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.

On Appeal from the United States District Court
For the District of District of Massachusetts

Lower Court Case No. 3:12-cv-30051-MAP

BRIEF OF PLAINTIFF-APPELLEE SEXUAL MINORITIES UGANDA

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction over the appeal by Defendant-Appellant Scott Lively ("Lively"). Lively prevailed below in obtaining summary judgment and dismissal of all of the federal and state law claims asserted by Plaintiff-Appellee Sexual Minorities Uganda ("SMUG").[1] Accordingly, having received the relief he requested on both the federal and state law claims, Lively has not suffered a concrete injury sufficient to confer the necessary standing to appeal the judgment below. *See Hollingsworth v. Perry*, 133 S.Ct. 2652, 2662 (2013) (no standing to appeal in cases where, as here, the "district court had not ordered [a party] to do or refrain from doing anything").

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[1] Lively's June 8, 2016 Notice of Appeal asserted, in a footnote, the following basis for appellate jurisdiction:

> 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, 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).

On July 3, 2017, SMUG moved to dismiss Lively's appeal for lack of jurisdiction. On March 19, 2018, a motions panel of this Court denied that motion without prejudice to reconsideration by a merits panel.

And, because courts of appeal are jurisdictionally limited to reviewing judgments and orders – not statements in opinions – this Court has no authority to hear an appeal of the otherwise dismissed federal claims in order to "reform" language that Lively finds objectionable. *In re Shkolnikov*, 470 F.3d 22, 24 (1st Cir. 2006). Likewise, having obtained the very relief Lively sought below on the state law claims, Lively has no standing to seek review of that favorable judgment even if he now prefers that the dismissal he obtained were with prejudice.

ISSUES PRESENTED

1. Does this Court have jurisdiction to hear an appeal from a putative appellant who successfully obtained a dismissal of the federal claims asserted against him, simply so that this Court can "reform" language in the opinion that the prevailing party finds objectionable?

2. Does this Court have jurisdiction to hear an appeal of the District Court's interlocutory order denying Lively's motion to dismiss SMUG's federal claims, where the same claim was ultimately dismissed by the District Court in its ruling granting Lively's Motion for Summary Judgment?

3. Does this Court have jurisdiction over Lively's appeal of SMUG's state law claims, after Lively obtained a judgment dismissing those claims, simply because Lively would now prefer those claims to have been dismissed with prejudice?

a. Is Lively judicially estopped from asserting to this Court that the District Court was required to exercise diversity jurisdiction after he took the exact opposite position below, and where this about-face would evade the District Court's review of SMUG's state law claims, and instead have this Court review the merits of those claims for the first time on appeal?

b. Did the District Court abuse its discretion in declining to exercise supplemental jurisdiction over SMUG's state law claims (as Lively had requested) after dismissing its federal law claim?

c. Even assuming, contrary to the position Lively took below, that there is a basis for federal jurisdiction over the state law claims, should this Court adjudicate the merits of Lively's purported defenses to those claims in the first instance, rather than remanding to the District Court?

STATEMENT OF THE CASE

SMUG brought this lawsuit against Lively to hold him accountable for his contribution to a sustained, systematic, and targeted persecution of the lesbian, gay, bisexual, transgender, and intersex ("LGBTI") community in Uganda. *See* First Amended Complaint ("Am. Compl."), Appendix at 42. "Persecution" is defined as the intentional and severe deprivation of fundamental rights on the basis of the

identity of a group or collectivity,[2] *id.* at ¶ 3, and is considered "one of the most vicious of all crimes against humanity" because it "nourishes its roots in the negation of the principle of equality of human beings" and is "one step away from genocide." *Prosecutor v. Kupreškić,* Case No. IT-95-16-T, Judgment, ¶ 751 (Jan. 14, 2000) ("*Kupreškić* Trial Judgment").[3]

SMUG is an umbrella organization for a coalition of Ugandan organizations advocating for the rights of LGBTI communities. On March 14, 2012, SMUG commenced an action against Scott 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. SMUG sought relief in the form of damages and a judgment declaring Lively's conduct in violation of the law of nations and enjoining Lively from "undertaking further actions, and from plotting and conspiring with others, to persecute SMUG and the LGBTI community in Uganda on the basis of their sexual orientation and

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[2] *See, e.g.*, Rome Statute of the International Criminal Court, art. 7(2)(g), available at https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

[3] Judgments of the International Criminal Tribunal for the Former Yugoslavia are available at: http://www.icty.org/.

gender identity." Am. Compl., Appendix at 42, 59-60.[4]

In 2013, Lively moved to dismiss the action on a variety of grounds, including lack of subject-matter jurisdiction, arguing that the crime against humanity of persecution was not cognizable under the ATS and that it was barred by the presumption against extraterritoriality. Lively Motion to Dismiss, dkt. 33. The District Court denied Lively's motion to dismiss, holding, *inter alia*, that the Court had subject-matter jurisdiction over the claim because "[w]idespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international norms" and that allegations as to Lively's status as a United States citizen who also committed acts within this country in furtherance of the substantive law-of-nations violation were sufficient at that stage to overcome the presumption against extraterritoriality. Order on Motion to Dismiss ("MTD Order"), Abbreviated Electronic Record ("AER") at 65, 89-90.

Discovery then proceeded for nearly two and a half years, followed by Lively's motion for summary judgment seeking dismissal of SMUG's federal ATS claims and its state law claims also on a variety of jurisdictional and substantive

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[4] The purported injunctive relief described on page 7 of Lively's opening brief reflects the language of Lively's counsel, not SMUG's testifying witness. Deposition of Pepe Onziema, dkt. 293-31 at 434-35. As a foreign organization, SMUG understands that what SMUG would "want the court to prohibit Lively from doing," *id*., may be different from what a court is able to do under the United States Constitution, and is different from what SMUG is asking the Court to do. Declaration of Pepe Onziema, dkt. 291 at ¶ 66.

grounds. On June 5, 2017, and on a full factual record and briefing, the District Court issued its decision and order granting Lively's motion. Order on Defendant's Motion for Summary Judgment ("S.J. Order"), AER at 125. The District Court explained that, while the record evidence supported a finding that Lively's actions arose to the level of 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 SMUG'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. *Id.*

STATEMENT OF FACTS

During the course of two and a half years of discovery, SMUG obtained ample evidence in support of its substantive claims that Lively engaged in a conspiracy and aided and abetted the persecution of the LGBTI community in

Uganda based on conduct he undertook in the United States and abroad.[5] As explained throughout, this Court need not review the full record evidence because this action was dismissed in its entirety and SMUG, the party actually injured by that dismissal, has not appealed.

Thus, given the absence of jurisdiction over this appeal, the viability of SMUG's substantive ATS and state law claims is before this Court in only the most indirect and attenuated way: only *if* the Court finds there is jurisdiction over Lively's appeal of claims upon which he prevailed and then *if* this Court finds diversity jurisdiction over SMUG's state law claims (rather than directing the District Court to expressly determine the question of diversity jurisdiction) or that the District Court abused its discretion in relinquishing supplemental jurisdiction

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[5] Lively repeatedly asserts that SMUG had no direct, personal knowledge of his conduct contributing to the widespread and systematic persecution of Uganda's LGBTI community, citing as support excerpts from the depositions of SMUG personnel. *See*, *e.g.*, Def. Appeal Br. at 10-15. Lively thus proceeds on the manifestly incorrect premise that his liability could not ever be proven absent SMUG's – and its deponents' – personal knowledge of his conduct (including his non-public conduct). This theory misunderstands law and procedure. Tort liability does not require that proof be based on the plaintiff's personal knowledge of all relevant conduct of the defendant. *See Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). If that were the case, there would be no need for discovery in litigation. Critically, Lively entirely ignores, and asked the District Court to ignore as well, the wealth of relevant evidence that appears in the form of *his own private oral and written statements and private statements of his co-conspirators*, admissible under Federal Rule of Evidence 801(d)(2)(D). Moreover, Lively omits the testimony of SMUG staff describing their knowledge based on Lively's own documents and the fact that his counsel asked them to answer "apart" from that knowledge. *See*, *e.g.*, Deposition of Richard Lusimbo, dkt. 293-53 at pp. 65:3-4, 65:11-14, 65:23-66:1-11.

and then *if* the Court accepts Lively's remarkable invitation to address his defenses on the merits of the state law claims as a court of first impression, rather than remanding to the District Court for adjudication in the ordinary course. In case of that remote eventuality, SMUG only briefly summarizes what the record evidence shows to demonstrate that its state law claims would not be barred by the reasons Lively asserts in this appeal on first review by this Court.

The full record is not before the Court, and SMUG respectfully submits that adjudication of the merits of the state law claims could not fairly occur absent this record. Accordingly, should the Court accept Lively's invitation to adjudicate the merits of SMUG's state law claims in the first instance, SMUG would respectfully request an opportunity to supplement the briefing and submit the full, relevant record evidence for a meaningful evaluation of the state law claims and Lively's purported defenses.

In sum, and for purposes of the limited questions on appeal, SMUG developed a robust factual record demonstrating that:

(i) There was a systematic and sustained campaign of persecution on the basis of sexual orientation and gender identity targeting the LGBTI population in Uganda, a crime against humanity in international law cognizable under the Alien Tort Statute. *See generally* Plaintiff's Response to Defendant's Local Civil Rule 56.1 Statement of Facts and Plaintiff's

Concise Statement of Material Facts of Record Omitted by Defendant ("Plaintiff's Statement of Facts"), dkt. 270 at ¶¶ 23-212.[6]

(ii) As part of this persecution and because of its identity as a leading LGBTI organization and role advocating for the rights of the LGBTI community, SMUG and its staff suffered severe deprivations of fundamental rights, including the rights to free expression and association, *see, e.g.,* dkt. 270 at ¶¶ 40, 139-143, 150-154, 155, 161, 175, 205, 210-211, privacy, *see, e.g., id.* at ¶¶ 45-46, 127-132, 184-187, nondiscrimination, *see, e.g., id.* at 160, 178, 180-181, 191-192, and to be free from arbitrary arrests and detention and cruel, inhuman, or degrading treatment, *see, e.g., id.* at 40, 56, 210-211, and were thus injured by the persecution.

(iii) Lively entered into a conspiratorial agreement and otherwise aided and abetted (by providing substantial assistance to) a number of powerful and prominent Ugandan state and non-state actors to deprive SMUG and other LGBTI people in Uganda of their fundamental rights. *See, e.g.,* dkt. 270 at ¶¶ 23-36, 42, 45-46, 48, 51, 63-111, 118-119, 121-122, 136,

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[6] Given the unusual posture of this appeal and the jurisdictional questions at issue and for the convenience of the Court, SMUG cites herein to documents in the District Court record using the ECF docket numbers. Should the Court decide to address the merits of the state law claims for the first time on appeal, SMUG would seek to supplement and amend the record to present the evidence more directly before this Court for its ease of reference.

138, 149, 153, 162, 166, 174, 178, 181, 190, 192, 211 (describing roles and relationships of different co-conspirators, their meetings, statements (admissions), and execution of their plans to deprive the LGBTI community in Uganda of fundamental rights, including collaboration on, drafting, introduction and enactment of law targeting LGBTI people for increased criminalization, punishment, and censorship).

(iv) Lively had the specific intent to discriminate against and persecute LGBTI people in Uganda, i.e. to deprive them of their fundamental rights to expression, association, non-discrimination, and to be free from arbitrary arrest or detention, as evidenced by his own statements and admissions. *See*, *e.g.*, dkt. 270 at ¶¶ 69-75, 78, 81, 149, 174 (Lively's admissions about his intent to further policies and laws that deprive LGBTI people in Uganda of their fundamental rights*); id*. at ¶¶ 7-20 (Lively's admissions about his intent to further laws and policies that deprive LGBTI people of fundamental rights generally and in other parts of the world).

(v) Lively's co-conspirators did in fact deprive SMUG of its fundamental rights, including rights to expression and association, causing SMUG to suffer both economic and non-economic harms as a result. *See*, *e.g.*, dkt. 270 at ¶¶ 2(e-f), 36, 45, 48, 51, 67, 87-90, 137, 140-42, 150-153,

155-56, 160, 176, 178, 190, 192, 211 (describing role of co-conspirators in deprivation of SMUG's and its staffs' rights).

While the record evidence demonstrated these facts, the District Court found that instances of Lively's conduct aiding and abetting the persecution and otherwise contributing to the persecution conspiracy did not sufficiently "touch and concern" the United States so as to meet the jurisdictional requirement under *Kiobel*.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction over Lively's appeal. Lively obtained the very judgment he sought in the District Court in this case: dismissal of SMUG's federal ATS claims and its state law claims. "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). As a prevailing party below, Lively has not suffered any cognizable injury sufficient to confer standing to appeal the favorable judgment. Simply put, because the District Court did not order Lively "to do or refrain from doing anything," he is not authorized to appeal. *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2662 (2013).

Lively's frustration with language in the District Court's opinion that he finds objectionable does not authorize him to burden an appellate court to review and "reform" such language. The appellate court's power is limited to "correct[ing]

wrong judgments, not to revis[ing] opinions." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Because he prevailed in the judgment, there is nothing legally adverse for this Court to "correct." Neither of the extremely limited exceptions to this bright line rule – that an aspect of a judgment would have a binding collateral or preclusive effect or produce imminent and concrete economic harm – apply here, where Lively merely articulates personal offense. Accepting Lively's appeal would open the gates to this Court's limited appellate jurisdiction in numerous, unpredictable and unworkable ways.

Second, the Court has no jurisdiction over the state law claims in this case. Lively sought and obtained dismissal of those claims. Lively urged the District Court to relinquish supplemental jurisdiction over those state law claims – not that they be dismissed with prejudice – and the District Court did so. Given his prevailing party status, Lively offers no support that would confer appellate jurisdiction over the state law claims because Lively, for the first time, seeks that they be dismissed *with* prejudice. Even worse, on appeal, Lively has taken a position diametrically opposed to the position he took below – and won. He had previously asserted that there was no basis for diversity jurisdiction over SMUG's state law claims. Remarkably, he now asserts that there *is* diversity jurisdiction and that this court should assume jurisdiction to adjudicate the claims on the merits in the first instance. He must be judicially estopped from taking contrary positions in

the very same case.

Third, the District Court did not abuse its broad discretion in relinquishing supplemental jurisdiction over the pendant state law claims (as Lively had requested). If this Court finds that the District Court abused its discretion or that there is diversity jurisdiction over the state law claims, it should remand those claims to the District Court, rather than adjudicate them in the first instance on appeal as Lively urges now. Finally, should this Court wish to adjudicate, in contravention of its precedent, the merits of Lively's state law defenses in the first instance, it should provide the parties an opportunity for supplemental briefing and submission of the necessary record evidence to adjudicate those claims. Should it do so, this Court would find the state law claims viable.

ARGUMENT

I. THE COURT LACKS APPELLATE JURISDICTION OVER LIVELY'S APPEAL FROM A FAVORABLE JUDGMENT DISMISSING SMUG'S FEDERAL AND STATE LAW CLAIMS.

Lively sought summary judgment dismissing SMUG's ATS claims on a variety of jurisdictional and substantive grounds. The District Court granted Lively's motion and dismissed the ATS claims for lack of subject-matter jurisdiction. Lively also sought a judgment dismissing the state law conspiracy and negligence claims for lack diversity jurisdiction and requesting the District Court relinquish supplemental jurisdiction over those claims. Again, the District

Court effectively granted the relief Lively sought when it did not exercise diversity jurisdiction and relinquished its supplemental jurisdiction.

As such, it is SMUG, not Lively, who is the aggrieved party in this case and is the only party authorized to appeal. Lively, having prevailed in obtaining a judgment in his favor on the federal and state law claims, has no judgment adverse to him to appeal or for this Court to correct. Lively has suffered no cognizable injury – even from the subjective harm he perceives from critical language or findings in the district court opinion – that would confer standing to continue litigation in the Court of Appeals. Even worse, Lively's demand that this Court assume federal jurisdiction over the state law claims is a position directly opposite to the one he took below. Despite prevailing below, Lively makes this about-face in order to have this Court adjudicate his defenses to the state law claims on the merits *in the first instance*. He should be judicially estopped from undertaking such litigation gamesmanship. The appeal should be dismissed in its entirety.

A. Lively Demonstrates No Cognizable Injury Arising from the District Court's Judgment in His Favor Sufficient to Establish Standing to Appeal.

Article III standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). On appeal as upon filing, standing requires that litigants 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). In addition to meeting the requirements of Article III, an appellant must also satisfy the long-standing 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) (emphasis added). *See also Camreta v. Greene*, 563 U.S. 692, 702 (2011) (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").

Lively's brief describes no injury that meets this double bar to appellate review. Where, as here, the "district court had not ordered [Lively] to do or refrain from doing anything," there is no standing to appeal. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). Likewise, given the federal appellate courts limited power and resources, they exist only 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" or "eliminate" language in the opinion he finds objectionable, there is nothing legally adverse to Lively arising from the actual judgment in this case for this Court to "correct." Indeed, it is hornbook law that an appellate litigant must demonstrate "injury caused by the

judgment rather than injury caused by the underlying facts." *Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004) (quoting 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3902, at 63 (2d ed. 1992).

Accordingly, this Circuit has repeatedly rejected pleas, like Lively's, to alter language in an opinion a prevailing party finds prejudicial or subjectively injurious. As this Court explained: "since 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." *In Re Shkolnikov*, 470 F.3d 22, 24 (1st Cir. 2006) (citing *Cal. v. Rooney*, 483 U.S. 307, 311 (1987); *United States v. Accra Pac, Inc.*, 173 F.3d 630, 632 (7th Cir. 1999) ("appellate courts do not issue Writs of Erasure to change language in district judge's opinions"); *see also 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 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.

Now recognizing the futility of his appeal, Lively attempts to shoehorn the stated grounds for his appeal to "eliminate" "certain extraneous but prejudicial language," *see* Lively Notice of Appeal, AER at 151, which is obviously not appealable, into a request for a "reformation of [a] decree," which sometimes can be. *See* Def. Appeal Br. at 26 (quoting *Elec. Fittings Corp. v. Thomas & Betts*, 307 U.S. 241, 242 (1939)). This attempt is unavailing because courts have "strictly interpreted 'decree' to mean 'judgment.'" *EPIC v. Pacific Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001). 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). It afforded no declaratory, injunctive, or other relief against Lively with respect to any of SMUG's claims. *See id.* Accordingly, Lively cannot appeal the District Court's "decree" as it granted him the judgment he requested.

Statements in *opinions* – as opposed to judgments – have only been found to be appealable in two narrow circumstances. First, if they present a prospective and concrete collateral estoppel-effect in future actions. *See In Re Shkolnikov*, 470 F.3d at 24 n. 1 (discussing *Elec. Fittings*) (explaining that 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"). While Lively asserts that the District Court effectively "declared [him] *hostis humani generis*," Def. Appeal Br. at 32, 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).[7]

The statements with which Lively takes issue do not establish any "controlling law" in subsequent litigation. *Compare id.* at 704-05 (finding a singular exception for constitutional rulings that form part of the two-step inquiry for a government official's qualified immunity defense because those 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*, 257 F.3d at 1076. *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

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[7] Likewise, statements by litigants in a press release, *see* Def. Appeal Br. at 22, are insufficient to create such a concrete preclusive effect in future litigation.

760 (2d ed. 1993)).[8]

Lively's fear that SMUG will use the language he finds offensive in other fora is insufficient to invoke appellate jurisdiction. As this Court has explained, 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." *Puerto Rico Tel. Co., Inc. v. Telecomm. Reg. Bd. of P.R.*, 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). Even if it were true that some foreign tribunal where SMUG could bring a later suit against Lively was not currently "familiar with the concept and limitations of subject-matter jurisdiction in United States courts," Def. Appeal Br. at 33, Lively provides no basis for the belief that a foreign tribunal could not *be made aware of* the limitations of the District Court's ruling in that subsequent case. Such statements are nothing like the necessary, preclusive effect that occurs as a matter of law in qualified immunity decisions. *Cf. Camreta*, 563 U.S. at 704.

The second circumstance is when the language in the opinion may amount to the kind of "adverse effect" that would rise to the level of a cognizable injury, such

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[8] For a statement by the court to constitute declaratory relief, as Lively asserts these statements amount to, *see* Def. Appeal Brief at 21, it must have been included in the *judgment*. *See* 28 U.S. Code § 2201(a). However, the statements Lively objects to do not appear in the judgment, and thus, do not constitute any form of relief that affects the rights and liabilities of Lively.

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, regrettably from SMUG's perspective, nothing in the order has any negative legal consequence for Lively and any vague speculation he offers – such as "significant reputational harm" – does 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.").

None of the cases Lively cites offer any support or basis for his appeal. In *Steel Co. v. Citizens for a Better Environment*, the Supreme Court objected to the circuit court practice of exercising "hypothetical jurisdiction," or "assuming jurisdiction for the purpose of deciding the merits." 523 U.S. 83, 94 (1998). However, the District Court here did not assume jurisdiction to decide on the merits. Rather, it did the opposite when it *ruled* on the question of jurisdiction, and finding none exists, dismissed the case without ever issuing a *ruling* on the merits of SMUG's claims.

The remainder of the authorities upon which Lively relies all presented

unique instances in which the prevailing party successfully challenged opinions issued *after* the case had already settled or been rendered moot, not statements that formed part of the opinion in which the court determined whether the case should be dismissed. For example, in *EPIC v. Pacific Lumber*, the district court had issued an order against the appellant after the case was mooted by the underlying factual events. 257 F.3d 1071, 1074 (9th Cir. 2001). Later, when dismissing the case as moot, the district court affirmed its prior order, stating that it had properly adjudicated the claims. *Id*. By contrast, the District Court here never issued an order adjudicating Lively's liability for persecution. *See also New Jersey v. Heldor Indus. Inc.*, 989 F.2d 702, 703 (3d Cir.1993) (opinion *entered after* the parties agreed to a settlement); *Black Rock City, LLC v. Pershing Cty. Bd. of Comm'rs*, 637 F. App'x 488, 487 (9th Cir. 2016) (order issued six weeks after the parties filed a stipulation for voluntary dismissal of the suit).[9]

Finally, Lively's proposed theory of appellate jurisdiction has no limiting principle. Allowing appeals such as that Lively seeks to bring would transform the limited appellate jurisdiction of the federal courts into an open forum for aggrieved litigants. *See In Re Williams*, 156 F.3d at 91 ("Practically speaking, any rule that

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[9] In *Unalachtigo Band of Nanticoke Lenni Lenape Nation v. Corzine*, a third party defendant was able to challenge a ruling denying its Rule 19 motion to join and have the case dismissed, on the ground that it failed to demonstrate an interest in the property at issue, even though the district court had dismissed the plaintiff's complaint for lack of standing. 606 F.3d 126, 127 (3d Cir. 2010).

purports to transform harsh judicial words into a '*de facto* sanction' will be almost impossible to cabin."); *see also Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984) (if courts permitted appeals of critical judicial findings, "[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)). 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.

B. This Court Lacks Jurisdiction Over Lively's Purported Appeal of the District Court's Interlocutory Order Denying Lively's Motion to Dismiss.

Lively attempts to contort appellate jurisdiction even further by asking this Court to review legal conclusions from a prior interlocutory order that denied Lively's motion to dismiss the complaint. Notably, he does not cite a single shred of authority that would authorize the Court to hear an appeal of a preceding interlocutory order made by a party that ultimately prevails in obtaining a judgment in the case. In fact, because "all interlocutory rulings in a case 'merge in the [final] judgment,'" *Denault v. Ahern*, 857 F.3d 76, 81 (1st Cir. 2017) (internal citations omitted), Lively lacks any independent basis to appeal the District Court's

legal conclusions in its interlocutory order denying Lively's motion to dismiss.

In addition, Lively can identify no potentially prejudicial or collateral estoppel effect any of the legal conclusions reached by the District Court would have on Lively in the future, because there are none. *Cf. Camreta*, 563 U.S. at 704, 709; *see infra* Section I(A). Those legal conclusions Lively asks this Court to vacate, *see* Def. Appeal Br. at 37-38, were not relevant or necessary to the District Court's ultimate determination that it lacked jurisdiction over the Alien Tort Statute claims under *Kiobel*. Consequently, they would have no "preclusive effect in a later action between these parties," and thus, Lively is "not sufficiently aggrieved to appeal" them. *Conwill v. Greenberg Traurig, LLP*, 448 F. App'x 434, 436-39 (5th Cir. 2011) (finding appeal of "district court's interlocutory ruling that the breach of fiduciary duty claim is subject to a ten-year prescription period under Louisiana law" improper because it was not necessary to the district court's ultimate determination to not exercise jurisdiction over the claim). *See also TJX Companies Retail Sec. Breach Litig.*, 564 F.3d 489, 493 (1st Cir. 2009) (explaining that in a situation where the "defendant wanted to challenge jury *findings*, fearing that they would prejudice it in future litigation," it could not because "the findings were not essential to the judgment and thus would have no collateral estoppel effect").

Moreover, contrary to Lively's ultimately irrelevant suggestion, the District

Court's standard of law on the question of extraterritoriality under *Kiobel* did not change between its ruling denying Lively's motion to dismiss and its grant of summary judgment on this question. The District Court never held that Lively's U.S. citizenship or residence *alone* could be sufficient to confer jurisdiction under *Kiobel*. *Compare* Def. Appeal Br. at 35 *with* MTD Order, AER at 46, 49-50 ("[T]he restrictions established in *Kiobel*…do not apply to the facts as alleged in this case, where Defendant is a citizen of the United States *and* where his offensive conduct is alleged to have occurred, in substantial part, within this country." (emphasis added)).[10] SMUG indeed produced evidence of Lively's conduct in the United States in furtherance of the persecution in Uganda, *see e.g.* dkt. 292 at 85-91, dkt. 324-1,[11] but the District Court ultimately deemed it insufficient.[12]

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[10] The Second Circuit's view in *Mastafa v. Chevron Corp.* that "neither the U.S. citizenship of defendants, nor their presence in the United States, *is of relevance* for jurisdictional purposes," 770 F.3d 170, 188 (2d Cir. 2014) (emphasis added), is a minority view, *compare, e.g.*, *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 595-98 (11th Cir. 2015); *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 & n.9 (9th Cir. 2014); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014).

[11] Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and Plaintiff's Post-Hearing Memorandum in Further Opposition to Defendant's Motion for Summary Judgment, respectively.

C. This Court Has No Jurisdiction Over Lively's Attempt to Appeal His Successful Dismissal of SMUG's State Law Claims.

1. Lively Has No Standing to Appeal The District Court's Decision to Not Exercise Diversity Jurisdiction.

Lively argues in his putative appeal that the District Court erred in failing to exercise diversity jurisdiction over SMUG's state law claims, Def. Appeal Br. at 40. He further asserts that because the District Court failed to adjudicate the state law claims, this Court should do so now. Yet, Lively made the *exact opposite argument* – and prevailed – in the District Court. *Compare* Def. Appeal Br. at 40 ("The District Court Erred in Relinquishing Original, Mandatory Jurisdiction Over SMUG's State Law Claims") *with* dkt. 257 at 171, Addendum at 1 ("**The Court Lacks Diversity Jurisdiction And Should Not Exercise Supplemental**

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[12] Lively also makes the bizarre claim that the District Court's finding that SMUG's sufficiently *alleged* Lively's U.S.-based conduct should be vacated because SMUG ultimately failed to produce sufficient *evidence* in connection with summary judgment. To begin, this is not how the Rules of Civil Procedure work: a ruling regarding sufficiency of allegations is not vitiated because a plaintiff does not ultimately sufficiently prove those allegations for purposes of summary judgment or at trial. Second, Lively's claim that there was *no* evidence of U.S. conduct is tethered to a silly and erroneous premise: *i.e.* that for there to have been evidence of U.S. conduct, that evidence could only come from plaintiff's testimony, *see, e.g.* Def. Appeal Br. at 36-37, as opposed to documentary evidence from Lively himself. While SMUG members themselves did not witness firsthand Lively's conduct in the United States, emails produced in discovery – and other evidence – showed it.

Jurisdiction Over SMUG's State Law Claims.") (emphasis added). *See also* dkt. 83 ¶ 15. As described below, he should be judicially estopped from taking opposite positions in the very same litigation. Nevertheless, the Court has no jurisdiction to hear his appeal of the state law claims.

By not exercising diversity jurisdiction, the District Court effectively granted the relief Lively sought and rendered him the prevailing party on the state law claims – as with the federal law claim. Lively has no standing to appeal his victory and demand that *this* Court, in the first instance, adjudicate the merits of SMUG's state claims to his satisfaction. *See Arizonans for Official English*, 520 U.S. at 64 (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 always satisfy itself of the existence of subject matter jurisdiction that he himself argued did not exist and to do so in this, *an otherwise non-existing*, appeal. However, "[w]hile the absence of subject matter jurisdiction is a bar to decision, its presence 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). Lively's position reflects "a confusion between power to decide and necessity and appropriateness of decision." *Id.* Under Lively's strange theory, Courts of Appeals would be obligated to go around

correcting all subject matter jurisdictional errors in the lower courts, regardless of which party was injured by the purported error.

First Circuit law specifically forecloses Lively's argument. This Court expressly declined to assess diversity jurisdiction on appeal where a plaintiff failed to raise diversity jurisdiction before the district court in post-judgment submissions following the dismissal of its claims, but instead argued it on appeal in an attempt to evade assessment of the claims by a district court that the plaintiff believed was hostile to its claims. *D'Amico*, 52 Fed. App'x at 526-27 ("A jurisdictional allegation and proof enable the advocate to invoke that jurisdiction. But this is no license to allow a jurisdictional concept to lie in limbo, and to be raised anew only after the judge has been misled by both the action and the inaction of counsel."). This is what Lively is seeking to do here, except even more brazenly, as the *defendant* rather than the plaintiff in this action, and after successfully arguing for dismissal below. Given Lively's remarkable about-face on this issue, it is clear that he only seeks to have this Court exercise diversity jurisdiction so that he can evade review by the District Court, with the hope of having these claims dismissed *with* prejudice.

Lively can point to no authorities to support this maneuver. He cites to only two cases where *defendants* have asserted the existence of diversity jurisdiction over plaintiffs' state law claims. Neither is applicable here and certainly neither

involve such an obvious and instrumental switch in litigation position. In both, the Supreme Court discussed the limits of the district court's authority to remand a case after it had been properly removed to federal court by the defendant. *See* Def. Appeal Br. at 43 (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) (discussing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976)); *Williams v. Costco Wholesale Corp.*, 471 F.3d 975 (9th Cir. 2006)). In those cases, the issue was not whether the court should have exercised jurisdiction based on the diversity statute but whether remand was permitted under the removal statute.[13]

2. This Court Has No Jurisdiction Over the District Court's Decision to Relinquish Supplemental Jurisdiction Over SMUG's State Law Claims.

Similarly, for the first time on appeal, Lively now argues that the District Court "erred in relinquishing supplemental jurisdiction over SMUG's state law

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[13] The remainder of the authorities that Lively cites either do not address the question of diversity jurisdiction at all or only do so upon the *plaintiff*'s assertion of diversity jurisdiction as an aggrieved party properly on appeal. *See* Def. Appeal Br. at 42-44 (citing *Nazario-Lugo v. Caribevision Holdings, Inc.*, 670 F.3d 109 (1st Cir. 2012) (finding that the district court correctly dismissed the suit on *abstention* grounds); *Marshall v. Marshall*, 547 U.S. 293 (2006) (finding that the Ninth Circuit inappropriately expanded the probate exception to 28 U.S.C. § 1334, the statute vesting in federal district courts jurisdiction in bankruptcy cases and related proceedings); *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995) (assessing diversity jurisdiction for the first time on appeal because of the plaintiff's assertion of diversity jurisdiction); *Custom Auto Body, Inc. v. Aetna Cas. & Sur. Co.*, No. 78-0301, 1983 WL 1873, (D.R.I. Aug. 3, 1983) (assessing diversity jurisdiction at the trial court level in the first instance based on plaintiff's assertion); *Melendez Garcia v. Sanchez*, No. CIV. 02-1646 ADC, 2007 WL 7610724 (D.P.R. Aug. 23, 2007) (same)).

claims." Def. Appeal Br. at 44. Yet, as with the arguments over diversity jurisdiction, he took *the exact opposite position* before the District Court. *See* dkt. 257 at 171-172, Addendum 1-2. ("[t]here is no good reason for this Court to retain supplemental jurisdiction over SMUG's defunct state law claims" and the Court "Should Not Exercise Supplemental Jurisdiction Over SMUG's State Law Claims").

Thus, again, it is Lively who was the prevailing party – and SMUG the aggrieved party – from the District Court's decision. To the extent Lively imagines that he is injured because the District Court did not dismiss the state law claims *with* prejudice, he cites no law supporting that as a cognizable injury sufficient to confer standing. That SMUG might re-file the claims in state court and that a state court might rule in SMUG's favor on those potentially refiled claims remains speculative and insufficiently concrete to confer standing. *Clapper v. Amnesty*, 568 U.S. 398, 409 (2013) ("allegations of possible future injury" are not sufficient to meet the imminence requirement of Article III standing); *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir. 2014). For the reasons stated above, Lively has no standing to appeal a legal ruling he sought and obtained.

3. Lively is Judicially Estopped from Attempting to Appeal the Dismissal of the State Law Claims.

As described above, Lively directly switched his position on both diversity and supplemental jurisdiction over SMUG's state law claims in the transition

between the District Court and this Court. He has done so in an attempt to get this Court to adjudicate, in the first instance, the merits of his defenses to the state law claims that the District Court dismissed, as he requested.

The doctrine of judicial estoppel exists precisely to prevent such litigation gamesmanship. *See Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004) ("[a]s a general matter, the doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding"). Lively's about-face with respect to the state law claims clearly meets the two conditions this Court has observed must be satisfied for judicial estoppel to attach: 1) that the estopping position and the estopped position be directly inconsistent; and 2) the responsible party must have succeeded in persuading a court to accept its prior position. *Id.*

With this appeal and his reversal of his previous position, Lively has created a situation to which this Court has said judicial estoppel applies, i.e. when "party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of a legal advantage." *Id.* (citing *InterGen, N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003)). Lively must not be allowed to do so.

II. THE COURT SHOULD NOT REVIEW THE DISTRICT COURT'S DECISION TO RELINQUISH SUPPLEMENTAL JURISDICTION OR ADJUDICATE LIVELY'S DEFENSES TO THE MERITS OF THE STATE LAW CLAIMS.

A. The District Court Did Not Abuse Its Discretion in Relinquishing Jurisdiction Over the Pendent State Law Claims.

In exercising its broad discretion to relinquish jurisdiction over pendent state law claims, the District Court noted that, "the sensitivity of the issues raised makes it more prudent to allow a court of the Commonwealth of Massachusetts to take the lead." S.J. Order, AER at 147. In doing so, the court followed well-established principles. The federal supplemental jurisdiction statute, 28 U.S.C. §1367(c), 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).

Lively's assertion now that the District Court abused its discretion in relinquishing pendent jurisdiction – again, directly contrary his argument below that such jurisdiction should be relinquished – cannot meet the high standard for showing abuse of discretion, *see, e.g., Senra v. Town of Smithfield,* 715 F.3d 34, 41 (1st Cir. 2013), 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 . . ."). Presumably balancing these multiple concerns, the District Court concluded that a Massachusetts state court would be better positioned to adjudicate SMUG's state law claims. 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").

The authorities cited by Lively do not suggest otherwise. One case Lively cites, where this Court found abuse of discretion in not exercising pendent jurisdiction, involved a dismissal just 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 another, the court found an "extraordinary circumstance[]," in which the District Court "master[ed] [] the minutiae of airport administration, aviation commerce, as well as the inner workings of the various decision-making processes within Milwaukee County's government," and the circuit court believed that a remand of the supplemental claims "would require a 'duplication of effort' by the state court." *Miller Aviation v. Milwaukee Cnty. Bd. of Supervisors*, 273 F.3d 722, 731-32 (7th Cir. 2001). No such comparable task was undertaken by the District Court here.

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 with standing, argued that the court should have relinquished jurisdiction. *See 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). And, in each, the Court found no abuse of discretion.

Unsurprisingly, Lively cites to no case in which a party who argued that a court should relinquish supplemental jurisdiction and then, after achieving that result, turned around and argued on appeal that the court was wrong and the appellate court should adjudicate the claim in the first instance.

B. Even if it Were Appropriate for the Court to Determine There Is Federal Jurisdiction over SMUG's State Law Claims, the Proper Remedy Would be to Remand to the District Court to Assess their Merits in the First Instance.

Lively seeks for this Court both to find that federal jurisdiction exists over the state law claims *and* to adjudicate the validity of those state law claims sitting as a court of first impression. Even if the former proposition were possible, the latter makes no sense.

In dismissing SMUG's state law claims without prejudice, 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 supplemental jurisdiction in removed action); *City of Chi. v. Int'l Coll. Of Surgeons*, 522 U.S. 156, 172-74 (1997).

Should this Court determine that the District Court somehow abused its discretion in declining to exercise pendent jurisdiction (which was consistent with Lively's request), the Court should remand those claims to the District Court to assess their merits in the first instance. *See, e.g.*, *Redondo*, 662 F.3d at 44; *Miller*

Aviation, 273 F.3d at 732. The same holds true for the exercise of diversity jurisdiction. Even where this Court has determined the existence of diversity jurisdiction where the district court failed to exercise it,[14] the normal course of practice has been to remand those claims that the district court did not assess in the first instance. *See, e.g.*, *Leon v. Municipality of San Juan*, 320 F.3d 69, 75 (1st Cir. 2003) (upon examining *sua sponte* the existence of diversity jurisdiction, and finding jurisdiction, proceeding to address the merits of only those issues that had already been addressed by the district court and expressly declining to address matters not reached by the district court, remanding them for consideration by the district court).

C. Should This Court Choose to Adjudicate the Merits of the State Law Claims in the First Instance, It Should Reject Lively's Asserted Defenses.

If this Court finds that it has jurisdiction to hear Lively's appeal from his successful attempt to dismiss the state law claims and *if* this Court finds that the district court abused its discretion in dismissing the pendant state law claims and *if*

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[14] Though, the First Circuit has declined to even *determine the existence of diversity jurisdiction* when the record lacks trial court findings on the matter or evidence of a formal stipulation between the parties. *See, e.g.*, *Macera v. Mortgage Elec. Registration Sys.*, 719 F.3d 46, 49 (1st Cir. 2013) (while finding that the district court erred in not ruling on the question of diversity jurisdiction, refusing to determine whether diversity could be established on the ground that the district court was better positioned to rule on subject matter jurisdiction based on its traditional position as a fact-finder).

this Court chooses to adjudicate the merits of Lively's defenses to the state law claims rather than to remand to the District Court to assess them according to the practice in this Court, the Court should nevertheless reject Lively's asserted defenses. SMUG's state law claims are timely, do not infringe on protected activity, and are supported by a sufficient record of damages.

The argument below addresses the merits of the defenses in a more summary fashion than they deserve, rather than introduce the entire factual record in an appeal where the Court's jurisdiction is the primary issue. Should the Court take up Lively's invitation to address the merits, however, SMUG would respectfully request an opportunity for supplemental briefing to introduce on appeal the full factual record supporting the viability of the state law claims.

1. SMUG's State Law Claims are Not Time-Barred.

As Lively concedes, under Massachusetts law, the limitations period for civil conspiracy and negligence is three years. Def. Appeal Br. at 47 (citing Mass. Gen. Laws Ann. ch. 260, § 2A (West)); *see also* MTD Order, AER at 116, 122. The statute of limitations period on SMUG's civil conspiracy and negligence claims begins to run at the time the plaintiff is injured or when he discovers or

reasonably should have discovered the cause of the injury.[15] AER at 116-17, 122-23 (citing cases). *See also Riley v. Presnell*, 565 N.E.2d 780, 785-786 (Mass. 1991) (although plaintiff knew of his injury, claim would not accrue until a reasonable person would have been aware of its causal connection to the defendant's actions).

Since SMUG filed its complaint on March 14, 2012, the operative date for purposes of the statute of limitations is March 14, 2009. Lively argues that SMUG's claims are barred because SMUG's corporate representative testified that SMUG's personnel were at a March 5-7, 2009 seminar in Uganda where Lively spoke and that, based on his speech at that conference, SMUG believed that Lively was persecuting SMUG. Def. Appeal Br. at 48 (citing Onziema Dep. Tr. at 372:15-373:14). However, the fact that SMUG was aware of Lively's anti-LGBTI speech at the March 2009 conference does not mean that it was aware of the conspiracy to deprive SMUG of its fundamental rights, the degree of Lively's involvement in that conspiracy at that moment, the nature of SMUG's injuries as a result of that conspiracy, or the causal connection between Lively's actions and SMUG's

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[15] Lively appears to argue that the Court should adopt the "first overt act" accrual standard. Def. Appeal Br. at 47-48. However, as the District Court explained, "this accrual rule only applies to federal and state statutory civil rights claims, which are not asserted here." MTD Order, AER at 116 (citing *Pagliuca v. City of Boston*, 626 N.E.2d 625, 627-28 (Mass. 1994)).

injuries – *i.e.*, the requirements of a legal claim.[16] Put simply, the fact that SMUG was aware of Lively's anti-LGBTI speeches and believed that such speech would cause it some manner of injury does not compel a conclusion that it understood that Lively was causing it a legal injury, particularly since, as explained below, SMUG's legal claims do not arise from Lively's public speeches.

Furthermore, SMUG also asserted several harmful incidents that occurred after March 2009. For example, the deliberately intimidating, mass disclosures of the identities of LGBTI peoples and raids targeted at SMUG and its activities, all occurred after March 2009. *See* Plaintiff's Statement of Facts, dkt. 270 at ¶¶ 100, 106, 112, 127-29, 139-42, 150-54, 168, 170, 187, 210-11. Moreover, Lively's communications with his co-conspirators regarding, *inter alia*, a central piece of the systematic persecution, the Anti-Homosexuality Bill, which later became law, did not occur until after March 2009. *Id.* at D-MFR ¶¶ 77-78*; id*. at ¶ 92-98. As such, those post-March 2009 harmful incidents and conspiratorial activities are clearly not barred by the statute of limitations.

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[16] In fact, Lively's role in the conspiracy and the specific nature of his damaging actions did not become clear to SMUG until well after the March 2009 conference. For example, the Anti-Homosexuality Bill, which contained a number of provisions that would deprive SMUG of fundamental rights to expression and association and to which Lively heavily contributed, was not introduced in Parliament by Lively's co-conspirator until April 29, 2009. Plaintiff's Statement of Facts, dkt. 270 at ¶¶ 98.

2. SMUG's State Law Claims Are Not Barred by the First Amendment.

Lively's disquisition on the First Amendment is disingenuous and ironic given that Lively, among other things, helped draft and pass a law that subjected SMUG's staff to *five to seven years in prison* for the exercise of their rights to freedom of expression and association. Dkt. 270 ¶ 96(a) (recommending five years imprisonment for "promotion of homosexuality"); *Id.* ¶ 184 (enacting of Anti-Homosexuality Act, which criminalized SMUG and its staff members for their advocacy of LGBTI rights); *Id.* ¶ 122 (identifying LGBTI "activists" as primary focus of law); *Id.* ¶ 123 (suggesting a law school dean be removed from her post because she was supportive of LGBTI rights). More than once, Lively has acknowledged that the Ugandan law he assisted with and the rights-stripping laws he has worked to bring about elsewhere would not be legal in the United States. *Id.* ¶ 18(iv), 149.

Critically, the basis of Lively's liability is not any "expression of his Christian views on marriage, family, and homosexuality," Def. Appeal Br. at 51, nor is it based on his commitment to demonize LGBTI people or liken the movement for LGBTI rights to Nazi atrocities. Nor is this an incitement case. Rather, Lively's statements were cited in this case by SMUG and the District Court (as they would be in any conspiracy case without implicating the First Amendment) as (i) evidence of Lively's persecutory and discriminatory *intent* and

(ii) evidence of his *agreement* to engage in the crime of persecution with his accomplices. Put another way, the statements are *not* an independent basis of liability; they are circumstantial evidence of his invidious state of mind and traditional evidence used to prove the existence of an agreement between he and his co-conspirators.

Civil conspiracy is defined under Massachusetts law as occurring "when the conspirators, acting in unison, exercise a peculiar power of coercion over the plaintiff that they would not have had if they had acted alone." *Limone v. United States*, 497 F.Supp.2d 143, 224 (D. Mass. 2007). Courts have held that, in a conspiracy, "the wrong was in the particular combination of the defendants rather than in the tortious nature of the underlying conduct." *Kurker v. Hill*, 689 N.E.2d 833, 836 (Mass. App. Ct. 1998); *see also Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.*, 62 F.Supp. 2d 236, 244 (D. Mass. 1999) ("the exercise of this 'peculiar power of coercion' is itself the wrong, and no other tortious act need be shown"). In *Limone*, the court found that there was "no better example of the 'peculiar power of coercion'" than the conduct of FBI agents that resulted in the deprivation of plaintiffs' fundamental rights. *Limone*, 497 F. Supp. 2d at 224-226.

The evidence in the record in this case demonstrates just such a combination of actors, and Lively's role in, indeed management of, a crime: (1) Lively's

avowed goal was to ensure through actions undertaken by his co-conspirators that LGBTI activists would not be able to engage in their fundamental right to advocate in support of equal treatment for LGBTI persons, dkt. 270 at ¶ 9, 18, 73, 149, 174; (2) Lively worked closely with "influential leaders" to develop a law to target LGBTI status and criminalize LGBTI advocacy, and in support of those efforts:

(a) visited Uganda to assist Ugandan political leaders to "be[] able to implement it," dkt. 270 at ¶ 78;

(b) provided assistance to co-conspirator who sought help in developing "a strong detterent [sic] law against homosexuality in Uganda" and with trying to "hinder and silence advocacy of this issue," dkt. 270 at ¶ 93;

(c) recommended a five-year prison sentence in a provision of the law penalizing the "promotion of homosexuality," dkt. 270 at ¶ 96;

(d) advised co-conspirators on strategies to ensure the passage and viability of the anti-homosexuality legislation, urging certain modifications "to make it more palatable to the international community," dkt. 270 at ¶ 107, but otherwise supporting all the other repressive aspects of the bill, offering as a strategy for the persecution: "homosexuality would still be criminalized, but the primary enforcement effort would target the recruiters and activists," dkt. 270 at ¶ 122;

and, (3) Lively advised and strategized with his co-conspirators to implement the provision of the anti-LGBTI bill prohibiting LGBTI rights advocacy before it became law. *See, e.g.*, dkt. 270 at ¶¶ 86-89, 96-99, 102-104,121-22.

As the District Court held, MTD Order, AER at 103-07, speech used to show motives or intent does not implicate the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489-90 (1993) ("First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to

prove motive or intent.") (citing *Haupt v. United States*, 330 U.S. 631 (1947) (substance of conversations admissible to show defendant's motive to commit crime)); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-252 (1989) (content of defendant's otherwise protected speech relevant and admissible to prove Title VII discrimination claim).

In addition, Lively's communications with his co-conspirators, in meetings and by email, do not receive First Amendment protection because they are central evidence going to the existence of a plan and agreement. It is axiomatic that unlawful agreements can be established through speech. MTD Order, AER at 105 ("It is well established that speech that constitutes criminal aiding and abetting is not protected by the First Amendment") (citing cases). In light of this elementary proposition of law, Lively's belabored attempt to parse *Giboney v. Empire Storage & Ice Co*, 336 U.S. 490 (1949), on its facts is pointless. *Giboney* itself is not the basis of liability, such that factual distinctions might undermine the basis of SMUG's claims. *Giboney* simply reiterates the basic point that crimes can be committed through the use of words. *See Nat'l Org for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994); *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) ("Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment . . . .");

Osborne v. Ohio, 495 U.S. 103, 110 (1990); *New York v. Ferber*, 458 U.S. 747, 761-62 (1982); *see also United States v. Barnett*, 667 F.2d 835, 842 43 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes including that of aiding and abetting, frequently involved the use of speech as part of the criminal transaction."); *United States v. Bell*, 414 F.3d 474, 482 n. 8 (3d Cir. 2005) (same).

This basic principle does not lose any force where the conspiracy involves the deprivation of fundamental rights of a targeted group. Indeed, they find a strong domestic analog in 42 U.S.C. § 1985(3), also known as the Ku Klux Klan Act of 1871. The Reconstruction Congress passed the law to prohibit – in both civil and criminal fora – conspiracies motivated by class-based animus to deprive persons ("either directly or indirectly") of access to civil rights ("equal protection of the laws, or of equal privileges and immunities under the laws") – *i.e.*, to protect minority groups from conspiracies to limit their access to rights of association, assembly, voting, or speech. *See Griffin v. Breckinridge*, 403 U.S. 88, 102-103 (1971); *Uphoff Figueroa v. Alejandro*, 597 F.3d 423, 432 (1st Cir. 2010) (elements of a claim are (1) unlawful agreement, (2) conspiratorial purpose, (3) overt act in furtherance of conspiracy, and (4) injury, including deprivation of a constitutionally protected right); *see also Hardyman v. Collins*, 183 F.2d 308 (9th

Cir. 1950) (finding that private conspiracy to disrupt political club's meetings was actionable under § 1985(3)), rev'd on other grounds, *Collins v. Hardyman*, 341 U.S. 651 (1951) (imposing requirement that the alleged conspiracy involve a state actor).

Thus, a litigant would prove a domestic law conspiracy under § 1985(3) to deprive a protected class of fundamental rights in the same way SMUG would prove a conspiracy persecuting the Ugandan LGBTI community – and in neither case would such proof violate the First Amendment. Under either form of conspiracy, an "unlawful agreement" can be proven by "explicit agreement" or a "tacit understanding to carry out the prohibited conduct," which can be inferred through circumstantial evidence. *See Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 792 (2d Cir. 2007); *compare Hampton v. Hanrahan*, 600 F.2d 600, 621-622 (7th Cir. 1979) (unlawful agreement under § 1985(3) inferred from presence of multiple police officers during shooting of Black racial justice activist), rev'd in part on other grounds, 446 U.S. 754 (1980) *with Indianapolis Minority Contrs. Association v. Wiley*, 187 F.3d 743, 754-55 (7th Cir. 1999) (no evidence showing how, when, or with whom defendant conspired).

The intent element is the same in both instances as well, and to prove intent, speech or political opinion can serve as circumstantial evidence of a party's state of mind. This is why the defendant in *New York State NOW v. Terry*, 886 F.2d 1339

(2d Cir. 1989), was found liable under 42 U.S.C. § 1985(3) for a conspiracy to deprive women of their fundamental constitutional right to access abortion services, even though defendant's conduct included what would otherwise be protected speech and assembly, because that conduct proved defendant's discriminatory intent. Likewise, in *Wells v. Rhodes*, 928 F.Supp.2d 920, 931 (S.D. Ohio 2013), the court found the requisite discriminatory intent to support liability under § 1985(3), where defendants' conspiracy to burn a cross on plaintiffs' lawn deprived plaintiffs of their right to property. *See also Startzell v. City of Philadelphia*, No. 05-5287, 2006 U.S. Dist. LEXIS 34128, *11-12 (E.D. Pa. May 26, 2006) (plaintiffs plausibly proved discriminatory intent of conspiracy to deprive plaintiffs of right to protest or assemble at gay pride event); *Azar v. Conley*, 456 F.2d 1382, 1388-89 (6th Cir. 1972) (while § 1985(3) does not give rise to direct cause of action for slander, "slanderous remarks might constitute an integral part of the [clause (3)] conspiracy.").

Lively's heavy reliance on *United States v. Spock*, 416 F.2d 165 (1st Cir. 1965), is unhelpful to him, and in fact helps highlight how his actions fall beyond the protection of the First Amendment. Spock was charged with the *inchoate* crime of conspiracy, not conspiracy as form of liability for a completed, substantive offense that caused actual harm, like in SMUG's claim of civil conspiracy under Massachusetts state law. *Compare United States v. Spock*, 416 F.2d 165, 171 (1st

Cir. 1969) ("The government's ability to deter and punish those who increase the likelihood of crime by concerted action has long been established. Restricting it to punishment of substantive violations ignores the potency of conspiratorial conduct; to wait for the substantive offense may be to wait too long.") *with Limone*, 497 F. Supp. 2d at 224 n.183 (describing civil conspiracy under Massachusetts law, explaining, "[i]n addition to coercion, the tort requires that the conspirators have combined to accomplish an unlawful purpose or other purpose by unlawful means, and that the plaintiff suffer damage). In this matter, Lively's liability for civil conspiracy is premised on his contribution to a crime – persecution, *i.e*. the deprivation of fundamental rights – that caused real harm to the LGBTI community in Uganda and his specific intent – as evidenced in part through his own statements – to bring that about.

Moreover, even if *Spock* did apply to the situation presented in this case, the Court's requirement of specific intent on the part of a party to a conspiracy to break the law, *id*. at 176-77, is met by the substantial evidence (i) regarding the existence of a conspiracy that includes Lively; (ii) demonstrating that all of the conspirators, including Lively, had the *specific intent* to deprive LGBTI individuals of their fundamental rights to speech, association, nondiscrimination, and bodily integrity; and (iii) the conspirators took overt acts in furtherance of that unlawful purpose. *Spock* adds nothing to this discussion.

Similarly, SMUG's claim of negligence is not barred by the First Amendment. In the context of negligence claims, Massachusetts courts have held that one who takes action ordinarily owes to everyone else who may be affected thereby a duty to act reasonably. *Onofrio v. Dep't of Mental Health*, 562 N.E.2d 1341, 1344-1345 (Mass. 1990). SMUG put forth evidence to demonstrate that Lively created an unreasonably dangerous condition that was rife with the possibility, indeed the actuality, of severe violations of the rights of LGBTI organizations and individuals and failed to act reasonably to prevent the ensuing harm. In arguing that this claim is based on his speech, Def. Appeal Br. 53, Lively unsurprisingly omits the fact that, in addition to helping to create a "virulently hostile environment" (which he claims, without any basis, carries no duty of care for one who creates it), the negligence claim is also based on his work "with his co-conspirators to severely deprive Plaintiff, and the LGBTI community in Uganda, of basic fundamental rights." Am. Compl., Appendix at 42, ¶ 258.

3. SMUG Presented Sufficient Evidence of Damages.

Lively erroneously assumes that SMUG's state law claims require a showing of pecuniary harm and offers no support for that conclusion. *See* Def. Appeal Br. at 55-56. In any event, SMUG sufficiently demonstrated such harm.

The record evidence demonstrates that SMUG suffered noneconomic harm as a result of the severe deprivation of its fundamental rights. *See* dkt. 270 at ¶¶

101, 105, 127-29, 139-43, 150-53, 155, 161, 170, 180, 184-85, 187-88, 209-11. Civil conspiracy claims under Massachusetts law may be premised on non-economic damages. Indeed, there is a long line of civil conspiracy cases that involved non-economic damages. *See, e.g.*, *Earle v. Benoit*, 850 F.2d 836, 844 (1st Cir. 1988) (in suit alleging a civil conspiracy existed to deprive him of his constitutional rights, taking no issue with non-economic damages being sought based on a deprivation of constitutional rights); *Grant v. John Hancock Mutual Life Insurance Co.*, 183 F. Supp. 2d 344 (D. Mass. 2002). It also is well established that negligence claims may seek non-economic damages. *See, e.g.*, *Smith v. Kmart Corp*., 177 F.3d 19 (1st Cir. 1999) (defining "pain and suffering" damages to include any damages for loss of enjoyment of life that a plaintiff is reasonably certain to suffer in the future, taking into account each plaintiff's past interests and way of life); *Rodriguez v. Senor Frog's de la Isla, Inc.*, 642 F.3d 28, 31 (1st Cir. 2011) (awarding plaintiff pain and suffering damages in context of negligence claim, which constituted bulk of damages award).

The authorities Lively cites, Def. Appeal Br. at 56, are completely inapplicable as they address *commercial* claims of the kind that necessarily require an economic injury. *See Young v. Wells Fargo Bank, N.A.*, 109 F. Supp. 3d 387 (D. Mass. 2015) (breach of contract claim requires damages, but mental and emotional distress claims are generally not cognizable, and "injury" under the Massachusetts

Consumer Protection Act, means "economic injury in the traditional sense"); *Cash Energy, Inc. v. Weiner*, No. 95-1800, 1996 U.S. App. LEXIS 5820, at *3 (1st Cir. Mar. 29, 1996) (claim involving alleged diminution of property's market value, remediation costs, and other costs arising out of alleged groundwater contamination); *Boston Prop. Exchange Transfer Co. v. Iantosca*, 720 F.3d 1(1st Cir. 2013) (suit alleging financial misconduct in which plaintiff failed to show he suffered economic harm).

Critically, the task of estimating damages from non-pecuniary injuries is best suited for the jury, thus making it inappropriate to be decided as a legal matter on summary judgment. *See Davignon v. Clemmey*, 322 F.3d 1, 11 (1st Cir. 2003) ("The task of estimating money damages, especially intangible, *noneconomic loss*, constitutes a core jury function." (emphasis added)); *see also Trull v. Volkswagon of America, Inc*., 320 F.3d 1, 9 (1st Cir. 2002) ("Translating legal damage into money damages is a matter peculiarly within a jury's ken, especially in cases involving intangible, non-economic losses.").

In any event, SMUG adequately demonstrated the existence of economic damages. The evidence demonstrates that Lively's tortious actions caused economic damage because SMUG had to utilize resources to protect itself from persecution by, *inter alia*, seeking redress for individual violations it suffered, adopting additional security measures and relocating its operations, and using

resources to counteract the persecution through public education. *See, e.g.*, dkt. 270 at ¶¶ 101, 143, 189, 205, 208. Indeed, the economic damages SMUG suffered were well documented in the discovery provided to Lively, and broken down by category for Lively to understand. *See* dkt. 270 at D-MFR ¶¶ 180-191.

CONCLUSION

For the foregoing reasons, the putative appeal of the prevailing party in this litigation, Defendant-Appellant Lively, should be dismissed.

Dated: April 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, 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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Dated: 04.18.2018

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.

On Appeal from the United States District Court
For the District of District of Massachusetts

Lower Court Case No. 3:12-cv-30051-MAP

ADDENDUM TO BRIEF OF PLAINTIFF-APPELLEE SEXUAL MINORITIES UGANDA

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Finally, without a legally cognizable duty of care, there can be no breach. SMUG's negligence claim fails as a matter of law.

X. SMUG'S STATE LAW CLAIMS ALSO FAIL AS MATTER OF LAW BECAUSE THE COURT LACKS JURISDICTION AND THEY ARE TIME BARRED.

In addition to the jurisdictional extraterritorial bar (Section II, *supra*), the jurisdictional standing bar (Section VI, *supra*), and SMUG's failure of proof as to damages (Section VII, *supra*) causation (Section VIII, *supra*), and all of the other essential elements (Section IX, *supra*), SMUG's claims of civil conspiracy (Count IV) and negligence (Count V) under state law also fail because the Court lacks diversity jurisdiction, and because they are time barred.

A. The Court Lacks Diversity Jurisdiction And Should Not Exercise Supplemental Jurisdiction Over SMUG's State Law Claims.

"Where a party seeks to invoke diversity jurisdiction under section 1332, the parties must be of complete diversity and the amount in controversy must exceed $75,000." *Fagan v. Mass Mut. Life Investors' Servs., Inc.*, No. 15-30049, 2015 WL 3630277, at *6 (D. Mass. June 10, 2015) (Ponsor, J.). "The burden is on the federal plaintiff to establish that the minimum amount in controversy has been met." *CE Design Ltd. v. Am. Econ. Ins. Co*., 755 F.3d 39, 43 (1st Cir. 2014).

Without proof of any damages (*see* Section VII, *supra*), SMUG cannot establish diversity jurisdiction over its state law claims. Although the jurisdictional inquiry of the amount in controversy typically focuses on the circumstances present at the time suit was filed, "if, from the proofs, the court is satisfied to a [legal] certainty that the plaintiff never was entitled to recover [the jurisdictional threshold] amount … the suit will be dismissed." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). Here, it is now readily apparent that SMUG never was entitled to recover the jurisdiction amount. Notwithstanding the writings of counsel in SMUG's Complaint, SMUG's own Chairman of the Board, who is "supposed to approve the budgets," and who is described as the "backbone of the LGBT movement in Uganda," was not able to identify

even one way that Lively has damaged SMUG monetarily. (MF ¶ 177). SMUG's failure to produce any calculation of damages during fact discovery, and its subsequent failure to provide any of the expert testimony it agreed was necessary and promised to provide, serve only to confirm that SMUG had no damages from the beginning (and certainly no damages caused by Lively). Therefore, SMUG's state law claims should be dismissed for lack of jurisdiction.

Moreover, "[i]f the court has 'dismissed all claims over which it has original jurisdiction,' the court may also 'decline to exercise supplemental jurisdiction' over the remaining claims." *South Commons Condominium Ass'n v. City of Springfield*, 967 F. Supp. 2d 457, 469 (D. Mass. 2013) (Ponsor, J.) (citing 28 U.S.C. § 1367(c)(3)); *see also Camelio v. Am. Federation*, 137 F.3d 666, 672 (1st Cir. 1998) (noting that a federal court granting summary judgment on federal claims "must reassess its jurisdiction, this time engaging in a pragmatic and case-specific evaluation of a variety of considerations that may bear on the issue"). "When federal claims are dismissed before trial, state claims are normally dismissed as well." *McInnis–Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 74 (1st Cir. 2003). "[A] federal court should be especially cautious about exercising supplemental jurisdiction 'when the state law that undergirds the nonfederal claim is of dubious scope and application.'" *Partelow v. Massachusetts*, 442 F. Supp. 2d 41, 53 (D. Mass. 2006) (Ponsor, J.) (dismissing negligence-based claims) (citing *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995)).

There is no good reason for this Court to retain supplemental jurisdiction over SMUG's defunct state law claims, particularly given troubling First Amendment implications and SMUG's total failure of proof as to causation, damages and other essential elements. The Court should enter summary judgment for lack of supplemental or diversity jurisdiction.