

**NO. 17-1593**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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**SEXUAL MINORITIES UGANDA**

**Plaintiff-Appellee,**

**v.**

**SCOTT LIVELY, individually and as President of Abiding Truth Ministries,**

**Defendant-Appellant.**

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**APPELLANT SCOTT LIVELY'S MOTION TO SET ORAL ARGUMENT  
AND TO EXCLUDE APPELLEE FROM ORAL ARGUMENT  
FOR DEFAULT IN FILING BRIEF**

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Defendant-Appellant Scott Lively (“Lively”), pursuant to Fed R. App. P. 27, moves the Court for an order setting oral argument, and excluding Plaintiff-Appellee, Sexual Minorities Uganda (“SMUG”), from oral argument for failure to file a brief. Lively shows the Court as follows in support of this motion:

1. On July 3, 2017, SMUG filed a motion to dismiss Lively’s appeal (EID 6103417), and a motion to stay all proceedings (EID 6103418) pending the Court’s resolution of the motion to dismiss.

2. On July 10, 2017, the Court issued Appellant’s Briefing Notice (EID 6104464), requiring Lively’s brief to be filed by August 21, 2017, and providing that the deadline for SMUG’s brief would be “set in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0.”

3. On July 28, 2017, SMUG filed a motion for extension of time to complete its briefing in support of its pending motions to dismiss and to stay, and requesting an extension of the merits briefing schedule. (EID 6109168.)

4. By Order entered August 2, 2017, the Court denied SMUG’s motion to extend the merits briefing schedule because the time for SMUG’s brief was not yet set (as Lively’s brief was not yet filed). (EID 6110208.) The Court, however, ordered that SMUG’s motion to extend the merits briefing deadline was “without prejudice” and “subject to renewal.” (*Id.*)

5. Lively sought, by motion, two extensions of time to file his merits brief (filed August 9 (EID 6111633) and September 6 (EID 6118018), respectively). Each time, the Court entered an order granting the requested extension, and ordering Lively to file his brief by the new deadline in the order. (*See* Aug. 10 (EID 6112071) and Sept. 7 (EID 6118300) Orders of Court.)

6. Lively filed and served his brief on October 3, 2017.<sup>1</sup> (EID 6123397.)

7. Pursuant to Fed. R. App. P. 31 and 1st Cir. R. 31.0, SMUG's brief became due thirty days later, on November 2, 2017. (*Id.*)

8. **Indeed, in accordance with the applicable rules, on October 6, 2017, the Court issued Appellee's Briefing Notice, expressly ordering SMUG to file its brief by November 2, 2017.** (EID 6124394 at 1 (“Appellee’s brief *must* be filed by **November 2, 2017.**” (first emphasis added; bold emphasis in original)).)

9. SMUG's November 2, 2017 briefing deadline has come and long expired, yet SMUG has neither filed its brief, nor has it sought any extension of time.

10. Prior to filing this motion, the undersigned counsel for Lively contacted counsel for SMUG, and was advised that SMUG's position is that no brief is due because of SMUG's pending stay motion. There is no authority, however, in either

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<sup>1</sup> By Order of Court dated October 6, 2017 (EID 6124385), the Court accepted the filing of Lively's brief, which, because of technical difficulties at the time of filing, was completed approximately twenty-four minutes after the October 2, 2017 deadline set by the Court's September 7 Order.

the Federal Rules of Appellate Procedure or this Court's Rules, to disregard the Court's explicit order establishing a briefing deadline, or otherwise for an "automatic" stay of briefing deadlines based solely on a pending motion to stay proceedings. To be sure, the proceedings to date exclude such an interpretation of the applicable rules:

a. The Court issued its original Appellant's Briefing Notice **after** SMUG filed its motion to stay;

b. When Lively filed motions to extend his deadline for filing his brief, the Court entered orders granting those motions, rather than denying them without prejudice or as moot based on SMUG's pending motion to stay;

c. When the Court denied SMUG's motion to extend the merits briefing deadlines pending resolution of SMUG's stay motion, the Court expressly allowed SMUG to renew its motion when SMUG's brief became due (which SMUG has not done); and

d. The Court has not granted SMUG's motion to stay.

11. In the absence of any rule, order, or other authority extending SMUG's deadline or otherwise excusing its failure to file its brief, SMUG is in default as to filing its brief. First Circuit Rule 45.0(b) mandates that the appeal be set for oral argument forthwith, and that SMUG be precluded from presenting oral argument.

(*Id.* (“When a cause is in default as to the filing of the brief for appellee or respondent, the cause **must** be assigned to the next list and the **appellee will not be heard at oral argument** except by leave of the Court.” (emphasis added)).) *See also* Fed. R. App. P. 31(c); First Circuit Internal Operating Procedure VI.D.

WHEREFORE, for good cause shown, Lively respectfully requests that this appeal be set for oral argument on the next list, and that SMUG be excluded from such argument for its default in filing a brief.

Respectfully submitted,

/s/ Roger K. Gannam

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**CERTIFICATE OF SERVICE**

I hereby certify that on this November 29, 2017, I caused the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Roger K. Gannam  
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*Attorney for Defendant-Appellant*