No. ___-_____

In the Supreme Court of the United States

DAVID SOLOMON,

Petitioner,

v.

AMAZON.COM, INC., WHOLE FOODS MARKET, INC., JAY WARREN,

JANE DOE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Norman A. Pattis
Counsel of Record
PATTIS & SMITH, LLC
383 Orange Street, 1st Floor
New Haven, Connecticut 06511
Phone: (203) 393-3017
Fax: 203-393-9745
Email: npattis@pattisandsmith.com

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in dismissing David Solomon's claims when uncontroverted evidence existed that he invoked federal jurisdiction first and that he was never given a meaningful hearing in a New York administrative forum, thus denying him due process?

2. Whether the Second Circuit erred in denying David Solomon leave to amend his complaint to state a claim for religious discrimination?

3. Whether the Second Circuit erred in denying David Solomon any relief from bad-faith litigation conduct including the intentional destruction of surveillance video and other information that would have enabled David Solomon to identify and sue persons who falsely accused him of committing crimes?

PARTIES TO THE PROCEEDING

The Petitioner is David Solomon. Petitioner was the Plaintiff in the Eastern District of New York and the Appellant in the U.S. Court of Appeals for the Second Circuit.

The Respondents are Amazon.com, Inc., Whole Foods Market, Inc., Jay Warren, and a Jane Doe. They were Defendants in the Eastern District of New York and the Appellees in the U.S. Court of Appeals for the Second Circuit.

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PETITION FOR A WRIT OF CERTIORARI

This is a defamation per se case where the courts refused to allow the Petitioner to learn the identity of his two defamers to depose them. The two key dates in this case that are six days apart are October 9, 2017 and October 15, 2017. On October 9, 2017 defamer number one demanded Petitioner be permanently banned from the Jericho, New York Whole Foods because she "feared" him. The basis for her fear was his unkempt appearance required by his religion to mourn his recently deceased mother. The manager refused to ban Petitioner on October 9, 2017. Six days later on October 15, 2017 she sent an email to Whole Foods that claimed that in the six intervening days many "annonymous" [sic] women reported to her that Petitioner had demanded sex from them in the supermarket using vulgar language. The record in this case does not reflect any evidence that Amazon ever received any report from any woman that Petitioner demanded sex from them in the supermarket. The inescapable conclusion is that Petitioner's victims are a fiction invented by defamer number one to ban Petitioner six days after her original demand to ban petitioner was denied. This fictional sexual harassment has succeeded in unlawful religious discrimination to ban Petitioner from public accommodations throughout the United States and worldwide.

Petitioner should have been given leave to amend his complaint to allege defamation per se directly against Amazon. The October 15, 2017 email in this record states that all Amazon employers who spoke to defamer number one called Petitioner a "sexual predator".

The original NYSDHR complaint was permanently lost by NYSDHR and never filed. The NYSDHR complaint which is found in this record bears the date stamp of both the Office of General Counsel dated August 23, 2018 and also the date stamp of the Hempstead Regional Office dated November 19, 2018 after it was forwarded to the Hempstead Regional Office from the Office of the General Counsel. There is no date stamp of NYSDHR Headquarters in this record. In between, August 23, 2018, and November 19, 2018, in October 2018 Petitioner filed his action in federal court.

The Respondents have banned David Solomon from their places of business across the United States and worldwide on the basis of false accusations of sexual harassment. The false accusations levied against Solomon are sensational in their vulgarity, but they contain a fatal flaw: Solomon's accusers reacted with hostility to his unkempt appearance – the result of his Jewish faith as he mourned the passing of his mother. Their unhinged hysteria did not stop at levying a #MeToo accusation at Solomon. It took on the character of a crusade designed to bar Solomon from a place of public accommodation, which he regularly attended to dine. Instead of calling timeout on the crusade, the Respondents accepted Solomon's accusers' accusations without question, and, when Solomon sought evidence to rebut their accusations from the Respondents, they delayed and avoided talking to him until they were sure that their internal processes had automatically destroyed their video evidence that would have disproved the accusations against him despite Solomon putting them on notice of their obligation to preserve evidence in anticipation of litigation. Fed. R. Civ. P. 37.

When Solomon turned to the legal process, his complaints met with similar delays and ultimately fell on hostile and deaf ears. His state administrative complaint disappeared. Before Solomon could even file his Reply brief, Regional Director Chungata told Solomon during a phone call that he had already decided to dismiss, and planned to do so on a mechanical finding of no probable cause because he "didn't have time for this case." Solomon's Motion to Disqualify for bias was ignored, never heard, and never addressed or ruled upon. True to his word, Chungata dismissed, as promised, by finding no probable cause. When he filed a diversity action in the Eastern District of New York, the initial presiding judge ultimately recused herself after making inappropriate comments toward Solomon. The replacement judge incredibly recognized affirmative defenses on behalf of the unserved defamers, which he granted. He also granted a motion to dismiss on behalf of the served defendants on election of remedies.

This Court has recognized that such hostility in the legal process can raise constitutional questions, but has deferred resolution of those questions for future cases. Justice Kennedy in *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018) stated that the facts of that case did not provide the Court with the opportunity to rule on the broader issue regarding anti-discrimination law and the free exercise of religion. Justice Kennedy stated that "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and

without subjecting gay persons to indignities when they seek goods and services in an open market."

The dynamic is no different when it comes to cases involving religious practices and accusations of sexual harassment. David Solomon's life has been upended by malicious accusations motivated by a hostility for his religious beliefs that the Respondents have adopted. He has been forced to defend himself and his sincere religious beliefs not only from the false accusations but also from hostility in the legal processes designed to afford everyone an opportunity be heard. Regardless of how hard or distasteful any agent of a government finds an unkempt Jewish man's claim that he has been falsely accused, the First Amendment and the principles of due process require them to afford him fair and respectful treatment throughout the legal process.

Solomon has not received fair and respectful treatment throughout the legal process and, for that reason, he asks the Court to grant his petition for certiorari.

OPINIONS BELOW

The Eastern District of New York's opinion is reported at 2020 WL 2837007 and reproduced at App.375-382. The U.S. Court of Appeals for the Second Circuit's opinion is reported at 838 Fed. Appx. 638(Mem), and reproduced at App.385-390. Its order denying reconsideration en banc is reprinted at App.391-392.

JURISDICTION

The U.S. Court of Appeals for the Second Circuit issued its opinion on March 8, 2021. The Petitioner timely moved for reconsideration, which the U.S. Court of

Appeals for the Second Circuit denied on April 9, 2021. On March 19, 2020, the Court issued a general order extending the time for filing any petitions for a writ of certiorari due on or after March 19, 2020 to one hundred and fifty (150) days.

The Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I states as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

On November 9, 2017, David Solomon received a trespass notice from Whole Foods Market, Inc., banning him from their premises worldwide because of Solomon's "action and interaction with our customers." App.32. The notice was signed by counsel to Whole Foods, Jay Warren, who was also named as a defendant in the underlying action. App.32. Solomon was directed to contact Attorney Warren, and Attorney Warren alone, by means of email or telephone if Mr. Solomon believed he was served the trespass notice in error. App.32. The notice was delivered to Solomon by the store manager of his preferred Whole Foods in Jericho, New York. App.151. Solomon immediately informed the store manager that Whole Foods should anticipate litigation if the trespass was not immediately reconsidered. App.151.

Solomon tried repeatedly without success to contact Attorney Warren from November 9, 2017 until November 29, 2017. App.33. Because Attorney Warren

intentionally failed to respond to repeated telephone calls, Solomon ultimately contacted the Texas Bar Association (TBA), where Attorney Warren's office was located. App.33. Solomon emailed Attorney Warren at the TBA's direction on November 29, 2017. App.33. In that email, Solomon tried to address the factual basis Whole Foods had for trespassing him. App.33. He told Attorney Warren that he had once asked a female patron to join her at her table in a public dining area at the Jericho store. App.33. On another occasion, he complimented a female patron about her shoes. App.33. He also regularly engaged in small talk with cashiers. App.33. Solomon assured Attorney Warren that his comments were always innocent attempts to compliment or connect with people. App.33. Solomon informed Attorney Warren that he considered any serious allegations to be defamatory per se. He asked Attorney Warren to reconsider the trespass notice, noting that he had been a daily Whole Foods customer for the past 12 years without any customer or employee complaints to his knowledge. App.33.

On December 1, 2017, after more than three weeks of trying to reach Attorney Warren, Solomon finally heard from him. App.33-34. Attorney Warren said that Solomon was banned from the premises for following women in the Jericho store. App.33-34. Solomon immediately demanded copies of, and for Mr. Warren to preserve, all store video for litigation. Attorney Warren immediately responded that he would neither view nor preserve the videos, even boasting that Whole Foods had successfully utilized the affirmative defense of "qualified privilege", in litigation across the country, to defeat customers' legal challenges to trespass. App.34. He also

failed to disclose the two complainants' identities, who sent the two emails dated October 15, 2017 and October 29, 2017. App.34.

Solomon vigorously denied following anyone and insisted that the store surveillance videos would show that there were not even interactions with the female complainants. App.34. In fact, there were no complaints about Mr. Solomon's following anyone. Solomon had once requested, on October 9, 2017, permission to join a fellow patron at a public table in Whole Foods' dining area. App.33. The fellow patron demurred, complained to store officials, and threatened that, unless Solomon was permanently banned, she would never return to the store. The store manager decided that there was no misconduct and rightly refused to act.

Solomon followed up this oral denial with an email sent to Attorney Warren on December 1, 2017. App.34. Attorney Warren told Solomon that, if the allegations were proven to be untrue, then Whole Foods would lift the trespass notice. App.34. Solomon placed Whole Foods on notice of potential litigation by way of a separate email to Attorney Warren also sent on December 1, 2017. App.34. Solomon followed up on his litigation notice with a demand for the preservation of any store videos of Solomon interacting with any of the complainants on December 4, 2017. App.34.

Attorney Warren responded to the request for preservation of videos by claiming that he did not know the complaints' dates and that the store surveillance did not make audio recordings. App.34. He also demanded that Solomon stop contacting him. App.35. A full month after Solomon sent another email on December 26, 2017, instructing Attorney Warren not to destroy video evidence, Attorney

Warren wrote to him on January 27, 2018, acknowledging for the first time that he had searched for video evidence. App.35.

Attorney Warren also told Solomon that he had ascertained one of the complaints – there was but one complaint that he could locate, arising from the October 9, 2017, request to join a fellow diner at a public table – was made "in early October 2017," but that store policy only preserved videos for 40 days and the video had since been destroyed. App.35. Attorney Warren's professional negligence in refusing to respond to Solomon's efforts to contact him represents the sole reason that the video of the October 9, 2017 interaction was destroyed. October 9, 2017 fell four days after the allegations of sexual misconduct against Harvey Weinstein became a staple of the daily news.

At the time Solomon first received the trespass notice and throughout the pendency of Solomon's efforts to clear his name, Whole Foods had complete and sole dominion and control over the now-destroyed evidence. In January 2019, an administrative filing by the appellees makes clear that two emails to Whole Foods from two Jane Does were received on October 15, 2017 and October 29, 2017. App.108, 109. Both emails use identical phrases and terms, suggesting, at a minimum, that the authors coordinated their efforts. Attorney Warren was aware of the two emailers' identities the entire time, yet he refused to give evidence to Solomon.

In an effort to learn the Jane Doe defendant's identity, Solomon attempted to file a pro se complaint with the New York Division of Human Rights on August 23, 2018, claiming that he had been discriminated against under New York's public

accommodations law and complaining about the spoliation of exculpatory evidence. App.91-95. That agency apparently misfiled or ignored the administrative complaint, failing to take any action on it until November 19, 2018 – 88 days later, when the complaint was finally docketed in the NYSDHR Hempstead regional office. App.91. The process of serving the respondents did not begin until November 27, 2018. App.84. On February 25, 2019, the agency dismissed the complaint without conducting a hearing of any sort, without providing any meaningful opportunity to engage in discovery, without issuing orders of any kind to compel the disclosure of Jane Doe, and without engaging in fact-finding of any meaningful sort. App.221-22.

Fearing that the statute of limitations would run on a defamation claim and frustrated by the New York Division of Human Rights' silence, Solomon filed a diversity action in the Eastern District of New York on October 2, 2018. He initially made claims of either intentional or negligent spoliation of evidence and defamation. He believed his discrimination case was pending before the NYSDHR although he had not received any indication from the agency that it was acting on his complaint. Solomon filed suit against Whole Foods Market, Inc., its parent company, Amazon.Com, Inc., Attorney Warren and Jane Doe.

Although an answer and corporate disclosure statement were filed for Amazon, Whole Foods, and Attorney Warren, no appearance was ever filed on Jane Doe's behalf. The appearing defendants filed a corporate disclosure statement with their answer on December 4, 2018. Solomon subsequently requested a 90-day extension to serve Jane Doe because her identity was not provided under Rules 26 and 33, nor in

the State proceeding either. App.17. The appearing defendants filed a motion to dismiss on behalf of all defendants, including Jane Doe on April 5, 2019. App.5. Solomon timely responded, and the District Court dismissed the action on June 24, 2019, giving Solomon leave to amend to cure minor defects in the pleadings, but denying him the right to raise additional claims. App.5-6.

Solomon, through counsel, subsequently filed a first amended complaint on August 5, 2019. App.25. When it became apparent that there had been a miscommunication between Solomon and counsel, Solomon filed pro se an affidavit with the District Court. App.183. In an effort to rectify the miscommunication and to make sure that Solomon's claims were fully and fairly litigated, counsel promptly filed a motion for permission to file a second amended complaint on August 23, 2019, raising certain new claims including a claim of religious discrimination. App.210. In the second amended complaint, Solomon sought to bring claims arising under asserted causes of action under New York's Public Accommodation Laws, Title II of the 1964 Civil Rights Act, defamation, and a state law tort claim sounding in breach of duty to a business invitee to avoid foreseeable harm due to the failure to preserve in-store video evidence. App.213.

Solomon then filed pro se a series of affidavits, complaining about judicial bias, asserting the factual basis of his claim of religious discrimination and clarifying the basis of his complaints against the defendants. App.312-360.

Thereafter, the appearing defendants filed a renewed motion to dismiss and an opposition to the motion to file a second amended complaint. App.39-311.

The district court again dismissed Mr. Solomon's causes of action, ruling on the first amended complaint. App.361. The court also denied Mr. Solomon permission to file a second amended complaint. App.366. Solomon timely appealed to the Second Circuit, which affirmed the district court's decision and denied Solomon's petition for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit Erred In Affirming The Dismissal Of David Solomon's Claims When Uncontroverted Evidence Existed That He Invoked Federal Jurisdiction First And That He Was Never Given A Meaningful Hearing In A New York Administrative Forum, Thus Denying Him Due Process.

This is a defamation per se case where the courts refused to allow the Petitioner to learn the identity of his two defamers to depose them. Only Amazon knows the identity of the two defamers. The only way Petitioner can learn the identity of his two defamers is discovery from Amazon. The Second Circuit erred to hold Petitioner can learn the identity from a source other than Amazon that it did not name. The defamation per se in the two emails dated October 15, 2017 and October 29, 2017 are hearsay. *Consolidated Edison v. NLRB* 305 U.S. 197 (1938) holds that due process requires that the courts must allow the Petitioner to cross-examine his two defamers and that a judgment wholly based on hearsay is void: "We agree with the Court of Appeals that the refusal to allow testimony was arbitrary and unreasonable...Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

The Second Circuit erroneously affirmed the district court's dismissal of Solomon's complaint for lack of subject matter jurisdiction on the grounds that New

York's election of remedies doctrine barred him from pursuing claims in court after invoking the jurisdiction of the New York State Division of Human Rights (NYSDHR). Both the Second Circuit and the district court erred in this conclusion, and, in doing so, ignored the fact that Solomon never received a meaningful opportunity to be heard in NYSDHR. By ignoring this crucial fact, the Second Circuit and the district court forever closed the door on allowing Solomon any opportunity to be heard and to seek redress for his claims.

New York Executive Law § 297(9) states that a person aggrieved by unlawful discrimination has a cause of action in any court of appropriate jurisdiction "unless such person had filed a complaint hereunder or with any local commission on human rights…." *See also Moodie v. Federal Reserve Bank of New York*, 58 F.3d 879, 882 (2d. Cir. 1995). The New York Court of Appeals has held that the judicial and administrative remedies are mutually exclusive. *Marine Midland Bank, N.A. v. New York State Div. of Human Rights*, 75 N.Y.2d 240, 245 (1989). Thus, if, as Solomon will show hereafter, he filed his federal complaint first, his federal claim barred his NYSDHR claim, and Respondents' counsel, the NYSDHR, and the Eastern District of New York failed to correctly apply the mutual exclusivity rule.

Solomon's pro se NYSDHR complaint was not docketed with the New York State Division of Human Rights Hempstead Regional Office until November 19, 2018. App. 91 (see the "received" stamp on the left side of the complaint). The New York administrative agency lost, or ignored, Solomon's complaints for just under three months. App.91 (indicating that the NYSDHR General Counsel's Office had received

the complaint on August 23, 2018 and that the Regional Office did not receive it until November 19, 2018); see also App.346 (indicating that the NYSDHR forced Mr. Solomon had to produce a signed U.S. Post Office receipt proving that he filed his complaint before they looked for it and docketed it). The initial underlying federal complaint in the Eastern District of New York (hereinafter "EDNY") was duly filed on October 2, 2018. App.8.

The combination of the NYSDHR's error and any error that can be fairly attributed to Solomon in the filing process means that Solomon, as a matter of law, did not file his NYSDHR complaint until November 19, 2018.

Under New York law, a NYSDHR complaint is not deemed to be filed until it has been received by the NYSDHR regional office:

> Complaint.
> (a) Who may file:
> (1) Any person or organization claiming to be aggrieved by an alleged unlawful discriminatory practice may, in person or by an attorney-at-law, make, sign and file with the regional office a verified complaint in writing. Assistance in drafting and filing complaints shall be available to complainants at all regional offices in person, by telephone or by mail. If a complainant lacks mental capacity, the complaint may be filed on his or her behalf by a person with a substantial interest in the welfare of the complainant,

New York State Division of Human Rights, Rules of Practice § 465.3 (emphasis added); *see also* New York State Division of Human Rights, Rules of Practice § 465.3(d) ("(d) Place of filing. A complaint shall be filed with the Division of Human Rights at any of its regional offices, or other place designated by the division")

(emphasis added). Here, the plaintiff filed a complaint with the NYSDHR on November 27, 2018.

The NYSDHR does not designate its general counsel's office as a place of filing. In its public instructions for filing complaints, it provides simple instructions to the public on how to file a complaint: "Return the completed complaint form to the Division. You may return the complaint by postal mail to the regional office nearest you, email your complaint to complaints@dhr.ny.gov, or fax it to (718) 741-8322." *See* New York State Division of Human Rights, Complaint – How To. DHR.NY.GOV [Website] https://dhr.ny.gov/complaint#howto. It then designates a list of acceptable offices. *See* New York State Division of Human Rights, Contact Us. DHR.NY.GOV [Website – Linked From Complaint – How To] https://dhr.ny.gov/contact-us.

The NYSDHR did not designate the General Counsel's Office as an acceptable place to file NYSDHR complaints. This is further confirmed by the following information that it provides to the public advising them that their case will not proceed until a regional office receives it: "Once a regional office receives your complaint the investigation by the Division of Human Rights will begin." See New York State Division of Human Rights, Complaint – Investigative Procedure. DHR.NY.GOV [Website] https://dhr.ny.gov/complaint#howto (emphasis in original).

The NYSDHR's Rules of Practice also belie any conclusion that the General Counsel's Office may receive complaints. The rules define the term regional office as "an office duly established by the division for the receipt and/or investigation of complaints." New York Division of Human Rights, Rules of Practice § 465.1(b). The

rules also define the general counsel as "the chief legal representative of the agency." New York Division of Human Rights, Rules of Practice § 465.1(e). Consequently, there is no evidence in the record or from the NYSDHR that it has designated its General Counsel's office as a place where complaints may be filed.

Additionally, the NYSDHR is required to "promptly" serve respondents upon the filing of a NYSDHR Complaint. New York Division of Human Rights, Rules of Practice § 465.3(g) (requiring prompt service on all parties). Here, the NYSDHR did not begin the process of service on the appellees until a week after it had received Mr. Solomon's complaint in its Hempstead Regional Office on November 19, 2018. App.84, 91. Thus, the NYSDHR's actions indicate that it did not deem Mr. Solomon's complaint filed until it received it in its regional office.

In a final demonstration of how the NYSDHR did not deem Mr. Solomon's complaint filed until November 19, 2018 despite its findings to the contrary, it took far more than the 180 days allotted to it by law to issue a finding of no probable cause. Under New York Executive Law § 297(2)(a), the NYSDHR must determine whether it has jurisdiction and whether there is probable cause for the complaint with 180 days of its filing. As reflected in the record, the NYSDHR did not make any such determinations, investigations or findings within 180 days of the August 23, 2018 General Counsel's receipt date. App.81-83 (showing a decision date of February 25, 2019 – 6 days after the 180-day mark). Thus, unless this Court concludes that the NYSDHR violated New York law, the date of the NYSDHR decision indicates that Mr. Solomon's NYSDHR complaint was filed on November 19, 2018.

Both the Second Circuit and the district court clearly erred when they found that Mr. Solomon's complaint had been filed on August 23, 2018. App.363. As set forth above, the General Counsel's Office's receipt of Mr. Solomon's NYSHR complaint did not constitute a "filed" NYSDHR Complaint. Instead, November 19, 2018 is the effective filing date and the beginning of the investigation, which is supported by the NYSDHR's beginning of service on November 27, 2018 date and its decision on February 25, 2019. This is approximately one month and seventeen days after the EDNY action commenced, rendering the EDNY first in time as a matter of law and the NYSDHR proceedings without jurisdiction and a nullity.

In addition to the district court's error, the respondents' claimed the election of remedies defense, but they conceded that Mr. Solomon's NYSDHR complaint was not filed on August 23, 2018, but well after he filed his initial federal complaint. App.242 ("Here, the plaintiff filed a complaint with the NYSDHR on November 27, 2018"). Mr. Solomon's initial federal complaint, fairly construed as it must be on a motion to dismiss, alleged that there was gender discriminatory motive for the appellees' treatment of him, including the spoliation of evidence. See App.13, ¶ 26. Mr. Solomon's amended complaint also included similar allegations. App.52, ¶ 26. Consequently, Solomon had already brought the primary subject matter – gender discrimination – of his non-filed NYSDHR complaint to federal district court long before the NYSDHR deemed his complaint actually filed.

The gravamen of the Second Circuit and district court's error, however, was the fact that they did not consider the NYSDHR Rules of Practice. App.362-364.

Without considering the NYSDHR Rules of Practice, they had no way of determining the proper filing date – November 19, 2018 – as a matter of law, and they relied on the NYSDHR's self-serving and haphazard declaration instead.

Whatever the procedural technicality of this issue is, it pales in comparison to the overall result that the Second Circuit and the district court's rulings have created in this case. Solomon has never received, and never will receive, a meaningful opportunity to be heard on the merits of his claims. The NYSDHR inexplicably lost his complaint for months. When it finally located it and processed it, the investigating officer, Director Chungata, told Solomon that he would dismiss it before the NYSDHR even received the Respondents' response and mocked Solomon's claims of discrimination. When Solomon took his claims to federal district court, a federal district court judge, Joan Azrack, made similar comments that ultimately led to her recusal. The district court's dismissal, and the Second Circuit's affirmation of that dismissal, without allowing Solomon any opportunity to conduct discovery continue a pattern where Solomon has been denied any access to the legal process on technicality after technicality and where he has been subjected to repeated hostility for his religion.

The Court's holding in *Masterpiece Cakeshop* specifically prohibits special hostility towards religion in the legal process. It requires that the NYSDHR "charged with the solemn responsibility of fair and neutral enforcement of [New York's] anti-discrimination law...must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting [Jewish] people to indignities when

they seek goods and services in an open market." 138 S.Ct. at 1732. NYSDHR Regional Director Chungata telling Solomon at the outset his case would be dismissed, ignoring the immediate request to recuse, not allowing any discovery and concluding Solomon presented "no evidence" to support his claims clearly violates *Masterpiece Cakeshop's* requirements. Even though Solomon pleaded and begged for the NYSDHR to allow him to compel the Respondents to identify his accusers and to afford him process to confront his accusers under oath, he never received it as the NYSDHR summarily dismissed his complaint in a rush to get rid of him.

When considered in the totality of the circumstances, the Second Circuit and the district court have effected a grievous wrong on Solomon by finding, without basis, that the NYSDHR had proper jurisdiction over his complaint. Their holdings affirm a grave miscarriage of justice based on hostility to Solomon's religion, deny Solomon the due process that he is entitled to, and close the door forever on Solomon's ability to clear his name from vile, false accusations.

II. The Second Circuit Erred In Denying David Solomon Leave To Amend His Complaint To State A Claim For Religious Discrimination.

In *Foman v. Davis*, 371 U.S. 178 (1962), this Court interpreted Fed. R. Civ. P. 15 to establish a liberal standard of allowing amendments to complaints:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of

> relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. at 182 (internal citation omitted).

It has also instructed courts to liberally construe civil rights complaints and give special leeway to efforts to amend them. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 165-66 (1993). Thus, courts usually only dismiss civil rights claims when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In this case, the Second Circuit and the district court deviated substantially from these clearly established rules. Mr. Solomon claimed a civil rights violation under Title II of the Civil Rights Act of 1964 in his proposed amended complaint. App.213, 216, ¶¶ 1, 13. He was thus entitled to the particular protection accompanying amendments to civil rights complaints. The district court abused its discretion by summarily concluding that Mr. Solomon alleged "no other facts to support an inference that the defendants even knew about his religious beliefs…." App.366. Even though Mr. Solomon was mourning his mother in accordance with Jewish tradition by remaining unshaven and not getting a haircut, the district court

refused to draw reasonable inferences that would render Mr. Solomon's claim of religious discrimination plausible. It gave no consideration that "Solomon" is a well-known and common Jewish name. It gave no consideration to the fact that Mr. Solomon was a regular patron of the Jericho Whole Foods store and the manager knew him well as a frequent customer. App.96. It gave no opportunity to depose the manager to ask whether he knew Solomon's unkempt appearance was due to practice of his religion to mourn his recently deceased mother. These facts are sufficient to support reasonable inference of, at least in part, discrimination directly based on an intense dislike for Mr. Solomon's appearance, which was required by his religious custom.

The district court and, by extension, the Second Circuit viewed Mr. Solomon as a problem case rather than a litigant struggling to be heard. Thus, instead of impartially applying the well-established standards of allowing liberal amendments, they summarily dismissed Mr. Solomon's claims in an effort to get rid of him and his case as fast as possible. The Federal Rules of Civil Procedure and due process require impartiality, especially in the amendment process, and Mr. Solomon did not receive it here. Thus, Mr. Solomon asks this Court to correct the Second Circuit and the district court's gross errors.

III. The Second Circuit Erred In Denying David Solomon Any Relief From Bad-Faith Litigation Conduct Including The Intentional Destruction Of Surveillance Video And Other Information That Would Have Enabled David Solomon To Identify And Sue Persons Who Falsely Accused Him Of Committing Crimes.

The Fourteenth Amendment due process of law clause fairly includes a requirement that courts follow Fed. R. Civ. P. 37(e). Despite Mr. Solomon going out of his way to request the preservation of video evidence that would exonerate him from outrageous and baseless claims of sexual harassment, the Second Circuit, the District Court, and the New York State Division of Human Rights repeatedly denied Mr. Solomon any opportunity to confront under oath in a deposition the two women who accused him, or to require the Respondents to produce the video evidence or be sanctioned for letting it be destroyed. Aggravating these actions was the blatant bias from the District Court and the New York State Division of Human Rights towards Mr. Solomon's religious discrimination claims, which violates the Court's instruction in *Masterpiece Cakeshop* that claims of religious discrimination be decided with the "solemn responsibility of fair and neutral enforcement of [New York's] anti-discrimination law...with tolerance [and] without undue disrespect to sincere religious beliefs." *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Com'n*, 138 S.Ct. 1719, 1729, 1732 (2018).

Here, Mr. Solomon was wholly precluded from prosecuting his defamation claim against Jane Doe when the district court dismissed the claim by denying him the opportunity to re-plead the defamation cause of action because it concluded that his claim was time-barred because he had not named his accusers and failed to apply New York's relation back statute, New York C.P.L.R. § 1024. App.364-65. The only way that Mr. Solomon could have named his accusers was through the district court's enforcement of the evidence preservation requirements of the Federal Rules of Civil

Procedure. Its refusal to do so and its blatant bias towards Mr. Solomon's claims represent precisely the kind of hostility that this Court has held is unconstitutional.

New York law establishes a one-year statute of limitations for defamation. New York C.P.L.R. §215(3); *Hogan v. Fischer*, 738 F.3d 509, 518 (2nd Cir. 2013). Fed. R. Civ. P. 15 does not preclude the application of state relation back statutes. *Id.* at 518 (citing Fed. R. Civ. P. 15, Advisory Comm. Notes (1991) and holding that Fed. R. Civ. 15 (c)(1)(A) was intended to expressly permit relation back under state law). Consequently, in *Hogan*, the Second Circuit applied the state relation back doctrine rather than the federal doctrine. *Id.* at 518. The district court, however, failed to even consider the relation back principles contained in New York C.P.L.R. § 1024, which reads:

> A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.

New York courts have interpreted §1024 to permit John Doe substitutions nunc pro tunc. *Bumpus v. N.Y.C. Transit Auth.*, 883 N.Y.S.2d 99 (2nd Dept. 2009) (collecting cases). In order to avail oneself of §1024, a party must (1) "exercise due diligence, prior to running the statute of limitations, to identify the defendant by name…" and (2) "describe the John Doe party in such form as will fairly apprise the party that [s]he is the intended defendant." *Hogan*, 738 F.3d at 519 (internal quotations and citation omitted).

In the instant matter, the Second Circuit and the district court erred by failing to apply §1024 to relate back Mr. Solomon's Jane Doe claim to the original complaint. Neither court clarified the extent of its § 1024 analysis or even whether it performed its abbreviated analysis under § 1024. Instead, they based their orders on the mistaken premise that Mr. Solomon failed to exercise due diligence: "Solomon had an ample opportunity to make full use of the discovery devices set forth in the Federal Rules of Civil Procedure as well as any other alternative means in order to ferret out Jane Doe[]'s identity,' but nevertheless failed to do so." App.365. This conclusion and summary analysis does not accurately reflect Mr. Solomon's efforts to identify Jane Doe or the complete lack of any opportunity he had to do so. Solomon's Rule 26 and Rule 33 discovery was never provided. Solomon had no other way to learn his two defamer's identity than by discovery from Amazon, which he was denied at every step of the process.

Despite Mr. Solomon's diligent efforts, he did not receive "ample opportunity" to identify the Jane Doe defendant. The appellees, particularly Attorney Warren, engaged in obstructive, bad faith conduct to thwart any and all attempts by Mr. Solomon to identify the anonymous defendant(s) who maliciously defamed him and upended his life. The Second Circuit plainly erred when it held that Solomon could have learned the identity of his two defamers from a source other than Amazon. The Second Circuit did not and could not name such an alternative source because such a source does not exist. While he was mourning his mother's death during the time period at issue, the extensive efforts he undertook to identify the Jane Doe

defendant(s) and the diligence he maintained throughout this time period were nothing short of extraordinary.

On November 9, 2017 Mr. Solomon received a trespass notice signed by Attorney Jay Warren, Global Litigation Counsel for Whole Foods Market, Inc., with instructions to contact Attorney Warren if he believed the notice was issued in error. App.216. The trespass notice was generated in response to emails sent by the Jane Doe defendant(s) on October 15 and October 29, 2017, alleging that Mr. Solomon had engaged in misconduct earlier in the month. App.215-16. Mr. Solomon received the notice from the manager of the Whole Foods Market in Jericho, New York on November 9, 2017. App.216. He immediately informed Mr. Osorio, in the Jericho Whole Foods on November 9, 2017 that he anticipated there would be litigation over the defamatory allegations if the trespass notice was not immediately reconsidered. App.216.

Immediately after leaving the store on November 9, 2017, Mr. Solomon attempted to contact Attorney Warren to learn what the allegations were, as the notice instructed. App.216-17. Mr. Solomon called Attorney Warren repeatedly from November 9, 2017 to November 29, 2017, and he left many voice mails for Attorney Warren, asking to speak about the November 9th trespass notice. App.216-17. When Mr. Solomon's calls went unanswered, he contacted the Texas Bar Association to seek assistance reaching Attorney Warren. App.217. At the advice of the Texas Bar representative, Mr. Solomon then sent an email to Attorney Warren on November 29, 2017. App.217. In that email, Mr. Solomon informed Attorney Warren that he

challenged the truth of the allegations whatever they were and asked Attorney Warren to reconsider the trespass notice. App.217.

On December 1, 2017, Mr. Solomon finally spoke with Attorney Warren on the phone to learn the allegations against him as per the trespass notice's instructions. App.217. Attorney Warren initially refused to discuss the basis for the trespass notice until Mr. Solomon threatened litigation. App. 217-18. He then informed Mr. Solomon of the allegations of essentially criminal sexual misconduct against him, namely, the following of women inside the store to demand sex in vulgar language. App.218. Mr. Solomon repeatedly demanded that Attorney Warren produce the store surveillance videos and told Attorney Warren the video recordings would completely exonerate him by showing that he had not stalked anyone in the store, but rather shopped like a normal shopper, and that no one reacted to any comments that he made with horror, disgust, or extreme displeasure or fear. App.218. Attorney Warren later told Mr. Solomon that, if the allegations were proven false, then Whole Foods would reconsider the trespass notice banning him from all Whole Foods stores. App.218.

The same day, Mr. Solomon sent a follow-up email to Attorney Warren, again denying the allegations and putting him on notice of potential litigation. App.216. Attorney Warren acknowledged receipt of the December 1, 2017 email potential litigation notice. App.218. On December 4, 2017, Mr. Solomon sent another email to Attorney Warren requesting the preservation of any and all in-store video of Mr. Solomon, on all dates relevant to any complaints against him. App.218-19. He even offered to pay for the storage and retrieval of the videos. App.219.

Attorney Warren responded to the email, and claimed he did not know the dates of every complaint so he could not "pull the video" and informed Mr. Solomon that the Jericho Whole Foods did not have audio recordings of what took place in the store. App.219. Attorney Warren then asked Mr. Solomon to stop contacting him. App.219.

On December 26, 2017, Mr. Solomon emailed Attorney Warren another notice, directing the Global Litigation Counsel to refrain from intentionally destroying evidence and of his intention to seek sanctions for willful destruction of evidence. App.219. Mr. Solomon specifically cited the preservation requirements of Federal Rules of Civil Procedure Rule 37(e) as well as *Herrera v. Matlin*, 758 N.Y.S.2d 7 (1st Dept. 2003) involving default for failure to comply. App.219.

On January 26, 2018, Attorney Warren emailed Mr. Solomon and advised that he searched for the requested video recordings. App.219. He informed Mr. Solomon that he dated one complaint to mid-October but since the store preserved tapes for only 40 days the tape had since been destroyed. App.219.

On August 23, 2018, Mr. Solomon filed a complaint with the New York State Division of Human Rights against appellees Amazon.com, Inc. and Attorney Warren in an effort to learn the name of the Jane Doe defendant. App.220. In the NYSDHR proceeding, much like the instant proceeding, Attorney Warren willfully refused to disclose the name, address, or any other identifying information of Jane Doe. App.220.

Mr. Solomon was not provided his statutorily protected rights to meaningful investigation, fact-finding, and/or discovery of relevant information, such as the name of Jane Doe, or any other witnesses with relevant information. App.220. Mr. Solomon was denied the right to a fair hearing and to cross-examine adversarial witnesses, especially the two emailers who based their allegations wholly on hearsay in a malicious attempt to paint the most despicable picture possible of him. App.220. The Second Circuit erred to hold Petitioner can learn the identity from a source other than Amazon that it did not name. The defamation per se in the two emails dated October 15, 2017 and October 29, 2017 are hearsay. *Consolidated Edison v. NLRB* 305 U.S. 197 (1938) holds that due process requires that the courts must allow the Petitioner to cross-examine his two defamers and that a judgment wholly based on hearsay is void. *Consolidated Edison* held, "We agree with the Court of Appeals that the refusal to allow testimony was arbitrary and unreasonable...Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

After initiating his federal action in October, 2018, Mr. Solomon sought and received an extension to serve Jane Doe on February 12, 2019 with the expectation that he would be able to speedily obtain her identity through his pending NYSDHR proceedings and through discovery in federal court. On February 20, 2019, counsel for Mr. Solomon served a Notice of Interrogatories and Requests for Production upon counsel for defendants, seeking name(s), address(es) and phone number(s) in order to identify the Jane Doe(s) defendant(s), as well as similar identifying information for any other individual witness(es) likely to have discoverable information. App.16.

The appellees failed to respond to the February 20, 2019 Interrogatories. They did not lodge an objection, request a protective order, or otherwise respond in an appropriate manner. Much like their intentional, bad-faith destruction of the aforementioned video requested by Mr. Solomon and their willful ignoring of their discovery obligations in the NYSDHR proceeding, the corporate respondents willfully ignored a valid discovery request without objecting to it or responding to it. In doing so, they made a mockery of the judicial system, the Federal Rules of Civil Procedure, and the basic principles of fair play that are supposed to undergird due process.

The bad-faith practice continued, unchecked throughout the pendency of the litigation as defendants ignored their obligations. The parties appeared before the Honorable Joan Azrack, on March 4, 2019, for an initial conference, which included a discussion of the corporate appellees' proposed motion to dismiss. App.3-4, Dkt. No. 17. Judge Azrack indicated that she did not have a chance to read the case file, but, after a brief summary of the case by Mr. Solomon's counsel, declared that Mr. Solomon's action was frivolous and that she planned to impose sanctions after she reviewed the case. App.318. She also stated that the "Plaintiff should shop at Shop Rite." App.318. Her comments including her threat of sanctions and her obvious bias against Mr. Solomon took all attention away from Mr. Solomon's pending interrogatories to discover information about Jane Doe. Consequently, the March 4, 2019 conference consisted of a federal judge and the corporate respondents both trying to get rid of Mr. Solomon's case before any briefing on its merits had occurred. Indeed, the only thing that the conference accomplished was establishing a briefing

schedule for the corporate appellee's motion to dismiss. Most importantly, the district court did not stay discovery at the March 4, 2019 conference or at anytime thereafter, and no party ever requested a stay of discovery.

After the March 4, 2019 conference, the corporate appellees did not produce initial disclosures, respond to the February 20, 2019 interrogatories, or otherwise provide the name(s) and/or identifying information of witnesses, including Jane Doe(s). Furthermore, they sought no clarification as to who the Jane Doe(s) were nor was such clarification necessary as Mr. Solomon had repeatedly identified them with sufficient specificity to the corporate appellees including in his complaint.

On April 5, 2019, the corporate appellees filed their initial motion to dismiss the complaint, and, on April 29, 2019, the case was reassigned to the Honorable Edward R. Korman. App.4, Dkt. No. 18, 20.

In his June 24, 2019 dismissal order and his May 30, 2020 dismissal order, Judge Korman sua sponte raised a statute of limitations defense for the Jane Doe(s) and accused Mr. Solomon of not using the tools available to him to identify the Jane Doe(s). App.36, 364-65. In doing so, Judge Korman completely ignored his attempts to leverage the federal remedies available to him to obtain the Jane Doe(s)' identity.

Judge Korman also held Mr. Solomon was required to name an individual defendant in place of Jane Doe no later than December 1, 2018 – one year after he first learned of Jane Doe's alleged statements. Id. Because Mr. Solomon did not do so, the Court deemed the defamation claim time-barred.

The district court erred in its holding because Mr. Solomon had met the requirements to avail himself of New York C.P.L.R. §1024. He exercised due diligence, prior to the running of the statute of limitations, to identify the Jane Doe defendant by name and, in both the initial complaint and second amended complaint, he described the Jane Doe defendant in such form as will fairly apprise the party that she is the intended defendant. *See Hogan v. Fischer*, 738 F.3d 509, 519 (2nd Cir. 2013) (citing *Bumpus v. N.Y.C. Transit*, 883 N.Y.S.2d 99, 104 (2nd Dept. 2009)).

The instant matter is similar to *Hogan v. Fischer*, as Mr. Solomon, like the plaintiff in *Hogan*, exercised due diligence, prior to the running of the statute of limitations, to identify the Jane Doe defendant by name. In *Hogan*, the Second Circuit held plaintiff diligently sought to identify the Doe defendants by submitting multiple discovery requests to the attorney general, counsel for defendants, that went unanswered over a three-year period, and also submitted Freedom of Information Law requests to New York State. *Id.* at 514. Like the plaintiff in *Hogan*, Mr. Solomon was forced to contend with a defendant who could easily identify the Doe defendant(s), but ignored the legitimate requests and made a mockery of the Court proceedings. The corporate appellees in this matter ignored their obligation to provide the identifying information under the Federal Rules of Civil Procedure. They ignored their obligation to respond to the interrogatories within 30 days under Fed. R. Civ. P. 33, and they further ignored their obligation under Fed. R. Civ. P. 26 to provide the name, address and telephone number of each individual likely to have discoverable information. Mr. Solomon, like the *Hogan* plaintiff, attempted to obtain the identity

of the Doe defendant(s) by standard discovery demands and by unorthodox means through New York State offices. Hogan attempted to obtain the information utilizing FOIA requests, while Mr. Solomon attempted to get the information, pre-litigation and prior to the statute of limitations running, by first contacting Attorney Warren and then through the NYSDHR proceeding.

The respondents in the instant matter blatantly ignored their obligations under the Federal Rules of Civil Procedure, and they faced no pressure from the district court or the NYSDHR to comply with their obligations. The appellees in this matter failed to respond to a single legitimate discovery request and failed to request a stay or a single extension of time or object. In other words, they simply ignored their discovery obligations in bad faith and filed a motion to dismiss immediately. The entire pendency of the litigation was motion practice, for motions to dismiss. Both the Second Circuit and the district court ignored this behavior, denying Mr. Solomon any opportunity to fairly pursue his claims or adequately amend his complaint. Solomon is not required to file a motion to compel to make discovery Rules 26 and 33 binding on the defendants.

As for the second requirement of New York's relation back doctrine, Mr. Solomon, like *Hogan*, described the Jane Doe defendant(s) in such form as will fairly apprise a party that she is the intended defendant. Hogan met the second requirement in the complaint by describing with particularity the date, time, and location of the alleged incident. Hogan, 738 F.3d at 519. Hogan also provided descriptions of appearances for some of the Doe defendants. Id. Although Mr. Solomon

did not provide descriptions of Jane Doe(s)'s appearances because he never engaged in the behavior that he is accused of and has no way of knowing what his accuser(s) look like apart from the video evidence destroyed by Attorney Warren, his three complaints provide sufficient detail of the date, location, and the offending conduct. The Jane Doe(s) knows who she is based on Mr. Solomon's explicit description of her conduct and so do the corporate appellees. Further, based on the manner defendants have represented the Jane Doe(s)'s interests during this matter's pendency, it would not be surprising if she has been in contact with Attorney Warren or other appellees, who had possession of the October 15, 2017 and the October 29, 2017 emails throughout the entire proceedings.

Both Hogan and Mr. Solomon were unsuccessful in identifying the Doe defendant(s). This was not for lack of due diligence, but for the appellees' wanton and bad-faith conduct. The appellees have blatantly ignored their obligations under Fed. R. Civ. P. 26, which requires them to produce the name and, if known, the address and telephone number of each individual likely to have discoverable information. They also failed to respond to Mr. Solomon's interrogatories seeking to learn Jane Doe(s)'s identity within 30 days as required by Fed. R. Civ. P. 33. The appellees' conduct was willful and in bad faith for the specific purpose of preventing Mr. Solomon from prosecuting his claims against both Jane Doe(s) and the appellees. Both the Second Circuit and the district court committed gross error by refusing to enforce the Federal Rules of Civil Procedure and allow him to amend his complaint.

Mr. Solomon's expectation, well founded in the Federal Rules of Civil Procedure, that he would receive the necessary information proved unrealistic as both court and counsel ignored his efforts. The appellees' global litigation counsel had no difficulty in misleading Mr. Solomon about the surveillance video and ignoring his requests – judicial and extrajudicial – for the necessary information. Instead, the appellees have treated the Federal Rules of Civil Procedure as mere suggestions rather than rules meant to be obeyed.

Ten states have an independent cause of action for spoliation. To date, New York courts have not recognized an independent cause of action for spoliation because the courts erroneously believe all courts will order Rule 37e sanctions against parties before them for intentional destruction of evidence. But Solomon's case lays bare the practical reality: here there were no sanctions, nor even a hearing or ruling of any kind for blatant violations of Rule 37e. *Lawrence v. North Country Animal Control Center Inc.,* 133 A.D. 3d 932 (3 Dept., 2015) illustrates the problem this can cause for the courts where the Court in *Lawrence* in pursuit of justice treated a spoliation cause of action as a motion for sanctions. Attorney Warren has intentionally destroyed evidence in prospective litigation and has not only escaped sanctions but also prevailed because of his spoliation. Just because no New York court has yet to recognize an independent cause of action for spoliation does not mean that Attorney Warren or other appellees are innocent actors. The facts of this case were sufficient for both the Second Circuit and the district court to certify to the New York State

Court of Appeals the question as to whether it should recognize an independent cause of action for spoliation.

Attorney Warren is certainly familiar with spoliation and the duty imposed upon him, and his company, by Rule 37 after a proper notice of litigation, which he received on multiple occasions. He is, no doubt, acutely aware of the duty to preserve electronic data and that a party's conscious dereliction of a known duty to preserve electronic data is both necessary and sufficient to find that the party "acted with the intent to deprive another party of the information's use under Rule 37(e)(2)." *See Unger v. City of New York*, 329 F.R.D. 8 (E.D.N.Y. 2018).

Whether the spoliator affirmatively destroys the data or passively allows it to be lost is irrelevant. It is the spoliator's state of mind that logically supports the adverse inference. *Moody v. CSX Transportation, Inc.*, 271 F.Supp.3d 410, 431 (W.D.N.Y. 2017) (holding that the defendant knew that it had a duty to prevent an event recorder from being overwritten and that it acted with intent to deprive [the plaintiff] of the use of the event recorder data"); *Ottoson v. SMBC Leasing and Finance Inc.*, 268 F.Supp.3d 570, 582-83 (S.D.N.Y. 2017) (holding that conscious failure to take any reasonable steps to preserve relevant communications satisfied the level of intent required of Rule 37(e)(2)") (collecting cases).

The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. *Leidig v. Buzzfeed, Inc.*, 2017 WL 6512353 at *8 (S.D.N.Y. Dec. 19, 2017) (quoting *Fujitsu Ltd. V. Fed. Express Corp.*, 247 F.3d 423

(2d Cir. 2001)). Defendants were on actual notice that the video of the alleged interactions between Mr. Solomon and his false accusers was evidence that was relevant to future litigation as of November 9, 2017, when Mr. Solomon explicitly advised the Jericho Whole Foods store manager that they could anticipate litigation. App.216. That same day, Mr. Solomon began calling Attorney Warren daily, leaving voice mails with the Global Litigation Counsel for Whole Foods. App.216-17. Mr. Solomon submits that the voicemails and the explicit mention of litigation to Mr. Osorio on November 9, 2017 would have caused a reasonable person to have notice of future litigation on that first day and every day thereafter. It was obvious that video evidence of interactions between Mr. Solomon, and his accusers, would be relevant in a case where Mr. Solomon told everyone involved that the accusations are false and he would sue for defamation and other claims against Whole Foods.

There is no question that Mr. Warren knew he had to preserve the video evidence long before December 1, 2017 when he and Mr. Solomon spoke of the potential for litigation over Jane Doe's accusations. App.216-17. Mr. Solomon served an additional notice of litigation and a preservation notice for the video on December 1, 2017. App. 217-18. Attorney Warren, as global litigation counsel for Whole Foods, would have intimate knowledge of Whole Foods retention policy for video and any other electronic record, or should have at least taken steps to immediately inform the Jericho store to preserve any and all evidence. Based on the above case law and Rule 37(e), Attorney Warren must be said to, at a minimum, have had a conscious dereliction of his duty to preserve evidence that he absolutely knew or, at best, should

have known was going to be highly relevant evidence in defamation litigation and other litigation against the appellees.

While New York has yet to catch up to the rest of the country with an independent cause of action for spoliation, Fed. R. Civ. P. 37(e) proscribes appropriate sanctions for such intentional destruction of evidence as was the case here. At a minimum, Mr. Solomon is entitled to an adverse inference in his favor that the video tapes are beneficial to his case. In other words, the Second Circuit and the district court should have held that the video portrayed Mr. Solomon acting in a completely respectful manner, without any disgusted reactions from the alleged victims of harassment, as he has been saying adamantly, and repeatedly since November 9, 2017. Furthermore, Whole Foods, and, in particular, Attorney Warren, should not be permitted to benefit from this bad-faith conduct in permitting deletion of the video, and for willfully withholding relevant evidence of Jane Doe's name and identifying information. Consequently, this Court should reverse the Second Circuit and district court's rulings that Solomon had ample opportunity to conduct discovery and denying him leave to amend because they have refused to allow Mr. Solomon a fair opportunity to be heard or pursue his claims.

CONCLUSION

For all these reasons, this Court should grant the petition for certiorari.

Respectfully submitted

NORMAN A. PATTIS
Counsel of Record
PATTIS & SMITH, LLC

383 Orange Street, 1st Fl.
New Haven, CT 06511
(203) 393-3017
npattis@pattisandsmith.com

Counsel for Petitioner

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APPENDIX