

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.

**DEFENDANT-APPELLANT SCOTT LIVELY'S OPPOSITION TO
PLAINTIFF-APPELLEE'S MOTION TO POSTPONE ORAL ARGUMENT**

Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
Mary E. McAlister
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Facsimile: (407) 875-0770
Email: court@LC.org

The Motion to Postpone Oral Argument (Doc. 00117286405) filed on May 8, 2018 by Plaintiff-Appellee Sexual Minorities Uganda (“SMUG”), is without merit and should be denied for any one of **four** separate and independent reasons:

1. **First**, the Motion is untimely and postponing Oral Argument would prejudice Defendant-Appellant Scott Lively (“Lively”). As SMUG itself was aware and acknowledges (Motion at ¶ 14), on April 30, 2018, this Court scheduled oral argument to take place just five-and-a-half weeks later, on June 7, 2018, and admonished the parties that “[t]here will be no continuance except for **grave** cause.” (Doc. 00117283365, p. 1 (emphasis added)). Relying on that admonishment, and prior to receiving any notification from SMUG about the purported inconveniences of the argument date, Lively’s counsel made approximately \$1,100 worth of non-refundable travel reservations from their office in Florida to Boston. Rather than notifying Lively’s counsel and this Court immediately of its “long-planned” scheduling concerns, SMUG waited more than one week to file its Motion. SMUG now complains of non-refundable travel reservations that two of its nine counsel purportedly have made for other matters (Motion at ¶ 17), but SMUG’s own delay in seeking relief has imposed the same burden on Lively in this appeal. It would be unfair and unjust to provide financial relief to SMUG at the expense of Lively, particularly when that expense to Lively would be occasioned solely by SMUG.

2. **Second**, SMUG was represented by no fewer than **thirteen** attorneys in the district court litigation, **nine** of whom have signed SMUG’s brief in this appeal. (Doc. 00117282587, p. 61). Each of these attorneys had extensive and substantive involvement in representing SMUG on the pleadings, at depositions and at hearings and oral argument. That **only two** of these attorneys now claim a scheduling conflict (Motion at ¶ 15) does not constitute the “grave cause” required by this Court. Indeed, Lively’s lead and co-lead counsel also have a previously scheduled oral argument in another federal court matter on June 7, 2018, which they were both planning to attend and handle substantively, but they understood this Court’s “grave cause” instruction to mean that they must split their time between the two commitments, and have already made plans for each to cover one of them. Notably, SMUG does not even disclose which two of its nine lawyers in this appeal have the purported conflict, nor the specific dates of their purported travel commitments,¹ nor any reason why one of them (or any one of the remaining seven attorneys) cannot adjust their schedules to handle this oral argument, as Lively’s counsel were forced to do.

¹ SMUG’s failure to specify the dates of its purported travel commitments makes it impossible for Lively and this Court to determine whether the purported conflict is truly a conflict in the first instance. For example, SMUG says that two of its nine lawyers in this appeal are scheduled to travel during “the two weeks **leading up to** the sitting in July,” but does not say that either of them will actually be travelling **during** the July sitting. (Motion at ¶ 17 (emphasis added)).

3. **Third**, SMUG’s purported “logistical hurdles in making travel arrangements from Uganda to Massachusetts” for one or more of its representatives (Motion at ¶ 16) also does not constitute “grave cause” for postponing the oral argument by three months. To be sure, the five-and-a-half weeks’ notice provided by this Court is in line with the notice provided by the district court for various hearings, which SMUG notes that it was able to have its Ugandan representatives attend without difficulty. (Motion at ¶ 16).² SMUG does not specify what the “logical hurdles” are this time, nor does it explain why they are insurmountable.³ And, indeed, SMUG’s representatives are quite accustomed with travel to the United States, since they travel to the United States several times each year.⁴ Scheduling

² See, e.g., district court dkt. 39 (providing seven weeks’ notice for motion to dismiss hearing); dkt. 312 (providing eight weeks’ notice for summary judgment hearing).

³ The Court should not allow SMUG to provide in a Reply memorandum the requisite details missing from its Motion, because Lively would be prejudiced by his inability to probe and respond to SMUG’s claims. SMUG had the burden of showing “grave cause” in its initial Motion, and failed to meet it.

⁴ For example, Pepe Onziema, just one of SMUG’s multiple officers, has traveled to the United States on numerous separate occasions, including: (1) collecting the Clinton Global Citizen Award in New York (<http://sexualminoritiesuganda.com/pepe-julian-onziema-receives-2012-clinton-global-citizen-awards/>); (2) participating in a panel discussion on LGBT rights at the National Cathedral in Washington, D.C. (<http://76crimes.com/2013/04/01/washington-cathedral-to-focus-on-lgbt-rights-abroad/>); (3) appearing on the television show *Last Week Tonight with John Oliver* in New York (www.youtube.com/watch?v=G2W41pvvZs0); (4) speaking at the National Endowment for Democracy in Washington, D.C. (<https://vimeo.com/126566151>); (5) collecting the GLAAD Media Award for Outstanding Talk Show Episode in New York

one more trip to the United States on almost six weeks' notice cannot be an insurmountable "logistical hurdle" for SMUG. Moreover, it cannot escape this Court that, in this appeal, SMUG is asking it to **affirm** the district court's **dismissal** of SMUG's claims. (Motion at ¶¶ 1, 4-5, 12). SMUG fails to explain why it is critically important for its representatives to travel to Massachusetts from Uganda, only to witness from the gallery how SMUG's counsel insist that SMUG's entire lawsuit was properly dismissed and should remain dismissed.

4. **Fourth** and finally, as SMUG readily acknowledges, SMUG has already visited at least a **five-month delay** upon Lively in this appeal, by interposing a failed motion to dismiss, and then by ignoring this Court's Order that SMUG must file its brief on or before November 2, 2017, and – even though no stay was issued – by refusing to file its brief until April 18, 2018, after SMUG's motion to dismiss was properly denied. (Motion at ¶¶ 4-12). Had SMUG timely filed its brief on November 2, 2017, when it was required to file it by this Court (Doc. 00117209014), SMUG would not have encountered the purported travel conflicts, and this appeal could have been briefed and argued long ago. Not content with its self-effectuated

(<http://www.advocate.com/world/2015/05/11/watch-ugandan-trans-man-emotionally-accepts-glaad-award>); and (6) speaking at a "Pride Month" event at the United States Department of State in Washington, D.C. (<http://www.advocate.com/pride/2015/06/07/watch-pride-us-state-department-affirms-lgbt-human-rights>).

five-month delay, SMUG now seeks an additional three-month delay. This Court should neither countenance nor reward these dilatory tactics.

At the end of the day, SMUG has utterly failed to show the requisite “grave cause” for changing the oral argument date and delaying this appeal by another three months. Granting SMUG’s Motion would unduly delay this appeal yet again, impose a financial burden on Lively, and reward SMUG for its dilatory tactics. The Court should deny SMUG’s Motion and should proceed with oral argument as scheduled.

Respectfully submitted,

/s/ Horatio G. Mihet

Mathew D. Staver

Horatio G. Mihet

Roger K. Gannam

Daniel J. Schmid

Mary E. McAlister

LIBERTY COUNSEL

P.O. Box 540774

Orlando, FL 32854

Phone: (407) 875-1776

Facsimile: (407) 875-0770

Email: dschmid@LC.org

Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2018, 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