

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-3775-cv Caption [use short title] \_\_\_\_\_

Motion for: leave to participate in oral argument Zarda (by co-independent executors of his estate),  
Plaintiffs-Appellants,

\_\_\_\_\_ v. \_\_\_\_\_

Set forth below precise, complete statement of relief sought: Altitude Express, Inc. et al., Defendants-Appellees.

Leave to participate in oral argument at the en  
banc hearing scheduled for September 26,  
2017. Amici will argue that Title VII's  
prohibition of sex discrimination includes  
discrimination on the basis of sexual  
orientation.

MOVING PARTY: AMICI: American Civil Liberties Union and NY Civil Liberties Union, et al. OPPOSING PARTY: Altitude Express & Ray Maynard  
 Plaintiff  Defendant  
 Appellant/Petitioner  Appellee/Respondent

MOVING ATTORNEY: Erin Beth Harrist OPPOSING ATTORNEY: Saul D. Zabell  
[name of attorney, with firm, address, phone number and e-mail]  
New York Civil Liberties Union Zabell & Associates, P.C.  
125 Broad Street, New York, NY 10004 1 Corporate Drive, Suite 103, Bohemia, NY 11716  
212-607-3399; eharrist@nyclu.org 631-589-7242; szabell@laborlawsny.com

Court-Judge/Agency appealed from: U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):  
 Yes  No (explain): \_\_\_\_\_

Opposing counsel's position on motion:  
 Unopposed  Opposed  Don't Know

Does opposing counsel intend to file a response:  
 Yes  No  Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?  Yes  No  
Has this relief been previously sought in this Court?  Yes  No  
Requested return date and explanation of emergency: \_\_\_\_\_

Is oral argument on motion requested?  Yes  No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?  Yes  No If yes, enter date: September 26, 2017

Signature of Moving Attorney: /s/ Erin Beth Harrist Date: 6/26/2017 Service by:  CM/ECF  Other [Attach proof of service]

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X	
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,	:
	:
<i>Plaintiffs-Appellants,</i>	:
	:
v.	:
	:
ALTITUDE EXPRESS, INC., dba SKYDIVE LONG	:
ISLAND, and RAY MAYNARD,	:
	:
<i>Defendants-Appellees.</i>	:
	:
	15-3775-cv
-----X	

**AFFIRMATION OF RIA TABACCO MAR IN SUPPORT OF MOTION BY  
*AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION;  
 NEW YORK CIVIL LIBERTIES UNION; NATIONAL WOMEN’S LAW  
 CENTER; 9to5, NATIONAL ASSOCIATION OF WORKING WOMEN;  
 A BETTER BALANCE; CALIFORNIA WOMEN’S LAW CENTER;  
 EQUAL RIGHTS ADVOCATES; FEMINIST MAJORITY FOUNDATION;  
 GENDER JUSTICE; LEGAL VOICE; NATIONAL ORGANIZATION FOR  
 WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR  
 WOMEN AND FAMILIES; SOUTHWEST WOMEN’S LAW CENTER;  
 WOMEN EMPLOYED; WOMEN’S LAW CENTER OF MARYLAND,  
 INC.; and WOMEN’S LAW PROJECT  
 FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT**

Ria Tabacco Mar declares under penalty of perjury, pursuant to 28 U.S.C.

§ 1746, that the following is true and correct:

1. I am a staff attorney at the American Civil Liberties Union (“ACLU”)

and a member of the bar of this Court.

2. I submit this affirmation in support of the motion of *amici curiae* the ACLU; New York Civil Liberties Union; National Women’s Law Center; 9to5, National Association of Working Women; A Better Balance; California Women’s Law Center; Equal Rights Advocates; Feminist Majority Foundation; Gender Justice; Legal Voice; National Organization for Women (NOW) Foundation; National Partnership for Women and Families; Southwest Women’s Law Center; Women Employed; Women’s Law Center of Maryland, Inc.; and Women’s Law Project for leave to participate in oral argument currently scheduled for September 26, 2017. *See* Fed. R. App. P. 29(a)(8) (providing that *amicus curiae* may participate in oral argument with Court’s permission). *Amici* would be represented by James D. Esseks, Director of the ACLU’s Lesbian, Gay, Bisexual, Transgender and HIV Project, who has extensive experience litigating on behalf of the constitutional and statutory rights of lesbian, gay, bisexual, and transgender people.

3. On May 25, 2017, this Court decided to reconsider en banc the issue of whether employers are free to discriminate against lesbian, gay, and bisexual people without violating Title VII’s prohibition against discrimination “because of sex.” This rehearing comes at a key moment as other Circuits consider the same question. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that sexual orientation discrimination is prohibited by Title VII’s sex provision); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017)

(holding, over a dissent, that sexual orientation discrimination is not prohibited by Title VII's sex provision), *petition for rehearing en banc pending*, No. 15-15234 (11th Cir. Mar. 31, 2017).

4. *Amici* have unique expertise regarding the history and scope of Title VII. The ACLU submitted an *amicus* brief in the first Title VII sex discrimination case heard by the Supreme Court. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that employer policy that barred hiring mothers of preschool-aged children, but not fathers, constituted unlawful sex discrimination). Since then, through its Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU has assumed a leading role in ensuring sex equality under the law and has participated as counsel or *amicus* in virtually every Supreme Court case interpreting Title VII's sex discrimination provision. *See, e.g., Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (failure to accommodate physical effects of pregnancy on same basis as other medical conditions violates Title VII); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (hostile work environment sexual harassment is created when a "reasonable person" would experience the environment as abusive); *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (finding discriminatory employer's "fetal protection" policy banning fertile women from lead-exposed jobs); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (adverse action premised on employee's failure to conform to sex

stereotype constitutes sex discrimination); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (recognizing hostile environment sexual harassment as sex discrimination prohibited by Title VII); *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (employer policy of requiring female workers to make higher pension contributions than male workers based on longer average life expectancy deemed unlawful sex discrimination); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (striking height and weight requirements for Alabama prison guards that had unlawful disparate impact on women). The ACLU also represented the plaintiff in *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), a landmark decision holding that discrimination against a transgender person is “sex discrimination” within the meaning of Title VII.

5. *Amici* also have specialized expertise in constitutional and statutory protections for lesbian, gay, and bisexual (“LGB”) people, having appeared as counsel in major cases involving civil rights of LGB people before the Supreme Court. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the Constitution guarantees same-sex couples the freedom to marry); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act). *Amici* have also appeared before this Court in cases relating to lesbian, gay, and bisexual rights. *See, e.g., Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (striking down the Defense of Marriage Act); *Able v. United States*, 155 F.3d 628

(2d Cir. 1998) (rejecting challenge to exclusion of lesbian and gay people from military service).

6. Given this expertise, *amici* submit that their participation in oral argument will assist the Court in situating the question of whether Title VII protects against sexual orientation discrimination within the history of the Supreme Court's expansive interpretation of what constitutes discrimination "because of sex." *Amici* will supplement Plaintiffs-Appellants' arguments by demonstrating how the Supreme Court's jurisprudence firmly supports the reasoning of the EEOC in its landmark ruling in *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015), that discrimination on the basis of sexual orientation necessarily turns on a consideration of an individual's sex in relation to his or her partner's sex and on sex-based stereotypes about to whom men and women should be attracted.

7. *Amici* recognize that the Court has invited both the Equal Employment Opportunity Commission and Adam K. Mortara of Bartlit Beck Herman Palenchar & Scott LLP to argue as friends of the court on either side of this appeal. *Amici* note that, while the EEOC has taken clear (and we believe correct) positions on this issue in the past, the EEOC currently lacks a full complement of Commissioners and a General Counsel, both of which will be nominated by the current federal administration sometime over the coming months.

It is not clear at this point whether the EEOC's position on the central issue in this case will change. In light of this very same uncertainty regarding the EEOC's possible future change of position, the United States Court of Appeals for the Sixth Circuit recently allowed an individual charging party, represented by the ACLU, to intervene in a Title VII discrimination case originally brought only by the EEOC as plaintiff. *EEOC v. R.G. & G.R. Harris Funeral Home*, No. 16-2424, ECF No. 28 (6th Cir. Mar. 27, 2017) (granting charging party, Aimee Stephens, intervention in EEOC's litigation about her employment). In granting that motion, the Sixth Circuit observed that "[t]he EEOC's recent actions imply that the new administration will less aggressively pursue transgender rights. Thus, while Stephens's fears that the EEOC will not support her case or withdraw from her case have yet to crystallize, the totality of the circumstances supports permitting her to intervene."

8. In light of the possibility that the EEOC could change its position on the central issue in this appeal between now and oral argument, *amici* respectfully submit that allowing an outside advocate to argue for coverage under Title VII would assist the Court's deliberations.

9. James D. Esseks would present oral argument for *amici*. Mr. Esseks is the Director of the Lesbian, Gay, Bisexual, Transgender ("LGBT") and HIV Project of the American Civil Liberties Union and is an expert in United States

constitutional and civil rights law as it pertains to lesbian, gay, bisexual, and transgender people.

10. Mr. Esseks graduated from Harvard Law School in 1991 and spent eight years litigating employment discrimination cases with the law firm of Vladeck, Waldman, Elias & Engelhard, P.C. (now known as Vladeck, Raskin & Clark, P.C.) in New York City. During that time, Mr. Esseks developed an expertise in litigation under Title VII of the Civil Rights Act of 1964.

11. Mr. Esseks has been counsel in cases about the central issue in the present appeal, namely whether statutory protections against sex discrimination cover discrimination against LGBT people. *See, e.g., Cargian v. Breitling USA, Inc.*, No. 16-3592-cv, ECF No. 81 (2d Cir. Apr. 19, 2017) (petition for initial hearing *en banc* on the question of whether Title VII's sex provision prohibits sexual orientation discrimination); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (holding that Title IX's ban on sex discrimination covers discrimination against transgender people), *cert. granted*, 137 S. Ct. 369 (2016), *vacated and remanded*, 137 S. Ct. 1239 (2017); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (holding that discrimination against a transgender person is "sex discrimination" within the meaning of Title VII).

12. Under Mr. Esseks's supervision, the ACLU has filed friend-of-the-court briefs addressing the scope of Title VII's ban on sex discrimination before

the three-judge panel in this case (ECF No. 219) as well as in *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017). He has also filed friend-of-the-court briefs in similar cases pending in other circuits, including *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc) (amicus in support of rehearing en banc); *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) (amicus in support of rehearing en banc); and *EEOC v. Scott Medical Health Center, P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016).

13. Mr. Esseks has been direct counsel in numerous constitutional cases about the freedom to marry for same-sex couples, including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the Constitution guarantees same-sex couples the freedom to marry), and *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (striking down the Defense of Marriage Act), *aff'd*, 133 S. Ct. 2675.

14. Mr. Esseks has argued appeals in United States Courts of Appeals for the Fourth and Seventh Circuits, in the Kansas Supreme Court, in the New York Court of Appeals, and in the Appellate Division of the New York Supreme Court, in addition to arguing motions and trying cases before many lower state and federal courts.

15. Plaintiffs-Appellants do not oppose *amici's* motion for leave to participate in oral argument. Defendants-Appellees oppose this motion.

16. For the above reasons, *amici curiae* request leave of the Court to participate in oral argument on September 26, 2017 in support of the position that sexual orientation discrimination is prohibited by Title VII's sex provision.

Dated: June 26, 2017  
New York, New York

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