

**United States Court of Appeals
For the First Circuit**

No. 17-1593

SEXUAL MINORITIES UGANDA

Plaintiff-Appellee

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries

Defendant-Appellant

**PLAINTIFF-APPELLEE’S MOTION
TO POSTPONE ORAL ARGUMENT**

Pursuant to Fed. R. App. P. 27, Fed. R. App. P. 34(b), and 1st Cir. R. 27, Plaintiff-Appellee Sexual Minorities Uganda (“SMUG”), by and through the undersigned counsel, move this Court for an order postponing oral argument, which is currently scheduled for June 7, 2018, at 9:30 a.m. In support thereof, SMUG states as follows:

1. On June 5, 2017, the District Court issued its order granting Defendant-Appellant Scott Lively’s Motion for Summary Judgment and dismissing the matter. Abbreviated Electronic Record (“AER”) at 150.

2. On June 8, 2017, Lively, the prevailing party, filed his Notice of Appeal with the United States District Court for the District of Massachusetts, noting that “[a]lthough this Order granted summary judgment in favor of [Lively],” he would be seeking to “eliminate from it certain extraneous but prejudicial language immaterial to the disposition of the case...” and have the state law claims dismissed with prejudice “such that they cannot be re-filed in state court.” AER at 151.

3. The instant appeal was docketed on June 14, 2017.

4. On July 3, 2017, SMUG filed a Motion to Dismiss the appeal and a Motion to Stay the proceedings pending resolution of its motion to dismiss.

5. Based on what could be gleaned from Lively’s Notice of Appeal, SMUG’s Motion to Dismiss was based primarily on the grounds that as a prevailing party who won all the relief he sought below, Lively lacked standing sufficient to confer jurisdiction on this Court.

6. On July 24, 2017, Lively filed his responses in opposition to SMUG’s motions to dismiss and stay the proceedings. On July 31, 2017, SMUG filed its reply briefs in support of its motions to dismiss and stay the proceedings.

7. On October 3, 2017, despite the fact that SMUG’s motion to dismiss his appeal and stay the proceedings were still pending, Lively filed his opening brief.

8. On November 29, 2017, because SMUG did not file an opposition brief given that its pending motions had not been ruled upon, Lively filed a Motion to Set Oral Argument and To Exclude Appellee From Oral Argument for Default in Filing the Brief.

9. On December 11, 2017, this Court issued an order denying Lively's motion to exclude SMUG from oral argument. With respect to the request for oral argument, the order stated that the request was "noted" and further that it would be "scheduled in due course unless a panel determines that it is unnecessary pursuant to Fed. R. App. P. 34(a)(2)."

10. On December 21, 2017, Lively filed a Motion for Reconsideration of Denial of Motion to Set Oral Argument and to Exclude Appellee From Oral Argument for Default in Filing Brief. On January 2, 2018, SMUG filed its response in opposition to Lively's Motion for Reconsideration; and on January 3, 2018, Lively filed his reply brief in support of his motion.

11. On March 19, 2018, this Court issued an order in which it denied SMUG's Motion to Dismiss "without prejudice to reconsideration by the merits panel." It also denied Lively's motion to set oral argument and exclude SMUG from the oral argument. The Court set a deadline for SMUG to file its opposition brief.

12. On April 18, 2018, SMUG filed its brief in opposition to Lively's appeal, in which it re-urged this Court to dismiss Lively's appeal, i.e. on the grounds that, as the prevailing party below, he does not have standing to appeal, and that he is judicially estopped from taking positions regarding the state law claims that are the opposite of what he argued for and won below.

13. Lively's reply brief is now due on May 16, 2018.

14. On April 30, 2018, this Court issued an order setting oral argument for June 7, 2018, wherein it noted that there would be no continuance "except for grave cause." The order further noted the possibility that the case could be removed from the argument calendar "if the panel ultimately concludes that argument is not warranted in a particular case."

15. In the event the merits panel determines that oral argument is warranted in this matter, despite the concerns raised by SMUG about lack of jurisdiction and judicial estoppel, SMUG respectfully requests a postponement of this date because its lead and co-lead counsel, who would be arguing the matter, are scheduled to be traveling internationally for work at that time. The trip has long been planned with the client and is the only period during the coming year that co-lead counsel is available to make this trip.

16. Additionally, because of the significance of this litigation for SMUG's staff and membership, SMUG has sent representatives to each major hearing in this

matter. SMUG would endeavor to do the same if a hearing is scheduled before this Court but faces logistical hurdles in making travel arrangements from Uganda to Massachusetts within a period of a month.

17. Counsel was advised that the next sittings of the Court are scheduled for the week of July 23-27 and in early September. However, lead counsel and co-lead counsel are also scheduled for separate international and domestic travel the two weeks leading up to the sitting in July with nonrefundable tickets and other related expenses having already been incurred.

18. Given these logistical concerns for SMUG and its counsel's travel schedules, if the Court finds an argument is warranted and is amenable to postponement, counsel would request the matter be set during the Court's September sitting.

19. This motion is brought in good faith and is not for purposes of delay.

20. Prior to filing this motion, counsel for SMUG conferred with Lively's counsel who indicated he opposes the request.

21. Finally, this motion does not affect any other deadlines in this lawsuit.

RELIEF REQUESTED

WHEREFORE, for good cause shown, SMUG respectfully requests that this motion be granted, and that the Court postpone the oral argument to the September sitting.

Dated: May 8, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically, that it will be served electronically upon all parties of record who are registered CM/ECF participants via the NEF, and that paper copies will be sent to any parties indicated on the NEF as non-registered participants on May 8, 2018.

/s/ Pamela C. Spees

Pamela C. Spees

Counsel for Plaintiff-Appellee