UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	**3:12-CV-30051-MAP**
	:	
v.	:	**JUDGE MICHAEL A. PONSOR**
	:	
SCOTT LIVELY, individually and as president of Abiding Truth Ministries,	:	**MAGISTRATE JUDGE KATHERINE A. ROBERTSON**
	:	
Defendant.	:	

DEFENDANT SCOTT LIVELY'S RESPONSE TO PLAINTIFF'S POST-HEARING MEMORANDUM ON SUMMARY JUDGMENT[1]

In its post-hearing memorandum (dkt. 324-1) ("SMUG Memo"), Plaintiff Sexual Minorities Uganda ("SMUG") attempts yet again to do that which it plainly could not do at the summary judgment hearing, nor in its summary judgment opposition, nor in its "sur-reply": (A) identify any specific actions of Defendant Scott Lively ("Lively") in the U.S. that had a direct causal link to any alleged injury suffered by SMUG in Uganda; and (B) identify any specific injunctive relief that this Court could even consider that would not violate the First Amendment. Although it is seemingly grasping at straws, SMUG still offers nothing.

A. SMUG STILL CANNOT IDENTIFY ANY UNPROTECTED DOMESTIC CONDUCT BY LIVELY THAT DIRECTLY CAUSED ANY INJURY IN UGANDA.

Before specifically addressing the handful of additional documents to which SMUG now points, two critical observations should be noted:

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[1] Through single-spacing and extensive use of footnotes, SMUG crammed **5,518 words** in its "ten-page" Memo. (Dkt. 324-1). Rather than attempt the same feat, Lively submits a response of **fewer words** (**5513**), which spans over ten pages. To the extent leave of court is necessary notwithstanding the fewer words, Lively respectfully requests leave, on the ground that exposing SMUG's general and deceptive references to bits and pieces of cherry picked documents requires more careful analysis and discussion of the documents SMUG invokes.

1. SMUG Cannot Identify New Documents On The Issue Of Domestic Conduct.

First, in his moving papers, Lively adduced evidence that he engaged in no actionable conduct in the United States. (Lively Statement of Material Facts ("MF") ¶¶ 130-131, dkt. 257, pp. 35-36). SMUG was required by Local Rule 56.1 to identify in its summary judgment opposition **all** of the evidence on which SMUG relies to establish actionable domestic conduct, and SMUG purported to do just that, identifying **only eight** pages of documents (out of 40,000+) which SMUG claimed to show Lively's participation in a "plan for persecuting Uganda's LGBTI community while in the United States." (SMUG D-MFR ¶¶ 130-131, dkt. 270, p. 34). Lively demonstrated with specificity in his Reply (dkt. 305, pp. 36-42) and at the summary judgment hearing why each of those eight pages does not come even close to meeting SMUG's high jurisdictional burden, and SMUG had no response, either in its written "sur-reply" or at the hearing. Now, SMUG attempts again to move the goal posts, by **entirely abandoning each and every one of the eight pages on which it exclusively relied in the pre-hearing briefing**, and instead seeking to point to a new set of documents as "evidence" of actionable domestic conduct. If Rule 56.1 means anything, the Court should not allow SMUG's maneuver and should, for this reason alone, disregard SMUG's new "evidence," such as it is.

2. SMUG Never Sought, And Therefore Does Not Have, Any Evidence Of Lively's Location When He Wrote Any Of The Things SMUG Does Not Like.

Second, as with the eight pages it identified before the hearing, SMUG now also has no evidence that any of the documents it currently identifies were actually authored in the United States. As demonstrated by Lively at the hearing and in his Reply (dkt. 305, pp. 30-33), SMUG did not ask Lively a single question—not at his two-day deposition (both of which SMUG ended early), nor through interrogatories, nor through requests for admission—about Lively's location

when he wrote a single document, old or new. SMUG has never explained its total evidentiary failure on the most critical element of its extraterritorial jurisdictional claim. Instead, SMUG now wants the Court to "presume," "infer," "suggest" or suppose that Lively authored a particular document in the United States simply: (1) because Lively is a U.S. citizen (SMUG Memo p. 2); or (2) because Lively "has never denied he was in the U.S. when he sent most of these communications" (*id.* at 2, n.1); or (3) because Lively does not say in a particular document that he is writing it from outside the United States (*id.* at 5, n.13); or (4) because other (irrelevant) documents written by Lively supposedly indicate that he was in the U.S. "during [the] time period," meaning **weeks or months before or after**, a particular document was written. (*Id.* at 4, n.9).

As demonstrated by Lively in his Reply (dkt. 305, pp. 34-35), it is **SMUG**, not Lively, who bears the burden of proof on every element of its jurisdictional claim, and Lively does not bear the burden of negating those elements. SMUG's jurisdictional burden, in a "crimes against humanity" case premised entirely on alleged criminal acts and injuries occurring on another continent, is formidable not light. SMUG cannot blithely shift that burden to Lively, least of all when SMUG had several years to conduct all of the jurisdictional discovery it wished.

Moreover, the very same documents now identified by SMUG demonstrate why the Court cannot indulge the "presumptions," "inferences," "suggestions" or suppositions that SMUG posits instead of actual proof: Although he is a U.S. citizen, Lively travels internationally frequently and extensively, sometimes for many months and even an entire year at a time. *See e.g.*, LIVELY 1748 (dkt. 293-30, p. 2 of 4) (cited in SMUG Memo p. 2) (discussing Lively's "**year-long** speaking tour through eight countries") (emphasis added); LIVELY 2710 (dkt. 293-193, p. 2 of 4) (cited in SMUG Memo p. 2, n.1) (Lively has "been out of the U.S. for almost **three months** now on our **seven month** missionary adventure") (emphasis added).

Because he travels internationally extensively, Lively routinely authors books, articles and other writings outside the United States, as evidenced in the very same documents now identified by SMUG. *See e.g.*, LIVELY 2769 (dkt. 257-1, p. 53 of 119) (cited in SMUG Memo p. 3, n.6) (Lively wrote parts of *Redeeming the Rainbow* "**on my flights to and from Uganda**") (emphasis added); LIVELY 2740 (dkt. 293-71, p. 2 of 3) (cited in SMUG Memo p. 2) (Lively stating, "Lately it seems I write most of these newsletters on airplanes"). This is important because, despite its early and vehement protestations that it was **not** suing Lively for his speeches and writings, SMUG's case has now clearly devolved into an eye-popping claim that Lively's authorship of *Redeeming the Rainbow* and other books constitutes "practical assistance" to crimes against humanity. *See, e.g.*, SMUG Memo p. 3 (bottom paragraph) and p. 4 (first bullet point) (identifying Lively's authorship of *Redeeming the Rainbow* "while in the U.S." as evidence of "additional conduct undertaken by Defendant in the United States that constitutes 'practical assistance' and evidence of the Defendant's contribution to the persecution conspiracy").

Even if the Court could accept SMUG's ridiculously offensive notion that writing books, or sharing those books with others, constitutes "practical assistance" to "crimes against humanity," SMUG has no evidence of which parts of Lively's books were written in the United States. Was it the "bad" parts? Was it the supposedly "criminal" parts? SMUG does not and cannot say, because SMUG never bothered to ask. In sum, there is no substitute for actual proof on the critical question of domestic conduct, and SMUG does not have any actual proof. The Court should disregard SMUG's new "evidence" and enter summary judgment on this ground alone.

3. The New "Evidence" Of Domestic "Practical Assistance" Adduced By SMUG Borders On The Ludicrous and Preposterous.

Looking at the specific handful of documents that SMUG attempts to bring forth on this its fourth try (s.j. opposition, "sur-reply," hearing, and now this Memo), reveals just how cavalierly SMUG brandishes words like "crimes against humanity," or "conspiracy" to engage in, or providing "practical assistance" to, crimes against humanity. For example:

- **LIVELY 4472** (dkt. 293-176, p. 2 of 4) (cited in SMUG Memo p. 7) – this April 2014 communication from Lively to Ssempa, Langa and Tuhaise, **from an unknown location**,[2] consists **entirely and exclusively** of this link to a discussion on Uganda at NYU Law School, **without any comment by Lively** about that discussion:

  https://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=30858

  SMUG has no evidence that any damages, let alone "crimes against humanity" resulted against anyone in Uganda as a result of this communication. If sending internet links to others lends "practical assistance" to "crimes against humanity," those words mean nothing.

- **LIVELY 3694-3695** (dkt. 293-141, pp. 2-3 of 3) (cited in SMUG Memo p. 5) – this August 2010 communication from Lively to Langa and Ssempa, **from an unknown location**,[3] consists **entirely and exclusively** of Lively forwarding a funding request that an LGBT organization sent to him, **without any comment by Lively** about that organization or its strange funding request. SMUG has no evidence that any adverse action was ever taken against that organization, or that any damages, let alone a "crime against humanity" occurred as a result of this communication.

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[2] The only "evidence" SMUG offers to "prove" that Lively sent this communication "while in the U.S." is Tuhaise's best wishes for Lively's "on-going" gubernatorial campaign in Massachusetts. (SMUG Memo, p. 7, n.22). But Lively's gubernatorial campaign was "on-going" for **over two years**—starting in November 2012 (*see* http://www.lively2014runforgov.com/images/timeforanewGOP.pdf, last visited December 8, 2016)—and SMUG has no evidence that Lively did not leave the United States during that entire time. Indeed, in another document identified by SMUG dated six months earlier (October 2013), Langa also sends his well wishes for Lively's gubernatorial campaign. (LIVELY 3742, dkt. 257-1, p. 116 of 119). Employing SMUG's logic, Lively must have been in the United States during this exchange, but the exchange actually starts with Lively saying "**Greetings from Moscow**." (*Id.* at p. 114 of 119) (emphasis added). SMUG's logic and inferences do not work.

[3] Since SMUG didn't ask Lively, SMUG is forced to speculate that this email was sent "presumptively in the U.S." merely because Lively does not say in the email that he is writing it from outside the United States. (SMUG Memo p. 5, n.13 & n.14). This assertion is laughable, given that Lively did not say **anything** in this supposedly "criminal" communication.

- **LIVELY 3365** (dkt. 293-22, p. 4 of 4) (cited in SMUG Memo p. 5) – this July 2010 communication from Lively to several recipients in and outside of Uganda, **from an unknown location**,[4] consists of Lively's opinion that the dean of a Ugandan law school, Sylvia Tamale, should be fired or demoted because she "teaches a course on gender in the law school in which she reportedly expects students to adopt her pan-sexual ideologies." (Dkt. 293-22, p. 2 of 4). SMUG has no evidence that any adverse action was ever taken against Tamale, nor that any damages, let alone a "crime against humanity" resulted from Lively sharing his opinion.

  Indeed, Tamale herself has submitted a Declaration to this Court in which she describes her free and unrestricted advocacy on homosexual causes in Uganda, without any mention of any attempts to fire or demote her from her job. (Dkt. 289).

  Calling for the resignation or firing of public figures with whom one disagrees is protected First Amendment expression, part and parcel of public debate, and an advocacy tool frequently (and successfully) employed by LGBT advocates.[5] The Court cannot accept SMUG's plea to criminalize such free expression.

- **LIVELY 3276** (dkt. 293-108, p. 2 of 2) (cited in SMUG Memo p. 4) – SMUG says that this document shows that Lively "sent … materials to Langa in response to Langa's request." (SMUG Memo p. 4). In reality, the so called "materials" consist, **entirely and exclusively**, of this link to **one article** posted on Lively's website, which Lively forwarded **without any comment**:

  http://www.defendthefamily.com/intl/

  Is SMUG really asking the Court to find that Lively has a constitutional right to post writings to his website, but that Lively commits a "crime against humanity," or provides "practical assistance" if he merely sends a link to those articles to others? Would "practical assistance" still be provided in SMUG's paradigm if Langa found the article on his own? Would a third party reading the article provide "practical assistance" to a "crime against humanity" if (s)he forwarded the link to Langa? The mere suggestion of this is too fanciful to maintain.

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[4] SMUG's sole "evidence" that this communication was written "presumptively in the U.S." is the same untenable "inference" that Lively did not say in the communication that he was outside of the U.S. (SMUG Memo p. 5, n.13).

[5] *See, e.g.*, *Mozilla employees tell Brendan Eich he needs to "step down,"* arsTECHNICA, March 27, 2014 (discussing numerous calls for the resignation or firing of Mozilla CEO Brendan Eich for donating $1,000 to Proposition 8 effort to ban same sex marriage) (available at http://arstechnica.com/business/2014/03/mozilla-employees-to-brendan-eich-step-down/, last visited December 7, 2016); *OkCupid Doesn't Care How You Find Love, As Long As You Never Ever Use Firefox* (discussing dating website's calls for boycotting Mozilla web browser Firefox until its CEO is fired or resigns because of his support for Proposition 8) (available at http://www.slate.com/blogs/the_slatest/2014/03/31/okcupid_urges_members_to_boycott_firefox_because_of_ceo_s_opposition_to.html, last visited December 7, 2016).

- **LIVELY 3202** (dkt. 293-34, p. 2 of 4) (cited in SMUG Memo p.2);
  LIVELY 3223 (dkt. 257-1, p. 38 of 119) (cited in SMUG Memo pp. 2-3); and
  LIVELY 3246 (dkt. 293-6, p. 3 of 4) (cited in SMUG Memo p. 4).

  SMUG posits these three documents as "proof" that Lively authored three books (*Activist Handbook*, *Seven Steps to Recruit Proof Your Child*, and *Redeeming the Rainbow*), and then either "sen[t] a copy" to, or "grant[ed] permission" "to make copies" of those books in, Uganda. (SMUG Memo pp. 2, 4).

  SMUG has no proof that these books were authored in the U.S., and, as demonstrated above, the documents identified by SMUG show that at least some portions were written abroad. (*See* p. 4, *supra*). SMUG also has no proof that Lively was in the U.S. when he sent these communications.[6]

  The place of authorship is only relevant, of course, if we assume that the authorship itself is criminal – an astounding proposition. SMUG has apparently abandoned its oft-repeated mantra that it is **not** suing Lively for his speeches and writings. Or is SMUG claiming that Lively has a constitutional right to write these books, but that sending them to others lends "practical assistance" to "crimes against humanity"? Would it not be a crime if Ugandans ordered Lively's books directly from the publisher? And is SMUG really asking the Court to prohibit Lively from publishing his books in Uganda or elsewhere?

  Lastly, SMUG has no evidence that Lively's books caused any damages, let alone "crimes against humanity" in Uganda. How many of Lively's books were sold in Uganda? To whom? How many people read them? SMUG does not and cannot say.

- **LIVELY 3217-3218** (dkt. 293-101, pp. 4-5 of 5) (cited in SMUG Memo p. 2) – SMUG claims that Lively wrote these communications "presumptively from the U.S." to "recruit" another speaker, Don Schmirer, to speak at the March 2009 conference in Uganda. SMUG, however, has no evidence that Lively wrote these communications from the U.S., "presumptively" or not.

  The only "evidence" SMUG has is that Lively supposedly "moved to Springfield" "in 2008," so he must have been in Springfield in **January** 2008 when this communication was sent. (SMUG Memo p. 2, n.4). But another document identified by SMUG lays SMUG's "presumptions" to rest, because it shows that Lively moved to Springfield **in June**, not January, 2008. (*See* LIVELY 2740, dkt. 293-71, p. 2 of 3) (cited in SMUG Memo p. 2) (stating that Lively was en route to Springfield on June 1, 2008).

  Moreover, SMUG deposed Schmirer and has abandoned any claim that Schmirer is a co-conspirator or that he provided "practical assistance" to "crimes against humanity." SMUG has no proof that anything Schmirer said or did in the U.S. or at the conference in Uganda caused SMUG any damages, so Lively's so-called "recruiting" of Schmirer cannot possibly constitute "practical assistance" to crimes against humanity.

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[6] All that SMUG can say is that another document dated **the same month** "suggests" (but does not actually show) that Lively was in the U.S., as if Lively cannot be in the U.S. during any part of a month without being in the U.S. for that entire month. (SMUG Memo p. 2, n.1)

- **LIVELY 3210** (dkt. 257-1, p. 32 of 119) (cited in SMUG Memo p. 2) – in this December 2007 communication from Lively to Langa, **from an unknown location**, [7] Lively discusses the possibility of involving "The Russians" in a conference in Uganda involving "live music performances and worship services mixed together with pro-family speakers." (*Id.*) SMUG apparently considers this to be a "crime against humanity" or "practical assistance" thereto, but does not say whether the criminal component is the music, the worship, the speakers, or all three. (*Id.*) Setting aside the ridiculous nature of SMUG's proposition, **it is undisputed that "The Russians" were never actually involved in any conference in Uganda**, reason for which this Court properly denied SMUG's motion to compel discovery into any "activities in countries other than the United States and Uganda." (Elec. Order Jul. 31, 2015, dkt. 202). If "The Russians" were not actually involved in any conference in Uganda, then Lively's entertaining of the thought to involve "The Russians" cannot possibly be "practical assistance" to anything.

- **LIVELY 3737** (dkt. 257-1, p. 110 of 119) (cited in SMUG Memo pp. 6-7); and **LIVELY 3740-3741** (dkt. 257-1, pp. 114-115 of 119) (cited in SMUG Memo pp. 6-7).

  SMUG says that these communications were sent by Lively "presumptively from the U.S." to provide Ugandans with an "alternative strategy," that is, to urge them to abandon the AHB altogether and to adopt a Russian-style law.

  First, SMUG has no evidence that these communications were actually (or "presumptively") sent from the U.S. SMUG points only to Lively's supposed failure to indicate in the writings themselves that he was abroad, as if he was required to make such disclosure in every writing. (SMUG Memo p. 6, n.21, incorporating p. 5, n.13). In fact, SMUG is dead wrong, because Lively **does** actually start one of the communications with "**Greetings from Moscow**." (LIVELY 3740, dkt. 257-1, p. 114 of 119) (emphasis added).

  Second, foreign location aside, in the operative language that SMUG itself quotes, Lively suggests to Ugandans that they should "preserv[e] basic civil rights of homosexuals to live their lives privately and discretely in society," hardly the pitchforks-and-torches incitement that SMUG continually attempts to lay at Lively's feet, and certainly not a "crime against humanity" under any iteration of that term.

  Third and last, it is undisputed that Ugandans flatly rejected Lively's suggestion and never adopted a Russian-style law. Suggesting consideration of a law by a sovereign legislature that does not actually consider or enact that law cannot possibly be "practical assistance" to anything.

[7] The only "evidence" proffered by SMUG that this communication in **December** 2007 was "presumptively" authored in the U.S. is some other document which merely "suggests" (but does not actually show) that Lively was in the U.S. in early **October** 2007. (SMUG Memo p. 2, n.1 & n.3). SMUG is now grasping at straws to make up for its total failure to obtain any jurisdictional evidence during discovery.

4. Lively's Comments On The AHB Cannot Constitute "Practical Assistance" To "Crimes Against Humanity."

All of the remaining few documents identified by SMUG relate to Lively's comments on the draft Anti-Homosexuality Bill ("AHB") considered by Uganda's sovereign legislature. Lively has already demonstrated in his Reply brief that the AHB was indisputably drafted by others, and that his comments—in which he repeatedly characterized the AHB as overly harsh and continuously urged the drastic reduction of the criminal penalties proposed by others, the abandonment of the death penalty even for aggravated offenses, and the removal of the reporting requirement—did not "practically assist" any persecution. (Dkt. 305 pp. 90-93). Lively incorporates that discussion here.

SMUG has not rebutted Lively's showing, either in its "sur-reply," or at the hearing, or in the instant Memo. Accordingly, Lively's location when he publicly commented on the AHB is irrelevant, because his core political speech on a pending law considered by a sovereign legislature is protected and not actionable irrespective of where it takes place. This Court should resist SMUG's urging to hold a citizen legally responsible (under a "crime against humanity" label, no less) for the enactment of a law debated by a sovereign legislature, especially when that legislature rejected that citizen's pleas to moderate that law.

Although Lively's location during his protected speech on the AHB is not relevant, it is worth noting that, here too, SMUG has no evidence that Lively was actually in the United States during any of that speech. For example, in footnote 6 of its Memo SMUG identifies four unrelated documents supposedly establishing that Lively was in the U.S. between **March 10 and April 1, 2009** (SMUG Memo p. 3, n.6).[8] SMUG then attempts to speculate that Lively must

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[8] Deceptively, SMUG does not identify the dates of the four documents in its footnote, choosing instead to mischaracterize them as covering the entire "March and April 2009" "time-period." (SMUG Memo p. 3, n.6). But the only "April 2009" document out of the four is the last

have also been in the U.S. **four weeks later**, on **April 28, 2009**, when Lively provided the draft AHB comments requested by Ssempa.[9] (SMUG Memo p. 3). SMUG is forced to take this four-week-leap of logic because it never asked Lively where he was when he commented on the AHB. The Court should not engage in the rank speculation urged by SMUG.

Beyond deceptive date manipulations and gross evidentiary failures, the few passages from Lively's writings that SMUG picks to show evidence of "practical assistance" to "crimes against humanity" are truly striking. For example, SMUG quotes Lively as stating, "**I do not support the proposed anti-homosexuality law as written. … the punishment that it calls for is unacceptably harsh**." (SMUG Memo p. 4) (emphasis added). SMUG also quotes Lively in a different document as stating, "Has the language of the bill been modified at all? If not, would Mr. Bahati be open to suggestions for excluding simple homosexuality from the capital punishment provision? (SMUG Memo p. 5). If these comments on pending legislation constitute "crimes against humanity" or "practical assistance" thereto, those terms no longer mean anything.

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one, LIVELY 2768 (dkt. 257-1, p. 52 of 119), which is dated **April 1, 2009**. (*Id.*) The reason for SMUG's deliberate murkiness is clear: SMUG wants to deceptively imply that Lively was in the U.S. throughout the entire "March and April 2009" "time-period," to "prove" that Lively was in the U.S. on **April 28, 2009**, even though SMUG has no proof of Lively's whereabouts after the **first day** of "April 2009." Why does SMUG have to play fast and loose with the facts? The answer is obvious.

[9] Again, SMUG does not identify the actual date of Lively's comments to Ssempa on the draft AHB, referring only to the "April 2009 email," to further its deceptive narrative that Lively must have been in the U.S. when he wrote it. (SMUG Memo p. 3). The date on LIVELY 3514 (dkt. 293-115, p. 2 of 11) is April 28, 2009. Why doesn't SMUG honestly tell the Court that SMUG is asking it to make a four-week logical leap? Was SMUG hoping that the Court would not notice?

B. SMUG STILL CANNOT IDENTIFY ANY SPECIFIC INJUNCTIVE RELIEF THAT WOULD NOT VIOLATE THE FIRST AMENDMENT.

At the summary judgment hearing, SMUG was unable to explain to the Court how to fashion an injunction against Lively's alleged "crimes against humanity"—*i.e.*, Lively's speaking and writing that SMUG finds offensive. Now, in its post-hearing Memo, SMUG merely rehearses the same, non-specific legal argument presented at the hearing, and still cannot (or will not) answer the question.

SMUG primarily relies on *NOW v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994), to argue the unremarkable proposition that courts can "craft injunctions that appropriately navigate the line between conduct protected by the First Amendment and conduct that constitutes criminal activity and thus falls outside of its protections." (SMUG Memo p. 9). But whether an injunction against unprotected speech is possible was not the Court's question, and the Court told SMUG as much when SMUG tried to recite the same general principles at the hearing. Rather, the Court asked, what, specifically, does SMUG want the Court to enjoin Lively from doing that is not protected speech?

SMUG ostensibly attempts to answer with the injunction affirmed by the *NOW* court, which enjoined "trespassing on, blockading, impeding or obstructing access to or egress from any facility at which abortions, family planning, or gynecological services are performed in the District of Colombia and from *inducing*, *encouraging, directing, aiding, or abetting others* to engage in such activities." (SMUG Memo p. 9 (quoting *NOW*, 37 F.3d at 648-49) (emphasis SMUG's)). But SMUG glosses over the *NOW* court's "serious First Amendment concerns" with the speech-based "second part of the injunction" emphasized by SMUG, 37 F.3d at 655, and simply fails to show how the *NOW* court's resolution of those concerns helps SMUG in this case.

Specifically, the injunction affirmed in *NOW* prohibited "trespassing on or blockading nine specifically identified clinics, and further prohibit[ed] 'inducing' or 'encouraging' others 'to trespass on [or] blockade'" any similar facility in the District of Columbia. *Id.* at 657 (second brackets in original). Tying the speech-imbued terms "inducing" and "encouraging" to **specific prohibited conduct**, the court reasoned, saved the injunction from being an unconstitutional prohibition against "mere abstract advocacy," and made it a permissible injunction against "incitement to imminent unlawful action . . . not protected by [the] First Amendment." *See id.* at 656 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969)). The *NOW* court further explained,

> More importantly, the meaning of these terms is constrained by the context in which they are actually used in the injunction. . . . As the district court itself stated after contempt citations had been issued, "it is clear that 'inducing' and 'encouraging' the violations are defined in context of the Injunction and are understood by all the parties to mean direct incitement of these blockades."

Id. at 657.[10]

In other words, enjoining the broad categories of "inducing" and "encouraging" was permissible because they were constrained by the specific prohibited conduct ("trespassing" and "blockading"), at the specific places where that conduct was prohibited ("nine specifically identified clinics" and similar facilities in the District of Columbia). SMUG readily conscripts the *NOW* court's conclusion, but mocks *NOW*'s careful constitutional analysis by positing that

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[10] The constitutional requirement that injunctions restricting speech not prohibit mere abstract advocacy, but only actual incitement to **imminent** unlawful action, complements the requirement, prior to imposing conspiracy liability "in the shadow of the First Amendment," for unambiguous evidence that a defendant personally agreed to participate in illegal activity. *See United States v. Spock*, 416 F.2d 165, 168-179 (1st Cir. 1969). (Lively MSJ Reply Memo., dkt. 305, 46-73.) Both requirements reflect the reality imbedded in the First Amendment that "Every idea is an incitement." *Spock*, 416 F.2d at 170 n.11.

SMUG's prayer to enjoin Lively's speech is permissible because it is somehow constrained by the amorphous concept of "persecution." (SMUG Memo pp. 9-10).

SMUG imagines an injunction prohibiting "speech or conduct in pursuit of a plan to further the persecution of the LGBTI community in Uganda . . . ." (*Id.*, at 10). Apparently serious, **this** is the language SMUG offers to "clarify" (dkt. 324, ¶ 4) the injunction it seeks against Lively: speech or conduct—**in pursuit of**—**a plan**—**to further**—**the persecution** . . . ." (SMUG Memo p. 10 (emphasis added)). So, SMUG wants to enjoin encouraging a plan of encouraging? Inducing a plan of inducing? Aiding and abetting a plan of aiding and abetting? SMUG's proposal falls far, far short of *NOW* and the substantial authority requiring specificity in injunctions. "Those enjoined, since under threat of judicial punishment, are entitled to be told '**precisely** what conduct is outlawed.'" *Ben David v. Travisono*, 495 F.2d 562, 564 (1st Cir. 1974) (emphasis added) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)). "An injunction should clearly let defendant know what he is ordered to do or not to do. A court order should be phrased in terms of objective actions, **not legal conclusions**." *S.E.C. v. Goble*, 682 F.3d 934, 950 (11th Cir. 2012) (internal quotation marks and citation omitted) (emphasis added).

SMUG's inability or unwillingness to specify what conduct it proposes to enjoin not only violates due process, but also thwarts this Court's jurisdiction under the Alien Tort Statute ("ATS"). SMUG's injunctive remedy under its ATS claims depends on SMUG's proving unlawful conduct by Lively cognizable under the ATS. *See Hearring v. Sliwowski*, 806 F.3d 864, 867 (6th Cir. 2015) ("Judges have authority to enter injunctions against a party—to change the party's behavior through the power of the federal courts—**when they have done something wrong** . . . ." (emphasis added)). And, "[t]o justify an injunction when the incident now lies in the past, there must be a real and immediate threat of future legal violations rather than an abstract or conjectural one." *Asociacion De Periodistas De Puerto Rico v. Mueller*, 680 F.3d 70,

84–85 (1st Cir. 2012) (internal quotation marks and citation omitted). Thus, SMUG must articulate what ATS-cognizable conduct Lively has committed, and for which there is a real and immediate threat of his committing again, in order to enjoin Lively from that conduct. SMUG's inability to identify that conduct for purposes of its remedy betrays its inability to identify that conduct at all.

Nonetheless, despite SMUG's repeated failures to specify what conduct by Lively it seeks to enjoin, does SMUG have an injunction in mind? While SMUG feigns tolerance of Lively's writing or speaking as long as it is "abstract advocacy, such as posting writings on a website or in books, speaking at public events, or associating with those who hold anti-LGBTI beliefs" (SMUG Memo p. 10), SMUG would impose liability for, and seek to enjoin Lively from, violating the binding, specific, and universal norm against . . . **what**? E-mailing Langa a link to his website? Sending Ssempa a copy of his book? Preaching at Ssempa's church? Commending his writings to the public at a speaking event in Uganda? Commenting on a draft law proposed by others, and asking that its proposed punishment be moderated?

Actually, and incredibly, yes. SMUG unequivocally seeks a speech-chilling injunction against anything Lively might say which SMUG finds offensive, to hold over Lively like a club. SMUG, itself, said so:

> 171. SMUG wants this Court to enjoin Lively from selling or giving away his books in Uganda. (Onziema 435:19-436:7).
>
> 172. SMUG wants this Court to enjoin Lively from going to Uganda and preaching at Martin Ssempa's church . . . . (Onziema 436:8-15).
>
> 173. SMUG wants this Court to enjoin Lively from going to Uganda to speak to a group of high school students about what Lively perceives to be the many and serious health hazards of homosexual conduct. (Onziema 436:23-437:5).

> 174. SMUG wants this Court to enjoin Lively from going to Uganda to train lawyers on how to use the law to oppose the legalization of same-sex marriage. (Onziema 437:6-13).
>
> 175. SMUG wants this Court to enjoin Lively from going to Uganda to lobby the Ugandan Parliament not to legalize same-sex marriage. (Onziema 437:14-19).

(Lively MF ¶¶ 171-75, dkt. 257, pp. 42-43.)[11]

SMUG has been vague about the injunction it wants because SMUG knows it has no legal basis for it. No matter how offensive SMUG finds Lively, SMUG knows it cannot enjoin what it really wants to enjoin—Lively's ideas. *See SEC v. World Radio Mission, Inc.*, 544 F.2d 535, 541 (1st Cir. 1976) ("An injunction is designed to protect the public against conduct, not to punish a state of mind.")

Respectfully submitted,

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[11] In light of SMUG's admissions about what it really wants to enjoin—Lively's speech—SMUG's feigned consolation that Lively would retain First Amendment defenses to any contempt action by SMUG is laughable. SMUG has maintained the current action for four years with no proof of unprotected speech or conduct by Lively, at times employing half-truths and outright fabrications to keep it going. The process is the punishment. If awarded an injunction, would SMUG refrain from claiming contempt for protected speech? Of course not.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on December 8, 2016. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Horatio G. Mihet_________________
Horatio G. Mihet