purports to have devoted an entire subsection to the topic. *Id*. at 116-19. Entitled "'But for' an Employee's Sex," the section repeatedly asserts that, in this particular case, "but for" Zarda's sex — male — his employer's action against him would not have occurred, *ergo,* firing him on the ground of his sexual attraction to other males was "because of his sex." *See id*. at 113, 116-17.

This "but for" test is offered by the *en banc* court as an antidote to the argument put forth by the dissent in Hively v. Ivy Tech. Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (*en banc*), rejecting the claim that sex discrimination on the basis of sex cannot be established by comparing a woman's attraction to another woman with a man's attraction to a woman. *See* Zarda at 116-117. Rather, as the Hively dissent reasoned, the two relationships were noncomparative, a woman's sexual orientation to a member of her sex not being comparable to a man's attraction to a woman. This, the Chief Judge argues, overlooks the fact that "Hively would not have been denied a promotion but for her sex, and therefore sexual orientation is a function of sex." Zarda at 116.

However, it is Chief Judge Katzmann who is mistaken, not the Hively dissent. He wrongfully assumes that the "but for" test answers the question whether an employer's action was taken "because" of Hively's sex, that is, "for the reason" that she is a

woman, when the reason given for not promoting her was her sexual attraction to members of the same sex. The "but for" test does not serve to calculate the "reason" for the action taken against Hively, but reveals only whether Hively's sex is a necessary condition, verifying that the action taken was "because" of Hively's sexual orientation, namely, her sexual attraction to another woman.

The Chief Judge's mistake is a common one repeatedly made by law students in a first-year torts class when a student is taught the legal difference between a "cause" and a "condition." Hypothetically, the student is asked to identify the cause of a negligently-driven-automobile accident on an icy highway. After giving the correct answer (the driver), the student is asked why. The student answers, "but for" the negligent driver the accident would not have happened, to which the professor comments that "but for" the icy road, the accident would not have occurred. The "but for" test does not separate out the cause from the conditions necessary to explain the "reason" for the accident. Like the icy highway, it was a necessary condition for Hively to be a woman, but the community college did not fail to promote her "because of her sex." Rather, she was not promoted because of her sexual orientation, not "but for" the fact that Hively was a member of the female sex. The "but for" test proposed by the court, then, does not undermine the Hively dissent.

On the contrary, in the hands of the *en banc* court, the "but for" test is make-weight — a "semantic sleight

of hand"[8] — masking the commonly understood distinction between moral or legal responsibility — a "cause" — on the one hand, and explanatory phenomenon — a "condition" — on the other. *See* H.L.A. Hart and A.M. Honore, Causation in the Law, 58-61, 64-65 (Oxford Press: 1959).

In sum, following the lead of the Seventh Circuit's decision in Hively, the Second Circuit *en banc* has repeated its sister Circuit's error, mistakenly applying the "but for" test in a vain effort to equate cause and condition. The *en banc* court insists that Zarda's employer discriminated against him "**because** of (A) the employee's sex **and** (B) [his] sexual attraction to individuals of the **same** sex." Zarda at 113 (emphasis added). This is nonsensical on its face. If Zarda was fired "because" of his sex, then he could not also have been fired "because" of his sexual attraction to other males. The *en banc* court's claim of two causal connections refer to two incompatible actions — both cannot be true, only one or the other.

## III. THE SECOND CIRCUIT'S DEFINITION OF "SEX" IS BOGUS.

Zarda's identity as a male was fixed at conception. To whom he was attracted is a different matter. Although he alleged he had a "'predisposition or inclination toward sexual activity or behavior with other males'" and thus, "oriented" to a same-sex relationship, nevertheless, his sex at birth did not

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[8] *See* Zarda at 113.

determine his sexual behavior. This is the common sense of the matter. This is the world in which we live. But it is not the Second Circuit's *en banc* world. To these 10 majority judges, "sexual orientation is a function of sex." Thus, the court proclaims:

> Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected. [Zarda at 113.]

In other words, in the eyes of the *en banc* court below, a man like Zarda or a woman like Hively has no free will, no control, no real choice whether to be sexually attracted to and sexually involved with another person of the same sex, and therefore, one's sexual orientation, like one's sex, is "inherent," and is deserving of the same protection against discrimination as sex. Zarda at 107.

However, the notion that "sex" comprehends "sexual orientation" is not compatible with the ordinary meaning of "sex." If it were, then the *en banc* court would have made that finding, but conspicuously it did not. Even the "notoriously permissive *Webster's*

*Third New International Dictionary*"[9] leaves no wiggle room, defining sex as "one of the two divisions of organic esp. human beings respectively designated male and female." *Id.* at 2081. Had the *en banc* court followed the ordinary-meaning canon of interpretation of the word "sex,"it would have concluded that "sex" as it appears in the 1964 Civil Rights Act coincided with "sex" as it appears in *Webster's Third New International,* "'unless the context furnishes some ground to control, qualify, or enlarge it.'" Reading Law at 69. But the *en banc* court found no such exception. Not only did it ignore the ordinary-meaning rule — "the most fundamental semantic rule of interpretation" (*id.*) — but also it omitted altogether any working definition of "sex." Instead, it began with 2014 Black's Law Dictionary redefinition of "sexual orientation," "heterosexuality," "homosexuality," and "bisexuality." Zarda at 113. And then, continuing as if judges were lexicographers, the *en banc* court adopted the definitions of "sexual orientation" and related words from Black's Law Dictionary and finally added its own gloss "to operationalize" the definitions to reach the desired conclusion that sex comprehends sexual orientation for purposes of Title VII.

Totally missing from this account of human sexuality is any citation or reference to any authority supporting the court's ruling that, until now, the true meaning of "sex" has been "hidden" from view. The Chief Judge and his concurring colleagues are, it seems, on a quest of their own. But the exception to

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[9] Reading Law at 418.

the ordinary-meaning canon demands more from a judge. To justify departure from the ordinary-meaning canon in favor of a "technical" meaning, one must identify a "field of serious endeavor [which has] develop[ed] its own nomenclature — sometimes referred to as *terms of art*." Reading Law at 73. The *en banc* court has made no such effort here. Indeed, this Circuit court, like the other courts in the federal system, are devising their own "terms of art" in a pseudo-search for the meaning of human sexuality. In so doing, these courts are not saying what the law is, but making it up as their "legal doctrine evolves." Zarda at 107. According to the "ordinary-meaning" canon, the judge is bound by "common sense," not loosed to apply pseudoscientific psychology and humanistic evolutionary views to the interpretation of a statute "'adapted to common wants, designed for common use, and fitted for common understandings.'" Reading Law at 69.

## IV. ZARDA WAS FIRED FOR HIS INAPPROPRIATE BEHAVIOR, NOT HIS SEXUAL ORIENTATION.

The facts of the Zarda case demonstrate the perils associated with the Second Circuit's judicial amendment to Title VII confusing sex with sexual orientation. Respondent's entire case is based on the allegation that his employer discriminated against him because of his "sexual orientation." But, as Zarda's own briefs below made clear, he was fired not because of his sexual orientation, but because of his overt sexual behavior. *See* Aplt. Br. at 2-4; Pet. Cert. at 2.

Zarda made no secret about his homosexuality with his employer and coworkers. His brief in the Second Circuit admitted that, for many years prior to Zarda's firing, "Maynard [the owner of Altitude Express knew] plaintiff was gay" and yet "never told Zarda to cover his sexuality." Aplt. Br. at 15. In fact, among coworkers at the office, "Zarda's orientation was subject of humor." *Id.* Based on the oversharing with his employer's customers that is reflected in detail in Zarda's brief below, it is clear that everyone at his office (including Maynard) knew of and accepted his sexuality, even if he was the subject of "testosterone-crammed" jokes. *Id.*

As the Zarda brief below further noted, he had a bad habit of unprofessionally sharing details about his sexuality with anyone who would listen (including some customers who did not make objections), and still Maynard did not fire him. *Id.* at 12. However, it seems clear that, when a customer finally complained about Zarda's unprofessional behavior, Maynard was forced to take action. Pet. Cert. at 2-3.

Zarda's brief below essentially argued that his homosexuality permitted him to engage in unprofessional behavior with customers, without sanction, and that to require a certain minimum level of professionalism from such employees is actionable. As Zarda's brief below alleges, the main reason he chose to reveal his homosexuality to this particular customer was because he was strapped to her prior to a jump. Aplt. Br. at 9. It also seems clear that, just as an employer has the right to dismiss straight male instructors who tell women customers to whom they

are strapped about their sexuality, the employer should have the same authority over controlling the behavior of homosexual employees.

In fact, Zarda's brief below actually admitted that Zarda was not fired because of his sexual orientation, but rather because of his indiscriminate chit chat — "Zarda lost his job **because he told** Orellana that he was a gay man." Aplt. Br. at 8 (emphasis added). The record is clear, then, that Zarda was not fired for being homosexual, but for his apparent need to openly profess his gayness to everyone with whom he came into contact — so they would celebrate his orientation along with him. For such manifestly unprofessional behavior, Title VII provides no protection no matter how it is read.

The Second Circuit's decision, thus, does not involve supposed discrimination based on sexual orientation, but rather on overt behavior that created a #MeToo encounter, potentially putting Zarda's employer in jeopardy of liability for employing a known sexual harasser. For these reasons, this case would be best handled by granting the petition, vacating the decision, and remanding it to the Second Circuit.

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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