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.

APPELLANT SCOTT LIVELY'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF DENIAL OF MOTION TO SET ORAL ARGUMENT AND TO EXCLUDE APPELLEE FROM ORAL ARGUMENT FOR DEFAULT IN FILING BRIEF

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Defendant-Appellant Scott Lively ("Lively"), pursuant to Fed R. App. P. 27(a)(4), and in support of his Motion for Reconsideration of Denial of Motion to Set Oral Argument and to Exclude Appellee from Oral Argument for Default in Filing Brief (EID 6140152, the "Reconsideration Motion"), submits this reply to the Opposition (EID 6141632) filed by Plaintiff-Appellee Sexual Minorities Uganda ("SMUG"):

1. In SMUG's Opposition, SMUG's counsel tell the Court far more than they ever told Lively's counsel about their reasons for not filing a brief, but SMUG still fails to identify any authority for disregarding the Court's briefing schedule apart from exclusive, *ex-parte* personal assurances from the Clerk.

2. In reply to Mr. McNeely's e-mail of October 3, 2017 (Opp'n, EID 6141632, ¶ 13), Mr. Mihet wrote to Mr. McNeely, "We do not share the understanding that the pendency of SMUG's motions tolls briefing deadlines – if you care to share the basis for your understanding, please do." (Declaration of Horatio G. Mihet, dated January 3, 2018 ("Mihet Declaration"), ¶ 3, Ex. A.) **Mr. McNeely never responded**. (Mihet Decl., ¶ 3.) Tellingly, Mr. McNeely does not himself reveal to this Court his failure to respond to Mr. Mihet's express inquiry, which makes SMUG's decision to fault Lively's counsel for supposedly failing to apprise the Court of SMUG's undisclosed, secret "authority" even more troubling. (Opp'n, EID 6141632, ¶ 20).

3. Further, in the telephone call between Mr. McNeely and Mr. Gannam on November 9, 2017 (Opp'n, EID 6141632, ¶ 19), Mr. McNeely stated that he had not spoken to anyone in the Clerk's office regarding SMUG's briefing deadline, but that SMUG's position, based on an unidentified person's oral communication with the Clerk's office, was that SMUG's brief was not due because of SMUG's pending motion to stay. (Declaration of Roger K. Gannam, dated January 3, 2017 ("Gannam Declaration"), ¶ 3.) Mr. McNeely did not advise Mr. Gannam of the number or content of the several conversations between SMUG's counsel and the Clerk's office now revealed in SMUG's Opposition. (Gannam Decl., ¶ 3; *see* Opp'n, EID 6141632, ¶¶ 7-10, 14-16, 18.) This failure, coupled with Mr. McNeely's failure to respond to Mr. Mihet's written request, makes SMUG's accusation against Lively's counsel plainly dishonest. (Opp'n, EID 6141632, ¶ 20).

4. Also on November 9, 2017, Jill M. Schmid, Senior Litigation Assistant to Lively's counsel, called and spoke to Mr. Gerry Claude in the Clerk's office, and was advised that SMUG's brief was not due because of SMUG's pending motion to stay. (Declaration of Jill M. Schmid, dated January 3, 2018 ("Schmid Declaration"), ¶ 3.) However, when Ms. Schmid advised Mr. Claude that Lively's counsel could not locate any rule, procedure, or other authority excusing SMUG from filing its brief in accordance with the Court's briefing schedule, Mr. Claude advised Ms. Schmid to "keep looking" and that Mr. Claude could not dispense legal advice. (Schmid Decl., ¶ 3.) Lively's counsel is still looking, to this day.

5. SMUG's complaint, that "Counsel for Lively made no mention of the explanations SMUG's counsel had provided as to why SMUG's merits brief had not actually been due" (Opp'n, EID 6141632, ¶ 20), is not only misleading, but outright dishonest. First, Lively's counsel's representation to the Court in Lively's original Motion to Set Oral Argument and to Exclude Appellee from Oral Argument for Default in Filing Brief (EID 6134651, the "Motion to Set"), that Lively's counsel "was advised that SMUG's position is that no brief is due because of SMUG's pending stay motion" (Mot. Set, EID 6134651, ¶ 10), was entirely accurate, and complete. Second, at the time of Lively's Motion to Set, SMUG's counsel had not provided "explanation**s**"—because SMUG's counsel declined to provide an explanation when invited to do so by Mr. Mihet (*see supra* ¶ 2), the only explanation that Lively's counsel had received from SMUG's counsel at the time of filing was the second-hand, "the Clerk said so to an unidentified person" "explanation" provided by Mr. McNeely. To this day, Lively still has not been provided any authority from either SMUG's counsel or the Clerk. SMUG's additional protestation, that "Lively was well aware of the statements made by the Clerk of this Court regarding the fact that there were no deadlines for SMUG's merits brief" (Opp'n, EID 6141632, ¶ 24), is false.

6. SMUG also complains that filing its brief would "moot its own Motion to Stay." (Opp'n, EID 6141632, ¶ 28.) This argument presupposes that SMUG is entitled to a stay by simply filing its motion, which is a proposition without any authority whatsoever.

7. The prejudice to Lively is self-evident: Lively has been required to comply with the Court's briefing schedule while SMUG has been excused from compliance, and this benefit was conferred on SMUG by the secret policy of the Clerk which was hidden from Lively. Furthermore, SMUG has received from the Clerk a *de facto* stay of this appeal based solely on SMUG's filing a contested motion to stay. Lively complied with the Court's deadlines but is prevented from moving forward in his appeal; SMUG did not comply with the Court's deadlines but nonetheless has received the stay it wanted.

8. If SMUG's declarations and version of facts are to be believed, Lively is troubled by the apparent fact that the same Clerk who answered numerous *ex-parte* calls from SMUG's counsel and provided repeated assurances to SMUG's counsel about an issue that is the subject of a contested motion, would only tell Lively's counsel to "keep looking" for the answer to a simple and basic question: On what authority can the Clerk impose a *de facto* stay simply upon the filing of a contested motion to stay, when nothing in the Federal Rules of Appellate Procedures, this Court's local rules, and this Court's internal operating procedures would seem to authorize such action?

9. Also troubling are the numerous *ex parte* calls themselves, which SMUG's counsel now admit to have had with the Clerk about an issue that is the subject of a contested motion—that is, whether or not there is or should be a stay of this appeal. The mere fact that SMUG's counsel felt it necessary to make all those

calls should have alerted them of the perils of relying on verbal assurances instead of published rules and procedures. Be that as it may, at the very least SMUG's counsel could have involved Lively's counsel in those communications, so that all parties operate from the same set of rules and facts. Tellingly, SMUG chose another way.

10. In sum, Lively's Reconsideration Motion and Motion to Set should be granted. If the Court, however, concludes that SMUG should not be defaulted and excluded from oral argument, despite SMUG's disregard of the Court's briefing deadlines based solely on *ex-parte*, *ultra vires* verbal assurances from the Clerk, then the Court should order SMUG to file its brief forthwith, so that this matter may be scheduled for oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this January 3, 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/ Roger K. Gannam
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Scott Lively