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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
WESTERN SECTION

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Sexual Minorities Uganda	.	
	.	Civil No.
v.	.	12-30051-MAP
	.	
Scott Lively	.	
.....		

Before the Honorable Michael A. Ponsor,
United States District Court Judge,
Motion Hearing Held on **January 7, 2013.**

APPEARANCES:

See the following page.

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None

1 **(Hearing commenced at 11:01.)**

2 THE CLERK: Judge, this is the matter of Sexual
3 Minorities Uganda versus Scott Lively, Civil Action
4 12-30051.

5 THE COURT: We're here this morning for argument
6 on the motion to dismiss that has been filed by the
7 defendant in this case.

8 What I want to do is to begin by having counsel
9 introduce themselves for the record, and then I think I
10 would like to tee up some issues that are of particular
11 importance to me.

12 I want to note that the argument that we're hearing
13 this morning is being broadcast remotely to two other
14 courtrooms so that we can accommodate the people who are
15 here to see the argument this morning, and I particularly
16 want to welcome everyone who has come here to see the
17 argument. I always feel very pleased when the people
18 whose interests are most directly affected come in to see
19 what we do this morning.

20 I hope, and plan, to keep this argument to about an
21 hour and a half. I know that with the very thorough
22 briefing that you've done, we can easily argue for the
23 entire day and probably long into the night with regard to
24 the many issues that have been raised.

25 I have some particular issues that are of importance

1 to me and as I go through my preamble I want to emphasize
2 those and perhaps steer your argument to areas that are of
3 most interest to me.

4 I'm going to ask counsel to begin by introducing
5 themselves. I think I'll start over here to my far right
6 and I'll just sweep to the left here.

7 MR. MORAN: Thank you, Your Honor. May it
8 please the Court, my name is Philip D. Moran and I'm local
9 counsel for the defendant Scott Lively.

10 THE COURT: M-o-r-a-n?

11 MR. MORAN: Correct.

12 THE COURT: Okay. And seated to your left is?

13 MR. MORAN: Is the defendant Scott Lively.

14 THE COURT: All right. Very good.

15 MR. CRAMPTON: Good morning, Your Honor. May it
16 please the Court, Steve Crampton with Liberty Counsel.

17 THE COURT: C-r-a-m-p-t-o-n?

18 MR. CRAMPTON: That's correct.

19 THE COURT: Very good.

20 MR. MIHET: Good morning, Your Honor. Horatio
21 Mihet on behalf of the defendant Scott Lively.

22 THE COURT: Would you spell your last name,
23 please?

24 MR. MIHET: M-i-h-e-t.

25 THE COURT: Okay. Thank you very much.

1 MS. SPEES: Good morning, Your Honor. I'm Pam
2 Spees with the Center for Constitutional Rights here on
3 behalf of the plaintiffs, Sexual Minorities Uganda, who's
4 represented today by Pepe Onzierna who sits to my far
5 right.

6 THE COURT: Okay. Next?

7 MS. SHAH: Good morning, Your Honor. My name is
8 Jeena Shah and I'm also with the Center for Constitutional
9 Rights.

10 THE COURT: S-h-a-h?

11 MS. SHAH: Yes.

12 THE COURT: Thank you.

13 MR. AZMY: Good morning, Your Honor, Baher Azmy
14 from the Center for Constitutional Rights; A-z-m-y.

15 THE COURT: All right.

16 MR. RYAN: Good morning, Your Honor. Luke Ryan
17 from the law firm of Sasson, Turnbull, Ryan & Hoose for
18 the plaintiffs Sexual Minorities Uganda.

19 THE COURT: Very good. And I know that Ms.
20 Spees referred to you in your introduction, but perhaps
21 you can introduce yourself for the record and spell your
22 last name?

23 MR. ONZIERNA: Pepe Onzierna, O-n-z-i-e-r-n-a,
24 for Sexual Minorities Uganda.

25 THE COURT: Very good.

1 All right. Well, let me see if I can tee up the
2 issues here. I can't help but mentioning that, like many
3 people in this courtroom, I've actually been to Uganda. I
4 was in Kampala many years ago. It's a beautiful city and
5 a wonderful country, and I feel privileged to be here
6 adjudicating issues that affect the people of Uganda
7 because my visit there impressed me so much with the
8 country and its people.

9 This is a lawsuit brought, as I understand it, by the
10 plaintiff which is an umbrella organization with its
11 headquarters in Kampala, and it is an advocacy group for
12 lesbians, gay, bisexual, transgender and intersex people.

13 The defendant is a minister, an evangelical minister,
14 at least described as an evangelical minister, an attorney
15 and author, and is an individual whom the plaintiffs
16 characterize as having made statements and writings that
17 identify the so-called gay movement as evil and
18 destructive, and, according to the plaintiffs at least,
19 has advocated the criminalization of homosexuality and
20 associations and advocacy related to homosexuality. Of
21 course, these are only allegations contained in the
22 complaint and they remain to be proved by the plaintiff.

23 The defendant, Reverend Lively, is alleged to have
24 visited Uganda beginning in 2002 and in connection with
25 his visit to Uganda was advocating his views with regard

1 to homosexuality which has had destructive effects on the
2 plaintiff.

3 The lawsuit is brought in five counts. It alleges a
4 crime against humanity under the Alien Tort Statute which
5 the plaintiffs contend is actionable based upon its
6 advocacy of persecution of gay people.

7 The complaint alleges both individual liability,
8 accessory liability, and conspirator liability for the
9 alleged crimes against humanity.

10 There are also two claims, the final two counts, two
11 of the five counts that have been offered under
12 Massachusetts state law, one for conspiracy and one for
13 negligence.

14 There is quite a lengthy list of defenses that have
15 been offered by the defendant in support of the motion to
16 dismiss. One of the defenses is one that I would suggest
17 we don't really need to get into here. It would be
18 time-consuming and it is an issue that is currently before
19 the Supreme Court.

20 The defense has offered the argument that the Alien
21 Tort Statute simply does not give this Court any
22 jurisdiction over activities that occur in another
23 country, and the Supreme Court is addressing that issue
24 probably almost as we speak in the -- I'm probably going
25 to mispronounce it, but it's the Kiobel, K-i-o-b-e-l,

1 versus Royal Dutch Petroleum case which came up from the
2 Second Circuit.

3 The only question I will have with regard to that is
4 should I wait until the Supreme Court makes its decision
5 before ruling on the motion to dismiss? The Supreme Court
6 may very well decide, or at least could possibly decide,
7 that there simply is no jurisdiction for activity which
8 takes place in a foreign county.

9 If they make that decision, they will be overturning
10 more than 30 years of appellate decisions which go the
11 other way starting with the 1980 decision in the Second
12 Circuit. But some of the judges at least have -- the
13 justices have at least hinted pretty strongly that they
14 want to take a look at that, but I'd prefer not to get
15 into that argument. It's lengthy and it would bog us
16 down. The Supreme Court will be making the decision on
17 that. The only comment I would be interested is whether
18 you think I should wait and let the Supreme Court make
19 that decision before I go on with my motion to dismiss.

20 There is another hierarchy of decisions though or
21 arguments though that are offered by the defendant. I may
22 -- I hope I won't catch you too much by surprise,
23 ordinarily it would be the defendant that would lead off
24 arguing. I may ask the plaintiff to go first here because
25 I am concerned about the First Amendment issue and that's

1 the issue that seems to me to be the one that I could most
2 helpfully receive argument on.

3 We all know that our country is committed to the
4 notion that people should have free speech and free
5 expression. And as one of my heroes, Tony Lewis, has said
6 that includes the protections for speech that we hate and
7 he has written a book by that name.

8 I know that the plaintiffs here are deeply offended
9 and find despicable many of the sentiments that they
10 allege have been expressed by the defendant here, but this
11 case exists at a crossroads between two very basic values
12 that our country holds perhaps closest to its national
13 heart and its national culture. And that is, one, that
14 all groups should be treated equally and should have the
15 same access to political and social rights that everyone
16 else does. We treat everyone equally. And, secondly, we
17 treasure, we value, and we revere the right to free
18 speech.

19 So the question that I'm probably going to lob to the
20 plaintiffs first is what has the defendant here done
21 beyond talking, beyond speech, beyond expression of his
22 opinion that should subject him to liability under the
23 constitutional standards that we hold so dear in our
24 country?

25 I know that there is an allegation that the defendant

1 here has engaged in persecution of this discrete group of
2 people within Uganda, and that he has worked with
3 representatives of the Ugandan government in order to
4 carry out a campaign of persecution against gay people.

5 I'm going to use gay people as a general phrase. I
6 don't mean to be insensitive, but I know it includes many
7 different people who approach their sexuality in various
8 ways. I'm just going to use that as a general phrase. I
9 hope that will be all right.

10 As I look at the complaint, I'm frankly struggling to
11 see what the actionable behavior is here beyond expressive
12 behavior that is the subject of the lawsuit.

13 The other strong argument that the defendant offers
14 is that this type of conduct, even if it weren't protected
15 by the First Amendment, is not the kind of conduct that
16 constitutes persecution that is actionable under norms of
17 international law and therefore a violation of the ATS.
18 I'm interested in hearing a little more from the plaintiff
19 on exactly what this means.

20 I'm handicapped a little bit because persecution is a
21 fluid kind of word. We use it colloquially and we use it
22 as a legal term of art.

23 If we're at a gathering of people and someone begins
24 yelling at somebody else because, let's say, they're
25 Lutherans and they don't like Presbyterians and they begin

1 accusing someone of being an evil person because they're a
2 Presbyterian rather than a Lutheran or because they're
3 left-handed rather than right-handed, in a broad sense you
4 could say I'm being persecuted here. You're ruining my
5 evening. You're being a jerk towards me, and at the same
6 time we wouldn't say that that would constitute a
7 violation of any norm of international law.

8 What is it here that carries the case over the
9 boundary into a violation of norms of international
10 conduct that constitute a violation of the ATS?

11 For the moment I don't think I need argument as to
12 whether this particular group enjoys protection under the
13 statute if the egregiousness of the behavior is strong
14 enough to carry it across the border. I'll hear from the
15 defendants on that in a minute but I don't need help on
16 that issue from the plaintiffs at the present time,
17 although I'll give you a chance to respond to whatever the
18 defendant's arguments are.

19 So I'm eating up a lot of your time here with my own
20 talking. That's what's of most interest to me so I will
21 let you lead off, Ms. Spees, and then we will hear from
22 the defendants and we'll go back and forth here, and we'll
23 try to see if we can get out of here by 12:30 or so.

24 MS. SPEES: Thank you, Your Honor.

25 We fully appreciate the Court's concerns around the

1 First Amendment, and as we stated in the brief Sexual
2 Minorities Uganda is bringing this case in a way that is
3 fully consistent with and respectful with the First
4 Amendment doctrine.

5 THE COURT: All right.

6 MS. SPEES: And, you know, in the Supreme Court
7 even First Amendment absolutist Justice Hugo Black said
8 "It has never been deemed an abridgement of freedom of
9 speech to" -- well, if you'll allow me, I'll just read
10 part of his quote.

11 "It has never been deemed an abridgment of freedom of
12 speech oppressed to make a course of conduct illegal
13 merely because the conduct was imparted, initiated,
14 evidenced, or carried out by means of language, either
15 written -- spoken, written, or printed."

16 That has been seconded by Justice Brennan as well who
17 also expanded First Amendment protections for the media in
18 defamation claims in New York Times v. Sullivan. He
19 authored that opinion but he said essentially the same
20 thing in Brown v. Hartlage.

21 The issue here is if we stripped away every single
22 thing that Mr. Lively uttered in public in Uganda, we
23 would still have underlining conduct that makes him liable
24 for the persecution.

25 Now let me just address the persecution issue because

1 I do agree that we often use it as shorthand for things,
2 but the legally operative -- the legal definition of
3 persecution under international law is simply -- and I say
4 simply in quotes -- the severe deprivation of fundamental
5 rights on the basis of identity, and that's what we have
6 here.

7 If I can just provide an example, if Out Now, which
8 is an organization based here in Springfield, if their
9 director's home was raided by the police and a person
10 inside was taken to the police and subjected to cruel and
11 inhumane and degraded treatment and their office equipment
12 was seized simply because they were gay, or if staff
13 members were arrested while silently and otherwise legally
14 protesting their exclusion from the country's HIV/AIDS
15 policies simply because they were gay, or if they couldn't
16 meet, if they couldn't meet here in Springfield or have
17 trainings or consultations, there would be no question
18 that they would have a cause of action against those who
19 were responsible for bringing those violations about under
20 42 U.S.C. 1985(3), including the private actors.

21 The thing that makes persecution different and more
22 challenging, but not impossible to prove, is that those
23 violations have to be happening in the context of a
24 widespread or systematic attack against that population,
25 and we've pled that sufficiently, and more than

1 sufficiently, I think in the complaint that there's a
2 context in which those violations are happening.

3 I would say that the conduct of Mr. Lively in helping
4 to bring those violations about is his planning with his
5 co-conspirators in Uganda over a period of ten years to
6 increase and deepen this kind of harm to specifically
7 strip away these rights because we hear -- and this is
8 where his speech becomes evidence, because we hear him
9 calling for the criminalization of their advocacy.

10 He tells us you have got to silence them. You have
11 got to ban gay pride parades. The legislation which he
12 consults about includes the severe criminalization of any
13 kind of advocacy. It bans organizations.

14 We have him -- he's not a passer-through in Uganda.
15 He's somebody that is very invested in this particular
16 outcome and he is helping them get there. So if he were
17 never saying anything in public but he were going there
18 and he was helping them plan and strategize and come up
19 with ways of bringing these types of violations about, we
20 would have a claim against him. It would just be more
21 difficult to prove because persecution is a specific
22 intent crime. You have to intend to discriminate on the
23 basis of that group identity.

24 So how do we know that he discriminates? He tells
25 us, he actually says in those terms you have to

1 discriminate; discrimination on this basis is good and
2 that's how we know. That's how we have some insight both
3 into his intent. He specifically intends this particular
4 population basically to tear their rights to speech and
5 assembling and association to shreds, and we know that his
6 speech also gives us insight into the nature of the
7 relationship with his co-conspirators.

8 THE COURT: Let me just insert a question. The
9 defendant's memorandum does a pretty good job of ticking
10 off every single incident which occurred in Uganda between
11 2002 and 2012 and, at least from their point of view,
12 pointing out that there is no sufficient allegation of any
13 direct association between the defendant here and the
14 activities of these other individuals in Uganda.

15 There are individuals such as Mr. Langa, Mr. Ssempe,
16 Mr. Buturo, Mr. Bahati, these are individuals who are
17 doing things in Uganda. There are raids that are taking
18 place; they are breaking up conferences; there are people
19 who are taken into custody. There are terrifying outings
20 of Mr. Kato.

21 There are other things that are occurring, but their
22 argument is that Mr. Lively's association with these
23 activities is too attenuated. In fact, they would say
24 it's not even attenuated. It's entirely independent --
25 apart from the fact that he's visited Uganda on occasion

1 -- to make him responsible for the physical conduct of
2 these other individuals within Uganda.

3 What do you say to that?

4 MS. SPEES: Well, there are several responses to
5 that. One is he was clearly part of the conspiracy and
6 those harms are a direct result of that conspiracy, and he
7 doesn't need to have committed those harms directly
8 himself. It's enough that he agreed and formed part of
9 this combination of people with the specific intention of
10 bringing those types of harms about, and that's exactly
11 what he has been working to achieve. That is not just a
12 reasonable or foreseeable result, that's the intended
13 result of his deep work with Stephen Langa, Martin Ssempe,
14 David Bahati, and James Buturo.

15 The other piece of this is that we've also alleged an
16 aiding and abetting claim, and there you don't need
17 intent. All you need is the knowing assistance provided
18 to this effort that results in the harms and we have that.

19 It's very clear he tells us that he goes there in
20 2009 -- and if I can, Your Honor, just explain why 2009 is
21 important because that conference that we plead in the
22 complaint occurs three months after a high court decision
23 ruled that you cannot deprive people of their basic
24 fundamental rights to be free from arbitrary governmental
25 interference, to be arbitrarily detained and subject to

1 cruel, inhumane, and degrading treatment simply because
2 they're gay.

3 Stephen Langa, his co-conspirator turned long-time
4 ministry partner says, oh, no -- oh, yes, we can and he
5 pulls together this conference three months later and
6 that's when Mr. Lively is called in again to headline and
7 help bring this about. And he even acknowledges, he says
8 I went there so that they would have an easier time
9 implementing this harsh legislation, and the legislation,
10 Your Honor, is just more evidence of his involvement in
11 the conspiracy.

12 THE COURT: It's never been passed.

13 MS. SPEES: It's never been passed, but the
14 harsh effects that it seeks to impose are already being
15 carried out.

16 So 2009 is important because it tells us, it shows us
17 why are they combining in 2009? Because it's in direct
18 response to that high court decision in Uganda which says
19 it's illegal, it's illegal here under our constitution in
20 Uganda to deprive people of their rights simply because
21 you think they're gay and so in that sense 2009 is
22 important.

23 So he goes there and he's giving substantial
24 assistance. He acknowledges that. He claims with Stephen
25 Langa that their work, that their campaign, they have

1 joint ownership over it, had the effect of a nuclear bomb
2 and he was proud of that. That's what he wanted, and we
3 know that part of that effect of the nuclear bomb was to
4 silence and criminalize any form of speech or advocacy by
5 LGBTI people. We know that that was an intended effect
6 because he tells -- he instructs that repeatedly. That is
7 what he wants to see happen.

8 THE COURT: All right. Let me put the question
9 maybe in a different way and it would help to make it a
10 little bit more concrete for me and again to kind of
11 display what it is that I'm struggling with.

12 You've asked for injunctive relief as part of the
13 complaint here as well as monetary damages, and I'm kind
14 of fanaticizing or trying to imagine how I would craft an
15 injunctive order that would restrict the activities of the
16 defendant here that would not transgress the First
17 Amendment.

18 Am I suppose to issue an order saying you can never
19 say anything about homosexuality again? You can never
20 meet with people or have a meeting with people who feel
21 the same way you do? You can never advocate for this?
22 That's -- obviously I can feel something inside me tensing
23 up when I think about the possibility of doing that.

24 MS. SPEES: Right.

25 THE COURT: So what kind of injunctive relief

1 are we talking about here that would be consistent with
2 the First Amendment?

3 MS. SPEES: Right, and the injunctive relief
4 goes to the association and standing and not SMUG acting
5 on its own behalf of the harms it itself has suffered.

6 THE COURT: Right.

7 MS. SPEES: So SMUG in no way is out to silence
8 Mr. Lively. That's the irony of this case is because the
9 only party whose rights to speech is simply an association
10 have been violated is the plaintiffs, Sexual Minorities
11 Uganda, and the only party that has actively sought to
12 silence them and deprive those rights and tear them to
13 shreds on the Uganda side is Mr. Lively. That's the irony
14 of this situation, and at this moment in time we know
15 that, as I said, if he never said anything in public, his
16 work to bring about this form of persecution is the
17 conduct we're talking about, the agreement.

18 He can speak as much as he wants obviously. That's
19 not something that SMUG is trying to achieve here. He is
20 entitled to his beliefs against their very existence, but
21 the injunctive relief could take the form of, you know,
22 prohibiting Mr. Lively from working to strip those rights
23 away.

24 I agree it's a novel situation. We don't know what
25 fact -- what additional facts would be yielded through

1 discovery that would tend to show exactly the nature of
2 how this worked. But as you said, Your Honor, this is at
3 a crossroads of First Amendment and equality and equality
4 is the *sine qua non* of how we want to function in a
5 democracy and that's exactly what he is working against.

6 THE COURT: Let me ask you a couple more
7 questions and I would like to hear from the defendant on
8 this particular issue.

9 There are certain allegations which could have been
10 offered in the complaint which I don't see have been
11 offered which would have given you a little more fire to
12 the complaint.

13 For example, there were raids in 2012 on the
14 plaintiffs' workshop and conference. There was a raid in
15 2005 on the home of Mr. Mukasa and the arrest of his house
16 guest, Ms. Oyo, but I don't see that there's any
17 allegation that the defendant here met with these people
18 on such and such a date. He met and he said, good, raid
19 that person's house. Arrest Ms. Oyo. I think we should
20 break up this conference; send the police in there. This
21 is part of our approach.

22 I agree with you that it probably would not be
23 necessary -- although I'm going to hear from the
24 defendants -- it probably would not be necessary for you
25 to allege that the defendant here was actually leading a

1 mob of people that attacked people who were gay or people
2 whose conduct he objected to, but I don't see even
3 allegations that he met with the sort of hands-on kind of
4 involvement in direct physical brutality; that he is sort
5 of perhaps a spiritual inspiration to the people who were
6 doing that kind of thing because of his writings and his
7 speaking, but I'm having a hard time seeing where he
8 crosses over the boundary again.

9 There isn't any allegation, is there, that he
10 actually helped to draft the legislation or met with and
11 developed strategies for attacking gay people or anything
12 of that sort, or is there? Or is that something that you
13 think you might discover during discovery?

14 MS. SPEES: There are allegations in the
15 complaint that he did assist in the development of that
16 legislation, and there are allegations in the complaint
17 that he has encouraged the criminalization.

18 I would say certainly at this point, Your Honor, but
19 even I think at the end of the offering of proof, it's not
20 necessary when you have a conspiracy pled that he know of
21 all of the details, all of the specific details. It's
22 enough that he was part of that agreement and intended to
23 bring the kind of harm that resulted, which is exactly
24 what we have here.

25 Even under the aiding and abetting theory of

1 liability, all he needed to have done is provide
2 substantial assistance or practical assistance and
3 encouragement to the effort that he knew would lead to
4 those results and we've pled that throughout the
5 complaint.

6 But you are correct that there is no specific
7 allegation that he singled out SMUG or went after them,
8 but that's something that we don't know. It could be at a
9 point later in the proceedings that we actually learn, we
10 learn more. But at this point and at this stage in terms
11 of what is required to be pled, we have pled that he was
12 part of this conspiracy, this agreement, and this
13 combination of people who are actively seeking to bring
14 those harms about and those harms occurred as a result of
15 the conspiracy and we know that because of his speech.

16 THE COURT: Okay. Thank you.

17 I'm going to hear on this point from the defendant,
18 and as I bowled some questions towards plaintiffs'
19 attorney that had some sort of tough rhetorical spin on
20 them, I'll do the same thing to the defendant here and
21 give you an opportunity to be heard.

22 This is a motion to dismiss. The question is whether
23 the allegations are sufficient or whether the plaintiff
24 should be given an opportunity to take discovery on this.

25 The First Circuit has made it clear that in a

1 situation where the defendant may have greater control of
2 the information obviously than the plaintiff has, that
3 courts should be cautious about granting motions to
4 dismiss and allowing plaintiffs to go forward with
5 discovery.

6 To put it a little bit rhetorically here, isn't the
7 plaintiffs' allegation here that not just that your client
8 was speaking but that he was kind of a minister of
9 propaganda for a conspiracy that involved some people
10 taking physical action, some people taking legislative
11 action, some people taking other sorts of direct physical
12 or legal initiatives against the gay population, and his
13 job, in coordination with all these other people they
14 allege -- I know they have to prove it and I know that you
15 would repeatedly deny it -- but his role in the conspiracy
16 was as a sort of minister of propaganda?

17 He was the one to keep the rhetoric turned up; he was
18 the one to inspire people; he was the one deliberately
19 intending that this be carried out, and when someone's
20 activities go that far, haven't we crossed the boundary
21 from protective First Amendment activity into an area
22 where you have the sort of brutal deliberate activity
23 that's intended to harm someone else in combination with
24 others who are actually doing the dirty work or the
25 dirtier work?

1 So again that's a little bit of an overheated way to
2 put it, but it helps me to frame it for myself as I think
3 about the arguments.

4 MR. MIHET: Thank you, Your Honor, and good
5 afternoon to you.

6 It's our belief that this case represents an
7 unprecedented attack upon the sovereignty and sanctity of
8 the United States Constitution by a foreign organization
9 that calls itself SMUG.

10 SMUG is clearly offended by what Mr. Lively has said
11 in Uganda --

12 THE COURT: Right.

13 MR. MIHET: -- and it has brought this lawsuit
14 against Mr. Lively predicated entirely on a purposeful
15 confusion between what Mr. Lively has said and between
16 what a handful of other people, whom Mr. Lively has never
17 even met, have done years after the speech that he
18 allegedly engaged in.

19 Today we will endeavor to cut through that confusion
20 and to show the Court that SMUG has not pled and cannot
21 plead any legally cognizable link between Mr. Lively's
22 pure political speech that is constitutionally protected
23 and the so-called acts of persecution that are being
24 complained of.

25 Now as Your Honor has noted, Mr. Lively's alleged

1 crime against humanity here is not that he perpetrated
2 these acts himself. SMUG has already sued the direct
3 actors in Uganda. It's had success in getting damages
4 against the police, crippling damages, and injunctions
5 against tabloids that have published incitement, and has
6 reaffirmed the rights of all Ugandan people under the
7 constitution. We applaud those rulings, as Mr. Lively has
8 done himself.

9 Mr. Lively's crime against humanity then is not that
10 he gave the police maps and meeting times and said go and
11 break up those meetings. It's not that he authored the
12 incitements that were published in the papers or that he
13 gave the papers the names of people to publish and to out.

14 What is Mr. Lively's crime against humanity, Judge?
15 What has he done that puts him, according to SMUG, in the
16 same category as the Nazi War criminals that put the
17 cyanide capsules in the gas chambers in Auschwitz?

18 According to SMUG in its complaint, his crime is that
19 he spoke. And SMUG alleges that Mr. Lively when he was in
20 Uganda did primarily two things: One, he conflated
21 homosexuality with a predilection against or violence
22 against children; and, two, he argued that Ugandan's laws,
23 which already criminalized homosexuality, not be relaxed.
24 Those are the two things, and this is not an
25 oversimplification of what SMUG alleges.

1 If you look at page 43 of the complaint, Judge, and I
2 think I can pull it up here, at the bottom of -- I'm
3 sorry, page 14, paragraph 43, at the bottom where SMUG
4 begins to describe the so-called conspiracy, in paragraph
5 44, on the following page, SMUG tells us that there is a
6 so-called conspiracy between Mr. Lively and four other
7 Ugandan people, four specific individuals: Ssempe,
8 Bahati, Buturo and Langa. Then SMUG devotes separate
9 sections in the complaint to each one of those five
10 so-called co-conspirators. Mr. Lively's section begins
11 right there on that same page and goes on for twelve
12 pages. There is where we're told what Mr. Lively
13 supposedly said and did.

14 Now, Judge, on the following page you'll see in
15 paragraph 65 this is where SMUG alleges the two things:
16 Advocacy of not relaxing the laws criminalizing advocacy,
17 and, two, conflating homosexuality with violence.

18 THE COURT: Right, not relaxing laws
19 criminalizing homosexuality.

20 MR. MIHET: That's right. So then there are two
21 subsections with those headings where SMUG details Mr.
22 Lively's speech in those categories, and, Your Honor, that
23 is it. Those are -- that's the entirety of his
24 contribution to this so-called conspiracy.

25 We want the Court to look at paragraph 93 of the

1 complaint because paragraph 93 comes at the very end of
2 the section where SMUG details Mr. Lively's supposed
3 contribution. We would submit this is the most important
4 paragraph in the entire complaint. It encapsulates the
5 crux of SMUG'S claim and this is what SMUG alleges.

6 That "By repeatedly characterizing the LGBTI
7 community as rapists and murderers and child abusers --
8 not to mention possessing genocidal tendencies of the
9 Nazis and Rwandan conspirators -- Lively deliberately
10 invited, induced and encouraged a proportional response
11 from Ugandans, i.e., severe repression, arrest certainty
12 and even violence."

13 Your Honor, no matter how much SMUG protests that
14 this case is not about Mr. Lively's speech, no matter how
15 much it denies that it is not claiming harm through
16 invitation, inducement or encouragement of unlawful
17 activity, no matter how much diversion SMUG tries to
18 create with talk of conspiracy to try to get around the
19 pesky protections of the First Amendment, Judge, we would
20 ask the Court to keep coming back to paragraph 93 of the
21 complaint because it unmaskes the true nature of SMUG's
22 complaint and it shows that it is in fact presenting a
23 classic incitement claim that must be submitted to the
24 Brandenburg test under our Constitution.

25 Your Honor, with respect to the First Amendment,

1 there is no question that Mr. Lively as an American
2 citizen enjoys a First Amendment right to engage in
3 political advocacy in pure speech even of unpopular or
4 controversial subject.

5 There's also no question that Mr. Lively did not
6 check that precious First Amendment right at the airport
7 on his way to Uganda, and that he enjoyed the right there
8 as he does in the United States. I have some detail on
9 that argument if the Court would like me to present that.

10 THE COURT: No, that's all right. I'm going to
11 -- at least for the moment I'm going to accept that Mr.
12 Lively does not lose his First Amendment rights when he
13 goes to Uganda.

14 MR. MIHET: Very good.

15 Well then, Your Honor, for well over two decades now
16 the Supreme Court, since the Brandenburg decision -- just
17 give me one second to catch up here -- the Supreme Court
18 says the Brandenburg decision "has held that political
19 advocacy of unpopular ideas even of outright criminal
20 conduct is protected by the First Amendment and immune
21 from criminal or civil liability, unless it is both
22 directed and likely to incite imminent lawless conduct."

23 THE COURT: Right. Let me just insert a
24 question. Isn't that exactly what the plaintiffs have
25 alleged?

1 MR. MIHET: No, Your Honor.

2 THE COURT: They say it was specifically
3 directed towards inciting imminent lawless activity; that
4 he knew that in -- again this is just the complaint now.
5 They have to prove it if they get past your motion to
6 dismiss, but it sounds to me that you've articulated
7 pretty clearly what the plaintiffs have articulated. That
8 he knew that the speech that he was giving actually would
9 or very likely would have resulted in physical violence
10 against the members of the plaintiffs' organization and
11 that he did it with that intention. That's I guess --
12 maybe I've missed something, but if I boiled down what the
13 plaintiffs' complaint says, that's basically what they
14 say, isn't it?

15 MR. MIHET: No, Your Honor.

16 THE COURT: Okay.

17 MR. MIHET: In fact, I would submit to the Court
18 that SMUG knows that it cannot meet the incitement test
19 under Brandenburg and so it has tried to move away from
20 that with the conspiracy allegation that I'll get into.
21 But in Hess v. Indiana, the court, after Brandenburg,
22 applied the Brandenburg imminence test and said that an
23 exhortation to lawful violence when somebody says we will
24 take back the street violently later, even though it was
25 assumed that later meant later that day, the Supreme Court

1 in Hess said that is not imminent.

2 Your Honor, if later that day is not imminent, later
3 this decade cannot possibly be imminent. The actions that
4 SMUG alleges, the eight specific acts of persecution took
5 place years, not days, not weeks, but years after the
6 speech in 2002 and 2009 that they complain of.

7 I submit to you that SMUG knows it cannot meet the
8 incitement test under Brandenburg. It doesn't even try to
9 do that in its brief. It simply says that the incitement
10 test doesn't apply because First Amendment doesn't cover
11 conspiracy.

12 Your Honor, if that's the crux of this case, then
13 they are merely placing a conspiracy label in a
14 transparent attempt to vitiate the constitutional
15 protection of Brandenburg.

16 The Supreme Court said in NAACP v. Button that "A
17 state cannot foreclose the exercise of constitutional
18 rights by mere labels."

19 Your Honor, how do we know that SMUG is merely using
20 clever labels rather than stating a valid conspiracy
21 claim? Three clues that combine, I submit, leave no doubt
22 that that is what is happening here. First, look again at
23 paragraph 93, Judge, classic invitation, inducement, and
24 encouragement claim under Brandenburg.

25 Then, second, if you look at the so-called conspiracy

1 that SMUG alleges --

2 THE COURT: Let me just get back to paragraph 93
3 for a second. Again I may be just repeating something and
4 I'll hear from Ms. Spees in a minute in response, but I
5 have a feeling that the plaintiffs would say if you want
6 us to stick the word deliberate incitement with knowledge
7 of likely catastrophic consequences into that paragraph,
8 fine, we'll insert it. That's what we think. That's what
9 we're alleging. That's essentially what they're saying
10 and you're saying --

11 MR. MIHET: As a matter of law under Hess that
12 cannot be so because also under the Supreme Court Iqbal
13 and Twombly decisions, mere thread bare recitals of
14 elements of a claim do not suffice.

15 They have to plead facts and the facts that they
16 plead in their own complaint show that these eight acts of
17 persecution took place literally years. There has been no
18 case from the Supreme Court to the lower courts that have
19 found imminence in activity that took place years after
20 the so-called speech, Judge.

21 THE COURT: Okay. Let me insert another
22 question and again this -- well, there are allegations
23 here of private meetings between your client and four or
24 five -- and of named Ugandans who they allege were
25 engaging in this campaign of retaliation against people

1 based on their sexual orientation.

2 They suggest that they should be entitled to take
3 discovery perhaps from other people at those meetings to
4 know what was going on and that this could possibly result
5 in the disclosure of some type of smoking gun showing even
6 more -- from their point of view they've already alleged
7 enough, but showing a higher degree of coordination and
8 teamwork between your client and the individuals in
9 Uganda.

10 Should I give them an opportunity to take that
11 discovery and give you another shot at the motion for
12 summary judgment and see where we are then?

13 MR. MIHET: No, Judge, because to get to
14 discovery they have to state a valid claim and they have
15 not stated a valid claim here with the facts that they
16 have.

17 They cannot put away thread bare recitals of a claim
18 and say, Judge, let us get to discovery in order to
19 support the thread bare recitals. That's not how it works
20 under Iqbal and Twombly.

21 THE COURT: Right.

22 MR. MIHET: They have to actually plead the
23 facts now and they have not pled those facts, Judge.

24 Let me demonstrate to the Court how this alleged
25 conspiracy is not really cognizable under the law. When

1 you look at what they allege in paragraph 64 of the
2 complaint, they allege that Mr. Lively engaged in this
3 conspiracy with four other people, and then they take all
4 the way to page 41 of the complaint to discuss what each
5 of those five people have done.

6 Now if the complaint stops at page 41, then we don't
7 need to be here because they haven't described any actual
8 persecution. Up to page 41 we've got pure political
9 speech by various people and it's only on page 42 of the
10 complaint that the acts, the eight acts of persecution are
11 being alleged.

12 Now, starting with page 42 SMUG alleges that the
13 police engaged in 2005 raids, 2008 arrests, 2012 raids.
14 They allege that Simon Lokodo, not one of the five people
15 in the conspiracy but another individual, threatened to
16 criminalize and shut down a clinic. Not actually shut it
17 down, but threatened to shut it down.

18 This is where they allege that the Attorney General
19 and the broadcasting counsel suspended a radio station
20 manager for interviewing a lesbian activist. This is
21 where they allege that the tabloids published the outings
22 and the incitements, and, lastly, this is where they
23 alleged that unnamed private actors engaged in
24 discrimination.

25 Now here's the key, Judge. Nowhere in the 13 pages

1 and 64 paragraphs that describe this persecution does SMUG
2 allege that Mr. Lively did anything. Not one thing.

3 In fact, in the first installment of the complaint
4 they omitted Mr. Lively's name entirely from that section.
5 Now we filed a motion to dismiss and we pointed out this
6 oversight and then SMUG voluntarily amended its complaint
7 and now his name appears twice in this section, Judge, but
8 they still don't allege that he actually did anything.

9 In the first amended complaint, the first reference
10 to Mr. Lively is in paragraph 199 and here they simply say
11 that it, SMUG, held a press conference to counter Mr.
12 Lively's message, not something actionable that Mr. Lively
13 did.

14 And the second and last reference to Mr. Lively is in
15 paragraph 214 where they say that the Score case that came
16 out intensified or set the stage for the intensification
17 of the war that had been allegedly declared by Mr. Lively.
18 Again, not an actionable act by Mr. Lively.

19 How telling is it, Your Honor, that even after we put
20 SMUG formally on notice it still could not muster a single
21 allegation of persecution or conspiracy by Mr. Lively,
22 not one act.

23 SMUG cannot allege that Mr. Lively gave police maps
24 and meeting times and locations. They can't allege that
25 he spoke with Mr. Simon Lokodo or that he even knows him.

1 They can't allege that he went to the broadcasting counsel
2 and he told them to crack down on the media.

3 They cannot and do not allege that Mr. Lively
4 actually gave the tabloids the names or the headlines, and
5 they do not allege that Mr. Lively even knew the private
6 actors that are unnamed.

7 Judge, the problem doesn't even stop there because
8 when you look at the complaint, they do not even allege
9 that any of the four other named co-conspirators did any
10 of these things.

11 When you put the names of the four co-conspirators
12 against the names of the actual alleged perpetrators of
13 these acts, you see that they are entirely different. And
14 the complaint doesn't allege that either Mr. Lively told
15 these actors what to do or that the four co-conspirators
16 told these actors what to do.

17 There is simply no link between Mr. Lively and the
18 four co-conspirators and these eight actors or acts other
19 than this idea that Mr. Lively's speech created a
20 poisonous environment, a hostile and dangerous environment
21 where these acts could take place.

22 Judge, that is a classic incitement claim no matter
23 what SMUG chooses to call it. And since I would submit
24 again that SMUG essentially concedes that its claims
25 cannot survive application of the Brandenburg incitement

1 test, the complaint should be dismissed.

2 Now --

3 THE COURT: I'm going to stop you there because
4 I think I'd like to give counsel for the plaintiff an
5 opportunity to respond.

6 MR. MIHET: Okay.

7 THE COURT: I promise to give you a chance to
8 say whatever you're about to say after the word now.

9 MR. MIHET: Thank you. I have one other very
10 important point about the specific intent requirement for
11 criminal conspiracies in the First Amendment context.

12 THE COURT: Okay. I'll give you a chance to say
13 that. I think it would be most helpful for me right now
14 to hear from counsel for the plaintiff.

15 MS. SPEES: Thank you, Your Honor.

16 First, I would like to take issue with the
17 characterization of the paragraphs in the complaint. They
18 clearly state -- let's just start with the very first
19 paragraph under the Scott Lively section where we allege
20 that "Lively has worked and schemed with others in Uganda
21 for at least the past ten years."

22 THE COURT: A little slower.

23 MS. SPEES: I'm sorry?

24 THE COURT: Just a little slower.

25 MS. SPEES: "That he has worked and schemed with

1 others for at least the past ten years, during which time
2 he has aligned and plotted with the persons who would
3 eventually surface as key players and close associates in
4 the anti-gay efforts and persecution that continue to
5 deprive LGBTI" --

6 THE COURT: A little slower. I've found that
7 whenever anybody reads, they turn up the speed.

8 MS. SPEES: I apologize.

9 THE COURT: We just have to make sure it gets
10 into the record.

11 MS. SPEES: I apologize, Your Honor. My point
12 is that we clearly state in paragraph 46 --

13 THE COURT: Isn't that just the kind of general
14 claim that the First Circuit has been uncomfortable with?

15 You know, I want to know on this day he met with this
16 person and he did this thing which had this consequence,
17 or maybe let me put it a little bit more open.

18 Don't you have to allege that on this day he met with
19 this person and he did this thing and as a result there
20 was this consequence? That that general kind of statement
21 I guess makes me uncomfortable. I'll certainly consider
22 it carefully.

23 MS. SPEES: There are things that we do -- if I
24 can make one more correction though about paragraph 65?

25 THE COURT: Sure.

1 MS. SPEES: I believe it was represented that
2 the claim was that two of the primary tactics he has used
3 and has used particularly in Uganda was, one, to
4 criminalize the advocacy undertaken by LGBTI rights, not
5 maintain criminalization of laws criminalizing sex.

6 THE COURT: Well, I think the allegations go
7 even further than that. I mean, you not only make the
8 argument that the defendant here has urged the
9 criminalization of advocacy, but he's also urged the
10 criminalization of association.

11 MS. SPEES: Absolutely.

12 THE COURT: Even people who have hotels where
13 gay people come to.

14 MS. SPEES: Absolutely.

15 THE COURT: So I know the allegations are very
16 strong and I'm sure deeply offensive to many people. I'm
17 still looking for that extra -- maybe I shouldn't be
18 looking for it, but I would be reassured I guess from the
19 point of view of the First Amendment if I had a more
20 concrete example of misbehavior, for lack of a better
21 word, that would justify continuation of the lawsuit.

22 Your colleague says you can't satisfy the Hess test;
23 you can't satisfy the Brandenburg test. This is nothing
24 more than encouragement. Someone can write an essay
25 saying -- I happen to be left-handed. They can say

1 left-handed people are evil. We don't like left-handed
2 people. They shouldn't be judges. Unfortunately I'd have
3 to read the article and I would have to smile and write my
4 own article and say we really aren't all that bad and so
5 on and so forth.

6 So isn't this the kind of encouragement that stops
7 short of being criminal behavior? It's not true in other
8 countries as I understand. This is an American tradition.
9 I think in Germany you can be put in jail for being a
10 Holocaust denier. There are other countries where
11 advocacy is criminalized and speech is criminalized, but
12 we have a sort of sacred attitude towards people's
13 expressions here in the United States.

14 MS. SPEES: And that is respected in the framing
15 of this complaint and let me explain the difference
16 because it's one thing to say that -- to criticize
17 left-handed people and it's another thing to say that
18 because they're left handed they don't get the same rights
19 as everybody else and to work to make sure that that
20 happens, and that's the difference in this case.

21 Mr. Lively is not a disinterested person just coming
22 in expressing his belief in Uganda about how evil gay
23 people are. He's saying that and if it stopped there,
24 that's one thing. But he goes beyond that and he works --
25 and we do give dates, Your Honor. We do give his meetings

1 with Stephen Langa and Martin Ssempe in 2002 and that's
2 where he literally instructs you've got to use your power
3 of censorship. It starts in 2002.

4 We come forward through the next few years and he's
5 still talking about, and I will quote, "criminalize the
6 public advocacy of homosexuality. The easiest way to
7 discourage gay pride parades and other homosexual advocacy
8 is to make such activity illegal."

9 Then we have him meeting with members of parliament,
10 government ministers, religious leaders. He's headlining
11 that conference in March of 2009. We know he's meeting
12 with them. We have alleged that. We don't know what
13 exactly was said but we know out of that emerges the
14 Anti-homosexuality Bill, which, by the way, criminalizes
15 all forms of advocacy and association. The bill still
16 hasn't passed so what starts happening? The
17 criminalization starts taking effect anyway.

18 The reason that we spent so much time setting out the
19 history of these four people, whom merely form the core of
20 this conspiracy, is that we have to show because
21 conspiracies are nebulous and the First Circuit has
22 recognized it's often difficult to at the pleading stage
23 have enough facts to suggest it.

24 I would suggest that we have plenty of facts to show
25 the existence of a conspiracy, but what we had to do is

1 set out each of these people's positions, their
2 relationships to each other. How do we do that? They
3 acknowledge it, and so the complaint contains pleadings
4 acknowledging the relationships, the strength of those
5 relationships and the shared intent of those
6 relationships. And you can plausibly infer from the fact
7 that Buturo was Minister of Ethics and Integrity and was
8 calling for the police to raid the homes and arrests that
9 that is an outcome of the conspiracy.

10 When the law -- when the faction within the Ugandan
11 government that is aligned with Mr. Lively, you know, is
12 having trouble getting this legislation passed, well, the
13 new minister who picks up where Buturo leaves off just
14 goes about criminalizing it anyway, shutting down these
15 meetings, threatening to arrest and attempting to arrest.

16 Back to the conspiracy law, Your Honor, in the
17 conspiracy rules it's not necessary that Mr. Lively know
18 Mr. Lokodo. All that's necessary is that they all be part
19 of the same -- operating pursuant to the same agreement
20 and conspiracy.

21 And he's much more than just somebody who's coming
22 along and sort of generally supporting it. He's an actual
23 architect because his instructions -- they're following
24 along with him and what he is suggesting the whole way in
25 terms of criminalizing of advocacy and making things

1 harder.

2 He tells us, and it's in the complaint, that when he
3 goes to Uganda in 2009 he acknowledges how hard it is
4 already in the law. Sex is already criminalized; imagine
5 how bad things would be if it weren't. And he
6 acknowledges at that point that he's there to help them
7 make things worse, and again it's on the heels of that
8 Ugandan high court judgment which said they're just like
9 everybody else when it comes to the enjoyment of basic
10 rights.

11 THE COURT: Right.

12 MS. SPEES: And if I could, Your Honor, go to
13 the issue of persecution -- and, by the way, on the
14 Twombly and Iqbal piece, Twombly, you know, actually
15 supports us in our allegations in this case because
16 Twombly there was no allegation of choreographed behavior.
17 It was all parallel conduct that more likely was explained
18 by lawful conduct.

19 Whereas here, there are allegations throughout the
20 complaint that this is choreographed and they tell us that
21 it's choreographed because Langa says he calls Lively and
22 Lively says he goes there to help them make things worse.
23 And he tells us that it's important to take away these
24 rights to speech, expression, and association.

25 And we've talked about Nuremberg and Nuremberg

1 recognized liability for conspirators, those who planned,
2 those who instigate, that's all clear liability coming out
3 of Nuremberg.

4 I would also re-emphasize this, and it's in the brief
5 as well, Your Honor, that persecution at Nuremberg -- the
6 persecution was recognized as everything that led up to
7 the implementation of the plan for extermination.

8 So the denial of rights, the denial of the right to
9 equality and nondiscrimination, the denial of the right
10 for Jewish people to, you know -- well, they couldn't
11 publish newspapers and immigrate into Germany, these are
12 all -- these were the persecutions, and it's the denial of
13 those fundamentals rights which make it so serious because
14 it's also often the precursor to something much worse and
15 that's what we're talking about here.

16 So if there is -- as I said before, this is something
17 that could be done under our law. This same claim could
18 be brought here if it were happening in Springfield,
19 Massachusetts and the defendant -- the First Amendment
20 would not protect him any more in that case because it is
21 something that he is deliberately trying to do which is
22 rip these rights to shreds when it comes to LGBTI groups.

23 It's not his speech, Your Honor. They have not --
24 there was no -- that's the reason that we're being so
25 careful even about Brandenburg. We in no way want this

1 case to become a case that has any adverse bearing on the
2 First Amendment rights.

3 THE COURT: All right. I can see that the
4 boundary for me and what I'm going to have to work -- this
5 has been very helpful to me, but the boundary for me is
6 the boundary between an individual who has certain strong
7 views and who expresses those certain strong views and
8 maybe even visits an area where he expresses those strong
9 views and where entirely independently as a result of
10 people reading those writings or listening to those
11 statements, as loopy as some people may think they are,
12 there is resulting conduct which harms a group, and I
13 believe in that kind of situation it would be a violation
14 of First Amendment except in the most extreme
15 circumstances for me or any judge to prohibit that
16 activity.

17 The second scenario in which somebody is like -- as
18 long as there have been several references to Nazi
19 Germany, someone like Goebbels who was a minister of
20 propaganda who didn't himself set up the train routes and
21 didn't himself go off and shoot anybody but who was
22 assigned the role in this organization of developing the
23 propoganda effort that would support the brutality, it's
24 easy to see that that would not be protected by the First
25 Amendment, and the question which this argument boils down

1 to is whether there are sufficient allegations in the
2 complaint to push this out of the advocacy realm and into
3 the ministry of propoganda realm. The defendants say the
4 allegations aren't there and you say they are and I'll
5 have to weigh that.

6 MS. SPEES: And, Your Honor -- I'm sorry.

7 THE COURT: I'm done.

8 MS. SPEES: If I can just offer one thing which
9 is that we have not alleged that this is independent --
10 this is conduct independent of the conspiracy. As long as
11 it can be traced to the object of the conspiracy and as a
12 result of the conspiracy, that's enough. It doesn't have
13 to be traced directly to Mr. Lively, and many of the other
14 Nuremberg defendants weren't people that had their hands
15 directly on anything. They were planners and conspirators
16 and architects of the plan and that is its own liability
17 and that's much different from advocacy.

18 THE COURT: Right. No, I don't think there's
19 any -- at least in theory it's easy to see the distinction
20 between a speaker and an architect, a speaker and a
21 planner.

22 The defendant's position in what is a very confused
23 record which has a lot of other issues flying around in
24 it, but one of the many things the defendant says is he
25 isn't anything more than a speaker and you haven't alleged

1 anything more than that. You say you have and that's
2 where we are.

3 MS. SPEES: Thank you, Your Honor.

4 THE COURT: Thank you. Mr. Mihet.

5 MR. MIHET: Thank you, Your Honor. I have a few
6 things that I need to say about the recognition of
7 persecution as an international law norm, but before I do
8 that, I appreciate the Court's struggle with this concept
9 of conspiracy and First Amendment protected conduct.

10 I will submit to you that the First Circuit has
11 actually made the Court's task on that point fairly easy
12 and that's because SMUG cannot plead a specific intent by
13 Mr. Lively to employ the alleged unlawful means or the
14 actual acts of persecution themselves.

15 On page 50 and 51 of its brief SMUG essentially
16 concedes that Mr. Lively does not even know the people who
17 actually perpetrated the allegedly unlawful acts. So he
18 could not have specifically intended for those specific
19 acts to take place.

20 No problem says SMUG because they say all you need is
21 knowledge of the conspiracy's unlawful objectives. Okay.
22 Now, aside from the fact that the acts of persecution were
23 not carried out by any of the named co-conspirators, I
24 submit to you that SMUG grossly misstates the law of
25 conspiracy in the First Amendment context.

1 While it is true that in a typical conspiracy not
2 involving free speech, knowledge of the overall objective
3 coupled with the specific intent to carry out that
4 objective would be sufficient for conspiratorial
5 liability, much more is required in the context of the
6 First Amendment.

7 The First Circuit held in United States v. Spock,
8 "The metastatic rules of ordinary conspiracy are a direct
9 variance with the principle of free speech." Why?
10 Because the First Circuit says, "The intertwining of legal
11 and illegal aspects of an alleged conspiracy involving
12 political advocacy, the public setting of the agreement
13 and its political purposes and the loose confederation of
14 possibly innocent and possibly guilty participants raise
15 the most serious First Amendment problems."

16 Well, as a result, according to the First Circuit in
17 Spock, when analyzing an alleged conspiracy involving
18 political speech within what the First Circuit calls "the
19 shadow of the First Amendment" -- clearly we're there
20 because otherwise we wouldn't have spent an hour talking
21 about the First Amendment today -- "Political speech
22 within the shadow of the First Amendment and conspiracy,"
23 what you do is your "criminal intent must be judged
24 *strictissimi juris*," by the strictest law, "for otherwise
25 there is a danger that one in sympathy with the legitimate

1 aims of an organization" -- like criticizing or even
2 condemning homosexual conduct, that is protected even
3 though it may not be politically correct -- "but not
4 specifically intending to accomplish them by resort to
5 violence, might be punished."

6 Now in Spock the First Circuit reversed the
7 conviction of Dr. Spock who was convicted for conspiring
8 with others to aid the hindrance of the Vietnam War draft.
9 Dr. Spock and his other co-conspirators offered and widely
10 circulated something called The Call, a manifesto in which
11 in no uncertain terms they urged people to resist the
12 draft, to turn in their draft cards, to burn them. Things
13 that were unquestionably illegal they urged to do in The
14 Call.

15 They went a step further. They said if you do those
16 unlawful things and you get arrested, we will defend you.
17 We will provide bail for you. We will provide financial
18 assistance to your families, all of it encouragement to
19 engage in illegal conduct, Judge.

20 Now, some of Dr. Spock's co-conspirators actually
21 went out and had demonstrations where they collected cards
22 and burned them. Unquestionably an illegal act. Dr.
23 Spock himself, however, attended some of those meetings
24 but just in the crowd and did not participate in the
25 actual unlawful act of burning, collecting and burning the

1 cards. Nevertheless, he was charged with conspiracy and
2 he was convicted along with the others.

3 Now, this is the key. The First Circuit found that
4 there was indeed sufficient evidence of an agreement. The
5 First Circuit also found that there was indeed sufficient
6 evidence of an illegal purpose.

7 Agreement and illegal purpose in a traditional
8 non-First Amendment conspiracy context is sufficient and
9 Dr. Spock goes to jail, right? Wrong. Because this
10 wasn't a traditional conspiracy. It was a First Amendment
11 -- a shadow of the First Amendment conspiracy.

12 The court went a step further and basically applied
13 the Doctrine of *strictissimi juris* and looked at whether
14 there was specific intent from Dr. Spock to actually carry
15 out the unlawful means, not just the objective.

16 The quote from pages 176 to 177, after finding
17 agreement and illegal purpose, the court says "There
18 remains the question whether it could have been found
19 within the strict test laid down by the cases supra that
20 the individual defendants personally agreed to employ the
21 illegal means" -- not objective, but means --
22 "contemplated by the agreement."

23 THE COURT: Again, I'll just break in. We're
24 going to have to wrap up here in a couple of minutes.
25 We've gone longer than I intended to.

1 Isn't that exactly what the plaintiffs have alleged?
2 They have alleged that your client specifically intended
3 in the same way that the First Circuit would have required
4 the government to show that Dr. Spock specifically
5 intended the equivalent of the burning of the draft cards,
6 the equivalent of the illegal shutting down of the
7 meetings, the equivalent of the outing and jeopardizing of
8 individuals who were activists, and that he specifically
9 intended that.

10 Now, again, if we get to trial or even summary
11 judgment they may not be able to come up with the horses
12 to carry that argument around the track, but right now
13 we're only talking about whether it's sufficiently
14 alleged, and isn't that what they actually specifically
15 allege?

16 MR. MIHET: No, Judge. To the extent they did
17 that, it's thread bare recitals not sufficient under
18 Twombly and Iqbal.

19 What they allege is that they don't need to allege
20 specific intent because all you need is intent to carry
21 out the objective and then you can be liable for what
22 these people do who you don't even know and that you've
23 never even met. That's what they've alleged.

24 They cannot allege that Mr. Lively actually did
25 anything more than Dr. Spock. Mr. Lively may have called

1 for this unlawful action to take place at some indefinite
2 point in the future, according to their allegations. They
3 don't allege that he actually specifically intended the
4 specific acts. How could they allege those things in more
5 than a thread bare recital when they admit that Mr. Lively
6 didn't even know these conspirators who acted years or
7 these perpetrators who acted years after the so-called
8 speeches?

9 If Dr. Spock could not have specific intent having
10 called for the action and having been present when the
11 unlawful activity took place, how much less specific
12 intent could Mr. Lively have when he was not even there?
13 He was half a world away and when he has never even met
14 these alleged perpetrators, Judge.

15 What the First Circuit said in Spock is that specific
16 intent is not established by generalizations.
17 Generalizations about Mr. Lively having criticism for
18 homosexual conduct is not sufficient to establish specific
19 intent, and when you look at the factual allegations,
20 that's the only thing that they have alleged and the only
21 thing that they can allege, Judge.

22 THE COURT: Okay. Thank you. Thank you very
23 much.

24 MR. MIHET: Okay.

25 THE COURT: I think I've got enough. I really

1 appreciate the argument.

2 Did you want one or two minutes to just tie it up?
3 I'll give you another minute or two, Ms. Spees, and then
4 we'll say good-bye for the day and let everybody get some
5 lunch.

6 MR. MIHET: Thank you, Your Honor. I had a
7 couple of minutes on international norms. I think that's
8 important.

9 THE COURT: Leave it. It's been alleged.
10 There's tons of other argument having to do with standing,
11 having to do with groups, having to do with the advocacy
12 of the allegations to support the state law claims.
13 There's, as I said, plenty. We can argue until the moon
14 rises but this is what was at the heart of it for me.

15 I will give you a couple minutes to respond, Ms.
16 Spees, and then we will close. Thank you.

17 MR. MIHET: Thank you, Your Honor.

18 THE COURT: Thank you very much.

19 MS. SPEES: Well, just in reference to the
20 relevance of Spock, it's my recollection, Your Honor, and
21 I don't want to represent anything that's, you know, but I
22 think that there were other violations involved in that
23 protest for which the court was reluctant to hold Spock
24 accountable for, and that's the situation where you have
25 the political right to speech versus the criminalization

1 of burning of draft cards and destroying draft cards.

2 This is a situation where we are talking about
3 segmenting off an entire group of people and treating them
4 differently from the rest of humanity and denying them
5 rights based on it and that's a very, very different
6 thing.

7 The other thing I would go back to is Your Honor had
8 a question about whether in light of Kiobel pending at the
9 Supreme Court we should proceed at this moment in time,
10 and I would say that we do have the state law claims and
11 in many ways the civil conspiracy claim really also gets
12 at the heart of this combination of people coming together
13 in this way to have the coercive effect on a plaintiff.

14 THE COURT: I guess I'll say one thing. This is
15 a shamelessly selfish thing for me to say but this is
16 going to be a lot of work to piece this out. I could
17 spend an entire two weeks drafting a brilliant opinion and
18 the Supreme Court could go boink and that's the end of it.

19 If Kiobel goes the wrong way, I'm afraid the
20 plaintiff is out of luck. Well, I shouldn't say I'm
21 afraid, but it's a moment of rejoicing for the defendant
22 but it does clearly resolve it. There is no ATS
23 jurisdiction if Kiobel goes the wrong way. I don't want
24 you to wait forever for a decision on that but that's a
25 fact.

1 I recognize that you have not just federal question
2 jurisdiction but you also allege diversity jurisdiction,
3 and you say that this Court has the ability under state
4 law -- under the federal jurisdictional statutes to hear
5 this as a diversity case and to apply Massachusetts state
6 law. The defendants make a number of arguments as to why
7 they think that would be inappropriate and I will give
8 them full attention when I go through putting together my
9 memorandum, but I'm going to have to work hard to resist
10 the temptation to wait to hear what the Supreme Court has
11 to say on this issue of the scope of the ATS. But thank
12 you very much.

13 MS. SPEES: Thank you, and then one last thing,
14 Your Honor, I would say that Justice Brennan's opinion in
15 Brown v Hartlage which follows the Spock case I think is
16 instructive too.

17 THE COURT: I'll take another look at that.

18 MS. SPEES: Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. MIHET: Your Honor, may I just have 30
21 seconds on Kiobel which may actually make the Court's job
22 easier?

23 THE COURT: Okay.

24 MR. MIHET: The Court denied Mr. Lively's motion
25 to stay after SMUG argued that Kiobel is different because

1 it involves foreign defendants, not local defendants.

2 I just want to point out to the Court that the
3 defendant's argument in Kiobel is that the Alien Tort
4 Statute should not apply to anyone, whether the defendant
5 is foreign or domestic, and that's an argument they
6 presented and an argument they could prevail on or they
7 may not prevail on, but that is squarely before the court.

8 Judge, in just ten seconds, the idea that you can
9 advocate political advocacy, you can do it so long as you
10 don't actually talk to government and try to get
11 legislation passed, that theory of liability would render
12 the proponents of Proposition 8 in California, who
13 conspired together to successfully pass a law that removes
14 the fundamental right, according to the Californian
15 courts, it would render all of those people war criminals
16 overnight, Judge.

17 The First Amendment protects conduct not just
18 abstract theory but actual advocacy of legislation which
19 is what Prop 8 does and many other things in the country.
20 Thank you.

21 THE COURT: All right. I know you have one more
22 -- I'll give you one more point otherwise -- when I was
23 young I had a very old car and I would turn the key off
24 and the engine would keep going and that's what I'm afraid
25 may be happening here. So I'll give you one last word and

1 then we'll wrap up.

2 MS. SPEES: Thank you, Your Honor.

3 Well, with respect to this issue of Kiobel, I fully
4 appreciate the Court's concern and at the same time would
5 just say that this is ongoing in Uganda and that there's a
6 sincere and very sort of grave interest in the outcome of
7 this case given the ongoing situation of Mr. Lively's
8 involvement.

9 On the issue of -- I'm sorry.

10 THE COURT: Prop 8? Yes, I saw you.

11 MS. SPEES: -- Prop 8, I think that's -- I can
12 imagine the Court having some concerns about that, and
13 what we're talking about here is the systematic denial and
14 stripping away of fundamental rights and particularly the
15 right to speech which is at the core, at the base of every
16 other right. You can't assert or defend if you can't
17 speak out about it and these are old, long-standing
18 rights. These are not special rights as the defendant
19 often likes to call them. Thank you, Your Honor.

20 THE COURT: Thank you. This is very, very, very
21 well briefed and very well argued, and I'm going to take
22 it under advisement. I'm going to have some hard work to
23 do.

24 As I said before, I really do very much value and
25 respect and appreciate the interest that people have shown

1 and the fact that so many people have come here and
2 behaved with such respect towards each other throughout
3 this argument and I very much appreciate that.

4 I'll take this under advisement and get you a ruling
5 as soon as possible. Thank you very much. Court's in
6 recess.

7 **(Court recessed at 12:15.)**

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C E R T I F I C A T E

I, Alice Moran, Official Federal Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Alice Moran

Dated January 8, 2013

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