

May 26, 2017

**Via ECF**

Office of the Clerk  
U.S. Court of Appeals for the Eleventh Circuit  
Elbert P. Tuttle Courthouse  
56 Forsyth St., NW  
Atlanta, GA 30303

**Re: *Evans v. Georgia Regional Hospital*, No. 15-15234  
Supplemental Authority, Fed. R. App. P. 28(j)**

To the Clerk of the Court,

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiff-Appellant Evans wishes to call the Court's attention to the Second Circuit's grant of rehearing en banc of the same question at issue in Ms. Evan's petition for rehearing en banc. *See Order, Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017). In its order, the Second Circuit granted rehearing en banc specifically on the question: "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex'?" The Second Circuit's action is especially noteworthy, as that court "deem[s] very few cases worthy of en banc rehearing, [and] hears the fewest cases en banc of any circuit by a substantial margin."<sup>1</sup>

Ms. Evans pointed out in her April 7, 2017 Rule 28(j) letter to this Court that the Seventh Circuit overruled multiple cases that were considerably more recent, with far more (albeit faulty) analysis, and with holdings essential to those appeals than was the case in *Blum v. Gulf Oil Co.*, 597 F.2d 936 (5th Cir. 1979). *See Hively v. Ivy Tech Comm. College*, 853 F.3d 339 (7th Cir. 2017) (en banc). By granting rehearing en banc in *Zarda*, the Second Circuit now will reconsider the continued vitality of *Simonton v. Dawson*, 232 F.3d 33 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 213 (2d Cir. 2005), which share some, if not all, the hallmarks of the precedents overruled in *Hively*.

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<sup>1</sup> Mario Lucero, *The Second Circuit's En Banc Crisis*, 2013 Cardozo L. Rev. de novo 32, 33 (2013).

Sincerely,

/s/ Gregory R. Nevins  
GREGORY R. NEVINS  
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Jamekia Powers  
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Charles Moss

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on May 26, 2017. I also mailed first-class the foregoing to Defendants-Appellees at the addresses listed below:

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15-3775

*Zarda v. Altitude Express, Inc.*

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

**ORDER**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25<sup>th</sup> day of May, two thousand seventeen.

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

*Plaintiffs-Appellants,*

v.

15-3775

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

*Defendants-Appellees.*

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Following disposition of this appeal on April 18, 2017, a judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and a majority of the active judges of the Court having voted in favor of rehearing this appeal *en banc*, IT IS HEREBY ORDERED that this appeal be heard *en banc*. See Fed. R. App. P. 35(a). The *en banc* panel will consist of the active judges of the Court, as well as those senior judges who sat on the panel that heard the initial appeal. See 28 U.S.C. § 46(c).

The parties are instructed to brief only the following question: “Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination ‘because of . . . sex?’”

We invite amicus curiae briefs from interested parties. Appellants’ brief and appendix, and any amicus curiae briefs in support thereof, shall be filed by June 26, 2017. Appellees’ brief and appendix, and any amicus curiae briefs in support thereof, shall be filed by July 26, 2017. Appellants’ reply brief shall be filed by August 9, 2017.

Oral argument will be held on September 26, 2016 at 2:00 p.m. at the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, NY.

FOR THE COURT:  
Catherine O’Hagan Wolfe, Clerk

  
*Catherine O'Hagan Wolfe*