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 REPLY TO DEFENDANT-APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL

As his response brief makes clear, Defendant-Appellant Scott Lively's pursuit of an appeal of the District Court's order granting his motion for summary judgment would turn the appellate process on its head.[1] First, taking a position diametrically opposed to what he vigorously argued and won below, Lively now seeks to have this Court assume jurisdiction over, and adjudicate in the first instance, Plaintiff-Appellee Sexual Minorities Uganda's ("SMUG") state law claims and dismiss them with prejudice. He cites no authority for such an

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[1] Lively asserts in his opposition brief, Def. Br. n.2, that SMUG's motion to dismiss was procedurally defective because it lacked a Corporate Disclosure Statement. Lively apparently forgets that SMUG is not a corporate entity; it has not been allowed to register in Uganda because of its work in support of lesbian, gay, bisexual, transgender and intersex people. *See* dkt. 281 at ¶ 8, Ex. B.

unorthodox undertaking. Second, Lively cannot demonstrate that language in the District Court's opinion has caused the requisite injury to pursue an appeal. His appeal should be summarily dismissed.[2]

I. LIVELY OFFERS NO SUPPORT FOR HIS PROPOSITION THAT THIS COURT SHOULD EXERCISE JURISDICTION OVER SMUG'S STATE LAW CLAIMS AND ADJUDICATE THEIR MERITS IN THE FIRST INSTANCE.

In his quest to have this Court dismiss SMUG's state law claims with prejudice, Lively would have the Court either assume the existence of diversity jurisdiction or override the District Court's discretionary authority to decline pendent jurisdiction and conclusively adjudicate the merits of the state law claims *in the first instance*. *See* Def. Br. at 5-12. Yet, Lively took the diametrically opposite position below, arguing to the District Court that it "Lacks Diversity Jurisdiction and Should Not Exercise Supplemental Jurisdiction Over SMUG's State Law Claims." Dkt. 257 at 171. That is precisely what the District Court did. Despite his victory, Lively does a bizarre about-face and offers no authority for the relief he seeks. *At most*, the authorities he cites require remand if the District Court clearly abused its broad discretion in declining to exercise pendent jurisdiction.

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[2] In his opposition brief, Lively delves into what he describes as the "factual background" of the case, misrepresenting the record evidence and SMUG's testimony. Def. Br. at 4. SMUG has addressed similar mischaracterizations in previous briefing. *See, e.g.*, dkt. 292 at 2-5, 96-99. *See also, e.g.*, dkt. 270, in particular Pl.'s Resp. to Def.'s R. 56.1 Facts of Record ¶¶ 101-117; 118-128; 130-148.

A. AFTER HAVING ARGUED AGAINST DIVERSITY JURISDICTION AND PREVAILING, LIVELY CANNOT NOW ASK THIS COURT TO EXERCISE IT.

Lively argues now – directly contrary to his position below – that diversity jurisdiction exists and therefore, the District Court was obligated to adjudicate SMUG's state claims, as is this Court now. Def. Br. at 7-10. This is richly ironic given that Lively vigorously disputed the existence of diversity jurisdiction below. *See* dkt. 83 ¶ 15; dkt. 257 at 171. And, the District Court found for Lively on this point by not exercising diversity jurisdiction over SMUG's state claims; a decision SMUG did not appeal.[3] Lively thus has no standing to appeal his victory so that this Court can, in the first instance, adjudicate the merits of SMUG's state claims. *See Arizonans for Official English v. Ariz.*, 520 U.S. 43, 64 (1997) (explaining that standing is required in all stages of litigation).

Lively attempts an end-run around the District Court, and his own arguments, by suggesting that this Court must satisfy itself about the existence of subject matter jurisdiction *in an otherwise non-existing appeal*. *See* Def. Br. at 9 (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 356 (1988)). However, "[w]hile the absence of subject matter jurisdiction is a bar to decision, its presence

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[3] The District Court did not, as Lively states, "*relinquish*[] its original, diversity jurisdiction over SMUG's state claims." Def. Br. at 8 (emphasis added). The court made clear it "decline[d] supplemental jurisdiction." AER at 149. By not exercising diversity jurisdiction, the Court effectively granted the relief Lively sought.

does not compel decision." *D'Amico v. Compass Group, USA, Inc.*, 52 Fed. App'x 524, 527 (1st Cir. 2002) (dismissing attempted appeal of diversity jurisdiction claims that were not addressed by the district court). For Lively to state otherwise reveals "a confusion between power to decide and necessity and appropriateness of decision." *Id.* Indeed, in all of the cases Lively cites, it was the party claiming below that diversity jurisdiction *existed* (either as the plaintiff or as the defendant who had counterclaimed or originally removed the case from state to federal court) that appealed the district court's decision not to exercise jurisdiction. *See* Def. Br. 8-9.

B. THE DECISION NOT TO EXERCISE PENDENT JURISDICTION PRESENTS NO SUBSTANTIAL QUESTION.

Lively also argues now – again, directly contrary to his position below – that the District Court abused its discretion in relinquishing pendent jurisdiction. *Compare* Def. Br. at 10-12 *with* dkt. 257 at 171 ("[t]here is no good reason for this Court to retain supplemental jurisdiction over SMUG's defunct state law claims"). Lively cannot meet the high standard for showing that the court abused its discretion, *see, e.g., Senra v. Town of Smithfield*, 715 F.3d 34, 41 (1st Cir. 2013), particularly when he himself urged this outcome, and he scarcely attempts to do so.

Indeed, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Redondo Const. Corp. v.*

Izquierdo, 662 F.3d 42, 49 (1st Cir. 2011) (internal quotations omitted). The district court is required only to "take into account concerns of 'comity, judicial economy, convenience, fairness, and the like,'" *Senra*, 715 F.3d at 41, in a fashion that is "pragmatic and case-specific," *Redondo*, 662 F.3d at 49. *See also Carnegie-Mellon Univ.*, 484 U.S. at 350 ("[Pendent jurisdiction is] designed to allow courts to deal with cases . . . in the manner that most sensibly accommodates a range of concerns and values . . ."). No doubt balancing these multiple concerns, the District Court concluded that "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.

This concern for comity is not outweighed here by judicial economy, as Lively suggests. Courts routinely relinquish pendent jurisdiction once a federal claim is disposed of at the summary judgment stage. *See, e.g.*, *Fox v. Vice*, 563 U.S. 826, 830 (2011) (noting trial court's observation that, where it had relinquished pendent jurisdiction after discovery and summary judgment, "[a]ny trial preparation, legal research, and discovery may be used by parties in the state court proceedings"); *Disher v. Info. Res., Inc.*, 873 F.2d 136 (7th Cir. 1989).

The authorities cited by Lively do not mandate otherwise. The one case Lively cites where this Court found abuse of discretion in not exercising pendent jurisdiction involved a dismissal four days before trial and a party who would have

had to litigate the case in another language after having fully prepared to litigate in English. *See Redondo*, 662 F.3d 42. In the other decisions Lively cites, the defendants removed the cases to federal court, the district courts decided in favor of jurisdiction and resolved the claims against the plaintiffs, who then, as the losing parties, argued that the court should have relinquished jurisdiction. *Senra*, 715 F.3d 34; *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249 (1st Cir. 1996); *Delgado v. Pawtucket Police Dep't*, 668 F.3d 42 (1st Cir. 2012). In each, the Court found no abuse of discretion.

Finally, even if Lively could demonstrate an abuse of discretion, the authorities he cites provide that the appropriate remedy is to remand to the District Court, not have this Court adjudicate the merits in the first instance. *See Redondo*, 662 F.3d at 44.

II. LIVELY DEMONSTRATES NO INJURY ARISING FROM THE STATEMENTS IN THE DISTRICT COURT'S OPINION THAT HE FINDS OFFENSIVE TO MEET THE REQUIREMENTS OF STANDING.

The "firm jurisdictional rule" that SMUG describes in its opening brief is the requirement that all parties demonstrate Article III standing, including a concrete and particularized injury, to appeal a lower court decision. *See* Pl. Br. at 7. In addition to ensuring that a party meets the requirements of Article III, they must *also* satisfy the rule of federal practice that "only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom."

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333-34 (1980). *See also Camreta v. Greene*, 563 U.S. 692, 702 (2011) (explaining that while a "prevailing party may satisfy Article III's case-or-controversy requirement . . . , a court will usually invoke rules of 'federal appellate practice' to decline review of a prevailing party's challenge even when he has the requisite stake"). If Lively included the entire sentence he quoted from the Supreme Court's decision in *Deposit Guar. Nat'l Bank*, this would be clear:

> 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 *satisfying the requirements of Art. III.*

445 U.S at 334 (emphasis added). *Compare* Def. Br. at 13. Lively's opposition brief describes no injury that meets this double bar.

Lively asserts that he was essentially "declared the enemy of mankind" by the District Court and, thus, he "unquestionably possesses the requisite personal stake in this appeal." Def. Br. at 13. Yet the Supreme Court has drawn a clear line between "mere dicta or statements in opinions" and rulings that have a determinative preclusive effect on a party's rights. *Camreta*, 563 U.S. at 704 (internal quotations omitted). The statements with which Lively takes issue do not establish any "controlling law" in subsequent litigation. *Compare id.* at 704-05 (finding an exception for constitutional rulings that form part of the two-step inquiry for qualified immunity because they are "self-consciously designed to . . .

establish[] controlling law and preventing invocations of immunity in later cases."). When statements or determinations "are immaterial to the judgment below" or "were entered without jurisdiction" – as are the statements Lively seeks to challenge on appeal – they have no preclusive effect. *EPIC v. Pacific Lumber Co.*, 257 F.3d 1071, 1076 (9th Cir. 2001). *See also In re DES Litig.*, 7 F.3d 20, 23 (2d Cir. 1993) ("Relitigation of an issue in a second action is precluded only if 'the judgment in the prior action was dependent upon the determination made of the issue.'" (quoting 1B JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.443[1], at 760 (2d ed. 1993)). The same is true for interlocutory orders. *See Conwill v. Greenberg Traurig, LLP*, 448 F. App'x 434 (5th Cir. 2011); *In re DES Litig.*, 7 F.3d 20, 25 (2d Cir. 1993). Thus, the offending statements fail to provide Lively with the requisite "personal stake."

Lively's requested relief also does not constitute "reformation of a favorable decree." Def. Br. at 14 (quoting *Elec. Fittings Corp. v. Thomas & Betts*, 307 U.S. 241, 242 (1939)). Courts have "strictly interpreted 'decree' to mean 'judgment.'" *EPIC*, 257 F.3d at 1075. Here, the District Court's judgment granted Lively's motion for summary judgment based on lack of jurisdiction, AER at 149, 150, and "[t]hat is all it did." *EPIC*, 257 F.3d at 1075 (internal quotations omitted). Contrary to Lively's assertions, it afforded no declaratory or injunctive relief with respect to SMUG's claims. *See id.*

By contrast, in *Elec. Fittings*, the *judgment* included the ruling of the patent's validity, which was the ruling the prevailing party sought to appeal. 307 U.S. 241. The Supreme Court emphasized that while a "party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree," in that case, "the *decree itself* purport[ed] to adjudge the validity of [the] claim," and thus, was subject to review. *Id.* at 242 (emphasis added). *See also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 337 (1980) (explaining that in *Elec. Fittings*, Article III standing was satisfied when petitioners were harmed by an erroneous ruling in "the *decree*." (emphasis added)); *In re DES Litig.*, 7 F.3d at 25 (finding appellate jurisdiction improper since the challenged rulings "d[id] not appear on the face of the judgment, as was the case with finding of validity in *Electrical Fittings*," since the judgment "says only that the complaint is dismissed.").

Lively makes much ado about a Second Circuit decision from 1950 that described the statement subject to revision in *Elec. Fittings* as not "an estoppel," but one that served only to "create some presumptive prejudice against" the prevailing party. Def. Br. at 15 (quoting *Harries v. Air King Prod. Co.*, 183 F.2d 158, 161 (2d Cir. 1950)). However, this Court correctly understood the statement at issue in *Elec. Fittings* as having a "detrimental preclusive legal effect on the

would-be appellant in future proceedings." *In Re Shkolnikov*, 470 F.3d 22, 24 n.1 (1st Cir. 2006).

Lively's fear that SMUG will use the language he finds offensive in other fora is insufficient to confer standing. As this Court explained in *Puerto Rico Tel. Co., Inc. v. Telecomm. Reg. Bd. of P.R.*, if an adjudicator later relies on the district court's *dicta* in a separate proceeding, "the proper place to challenge that reliance is in that proceeding." 665 F.3d 309, 325 & n.22 (1st Cir. 2011). *See also In re DES Litig.*, 7 F.3d at 25 (dismissing the prevailing party's appeal of interlocutory rulings even though dozens of similar cases were pending against the party).[4]

Failing to find any real harm, Lively invents relief for SMUG that the District Court did not grant. Def. Br. at 18-19. For a statement by the court to constitute declaratory relief, it must have been included in the *judgment*. *See* 28 U.S. Code § 2201(a). However, the statements Lively describes do not appear in the judgment here, *see* AER at 150, and the district court's statements in its opinion do not constitute any form of relief that affects the rights and liabilities of Lively, and thus, he does not have standing to appeal them.[5]

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[4] Lively cites to *Disher*, 873 F.2d 136, in support of this assertion, but *Disher* only addresses whether a dismissal without prejudice constitutes harm, not findings or statements immaterial to the final order or interlocutory rulings.

[5] None of the other cases Lively cites offer any basis for Lively's appeal. *EPIC*, 257 F.3d 1071 and *New Jersey v. Heldor Indus., Inc.*, 989 F.2d 702 (3d Cir. 1993) presented unique instances in which the prevailing party successfully challenged opinions issued below *after* the case had already settled or been

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.

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Respectfully submitted,

/s/ Pamela C. Spees

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rendered moot, not statements that formed part of the opinion in which the court determined whether the case should be dismissed.

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 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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