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 DISMISS DEFENDANT-APPELLANT'S APPEAL

Pursuant to Fed. R. App. P. 27 and Local Rule 27(c), Plaintiff-Appellee Sexual Minorities Uganda respectfully moves to dismiss the appeal docketed as 17-1593.

PRELIMINARY STATEMENT

The Defendant-Appellant Scott Lively ("Lively") seeks to appeal a final order that granted *his* motion for summary judgment and dismissed Plaintiff-Appellee's lawsuit, and rendered him a prevailing party. Because neither of Lively's two asserted grounds for appealing, as set forth in his Notice of Appeal,

are sufficient to confer jurisdiction on this Court or raise a substantial question, the appeal should be summarily dismissed. (AER[1] at 151).

First, Lively seeks to appeal from the summary judgment order that was issued *in his favor* to ask this Court to "reform" language in the district court's opinion that he finds "prejudicial." It is axiomatic that federal appellate courts review and correct orders or judgments; they do not serve to review or "reform" the wording of opinions, even if they have caused umbrage or hurt feelings. In this case, there is no judgment that orders Lively to do – or refrain from doing – anything. Likewise, Lively can point to no concrete and particularized harm to a legally protected interest that will result from the order in his favor. Thus, Lively has no standing to appeal for the purpose of "reform[ing]" judicial language. For this reason, the Court lacks jurisdiction to hear the appeal and it should be summarily dismissed.

Second, Lively also seeks to appeal the district court's decision to dismiss Plaintiff-Appellee's pendent state law claims without prejudice. However, the district court's decision was merely following the law in this Circuit that pendent state law claims should be dismissed without prejudice when a court declines to exercise supplemental jurisdiction over them. Lively points to no authority in this Circuit for the proposition that his desire to have the state law claims dismissed

[1] "AER" refers to the Abbreviated Electronic Record.

with prejudice presents a ripe controversy or otherwise provides sufficient grounds to appeal. Rather, the cases to which he cites from other circuits concern the inapposite question of whether the state law claims were preempted by federal law. This fails to present a substantial question, and should likewise be summarily dismissed, pursuant to Local Rule 27(c).

PROCEDURAL HISTORY

Plaintiff-Appellee Sexual Minorities Uganda is an umbrella organization for a coalition of Ugandan organizations advocating for the rights of lesbian, gay, bisexual, transgender, and intersex ("LGBTI") communities. On March 14, 2012, Sexual Minorities Uganda commenced an action against Lively, a U.S. citizen residing in Massachusetts, under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, and also alleging Massachusetts state law claims for civil conspiracy and negligence for his role in the widespread or systematic persecution of LGBTI persons in Uganda. In 2013, the district court denied Lively's motion to dismiss, AER at 46, and discovery then proceeded for nearly two and a half years.

On June 5, 2017, after extensive briefing of a summary judgment motion brought by Lively in which he sought dismissal of all claims, the district court issued its decision and order granting Lively's motion. AER at 125. The district court explained the record evidence showed that, while Lively's actions constituted aiding and abetting the crime against humanity of persecution as alleged in the

complaint, the "actions taken by Defendant *on American soil* in pursuit" thereof were not sufficient to sustain jurisdiction under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). *Id.* at 127-28, 146. The district court further "decline[d] to exercise supplemental jurisdiction" over Sexual Minorities Uganda's common law tort claims, explaining that "the sensitivity of the issues raised makes it more prudent to allow a court of the Commonwealth of Massachusetts to take the lead." *Id.* at 147. The district court dismissed the state law claims "without prejudice to their refiling in state court, if Plaintiff wishes to take this route." *Id.*

On June 8, 2017, Lively filed his Notice of Appeal from the district court's order granting his motion for summary judgment, explaining the putative basis for his appeal in a footnote:

> Although this Order granted summary judgment in favor of Defendant-Appellant Lively, multiple jurisdictional grounds exist for its review by the First Circuit, including: (1) to reform the Order and eliminate from it certain extraneous but prejudicial language immaterial to the disposition of the case and which the district court had no jurisdiction to entertain or enter; *see, e.g., Elec. Fittings Corp. v. Thomas & Betts*, 307 U.S. 241, 242 (1939); *Camreta v. Greene*, 563 U.S. 692, 702-703 (2011); *Conwill v. Greenber Taurig* [sic], *L.L.P.*, 448 F. App'x 434, 436-37 (5th Cir. 2011); and (2) to correct the district court's error in failing to dismiss Plaintiff's state law claims with prejudice, such that they cannot be re-filed in state court. *See e.g., LaBuhn v. Bulkmatic Transport Co.*, 865 F.2d 119, 121-122 (7th Cir. 1988); *Briscoe v. Fine*, 444 F.3d 478, 495-96 (6th Cir. 2006).

AER at 151, n. 1.[2]

ARGUMENT

A. THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE, AS THE PREVAILING PARTY, LIVELY HAS NO STANDING TO APPEAL, NOTWITHSTANDING THE LANGUAGE HE FINDS DISPLEASING.

Because he obtained a dismissal of Sexual Minorities Uganda's federal claims with prejudice, and the remaining state claims without prejudice, Lively is the prevailing party in this action. "It is an abecedarian rule that a party cannot prosecute an appeal from a judgment in its favor." *In Re Shkolnikov*, 470 F.3d 22, 24 (1st Cir. 2006). This stems from a jurisdictional rule delineating the appellate court's power, which is "to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945).

The judgment in this case was in Lively's favor so, despite his desire to "reform" language in the opinion he finds objectionable, there is nothing legally adverse to Lively for this Court to "correct." As the Supreme Court recently explained, parties may not appeal a judicial decision where, as here, the "district court had not ordered them to do or refrain from doing anything." *Hollingsworth*

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[2] Lively also included the district court's interlocutory order denying his motion to dismiss, AER at 46, in his Notice of Appeal, *id.* at 151. Lively lacks any independent basis to appeal the district court's interlocutory order, *see*, *e.g.*, *Denault v. Ahern*, 857 F.3d 76, 81 (1st Cir. 2017) ("all interlocutory rulings in a case 'merge in the [final] judgment'"), and his appeal of this order should also be dismissed.

v. Perry, 133 S. Ct. 2652, 2662 (2013). *See also Shkolnikov*, 470 F.3d at 24 ("[S]ince courts of appeals sit to review final decisions, orders, and judgments of lower courts, [] not to review passages in lower court opinions, a party may not appeal a favorable decision, order, or judgment for the purpose of securing appellate review of statements or findings therein.") (citing *Cal. v. Rooney*, 483 U.S. 307, 311 (1987)); *Cioffi v. Gilbert Enterprises, Inc.*, 769 F.3d 90, 92 (1st Cir. 2014) ("A district court speaks through orders and judgments, and only those decisions are reviewable."); *In re Williams*, 156 F.3d 86, 90 (1st Cir. 1998) ("[F]ederal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations" and "[b]ecause no sanction remains, we lack jurisdiction…").

This firm jurisdictional rule does not yield merely because "the appealing party considers the offending statements or findings to be erroneous." *In Re Shkolnikov*, 470 F.3d at 24. "[A]ppellate courts do not issue Writs of Erasure to change language in district judge's opinions, when the judgments are uncontested." *United States v. Accra Pac, Inc.*, 173 F.3d 630, 632 (7th Cir. 1999). Indeed, if litigants "can enlist appellate courts to act as some sort of civility police charged with enforcing an inherently undefinable standard of what constitutes appropriate judicial comment" then "[t]he net result would be tantamount to declaring open season on trial judges." *In Re Williams*, 156 F.3d at 91; *see also id*. at 92 ("Indeed,

the well-entrenched doctrine of absolute judicial immunity from liability for defamation is rooted in concerns about preserving judicial independence, effectiveness, and frankness.").

This bright-line rule reflects the broader constitutional requirement that parties to litigation must have standing throughout all of its stages. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance"). Article III grants federal courts authority to adjudicate actual "Cases" or "Controversies," which require that litigants demonstrate a "personal stake" in the suit. *Camreta v. Greene*, 563 U.S. 692, 701 (2011).

Based on these fundamental principles, it is beyond dispute that an appellant must demonstrate the judgment below resulted in "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III's case or controversy requirement "do[es] not include every sort of dispute, but only those 'historically viewed as capable of resolution through the judicial process.'" *Hollingsworth*, 133 S. Ct. at 2659 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). Accordingly, "presence of a disagreement, however sharp and acrimonious it may be, is insufficient" to confer standing. *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

Moreover, any "[u]nwelcome language in a substantively favorable decision is not the kind of adverse effect that meets the requirement of actual injury." *Accra Pac, Inc.*, 173 F.3d at 632; *see also Warner/Elektra/Atl. Corp. v. Cnty. of DuPage*, 991 F.2d 1280, 1282 (7th Cir. 1993) ("If an appellant is complaining not about a judgment *but about a finding* . . . the appeal does not present a real case or controversy.") (emphasis added). For language alone to amount to the kind of "adverse effect" that would rise to the level of actual injury, it must come in the form of legally cognizable harm, such as putting someone on a blacklist or formally censuring them for misconduct "because it diminishes (or eliminates) the opportunity to practice one's profession." *Accra Pac, Inc.*, 173 F.3d. at 633. In other words, mere offense or subjective prejudice is not enough; the harm must be concrete and imminent, and not conjectural. Here, nothing in the order has any negative legal consequence for Lively and any possible speculation he may offer would not suffice. *See Aug. Tech. Corp. v. Camtek, Ltd.*, 542 F. App'x 985, 994–95 (Fed. Cir. 2013) ("Although Camtek speculates that the willfulness finding will damage its business reputation, we agree with the district court that such speculation is insufficient to demonstrate injury in fact.").

Ultimately, allowing appeals such as that Lively seeks to bring would be utterly unworkable. *See Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984) ("[l]awyers, witnesses, *victorious parties*, victims, bystanders—all who might be

subject to critical comments by a district judge—could appeal their slight if they could show it might lead to a tangible consequence" (emphasis added)); *see also In Re Williams*, 156 F.3d at 91 ("Practically speaking, any rule that purports to transform harsh judicial words into a '*de facto* sanction' will be almost impossible to cabin.").

None of the cases Lively cites in his Notice of Appeal displaces the force of the foregoing principles or otherwise supports the exercise of appellate jurisdiction here. Each of those cases involved parties who faced a prospective and concrete collateral estoppel-effect in future actions. *See* AER at 151, n. 1. In *Elec. Fittings*, the district court's opinion rendered legal conclusions unnecessary to the judgment of dismissal, but which had a "detrimental preclusive legal effect on the would-be appellant in future proceedings." *In Re Shkolnikov*, 470 F.3d at 24 n. 1 (discussing *Elec. Fittings*). Similarly, in *Camreta*, the Supreme Court noted that its departure from the general rule against allowing prevailing-party petitions was only for "qualified immunity cases" brought under 42 U.S.C. §1983 which were to be treated as a "special category." 563 U.S. at 704, 709.[3] *Compare Conwill v.*

[3] The Supreme Court also emphasized the limited nature of its ruling in *Camreta*. First, the Court noted that "[t]he statute governing th[e] [Supreme] Court's jurisdiction…confers unqualified power on this Court to grant certiorari 'upon the petition of *any* party.'" *Camreta*, 563 U.S. at 700 (emphasis in original) (quoting 28 U.S.C. § 1254(1)). Its ruling expressly did "not decide if an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds" given that "[a] decision of a federal district court judge is not binding

Greenberg Traurig, L.L.P., 448 F. App'x 434 (5th Cir. 2011) (finding no appellate jurisdiction over ruling because it had no collateral estoppel effect).

B. THERE IS NO BASIS FOR LIVELY TO APPEAL THE DISMISSAL WITHOUT PREJUDICE OF THE PENDENT STATE LAW CLAIMS, AND THE ISSUE DOES NOT PRESENT A SUBSTANTIAL QUESTION.

Defendant objects that the district court dismissed Plaintiff's state law claims without prejudice. AER at 151, n.1. Critically, Lively cites to no binding authority that would render his preference for a dismissal *with* prejudice to be a sufficiently concrete or particularized injury to permit an appeal. Indeed, the district court followed this Court's repeated directives that pendent state law claims be dismissed without prejudice when supplemental jurisdiction is relinquished. *See United States ex rel. Kelly v. Novartis Pharms. Corp*., 827 F.3d 5, 15-16 (1st Cir. 2016); *see also Rodríguez v. Doral Mortg. Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995). These decisions are consistent with Supreme Court jurisprudence. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) (holding that state law claims should be dismissed without prejudice when court declines to exercise

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precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Id*. at 709 & n. 7 (internal quotations omitted). Second, the Court expressly stated that its decision "does no more than exempt one special category of cases from our usual rule against considering prevailing parties' petitions," given the "significant future effect" of constitutional rulings on the regularly engaged conduct of public officials pursuant to their duties on behalf of the government. *Id*. at 704, 709.

supplemental jurisdiction in removed action); *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172-74 (1997) (discussing consideration of factors set out in supplemental jurisdiction statute in determinations as to the exercise of jurisdiction over state law claims).

The district court's decision to relinquish jurisdiction over the state law claims is also consistent with the considerations set forth in the federal supplemental jurisdiction statute, 28 U.S.C. §1367(c). In particular, that statute provides that a district court may decline to exercise supplemental jurisdiction if it has "dismissed all claims over which it has original jurisdiction" or when the claim raises a "novel or complex issue of State law." 28 U.S.C. §1367(c).

Further, the authorities from other circuits he cites, *see* AER at 151, n.1, involved the question of whether the state law claims at issue were preempted by federal law. *See LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119 (7th Cir. 1988) and *Briscoe v. Fine*, 444 F.3d 478 (6th Cir. 2006). As such, the cases did not involve, as here, the disposition of pure, state law claims best suited for resolution by a state court; rather, they involved a substantial question of federal law that may be better resolved in the first instance by the federal court in light of superseding federal law.

Accordingly, here, the district court declined to exercise supplemental jurisdiction over the state law claims because "the sensitivity of the issues raised

makes it more prudent to allow a court of the Commonwealth of Massachusetts to take the lead." AER at 147. In doing so, the court followed the well-established principles addressed above. The question presented is not substantial and worthy of appellate review. *See* Local Rule 27(c).

CONCLUSION

For the foregoing reasons, the Court should dismiss Defendant-Appellant's appeal of the District Court's Order Granting Defendant Scott Lively's Motion for Summary Judgment and the Memorandum and Order denying Defendant Scott Lively's Motion to Dismiss.

Dated: July 3, 2017

Respectfully submitted,

/s/ Pamela C. Spees

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2017, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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