

NO. 17-1593

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UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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SEXUAL MINORITIES UGANDA

Plaintiff-Appellee,

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries,

Defendant-Appellant.

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**DEFENDANT-APPELLANT SCOTT LIVELY'S RESPONSE  
IN OPPOSITION TO PLAINTIFF-APPELLEE'S  
MOTION TO DISMISS APPEAL**

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## INTRODUCTION

*“The judge agrees with us in every claim we made....  
He has left the way open for us to...make another case in another court.”*

—Frank Mugisha, SMUG Executive Director<sup>1</sup>

Besides being procedurally defective,<sup>2</sup> the Motion to Dismiss (EID 6103417) filed by Plaintiff-Appellee Sexual Minorities Uganda (“SMUG”) is utterly devoid of merit. After correctly concluding that it lacked jurisdiction to adjudicate SMUG’s “crimes against humanity” claims against Defendant-Appellant Scott Lively (“Lively”) – a decision SMUG has not appealed – instead of simply dismissing those claims the court did exactly what it could not: adjudicate them. Without evidence, authority, analysis **or jurisdiction**, the court granted SMUG the declaratory relief it sought, declaring that Lively’s core political speech and advocacy did, in fact, “constitute violations of international law,” and that Lively did, in fact, aid-and-abet crimes against humanity, the worst crimes known to humankind. Having essentially declared Lively *hostis humani generis* for his Christian views and non-violent, protected speech and advocacy, the court then relinquished **original, non-discretionary**, diversity jurisdiction over SMUG’s state law claims, dismissing

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<sup>1</sup> See Declaration of Horatio G. Mihet, Exh.D, pp.4-5.

<sup>2</sup> Seven of SMUG’s nine attorneys are not admitted in this Court, nor have they filed appearance forms (L.R. 46.0(a)(2)); and SMUG did not file a corporate disclosure statement with its first motion. Fed.R.App.P. 26.1.

them **without prejudice**. The Court also relinquished supplemental jurisdiction without any consideration of the vast amount of judicial resources already consumed in the 5 and ½ years of this transcontinental litigation.

Notwithstanding summary judgment for Lively, this Court has plenary jurisdiction to review and correct these grievous errors. SMUG’s motion to dismiss, contending the absence of even “a substantial question” is borderline frivolous, and should be denied.

### **FACTUAL BACKGROUND**

SMUG, a Ugandan advocacy group for homosexual rights, brought this crimes against humanity lawsuit against Lively, an American pastor and author, to punish and enjoin his non-violent, political speech and advocacy in Uganda. (Am.Compl., dkt.27). SMUG alleged that, over the course of a decade, Ugandan citizens whom Lively has never met or spoken with committed 14 criminal acts against homosexual persons. (MF ¶¶102-117).<sup>3</sup> Even though Lively has condemned acts of violence and had no connection to any of the alleged criminal acts (*id.*), SMUG claimed that Lively was responsible for these acts of “persecution,” because his non-violent speech and advocacy advancing a Christian view of human sexuality created a “virulently hostile environment.” (Am.Compl., dkt.27, ¶258). Lively was

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<sup>3</sup> Citations to “MF” refer to Lively’s Statement of Material Facts, dkt.249, pp.27 to 69 of 198. Each Material Fact contains references to record evidence.

also alleged to have masterminded a “conspiracy” to commit the 14 acts, and to have conscripted and puppeteered Uganda’s sovereign legislature to do his bidding in passing draconian laws – laws that were promptly invalidated by Uganda’s independent judiciary and never enforced. (MF ¶¶102-117).

Although SMUG’s pleadings couched the injunctive relief sought in terms of stopping “persecution,” (Am.Compl., p.60), SMUG’s designated Rule 30(b)(6) witness on this topic revealed under oath that what SMUG was actually asking the court to prohibit was: (1) Lively selling or giving books in Uganda (MF ¶171); (2) Lively preaching Christian sermons on homosexuality in Uganda (MF ¶172); (3) Lively speaking to high schoolers in Uganda about the health hazards of certain sexual conduct (MF ¶173); (4) Lively training Ugandan lawyers to use the law to oppose legalization of same-sex marriage (MF ¶174); and Lively lobbying the Ugandan Parliament not to legalize same-sex marriage. (MF ¶175).

SMUG also sought a declaration from the court that “Defendant’s conduct was in violation of the law of nations.” (Am.Compl., p.60). SMUG’s principal federal claim against Lively was that he aided-and-abetted the crime against humanity of persecution. (*Id.* at ¶¶237-238, 241-244). SMUG also invoked the district court’s original, diversity jurisdiction to bring two state law claims, negligence and civil conspiracy. (*Id.* at ¶¶15, 251-262).

The court denied Lively's motion to dismiss. (MTD Order, AER at 46-124).<sup>4</sup> This opened the door to multi-year, transcontinental discovery, during which the parties exchanged 40,000 pages of documents, took 100 hours of depositions on both coasts and several states in between, and filed 5,000 pages of summary judgment papers. (AER at 34-43). Over the 5 and ½ year span of this litigation, the court considered 74 motions, held 6 hearings, and issued 90 orders (AER at 1-45), including a 79-page decision denying Lively's motion to dismiss (AER at 46-124), and the 25-page decision granting Lively summary judgment presently before this Court. (AER at 125-149).

At the conclusion of discovery, with all evidence in, SMUG's designated witness under Rule 30(b)(6) confirmed that: (1) SMUG still had no knowledge of "any assistance at all" provided by Lively to the alleged perpetrators of any of the 14 persecutory acts (MF ¶¶102-117); (2) SMUG still had no knowledge of any "unlawful agreement" or "conspiracy" "between Scott Lively and others to deprive persons of their fundamental rights" (MF ¶¶118-128); and (3) SMUG still had no knowledge of anything Lively did or said in the United States to contribute to any of the 14 persecutory acts or to deprive any Ugandan of fundamental rights. (MF ¶¶130-148).

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<sup>4</sup> Citations to "AER" refer to the Abbreviated Electronic Record.

Based upon SMUG’s evidentiary shortcomings, but amid a string of epithets denigrating Lively as a “crackpot bigot” and worse, the court granted Lively’s motion for summary judgment, concluding that it could not adjudicate SMUG’s federal claims because it lacked jurisdiction. (MSJ Order, AER at 125-149). SMUG has not appealed. (AER at 45).

The court relinquished jurisdiction over SMUG’s diversity claims, and dismissed them without prejudice, inviting SMUG to re-file in state court. (*Id.* at 149). Although it concluded that it lacked jurisdiction to adjudicate SMUG’s federal claims, the court declared that Lively’s speech and advocacy “constitute violations of international law.” (*Id.* at 127). The court also held that Lively did, in fact, aid-and-abet crimes against humanity. (*Id.* at 125, 127, 148).

Lively filed this appeal.

### **ARGUMENT**

#### **I. THIS COURT HAS JURISDICTION TO CORRECT THE DISTRICT COURT’S FAILURE TO DISMISS SMUG’S STATE LAW CLAIMS WITH PREJUDICE.**

After 5 and ½ years of litigation, which included discovery on two continents and yielded 40,000 pages of documents, the court refused to dismiss SMUG’s state law claims with prejudice, condemning Lively to yet more litigation in state court. (MSJ Order, AER 147). This, Lively will demonstrate in his merits brief, was erroneous and should be reversed by this Court for a myriad reasons, including that:

(1) SMUG failed to state causes of action for negligence and civil conspiracy; (2) Lively's speech and advocacy are protected by the First Amendment; (3) SMUG adduced no evidence for its fanciful claims; (4) SMUG adduced no evidence of any damages, an indispensable requirement for any tort claim; (5) SMUG adduced no evidence of causation; (6) SMUG lacks standing; and (7) SMUG's claims are barred by the Act of State Doctrine. (*See, generally*, Lively Mem.Supp.S.J., dkt.249; Lively Reply Mem.Supp.S.J., dkt.305).

It is beyond cavil, and SMUG does not dispute, that this Court has jurisdiction to correct the district court's failure to dismiss SMUG's state claims with prejudice. *See, e.g., In re TJX Companies Retail Sec. Breach Litig.*, 564 F.3d 489, 493 (1st Cir. 2009)(this Court has jurisdiction to review appeal of dismissal without prejudice, where, as here, district court invites plaintiff to re-file in state court rather than cure deficiencies in same court); *Corujo v. Eurobank*, 299 F. App'x 1, 1 (1st Cir. 2008)(allowing appeal to convert dismissal without prejudice into dismissal with prejudice); *Pavlovsky v. VanNatta*, 431 F.3d 1063, 1064 (7th Cir. 2005)("a winning party can appeal if he wants a bigger win than the trial court gave him in order to turn the dismissal into one with prejudice"); *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 122 (7th Cir. 1988)(appellate court has jurisdiction to review and correct dismissal without prejudice because "defendant was aggrieved in a practical sense" by the mere prospect of additional litigation in state court); *Amazon, Inc. v. Dirt*

*Camp, Inc.*, 273 F.3d 1271, 1276 (10th Cir. 2001)(same); *Briscoe v. Fine*, 444 F.3d 478, 495 (6th Cir. 2006)(same). *See also*, 15A Fed. Prac. & Proc. Juris. § 3914.6 (2d ed. 2002)(“Even more obviously, a defendant must be allowed to appeal a dismissal without prejudice in order to argue that the dismissal should have been with prejudice.”)

SMUG’s argument that the court was correct in dismissing its state claims without prejudice is not a jurisdictional argument, and founders for either of two reasons: A) SMUG invoked the court’s original jurisdiction over its state claims, which the court could not relinquish; and B) the court erred in relinquishing supplemental jurisdiction.

**A. SMUG Invoked the Court’s Original, Mandatory Jurisdiction.**

SMUG focuses its argument entirely on **supplemental** jurisdiction, conveniently forgetting that it properly and repeatedly invoked the court’s **original, diversity** jurisdiction. (*See, e.g.*, Am.Compl., dkt.27, ¶15 (“This Court also has jurisdiction...under 28 U.S.C. §1332 (diversity jurisdiction) because there is complete diversity among the parties who are citizens of different states and the amount in controversy exceeds \$75,000.”); Mem.Opp.MSJ, dkt.292, p.104 (“There can be no dispute that Plaintiff has made a good-faith claim to damages in excess of \$75,000....this Court has diversity jurisdiction.”)).

The court was fully cognizant that SMUG had invoked its original jurisdiction, and never concluded that it lacked diversity jurisdiction. (*See, e.g.*, Tr. MTD Hrg. Jan. 7, 2013, p.55 (“I recognize that you have not just federal question jurisdiction **but you also allege diversity jurisdiction**”)(emphasis added); Order Denying MTD, dkt.59, pp.16-17 (“The five-count Amended Complaint asserts...diversity jurisdiction”). Nevertheless, following dismissal of SMUG’s federal claims, the court relinquished its original, diversity jurisdiction over SMUG’s state claims, dismissing them without prejudice, without any explanation or authority for so doing. (AER at 147-149).

This is reversible error. Diversity jurisdiction is both original and mandatory. *See* 28 U.S.C. § 1332(a) (“The district courts **shall have original jurisdiction** of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between...citizens of a State and citizens or subjects of a foreign state”)(emphasis added). “[F]ederal courts must abide by their virtually unflagging obligation to exercise their lawful jurisdiction....” *Nazario-Lugo v. Caribevision Holdings, Inc.*, 670 F.3d 109, 114 (1st Cir. 2012) (reversing refusal to exercise diversity jurisdiction). “We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” *Marshall v. Marshall*, 547 U.S. 293, 298 (2006).

Unlike supplemental jurisdiction, federal courts sitting in diversity have **no discretion** to relinquish jurisdiction over state claims following dismissal of federal claims:

**The court had diversity jurisdiction over the case, which is not discretionary.** Thus, the District Court could not properly have eliminated the case from its docket...In contrast, when a...case involves pendent state-law claims, a district court has undoubted discretion to decline to hear the case.

*Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 356 (1988)(emphasis added). The Ninth Circuit has similarly explained this firmly-entrenched principle:

Dismissal of the federal claim would thus, ordinarily, have authorized the district court to remand the pendent state law claims. But...the amended complaint presented **an independent jurisdictional basis for the state law claims, namely diversity...**[W]here the district court is presented with a case within its original jurisdiction...**[it has] no discretion to remand these claims to state court.**

*Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 977 (9th Cir. 2006)(emphasis added)(internal quotes and citations omitted). *See also*, *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 130 (2d Cir. 1995)(“if jurisdiction over the [state law] claims had been based upon diversity of citizenship, the district court would have erred in dismissing them” following dismissal of federal claims); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1365 (7th Cir. 1990)(“pendent[] jurisdiction is discretionary, whereas diversity jurisdiction is mandatory”); *Custom Auto Body, Inc. v. Aetna Cas. & Sur. Co.*, No. 78-0301, 1983 WL 1873, \*20 (D.R.I. Aug. 3, 1983)(court “lacks any discretion to dismiss” diversity

state claims following dismissal of federal claims.); *Melendez Garcia v. Sanchez*, No. CIV. 02-1646 ADC, 2007 WL 7610724, \*20-21 (D.P.R. Aug. 23, 2007)(same).

At the foot of this mountain of authority that the court erred in relinquishing diversity jurisdiction, and that this Court has appellate jurisdiction to review and correct that error, SMUG’s unsupported contention that Lively’s appeal “does not present a substantial question” (MTD at 10) is borderline frivolous.

**B. The Court Erred in Relinquishing Supplemental Jurisdiction Over SMUG’s State Law Claims.**

Even if SMUG had not invoked the court’s original jurisdiction, the court erred in relinquishing supplemental jurisdiction over SMUG’s state claims. Notwithstanding SMUG’s bald contention, there is clearly at least a substantial question presented. SMUG’s motion to dismiss should be denied.

“[T]he termination of the foundational federal claim does not divest the district court of power to exercise supplemental jurisdiction, but, rather, sets the stage for an exercise of the court's informed discretion.” *Senra v. Town of Smithfield*, 715 F.3d 34, 41 (1st Cir. 2013). “In deciding whether to exercise supplemental jurisdiction in such a circumstance, a judge must take into account concerns of comity, judicial economy, convenience, fairness, and the like.” *Id.* (affirming retention of state claims, and dismissal of same with prejudice following dismissal of federal claims, because “parties had been litigating the matter for more than a year, and a seven-month window for discovery had closed”). “While dismissal may

sometimes be appropriate if the federal-question claim is eliminated **early in the proceedings**, each case must be gauged on its own facts.” *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 257 (1st Cir. 1996)(emphasis added)(affirming retention of state law claims, and dismissal of same with prejudice following dismissal of federal claims, because “[t]he litigation had matured well beyond its nascent stages, discovery had closed, the summary judgment record was complete, the federal and state claims were interconnected, and powerful interests in both judicial economy and fairness tugged in favor of retaining jurisdiction.”). *See also, Delgado v. Pawtucket Police Dep’t*, 668 F.3d 42, 48 (1st Cir. 2012) (affirming retention of state law claims following summary judgment on federal claims because “the case had passed through every phase of litigation but trial.”).

A court that fails to consider judicial economy, or that relinquishes supplemental jurisdiction over state claims fully and extensively litigated, abuses its discretion. *See Redondo Const. Corp. v. Izquierdo*, 662 F.3d 42, 49 (1st Cir. 2011)(court abused discretion in relinquishing supplemental jurisdiction over state claims after dismissing federal claims because “action had been pending in federal court for more than six years, the summary judgment record had been complete for nearly a year,” extensive discovery was relevant to federal and state claims, and state claims “rested on virtually the same factual basis as did [the federal] claim.” *See also, Miller Aviation v. Milwaukee Cty. Bd. of Supervisors*, 273 F.3d 722, 732 (7th

Cir. 2001)(district court abused its discretion in relinquishing supplemental jurisdiction over state claims, after “court spent more than five years overseeing this multifaceted litigation, [and] considered 22 motions, held 9 hearings, and issued 19 orders, including the 71–page decision presently before us on appeal.”).

Here, as in *Senra, Roche, Delgado, Redondo, and Miller Aviation*, everything but trial was complete for both the state and federal claims, which arose out of the same exact facts: the court spent more than five years overseeing this multifaceted and multi-continent litigation, with the parties’ having exchanged 40,000 pages of documents, taken 100 hours of depositions on both coasts and several states in between, and filed 5,000 pages of summary judgment papers (AER at 34-43), and the court’s having considered 74 motions, held 6 hearings, and issued 90 orders (AER at 1-45), including the 79-page decision denying Lively’s motion to dismiss (AER at 46-124), and the 25-page decision granting Lively summary judgment. (AER at 125-149).

Under these circumstances, it is evident, not merely arguable, that the court erred in relinquishing supplemental jurisdiction, without any consideration of judicial economy. SMUG’s contention that there is not even “a substantial question” cannot be seriously maintained, particularly where SMUG, like the district court, also ignores the vast judicial resources expended on SMUG’s state claims. (MTD at 10-12). SMUG’s motion should be denied.

**II. THIS COURT HAS JURISDICTION TO REFORM THE DISTRICT COURT'S PREJUDICIAL ORDER ADJUDICATING SMUG'S CLAIMS.**

**A. The General Limitation on Prevailing Party Appeals Is Not Jurisdictional.**

SMUG contends that this Court must dismiss Lively's appeal because there is a "firm jurisdictional rule" that prevailing parties cannot appeal. (MTD at 5). However, this general rule "does not have its source in the jurisdictional limitations of Art. III." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333-34 (1980); *Camreta v. Greene*, 563 U.S. 692, 702 (2011) ("in such a case, Article III is not what poses the bar"). SMUG's discussion of Article III standing (MTD at 7-8) is therefore irrelevant.

"In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal." *Deposit Guar.*, 445 U.S. at 334; *Camreta*, 563 U.S. at 702. Having been declared the enemy of mankind by a court which clearly lacked the evidence—and indisputably lacked the jurisdiction—to make such a grave declaration, Lively unquestionably possesses the requisite personal stake in this appeal.

**B. This Court has Jurisdiction to Order Reformation of the District Court’s Prejudicial Order.**

SMUG’s argument for dismissal rests on nothing more than the general rule that a prevailing party cannot challenge “language” in an opinion. (MTD at 5-6). SMUG’s own authorities, however, reveal that there are exceptions. *In re Shkolnikov*, 470 F.3d 22, 24 n.1 (1st Cir. 2006). Lively’s appeal falls squarely in the exceptions.

The Supreme Court has long recognized that a prevailing party is entitled to appeal a favorable decision where “the decree itself purports to adjudge the validity of [a claim], and though the adjudication was immaterial to the disposition of the cause, **it stands as an adjudication of one of the issues litigated.**” *Elec. Fittings Corp. v. Thomas & Betts Corp.*, 307 U.S. 241, 242 (1939)(emphasis added). Where, as here, the court entered findings on claims immaterial to the disposition of the matter, Lively is “entitled to have this portion of the decree eliminated,” and “the Court of Appeals [has] jurisdiction...to entertain the appeal, not for purposes of passing on the merits, **but to direct reformation of the decree.**” *Id.* (emphasis added); *Deposit Guar.*, 445 U.S. at 335 (same).

SMUG attempts to diminish the force of *Elec. Fittings* by claiming it requires “a detrimental preclusive legal effect on the would-be appellant in future proceedings.” (MTD at 9). But, that characterization is precisely what the Supreme Court rejected. The Second Circuit, whose dismissal of the appeal was reversed by

the Supreme Court in *Elec. Fittings*, subsequently recognized that its rationale—the same rationale advanced by SMUG—was rejected by the Supreme Court. *Harries v. Air King Prod. Co.*, 183 F.2d 158, 161 (2d Cir. 1950). The prevailing party in *Elec. Fittings* was entitled to have the decree reformed **despite the fact that “it was not an estoppel”** (*i.e.*, “detrimentally preclusive”), but merely “create[d] **some presumptive prejudice** against him.” *Harries*, 183 F.2d at 161 (emphasis added). That was a direct reversal of the Second Circuit’s (and SMUG’s) contention that a prevailing party must suffer a legally preclusive effect to appeal. *Id.*

SMUG’s contention also flies in the face of numerous circuit court decisions—including the First Circuit—holding that appellate courts may entertain appeals by prevailing parties to direct reformation of district court orders containing prejudicial findings which could potentially affect their rights in the future, or which contain findings or conclusions of law issued without jurisdiction. *See, e.g., Puerto Rico Tel. Co., Inc. v. Telecomm. Reg. Bd. of Puerto Rico*, 665 F.3d 309, 325 (1st Cir. 2011)(“under some circumstances, a prevailing party may appeal a court’s determination on a legal question if that determination could affect the party’s rights in the future”); *Conwill v. Greenberg Traurig, LLP*, 448 F. App’x 434, 436-37 (5th Cir. 2011)(“Courts have recognized a handful of situations in which a party may be sufficiently aggrieved by a favorable judgment to appeal it, such as **where the judgment itself contains prejudicial language on issues immaterial to the**

**disposition of the case.”**)(emphasis added); *Env’tl Prot. Info. Ctr., Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001)(“the Supreme Court has held that a party may seek reformation of a favorable decree—but not for a review of its merits—that contains discussion of issues immaterial to the disposition of the cause.”); *New Jersey v. Heldor Indus., Inc.*, 989 F.2d 702 (3d Cir. 1993)(permitting prevailing party to appeal favorable decision to have conclusions of law vacated because they were issued without jurisdiction); *In re DES Litig.*, 7 F.3d 20, 25 (2d Cir. 1993)(noting the general exception where “a prevailing party can show that it is aggrieved by some aspect of the trial court’s judgment or decree”); *Disher v. Info. Res., Inc.*, 873 F.2d 136, 139 (7th Cir. 1989)(noting exceptions to the general rule and permitting a prevailing party to appeal a favorable decision).

Here, Lively’s appeal fits comfortably within these exceptions. The district court’s legal and factual findings that Lively aided-and-abetted the most heinous of crimes known to humankind, **crimes against humanity**, constitute an adjudication of SMUG’s claims which the court was indisputably powerless to adjudicate. In addition, the court’s jurisdiction-less, evidence-less and analysis-less finding that Lively’s core protected speech violates “international law” and renders him the enemy of mankind will also affect Lively’s rights in the future and impose significant prejudice upon him by “condemn[ing] [him] to additional litigation” in international and state courts. *Disher*, 873 F.2d at 139.

**1. The District Court’s Legal and Factual Findings Constitute an Impermissible Adjudication of SMUG’s Claims.**

SMUG contends that this Court lacks jurisdiction to hear Lively’s appeal because “nothing in the order has any negative legal consequences for Lively.” (MTD at 8). This contradicts both logic and precedent. Where, as here, a district court enters an order purporting to adjudicate the validity of a claim while lacking jurisdiction, a prevailing party may appeal such ruling to seek reformation of the decree. *Elec. Fittings*, 307 U.S. at 242; *Deposit Guar.*, 445 U.S. at 333-34; *New Jersey*, 989 F.2d at 702-03; *Env’tl Prot.*, 257 F.3d at 1077.

Lively is not merely appealing “objectionable language” or a “tongue-lashing,” as was the case in *In re Williams*, 156 F.3d 86, 90 (1st Cir. 1998), repeatedly cited by SMUG. *In re Williams* addressed only whether attorneys criticized by the court as “obstructionist” could appeal such criticism, entirely disconnected from any adjudication of the underlying claims. 156 F.3d at 90-93.

Setting aside the obvious world of difference between an attorney being deemed “obstructionist” in a discovery dispute (an altogether common if unhappy occurrence in litigation), and a defendant being deemed the enemy of mankind for committing heinous crimes against humanity, the Order here contains much more than a “tongue-lashing”—**it contains an actual determination of legal issues and legal claims brought by SMUG**, which the Court was admittedly without jurisdiction to even entertain, much less decide.

The principal thrust of SMUG’s lawsuit was the specious claim that Lively’s speech and advocacy aided-and-abetted Ugandan actors (whom he never met or even spoken to) in the commission of 14 crimes in Uganda. (Am.Compl., dkt.27, ¶¶237-238, 241-244). SMUG emphasized that aiding-and-abetting was the principal claim it was asserting against Lively. (*See, e.g.*, Mem.Opp.S.J., dkt.292 p.65 (“Plaintiff asserts that: (i) Defendant participated in a conspiracy...to carry out the crime against humanity of persecution; and (ii) Defendant aided and abetted the crime against humanity of persecution.”). (*See also id.* at pp.2, 5, 9, 77, 123). SMUG also sought a declaration from the court that “Lively’s conduct was in violation of the law of nations,” (Am.Compl., p.60), and **this is precisely what SMUG received.**

Though not in the least bit necessary to the court’s determination that it lacked subject-matter jurisdiction, instead of simply dismissing SMUG’s lawsuit as was required, the court engaged in legal and factual findings **which unquestionably adjudicated SMUG’s aiding-and-abetting and declaratory relief claims:**

**Lively...has aided and abetted a vicious and frightening campaign of repression against LGBTI persons in Uganda.**

(MSJ Order, AER at 125)(emphasis added).

Anyone reading this memorandum should make no mistake. The question before the court is not whether **Defendant’s actions in aiding and abetting [persecution]...constitute violations of international law. They do.”**

(*Id.* at 127)(emphasis added).

Discovery confirmed the nature of Defendant's, on the one hand, vicious and, on the other hand, ludicrously extreme animus against LGBTI people and **his determination to assist in persecuting them** wherever they are, including Uganda.

(*Id.* at 148)(emphasis added).

**The evidence of record demonstrates that Defendant aided and abetted [persecution in Uganda].**

(*Id.*)(emphasis added).

The court thus clearly engaged in more than mere “objectionable” “language.” It issued the authority-free legal declaration sought by SMUG, that Lively’s speeches and advocacy in Uganda “constitute violations of international law,” and it (erroneously) determined that SMUG proved its principal claim that Lively aided-and-abetted the crime against humanity of persecution. (*Id.* at 125, 127, 148). These legal findings and conclusions for SMUG on its principal claims clearly “adjudge the validity of [SMUG’s] claim,” *Elec. Fittings*, 307 U.S. at 242, and impose appealable injury on Lively.

## **2. SMUG Agrees that the Court Adjudicated its Claims in its Favor.**

SMUG concedes as it must, and even relishes in the undeniable fact, that the court purported to adjudicate SMUG’s declaratory relief and aiding-and-abetting claims in SMUG’s favor. SMUG claims that the court’s conclusions of law are “a win for SMUG because we were able to hold Scott Lively accountable,” and because the MSJ Order “**shows that Scott Lively in fact aided and abetted the persecution**

**of Uganda’s LGBTI community.”** (See *Sexual Minorities Uganda Press Release*, June 7, 2017, attached as Exhibit A to Declaration of Horatio Mihet)(emphasis added). SMUG has further boasted that “[b]y having a court recognize that persecution of LGBTI people amounts to a crime against humanity, we have already been able to hold Lively to account and reduce his dangerous influence in Uganda.” (See *This Anti-LGBT Activist Violated International Law–But He Can’t Be Sued In the US*, BuzzFeedNews, June 6, 2017, attached as Exhibit B to Mihet Declaration).

SMUG’s counsel similarly claims that the court’s adjudication is a “win for SMUG” because it “**affirm[ed] that...Lively aided and abetted the crime against humanity.**” (See *Center for Constitutional Rights Press Release*, June 6, 2017, attached as Exhibit C to Mihet Declaration)(emphasis added). Indeed, SMUG stated that “[t]he **judge agrees with us in every claim we made.**” (See *Scott Lively Celebrates After Judge Condemns His ‘Crackpot Bigotry,’* attached as Exhibit D to Mihet Declaration).

### **3. The District Court Indisputably Lacked Jurisdiction to Adjudicate SMUG’s Claims.**

The fatal problem with the court’s legal conclusions, declarations and adjudication of SMUG’s claims (besides lacking any basis in law or evidence) is that the court correctly held that it had no jurisdiction to entertain SMUG’s declaratory relief, aiding-and-abetting, or other crimes against humanity claims. (MSJ Order, AER at 128, 146-47). The court correctly dismissed SMUG’s federal claims for lack

of jurisdiction. (*Id.*) Because it had no evidence whatsoever that Lively did anything illegal in the United States or elsewhere, SMUG chose not to appeal the dismissal. Remarkably, even after Lively appealed, SMUG still chose not to cross-appeal the dismissal. As all appeal deadlines have long expired, the court's holding that it lacked jurisdiction to entertain SMUG's crimes against humanity claims is final.

Without jurisdiction, the court's legal conclusions and adjudication of SMUG's declaratory relief and aiding-and-abetting claims "flout the dictates of Article III" and make Lively an aggrieved party. *Env't'l Prot.*, 257 F.3d at 1077. "Without jurisdiction the court cannot proceed **at all** in any cause. **Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.**" *Ex Parte McCardle*, 74 U.S. 506, 514 (1868) (emphasis added). By rendering extra-judicial rulings, declarations and adjudication on SMUG's claims, the court imposed an appealable injury on Lively. *New Jersey*, 989 F.2d at 709 & n.10 (holding that conclusions reached in an opinion issued without jurisdiction impose an injury sufficient to permit the prevailing party to appeal); *Env't'l Prot.*, 257 F.3d at 1077 (even "dicta entered after a court has lost jurisdiction over a party inflicts a wrong on that party of a different order than that which exists in the usual case of extraneous judicial pronouncement" and permits a prevailing party to appeal).

**4. The District Court’s Adjudication of SMUG’s Claims Imposes Cognizable Prejudice on Lively.**

Lively is permitted to appeal the court’s decision because it (1) “**could** affect [his] rights in the future,” *Puerto Rico Tel. Co.*, 665 F.3d at 325 (emphasis added), (2) imposes undue prejudice, *Harrie*, 183 F.2d at 161, and (3) he is “aggrieved by **some aspect**” of the decision. *In re DES Litig.*, 7 F.3d at 25 (emphasis added). Here, the court’s decision unquestionably could (and will) affect Lively’s rights in the future and imposes significant prejudice on him. As demonstrated above, the court adjudicated Lively to have aided-and-abetted crimes against humanity and to have violated international law. This is no mere “umbrage.” The court’s jurisdiction-less adjudication will now be used by SMUG to further chill Lively’s protected speech and to further prosecute him in state and international courts.

This much SMUG has unequivocally promised. SMUG intends to avail itself of “all the options, including...bringing the state law claims in Massachusetts State Court.” (Mihet Decl., Exh.D, p.5). SMUG boast that the court’s order will “**go a long way in helping advocates in other countries build support for these kinds of claims**” against Lively and others. (*Id.*)(emphasis added). SMUG also reveals that it intends to use the legal and factual findings in the court’s order to subject Lively to “**prosecution in other countries where laws to prosecute him already exist[.]**” (*Id.*)(emphasis added). This is why SMUG celebrates that the court “has left the way open for us to...make another case in another court.” (*Id.* at 4-5).

Indisputably, the court’s extra-jurisdictional adjudication of Lively as an international law breaker and an aider-and-abettor of crimes against humanity not only “may have a prospective effect on [Lively],” but certainly will. *Camreta*, 563 U.S. at 702. The court’s unlawful findings “create[s] some presumptive prejudice against [Lively]” in the future proceedings promised by SMUG. *Harrie*, 183 F.2d at 161. It defies all logic and reason to claim, as SMUG does, that a party may appeal an immaterial adjudication of the validity of a patent claim, *Elec. Fittings*, 307 U.S. at 242, but a party faces no injury, and thus has no remedy, when a court of law declares and adjudicates him to be *hostis humani generis*, despite lacking any jurisdiction (or evidence, or law) to reach that conclusion. If this case does not present sufficient injury for a prevailing party appeal, then it is difficult to imagine what could ever suffice. SMUG’s motion should be denied.

### **CONCLUSION**

For these reasons, SMUG’s motion to dismiss this appeal should be denied.

Respectfully submitted,

/s/ Horatio G. Mihet

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*Attorneys for Defendant-Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of July, 2017, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Horatio G. Mihet  
Horatio G. Mihet  
*Attorney for Defendant-Appellant*

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/s/ Horatio G. Mihet

Attorney for Defendant Appellant Scott Lively

Dated: July 24, 2017

NO. 17-1593

---

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

SEXUAL MINORITIES UGANDA

Plaintiff-Appellee,

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries,

Defendant-Appellant.

---

**DECLARATION OF HORATIO G. MIHET  
IN SUPPORT OF DEFENDANT-APPELLANT SCOTT LIVELY'S  
RESPONSE IN OPPOSITION TO PLAINTIFF-APPELLEE'S  
MOTION TO DISMISS APPEAL**

---

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I, Horatio G. Mihet, do hereby declare as follows:

1. I am over the age of eighteen years and am one of the attorneys for Defendant-Appellant, Scott Lively (“Lively”) in this appeal. The statements in this Declaration are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called to testify to them, I would and could do so competently.

2. I am submitting this Declaration in Support of Defendant-Appellant Scott Lively’s Response in Opposition to Plaintiff-Appellee, Sexual Minorities Uganda’s (“SMUG”) Motion to Dismiss Appeal. (EID 6103417).

3. Upon entrance of the district court’s Order granting Lively’s Motion for Summary Judgment (EID 6099384), I received and reviewed numerous press statements, news articles, and media interviews from SMUG’s officers and directors and SMUG’s counsel.

4. I have attached true and correct copies of the following press statements, news articles, and media interviews:

- **Exhibit A** – Press Release, Sexual Minorities Uganda, *SMUGvsLively a Win for Sexual Minorities Uganda* (June 7, 2017), available at <http://sexualminoritiesuganda.com/smugvslively-a-win-for-sexual-minorities-uganda/> (last visited July 24, 2017).

- **Exhibit B** – J. Lester Feder, *This Anti-LGBT Activist Violated International Law – But He Can’t Be Sued In The U.S.*, BuzzFeedNews (June 6, 2017), available at [https://www.buzzfeed.com/lesterfeder/a-us-court-dismissed-a-suit-against-the-activist-who-helped?utm\\_term=.mqrDNP9Rj#.vmWNePMaK](https://www.buzzfeed.com/lesterfeder/a-us-court-dismissed-a-suit-against-the-activist-who-helped?utm_term=.mqrDNP9Rj#.vmWNePMaK) (last visited July 24, 2017).
- **Exhibit C** – Press Release, Center for Constitutional Rights, *In Scathing Ruling, Court Affirms SMUG’s Charges Against U.S. Anti-Gay Extremist Scott Lively While Dismissing on Jurisdictional Ground* (June 6, 2017), available at <https://ccrjustice.org/home/press-center/press-releases/scathing-ruling-court-affirms-smug-s-charges-against-us-anti-gay> (last visited July 24, 2017).
- **Exhibit D** – Tim Teeman, *Scott Lively Celebrates After Judge Condemns His ‘Crackpot Bigotry,’* The Daily Beast (June 6, 2017), available at <http://www.thedailybeast.com/scott-lively-celebrates-as-judge-blasts-his-crackpot-bigotry> (last visited July 24, 2017).

5. I submit these Exhibits in Support of Lively’s argument in opposition to SMUG’s Motion to Dismiss Appeal, to demonstrate that the district court’s findings are perceived as constituting, and do actually constitute, an adjudication of the merits of some of SMUG’s claims, and that such an adjudication of SMUG’s claims imposes undue prejudice on Lively.

I declare under penalty of perjury of the laws of the United States and the Commonwealth of Massachusetts that the foregoing statements are true and correct.

/s/ Horatio G. Mihet  
Horatio G. Mihet

# SMUGvsLively a Win For Sexual Minorities Uganda.

By admin - June 7, 2017



Some members of Sexual Minorities Uganda, CCR and our supporters in Massachusetts last year attending the #SMUGvsLively case.

Sexual Minorities Uganda Executive Director Dr Frank Mugisha says #SMUGvsLively case is a win for the organization even though the case has been dismissed by a court in Massachusetts. In his own words Dr Frank says "The case is a win for SMUG because we were able to hold Scott Lively accountable , this case exposed the dangers of extreme Christians and reduced their influence in Uganda and for the first time a court recognised that persecution of LGBT persons amounts to crimes against humanity "

The court discussed, in strong and clear terms, how the evidence shows that Scott Lively in fact aided and abetted the persecution of Uganda's LGBTI community. The court also reaffirmed its previous landmark holding in this case – that persecution on the basis of sexual orientation and gender identity amounts to a crime against humanity under international law. In a key passage, the court made this clear:

"Anyone reading this memorandum should make no mistake. The question before the court is not whether Defendant's actions in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people in Uganda constitute violations of international law. They do."

In 2013 (after SMUG filed this case against Lively), the United States Supreme Court ruled in a different case, called *Kiobel v. Royal Dutch Shell*, that U.S. courts have limited ability to rule on human rights violations that occur in other countries. It was based on the *Kiobel* case that the court here dismissed SMUG's lawsuit. We believe that even with *Kiobel's* limitations, SMUG's case should have gone forward because Scott Lively is a U.S. citizen and contributed to the persecution in Uganda in part from the United States – and those two facts should give a U.S. court jurisdiction, but the court disagreed.

Apart from dismissing on this technical ground, the judge spent a lot time reviewing the evidence produced in this case and determined that Lively: "aided and abetted a vicious and frightening campaign of repression against LGBTI persons in Uganda." The court also dismissed as ridiculous Lively's key claims about "homosexuals" being responsible for the Holocaust and genocide and a threat to children.

Some more key quotes from the ruling:

"[Lively's] crackpot bigotry could be brushed aside as pathetic, except for the terrible harm it can cause. The record in this case demonstrates that Defendant has worked with elements in Uganda who share some of his views to try to repress freedom of expression by LGBTI people in Uganda, deprive them of the protection of the law, and render their very existence illegal."

The evidence "confirmed the nature of Defendant's, on the one hand, vicious and, on the other hand, ludicrously extreme animus against LGBTI people and his determination to assist in persecuting them wherever they are, including Uganda. The evidence of record demonstrates that Defendant aided and abetted efforts (1) to restrict freedom of expression by members of the LBGTI community in Uganda, (2) to suppress their civil rights, and (3) to make the very existence of LGBTI people in Uganda a crime."

The court explained that it was ruling on a much narrower and technical issue – whether Lively's actions on American soil in pursuit of his campaign in Uganda were sufficient to bestow a U.S. court jurisdiction to hold him accountable. ("Jurisdiction" means the court's ability to rule on an issue.)-This was the basis of the dismissal of the case.

## EXHIBIT A

SMUG vs Lively a Win For Sexual Minorities Uganda | Sexual Minorities Uganda  
However, SMUG is discussing modalities to appeal the ruling based on jurisdiction and hold Scott Lively accountable for his actions of aiding and abetting the efforts to demonize, intimidate, and injure LGBTI people.

admin

WORLD

## This Anti-LGBT Activist Violated International Law — But He Can't Be Sued In The US

The American activist Scott Lively violated international human rights law in supporting Uganda's anti-LGBT law, a federal judge ruled, but he can't be sued in US courts.

Posted on June 6, 2017, at 3:18 p.m.



**J. Lester Feder**

BuzzFeed News Reporter



Boston Globe / Getty Images

A US federal court dismissed a suit on Monday against Scott Lively, the American anti-LGBT activist whose 2009 visit to Uganda helped catalyze a campaign to enact a sweeping new law criminalizing homosexuality.

The case was brought by the organization Sexual Minorities Uganda (SMUG), which argued Lively

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**EXHIBIT B**

homosexuality when first proposed in 2009. That year, Lively participated in a conference called "Seminar on Exposing the Homosexual Agenda" organized by a Ugandan activist, during which he [gave a talk](#) asserting gays recruit vulnerable children and that homosexuality was linked to Naziism and mass murder.

He also met with Ugandan lawmakers on that trip, and advised them via email as they worked on what became the Anti-Homosexuality Act passed in 2013. (It was [struck down](#) in 2014 on technical grounds by Uganda's Constitutional Court.) But SMUG first brought its case back in 2012, when there was a renewed effort to pass the bill, arguing that he was participating in a broad campaign to deprive LGBT people of their fundamental rights in Uganda.

In [his ruling](#) on Monday, Judge Michael Ponsor of the U.S. District Court in Springfield, Massachusetts, agreed that Lively's actions violated international law. But, he ruled, US courts do not have jurisdiction over crimes committed on foreign soil.

"Anyone reading this memorandum should make no mistake. The question before the court is not whether Defendant's actions in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people in Uganda constitute violations of international law. They do," Ponsor wrote. "The much narrower and more technical question posed by Defendant's motion is whether the limited actions taken by Defendant on American soil in pursuit of his odious campaign are sufficient to give this court jurisdiction over Plaintiff's claims. Since they are not sufficient, summary judgment [to dismiss the case] is appropriate for this, and only this, reason."

Despite the case being dismissed, SMUG and its legal team claimed the ruling as a victory.

"The court's ruling recognized the dangers resulting from the hatred that Scott Lively and other extremist Christians from the U.S. have exported to my country," said SMUG's Frank Mugisha in [a statement](#) issued on Tuesday. "By having a court recognize that persecution of LGBTI people amounts to a crime against humanity, we have already been able to hold Lively to account and reduce his dangerous influence in Uganda."

SMUG was represented by lawyers from the New York-based Center for Constitutional Rights, which reiterated that preliminary rulings in this case broke important legal ground. In 2013, a ruling rejecting a previous motion to dismiss the case [clearly stated](#) that the persecution of LGBT people constituted a violation of international human rights law.

CCR's Pamela Spees [said in a statement](#), "No matter what happens next in this case, they have made an important difference in demanding their day in court, achieving the recognition that persecution of LGBTI people is a crime against humanity, and facing down one of their key persecutors armed only with the truth of their experience and moral courage."

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J. Lester Feder is a world correspondent for BuzzFeed News and is based in Washington, DC. His secure PGP fingerprint is 2353 DB68 8AA6 92BD 67B8 94DF 37D8 0A6F D70B 7211  
Contact J. Lester Feder at [lester.feder@buzzfeed.com](mailto:lester.feder@buzzfeed.com).

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5 Comments

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**Ennis Skalski** · Gold Coast, Queensland

"Stop complaining queer people, it would be so much worse if you were in Uganda! You should appreciate living in a ~civilised~ country." So, is their plan to make and/or keep things shitty in other countries to make the US look "better" by comparison, so they can sneak bills past because even though they're regressive they're not as openly so?

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**Marc Ragusa** · Toronto, Ontario

Since when is oppression a form of activism? Nothing more than ignorance.

Like · Reply · 1 · 15 hrs · Edited



**Claire Tlotlo Psarouthakis** · Minneapolis, Minnesota

People should watch the documentary "God Loves Uganda" if you want more information about this!

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**Jerry Riter** · Franciscan University of Steubenville

Scott Lively is deadly.

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**Kevin Akstin** · Author of 'Modoc: A Murder Ballad' at Self-Employed

What an ironic surname, huh?

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**C Rubye Falsz**

Looks like a closet queen.

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## In Scathing Ruling, Court Affirms SMUG's Charges Against U.S. Anti-Gay Extremist Scott Lively While Dismissing on Jurisdictional Ground

Contact: [press@ccrjustice.org](mailto:press@ccrjustice.org)

### Historic Case Has Broken New Legal Ground, Documented Lively's Campaign of Persecution in Uganda

June 6, 2017, New York – Yesterday, a federal court minced no words in affirming that U.S.-based anti-gay extremist Scott Lively aided and abetted the crime against humanity of persecution in a ruling dismissing the lawsuit brought by Sexual Minorities Uganda (SMUG) on a narrow jurisdictional ground.

“Anyone reading this memorandum should make no mistake,” wrote **Judge Michael Ponsor** of the U.S. District Court in Springfield Massachusetts. “The question before the court is not whether Defendant’s actions in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people in Uganda constitute violations of international law. They do.”

The judge ruled that even though the evidence supports SMUG’s claims that Lively worked to deprive them of fundamental rights, the court did not have jurisdiction as a result of a 2013 Supreme Court ruling issued after SMUG’s case was filed. The ruling in *Kiobel v. Royal Dutch Shell* limited the extraterritorial reach of the Alien Tort Statute, under which SMUG brought its claim. “The much narrower and more technical question posed by Defendant’s motion is whether the limited actions taken by Defendant on American soil in pursuit of his odious campaign are sufficient to give this court jurisdiction over Plaintiff’s claims,” Judge Ponsor continued. “Since they are not sufficient, summary judgment is appropriate for this, and only this, reason.”

**EXHIBIT C**

“This case is a win for SMUG,” said **Frank Mugisha**, SMUG Executive Director. “The court’s ruling recognized the dangers resulting from the hatred that Scott Lively and other extremist Christians from the U.S. have exported to my country. By having a court recognize that persecution of LGBTI people amounts to a crime against humanity, we have already been able to hold Lively to account and reduce his dangerous influence in Uganda.”

In 2013 *SMUG v. Lively* broke new legal ground when the court rejected Lively’s motion to dismiss the case, finding that persecution on the basis of sexual orientation and gender identity is a crime against humanity and that the fundamental human rights of LGBTI people are protected under international law.

“The ruling clearly vindicates what SMUG and the LGBTI community in Uganda have known and said all along about Lively and his role in Uganda,” said CCR Senior Staff Attorney **Pamela Spees**. “They have shown incredible courage, dignity, and determination in the face of rising repression and persecution. No matter what happens next in this case, they have made an important difference in demanding their day in court, achieving the recognition that persecution of LGBTI people is a crime against humanity, and facing down one of their key persecutors armed only with the truth of their experience and moral courage.”

Given the widespread claim that homosexuality is foreign to Africa and a corrupt Western import, the documentation of the Western role in orchestrating the persecution of LGBTI people has proven an embarrassment for Lively’s Ugandan partners.

“The court recognized that Lively worked to erase LGBTI Ugandans from civil and political life – a threat to Ugandan self-determination,” said Rutgers Law professor and Center for Constitutional Rights co-counsel **Jeena Shah**. “The evidence surfaced in this case showed how Lively’s persecutory efforts exploited a long history of Western homophobia in Uganda, beginning with British colonization.”

The court emphasized throughout the decision the illegality and harm of Lively’s campaign of persecution, finding that:

- “Defendant Scott Lively is an American citizen who has aided and abetted a vicious and frightening campaign of repression against LGBTI persons in Uganda.”

- “[Lively’s] crackpot bigotry could be brushed aside as pathetic, except for the terrible harm it can cause. The record in this case demonstrates that Defendant has worked with elements in Uganda who share some of his views to try to repress freedom of expression by LGBTI people in Uganda, deprive them of the protection of the law, and render their very existence illegal.”
- The evidence “confirmed the nature of Defendant's, on the one hand, vicious and, on the other hand, ludicrously extreme animus against LGBTI people and his determination to assist in persecuting them wherever they are, including Uganda. The evidence of record demonstrates that Defendant aided and abetted efforts (1) to restrict freedom of expression by members of the LGBTI community in Uganda, (2) to suppress their civil rights, and (3) to make the very existence of LGBTI people in Uganda a crime.”

Read today’s ruling [here](#). To learn more, visit [CCR’s case page](#).

Sexual Minorities Uganda is represented by Center for Constitutional Rights and Jeena Shah of the International Human Rights Clinic at Rutgers Law School in Newark, the law firm of Dorsey & Whitney, LLP, Christopher Betke, Luke Ryan, and Judith Chomsky.

*Sexual Minorities Uganda (SMUG) is non-profit umbrella organization for LGBTQI advocacy groups in Uganda. SMUG was founded in 2004 and the network currently comprises 18 organizations in Uganda offering counseling, health, and other services, to the LGBTQI community. As an umbrella entity, SMUG also works closely with international human rights organizations to bring attention to the persecution of LGBTI people in Uganda. Visit [www.sexualminoritiesuganda.com](http://www.sexualminoritiesuganda.com).*

*The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.*

June 6, 2017

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PHOTO ILLUSTRATION BY THE DAILY BEAST

**CONTEMPT OF COURT**

# Scott Lively Celebrates After Judge Condemns His ‘Crackpot Bigotry’

A judge dismissed a case against evangelical Scott Lively on a jurisdictional issue but condemned his anti-gay activities in Uganda. Lively tells The Daily Beast he’s ‘delighted.’



TIM TEEMAN 06.06.17 6:45 PM ET

## EXHIBIT D



PHOTO ILLUSTRATION BY THE DAILY BEAST

The U.S. District Court of Massachusetts may have dismissed a case bought by a Ugandan LGBT rights group against evangelical minister Scott Lively for “crimes against humanity,” but the judge in the case made it forcefully clear that this was down to a matter of jurisdiction —not because the court sided with Lively, his words and deeds.

In his ruling, Judge Michael Ponsor issued a strongly worded denunciation of Lively’s “crackpot bigotry,” his conspiracy to persecute LGBTI people in Uganda, and the “terrible harm” he has done. Lively had also violated international law, Judge Ponsor said.

“Defendant Scott Lively is an American citizen who has aided and abetted a vicious and frightening campaign of repression against LGBTI persons in Uganda,” Judge Ponsor ruled.

Ponsor added, “[Lively’s] crackpot bigotry could be brushed aside as pathetic, except for the terrible harm it can cause. The record in this case demonstrates that Defendant has worked with elements in Uganda who share some of his views to try to repress freedom of expression by LGBTI people in Uganda, deprive them of the protection of the law, and render their very existence illegal.”

The evidence, said Judge Ponsor, “confirmed the nature of Defendant's, on the one hand, vicious and, on the other hand, ludicrously extreme animus against LGBTI people and his determination to assist in persecuting them wherever they are, including Uganda. The evidence of record demonstrates that Defendant aided and abetted efforts (1) to restrict freedom of expression by members of the LBGTI community in Uganda, (2) to suppress their civil rights, and (3) to make the very existence of LGBTI people in Uganda a crime.”

In an interview with the Daily Beast, Lively welcomed the court ruling as a victory, dismissed the judge’s condemnation of him as political posturing, and indicated that he may return to Uganda in the future.

“I work all over the world to promote a family-centered society in which homosexuality is tolerated but not condoned or normalized in the mainstream,” Lively said. “I think it’s a very balanced, biblical approach that is consistently mischaracterized by activists on the other side who want to portray it as extremism and hate. It’s not.”

Judge Ponsor’s ruling, however, runs counter to that claim: it bluntly lays out the scale and consequences of Lively’s anti-gay activities.

“Anyone reading this memorandum should make no mistake,” the judge wrote. “The question before the court is not whether Defendant's actions in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people in Uganda constitute violations of international law. They do.”

\*\*\*

*Sexual Minorities Uganda v. Lively* was filed in 2012 under the Alien Tort Statute (ATS), which allows for foreign victims of human rights abuses to seek civil remedies in U.S. courts.

In 2013, however, a Supreme Court ruling limited the extraterritorial reach of the ATS, which meant the District Court did not have jurisdiction, Judge Ponsor said.

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The case had been brought against Lively by Sexual Minorities Uganda (SMUG) who were represented by the Center For Constitutional Rights (CCR), "for his (Lively's) role in the persecution of LGBTI people in Uganda, in particular his active participation in the conspiracy to strip away their fundamental rights."

Lively, president of Abiding Truth Ministries, had been active in anti-gay political maneuvering in Uganda since 2002, and had worked with proponents of the infamous 'Kill The Gays Bill'—which originally included the death penalty for "aggravated homosexuality"—that first materialized in 2009 as the Anti-Homosexuality Bill, later Act.

When SMUG filed their federal lawsuit in 2012, Frank Mugisha, its executive director said Lively had "actively and intensively worked to eradicate any trace of LGBT advocacy and identity. Particularly damaging has been his claim that children are at risk because of our existence. His influence has been incredibly harmful and destructive for LGBT Ugandans fighting for their rights. We have to stop people like Scott Lively from helping to codify and give legal cover to hatred."

Last year, Mugisha and others laid out in the starkest terms the political and cultural homophobia LGBT people faced in Uganda, after police had violently targeted an LGBT party, leading to the cancellation of a Pride event.

Today, Mugisha told the Daily Beast, "This ruling is good for us as an organization and for the LGBT community in Uganda because it affirms our claims against Scott Lively. The judge agrees with us in every claim we made. Technically he does not have the jurisdiction to make Scott Lively accountable, but that is the law.

"I would have been very disappointed if the judge had disagreed on the substance or any of the claims we made, but he did not," Mugisha said. "He has left the way open for us to appeal

or make another case in another court.”

Referencing a range of Lively’s writings and speeches, the judge in his ruling said Lively’s positions on LGBTI people “range from the ludicrous to the abhorrent. He has asserted that ‘Nazism was in large part an outgrowth of the German homosexual movement,’ and that “[i]n seeking the roots of fascism we once again find a high correlation between homosexuality and a mode of thinking which we identify with Nazism.’ He has tried to make gay people scapegoats for practically all of humanity’s ills,” finding “through various leads, a powerful homosexual presence in... the Spanish Inquisition, the French ‘Reign of Terror,’ the era of South African apartheid, and the two centuries of American slavery.”

One of Lively’s essays is titled, “Is Homosexuality Worse Than Mass Murder?”

The judge noted how Lively had traveled internationally “attending meetings and making speeches to encourage persecution of LGBTI people,” building “an international reputation for his virulently hateful rhetoric.”

Judge Ponsor’s ruling records in great detail Lively’s activities in Uganda, including a suggestion to his allies there that they should soften public backlash to the Anti-Homosexuality Act by nixing the death penalty as an ultimate punishment, and replacing it with a 20-year prison term.

Other emails exchanged ideas and suggestions on how to restrict LGBTI rights, and “intimidate and repress” the LGBTI community in Uganda.

\*\*\*

After Judge Ponsor’s ruling, Pamela Spees, the CCR’s senior staff attorney, told the Daily Beast, “Obviously we’re disappointed in the ruling itself, but feel very vindicated by court’s findings as to Lively’s role in the persecution in Uganda. It vindicates what SMUG said all along for his responsibility in for the persecution they had suffered and the court was very clear in condemning that.”

Spees said CCR and SMUG were currently examining “all the options,” including appealing the ruling to the First Circuit Court of Appeals, and bringing state law claims in Massachusetts State Court.

The precedent set in the ruling was significant, Spees said, in sending a deterrent message to Lively and other anti-LGBT activists like him.

“It reiterated an earlier ruling that persecution on the basis of sexual orientation and gender identity is a crime against humanity under international law,” Spees said. “It is one of most serious crimes in international law. In looking at the evidence produced, it showed that Lively aided and abetted persecution, and was trying to do so elsewhere around the world. It’s just that he can’t be held accountable here because of the ruling limiting the Court’s jurisdiction--not that he didn’t do it.”

Spees said Lively, and others like him, could face prosecution in other countries where laws to prosecute him already existed. “These factual findings go a long way in helping advocates in other countries build support for these kinds of claims.”

A reporter queried with Spees, however, if American law is unable to prosecute Lively and the countries where he operates are anti-LGBT themselves, then effective laws to prosecute him may not exist.

“Certainly, countries that are anti-LGBT and have retrograde laws on their books are going to continue to be difficult places to live and work,” conceded Spees. “But this case and these findings have contributed something very significant to the understanding of international law.

“This is the first case of its kind where have an organization like SMUG bringing a case against someone at the level of Lively pushing out this program of persecution. Now there’s an extensive factual record of how that happened, how it came about, who he worked with, and the impact it had.

“All this casts light on how situations develop and operate, which will be informative not just for people in Uganda, but in other places around the world where Lively and others like him target much more vulnerable communities.”

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“I’m delighted,” Lively told the Daily Beast following the ruling. “Even though Judge Ponsor engaged in a lot of nasty rhetoric about my beliefs and writings, he followed the rule of law and dismissed the case when he could have kept it going to proceed on to trial.”

A reporter recited to Lively the damning descriptions of his actions as described by the judge.

“He had to do that, didn't he?” Lively said of the judge’s denunciation. “He’s an ideologue on the Left, and he’s going to catch hell from his fellow travelers for letting me out of the lawsuit. This is his way of mitigating damages and deflecting blame. This is something they are going to be very unhappy with.”

Asked if he accepted the judge’s description of his actions, Lively remained defiant.

“No, this is all hyperbole,” Lively said. “This is the sort of thing you see written in editorials in college newspapers by gay student activists, not the kind of language you expect from an objective federal judge. I just think the extremity of the hyperbole is evidence of how much he feared the consequences of following the law in this case. The more he can attack me with this inflammatory language, the less he’s going to take from the Left for doing what he was required to do under the law.

“There a lot of other judges that are far Left extremists in the federal judiciary that wouldn't have granted the motion for summary judgment. They would have put forward some specious legal reasoning and allowed the case to continue towards trial. For some reason, Judge Ponsor has released me from their trap and I’m grateful for that.”

A reporter again read passages of the judge’s ruling, describing Lively as aiding and abetting the persecution of LGBTI Ugandans.

“If you read the Order, there is none of standard legal analysis that goes with those kind of conclusory (sic) statements. A serious federal ruling has a step-by-step prove-up of the conclusions. There is none of that here. This is just rhetoric you’d find in a gay editorial. It’s really meaningless in a legal sense. It’s not legally binding on anybody. It’s just one man’s opinion who just happens to be on a federal bench.”

Lively denied he had gone to Uganda to influence the law-making process. “I was invited to speak at a seminar which I did do.”

“I don't have an animus towards homosexuals,” Lively insisted. “I have an animus towards the homosexual political agenda. I don't believe sex outside of marriage in any form should be normalized in mainstream society, but that people who choose to live outside the mainstream should be left alone.

“I don't support invasion of privacy. I have never advocated hatred or violence against anyone. I believe and always support tolerance for people who have different views and forms of conduct. I just stand for public policy in which those things are not mainstream.”

Asked whether he believed in LGBT equality, Lively responded: “I think every person deserves basic human rights, but not based on their sexual conduct—just based on the fact they are a human being,” he said.

There are laws against LGBT people throughout the world—did Lively want to see those laws scrapped so LGBT people can live equally, a reporter asked.

“People’s basic human rights and civil rights should be protected in a way in which sexual conduct outside marriage is not normalized in the society,” Lively replied. “I think that is a balance that can be achieved and that's what I work towards.”

Asked if he planned to return to Uganda, Lively told the Daily Beast, “I don’t have any current plans to do that, but it’s certainly possible at some point in the future.”

Lively said he planned to go to Israel and the Middle East later this year “for a book I’m working on, not related to advocacy or conferences or speech-making. I just go where I’m invited and I advocate my views which are clearly laid out in my writing. Nothing is hidden. I have been taking the same position and advocating the same ideas for 30 years, which is why the SMUG lawsuit was really so outrageous.”

A reporter asked whether Lively accepted that what the judge called his “crackpot bigotry” had done “terrible harm” to LGBT people in Uganda.

“No, I don't accept that,” said Lively, “and I have to leave right now and finish this interview. I’ve gotta run, thank you, goodbye.”

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