NO. _____

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE SCOTT LIVELY,
Individually and as President of Abiding Truth Ministries

PETITION FOR WRIT OF MANDAMUS
to the United States District Court for the District of Massachusetts,
Springfield Division, Honorable Michael A. Ponsor,
Case No. 3:12-cv-30051-MAP

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Petitioner Scott Lively, in his capacity as President of Abiding Truth Ministries, states that Abiding Truth Ministries has no parent corporation, is not publicly traded, and no publicly held corporation owns 10% or more of its stock.

RELIEF SOUGHT

Pursuant to 28 U.S.C. § 1651 and Fed. R. App. P. 21, Petitioner Scott Lively, individually and as President of Abiding Truth Ministries (collectively "Lively"), respectfully applies for a writ of mandamus directing the Honorable Judge Michael A. Ponsor, Senior District Judge of the United States District Court for the District of Massachusetts, to vacate his Order denying Lively's Motion to Dismiss the First Amended Complaint filed by Sexual Minorities Uganda ("SMUG"), and to dismiss this action for lack of subject matter jurisdiction and/or failure to state a claim.

The lower court usurped its authority in refusing to dismiss this action, because it is clearly without jurisdiction and SMUG's claims are firmly foreclosed by the First Amendment. An extraordinary and immediate intervention by this Court is necessary because Lively has exhausted all alternatives and has no other viable means to confine the lower court to the lawful exercise of its proscribed jurisdiction, and to safeguard his First Amendment rights.

ISSUES PRESENTED

1) Did the district court usurp its authority by concluding that Lively's U.S. citizenship and lawful domestic conduct confer Alien Tort Statute jurisdiction over alleged crimes against humanity committed by foreign actors against foreign victims on foreign soil, when all other courts have reached the opposite conclusion?

2) Did the district court exceed its jurisdiction by inferring a clearly defined and universally accepted international norm against "persecution" based

upon sexual orientation or transgender grounds from the silent savings clause of an international treaty, when the United States has expressly rejected that treaty, no other court has expanded the treaty in this manner or imposed such liability, and a majority of nations do not proscribe such conduct?

3) Does the First Amendment still protect speech that is unfavorable to certain groups and public advocacy of laws that restrict their rights?

FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

I. SMUG AND ITS ALLEGED PERSECUTION IN UGANDA.

SMUG, a Ugandan umbrella organization claiming to represent Ugandan "sexual minorities," has filed this lawsuit under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), in a U.S. court, against a U.S. citizen, for the "crime against humanity of persecution." (Amended Complaint, ¶¶ 1-3, attached as Exhibit 1). SMUG claims that, on the basis of sexual orientation and transgender identity, it and its constituents were persecuted in Uganda by Ugandan police, Ugandan members of Parliament and other high-ranking Ugandan government officials. (Ex. 1, ¶¶ 165-228). In the section of its Complaint titled "Severe Deprivation of Fundamental Rights," SMUG alleges eight specific instances of "persecution," **all of which took place entirely outside the sovereign borders of the United States**, in Uganda. (*Id*.) Included among these are: "raids" of homosexual-rights conferences, allegedly perpetrated by Ugandan police (*id*. at ¶¶ 165-185); arrests of homosexual leaders, allegedly perpetrated by Ugandan police and "local authorities" (*id*. at ¶¶ 186-193,

209-214); "[c]rack-down on media [and] advocacy" by the Ugandan Deputy Attorney General (*id*. at ¶¶ 199-208); and "frequent and sensationalistic outings" of homosexuals and lesbians by two Ugandan tabloids." (*Id*. at ¶¶ 215-225).

SMUG has successfully sought redress in Ugandan courts against alleged perpetrators of these crimes, and won a "high profile ruling" by "the High Court of Uganda" which "held that gays and lesbians – like anyone else – could challenge the unlawful conduct of the authorities [and] that they simply enjoyed the basic protections of law," (*id*. at ¶ 34), as well as a separate victory in which the Ugandan "High Court issued a permanent injunction preventing [tabloids] from identifying LGBTI persons and ordering the tabloid to pay damages." (*Id*. at ¶ 221).

II. LIVELY'S ALLEGED CONDUCT IN UGANDA.

In this action, SMUG now seeks to hold Lively – an American author and minister – liable for the same eight acts of "persecution." (*Id*. at ¶ 1). However, SMUG does not claim that Lively himself perpetrated any of these crimes. (*Id*. at ¶¶ 165-228). Nor does SMUG claim that Lively directly assisted the perpetrators, such as by disclosing to them the identity and location of the alleged victims, or by inciting them to imminent lawless action. (*Id*.) Indeed, **SMUG does not claim that Lively has ever even met or communicated with the alleged perpetrators**. (*Id*.)

Instead, SMUG claims only that on three visits to Uganda (in 2002 and 2009), Lively publicly **said** false and offensive things about homosexuals, including that they have violent tendencies and a "predilection for child sexual violence." (*Id*. at ¶¶

22-23, 43-93). SMUG also claims that Lively "schemed," "plotted" and "campaigned" with four Ugandan citizens (two government officials and two private individuals) to "vilify" "sexual minorities" in Uganda, and to **attempt** to enact more restrictive laws against homosexual conduct and advocacy in Uganda. (*Id*.) These four alleged "co-conspirators" are **not** the same as the alleged perpetrators of the eight acts of persecution. (*Compare* Ex. 1, ¶¶ 94-164 *with* ¶¶ 165-228).

Moreover, the law on homosexual conduct and advocacy in Uganda today is **exactly the same** as it was prior to Lively's first visit in 2002. (*Id*. at ¶ 40). SMUG describes in great detail an "Anti-Homosexuality Bill" contemplated by the Ugandan Parliament following Lively's visit in 2009, which would have imposed further restrictions on homosexual advocacy and punished certain violent homosexual acts with the death penalty. (*Id*. at ¶¶ 9, 37-38, 68-69, 112-118, 159-164). SMUG acknowledges that Lively did not support this proposed law. (*Id*. at ¶ 9). **Lively instead has publicly opposed the proposed law, publicly condemned any and all violence against homosexuals, and publicly praised the Ugandan courts for siding with SMUG and punishing individuals who perpetrate crimes**. (Memo. in Support of Motion to Dismiss, p. 12, attached as Exhibit 2; Answer and Defenses, ¶¶ 9, 37-38, 86, 140, 161, attached hereto as Exhibit 3). It is undisputed that **the "Anti-Homosexuality Bill" was never enacted in any form** (Ex. 1, ¶ 40).

Accordingly, SMUG's theory of liability against Lively for the eight unconnected acts of persecution boils down to a claim that Lively's public speeches

opposing the promotion of sexual behaviors, and his unsuccessful advocacy for the enactment of laws that restrict homosexual rights, created a hateful environment in which people that Lively has never met perpetrated crimes of "persecution," for which they have been duly punished in Ugandan courts (*Id*. at ¶ 93):

> By repeatedly characterizing the LGBTI community as rapists and murderers and child abusers – not to mention possessing the genocidal tendencies of the Nazis and Rwandan conspirators – LIVELY deliberately invited, induced and encouraged a proportional response from Ugandans – *i.e.*, severe repression, arrest and certainly even violence.

III. LIVELY'S ALLEGED CONDUCT IN THE UNITED STATES.

The only conduct that Lively is alleged to have undertaken in the United States is that: (1) he is a U.S. citizen residing in Massachusetts (Ex. 1, ¶ 22); (2) he wrote and spoke publicly about his visits to Uganda (*id*. at ¶¶ 55-56); (3) he reviewed and commented on a draft of the never-enacted "Anti-Homosexuality Bill" (*id*. at ¶¶ 140, 161)[1]; and (4) he advised two Ugandan individuals (**not** among those allegedly perpetrating the eight acts of persecution) in their unsuccessful attempts to enact further legal restrictions on homosexual conduct in Uganda (*id*. at ¶¶ 55).

PROCEDURAL HISTORY

Lively filed a Motion to Dismiss on August 9, 2012 (Ex. 2), which was denied on August 14, 2013. (Order attached as Exhibit 4). Lively then filed a Motion to Certify Interlocutory Appeal on September 6, 2013 (attached as Exhibit

[1] Lively's "comment" was an open letter to one member of the Ugandan Parliament, posted online, in which Lively urged departure from the harsh penalties proposed in the now defunct "Anti-Homosexuality Bill." (Ex. 3, ¶¶ 140, 161).

5), which was summarily denied on September 23, 2013. (Docket Sheet at dkt. # 71, attached as Exhibit 6). Lively then filed a Motion for Reconsideration on September 24, 2013 (attached as Exhibit 7), which the court again summarily denied on October 9, 2013. (Ex. 6 at dkt. # 75).

The district court then required the parties to submit a Joint Discovery Plan on November 1, 2013 (attached as Exhibit 8), a modified version of which was entered on November 6, 2013 (attached as Exhibit 9). This Petition followed.

REASONS WHY THE WRIT SHOULD ISSUE

Because a writ of mandamus is "a drastic and extraordinary remedy," Lively must demonstrate three things: (1) "his right to issuance of the writ is clear and indisputable"; (2) he has "no other adequate means to attain the relief"; and (3) "the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). "These hurdles, however demanding, are not insuperable." *Id*. at 381. "[T]he mandamus power is not some vestigial remnant of a bygone era, to be wrapped in cellophane and left untouched by human hands." *In re Recticel Foam Corp.*, 859 F.2d 1000, 1005 (1st Cir. 1988).

Mandamus is particularly appropriate in three instances, each of which is present here. First, "**ATS jurisprudence … urge[s] greater appellate oversight through use of mandamus**," because "the ATS places federal judges in an unusual lawmaking role as creators of federal common law," and presents "risks of adverse foreign policy consequences." *Balintulo v. Daimler AG*, 727 F.3d 174, 187 (2d Cir.

2013) (emphasis added) (ordering dismissal of ATS case for lack of jurisdiction). Second, mandamus has been traditionally employed "to confine the court … to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 381; *see also*, *In re U.S.*, 426 F.3d 1, 5 (1st Cir. 2005) ("judicial authority … is a classic exceptional instance justifying interlocutory intervention"). Third, "in free-speech cases interlocutory appeals sometimes are more freely allowed, and writs of mandamus sometimes more freely issued," *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 712 (7th Cir. 1986), where the challenged order restricts speech, *In re Perry*, 859 F.2d 1043, 1047 (1st Cir. 1988) ("mandamus was appropriate" to review "meritorious" First Amendment claim), or where, as here, the mere pendency of litigation and threat of liability is likely to chill protected speech. *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1295 (3d Cir. 1994) (ALITO, J.) (granting mandamus and requiring immediate dismissal of action that sought to punish protected speech).

This Petition involves **all three** of these elements, and Lively can overcome each of the "hurdles" to mandamus relief. The Petition should therefore be granted.

I. LIVELY HAS A CLEAR AND INDISPUTABLE RIGHT TO ISSUANCE OF THE WRIT.

To demonstrate a "clear and indisputable" right to mandamus relief, Lively must show "that the challenged order is palpably erroneous." *In re Pearson*, 990 F.2d 653, 656 (1st Cir. 1993). Lively can meet his burden by demonstrating that "the lower court was clearly without jurisdiction, or exceeded its discretion to such a degree that its actions amount to a usurpation of power." *In re Recticel Foam Corp.*,

859 F.2d at 1006 (internal quotes omitted).

A. The District Court is Clearly without Jurisdiction because the Relevant Conduct Allegedly Took Place in Uganda.

On April 17, 2013, a "seismic shift" altered the Alien Tort Statute landscape, and it was "an earthquake that has shaken the very foundation of [SMUG's] claims against [Lively]." *Giraldo v. Drummond Co., Inc.*, 2:09-CV-1041-RDP, 2013 WL 3873960, *1 (N.D. Ala. July 25, 2013). The Supreme Court decided *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), in which it held that the ATS does not "reach conduct occurring in the territory of a foreign sovereign." *Id*. at 1664. Because "the ATS … is strictly jurisdictional," the Court held that it does not provide federal courts with jurisdiction over international law claims in which "all of the relevant conduct took place outside the United States." *Id*. at 1664, 1669.

In the aftermath of this "seismic shift," dozens of courts across the country immediately dismissed pending ATS cases for lack of subject matter jurisdiction.[2]

[2] The post-*Kiobel* dismissals for lack of jurisdiction are far too numerous to list here exhaustively. *See e.g., Al Shimari v. CACI Int'l, Inc.*, -- F.Supp.2d --, 1:08-CV-827 GBL/JFA, 2013 WL 3229720, *7 (E.D. Va. June 25, 2013) ("The application of *Kiobel* to this case compels the dismissal of Plaintiffs' [ATS] claims invoking international law for lack of subject matter jurisdiction"); *Mohammadi v. Islamic Republic of Iran*, -- F.Supp.2d --, CIV.A. 09-1289 BAH, 2013 WL 2370594, *15 (D.D.C. May 31, 2013) (vacating default judgment and dismissing ATS claims for lack of jurisdiction); *Giraldo v. Drummond Co., Inc.*, 2:09-CV-1041-RDP, 2013 WL 3873960, *8-9 (N.D. Ala. July 25, 2013) (granting summary judgment for lack of jurisdiction); *Muntslag v. D'Ieteren, S.A.*, 12-CV-07038 TPG, 2013 WL 2150686, *1-2 (S.D.N.Y. May 17, 2013) (dismissing ATS claims for lack of jurisdiction); *Ahmed-Al-Khalifa v. Queen Elizabeth II*, 5:13-CV-103-RS-CJK, 2013 WL 2242459, *1 (N.D. Fla. May 21, 2013) (same). *See also*, note 4, *infra*.

In fact, with only two exceptions, **every contested post-*Kiobel* ATS jurisdictional claim has resulted in dismissal**. *See* note 2, *supra*, and note 4, *infra*.

The first exception, *Mwani v. Bin Laden*, -- F.Supp.2d --, CIV.A. 99-125 JMF, 2013 WL 2325166 (D.D.C. May 29, 2013), involved facts not present here – an attack upon a U.S. embassy and U.S. citizens in Kenya, and thus an attack "directed at the United States government, with the intention of harming this country and its citizens." *Id*. at *3-4. But even with that peculiar U.S. connection, **the court *sua sponte* certified its decision for interlocutory appeal** because "the subject matter jurisdiction issue is one of first impression, and there may be a substantial difference of opinion among judges." *Id*. at *4. In contrast, the court here twice refused interlocutory certification, even after Lively requested it. (Ex. 5, 6, 7).

The second exception is the district court's decision in this case. The court found that SMUG's claim could survive *Kiobel* because (1) "unlike the British and Dutch corporations [in *Kiobel*], [Lively] is an American citizen" (Ex. 4, p. 38); and (2) "[SMUG] has alleged that substantial practical assistance was afforded to the commission of the crime against humanity from the United States." (*Id*. at 44).

This conclusion is palpably erroneous. What matters under *Kiobel* is neither the citizenship of the defendant, nor the locus of preparatory or secondary conduct, but where the "**relevant** conduct" occurred. *Kiobel*, 133 S.Ct. at 1669 (emphasis added). Under *Kiobel*, "the citizenship of the defendants" is merely an "irrelevant factual distinction," because "the [*Kiobel*] Court did not suggest that a defendant's

citizenship has any relevance to the presumption against extraterritoriality, and it instead stated over and over that the ATS bars suits where the relevant *conduct* occurs abroad." *Balintulo*, 727 F.3d at 190 & n.24 (italics in original).

Kiobel's heavy reliance on *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), demonstrates that the mere fact that **some** conduct occurred in the U.S. is not enough to overcome the extraterritoriality bar. *Morrison* involved a **Florida** corporation which allegedly undertook deceptive conduct in **Florida**, in furtherance of securities fraud transactions that occurred abroad. 130 S. Ct. at 2875-76, 2883-84. The Supreme Court held that those U.S. contacts (*i.e.*, citizenship and deceptive preparatory acts), were not enough to overcome the extraterritorial bar because "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States," and "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id*. at 2884 (italics in original).

The determinative question, therefore, is not whether "some domestic activity" took place, but whether **the conduct that was the "focus of congressional concern"** took place domestically. *Id*. (emphasis added). In *Morrison*, "the **focus** of the Exchange Act [was] not upon the place where the deception originated, but upon purchases and sales of securities." *Id*. (emphasis added). Since all of the allegedly fraudulent purchase and sale transactions occurred abroad, the extraterritorial presumption could not be met with other deceptive conduct by a U.S. citizen in the

U.S. *Id.*[3]

Here, the "focus of congressional concern" in the ATS is conduct violating the law of nations, 28 U.S.C. § 1350, which, as discussed in section I(B), *infra*, means only violations of clearly defined and universally accepted international norms. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Thus, the only way that SMUG could have invoked the subject-matter jurisdiction of the lower court was to allege that human rights violations – that is, the eight alleged acts of persecution – occurred on U.S. soil. *See Giraldo*, 2013 WL 3873960, at *8 ("where a complaint alleges activity in both foreign and domestic spheres, an extraterritorial application of a statute arises *only* if the event on which the statute *focuses* did not occur abroad") (italics in original) (ATS claims did not "touch and concern" the U.S. because "the ATS focuses on the . . . violations of the law of nations," which "occurred abroad, in Colombia"). But SMUG alleged exactly the opposite – that all eight alleged acts of persecution took place in **Uganda**, at the hands of **Ugandan** actors, and against **Ugandan** victims. (Ex. 1, ¶¶ 165-228).

In light of that undisputed fact, the district court's focus on Lively's citizenship and his alleged "practical assistance" of Ugandan actors from the United

[3] *See also*, *Hourani v. Mirtchev*, No. 10-1618, -- F. Supp.2d --, 2013 WL 1901013, *5 (D.D.C. May 8, 2013) ("U.S. citizenship, the location of the enterprise, and laundering money through accounts in the United States cannot change the essentially foreign nature of the racketeering activity in this case."); *Souryal v. Torres Advanced Enter. Solutions, LLC*, 847 F. Supp.2d 835, 840 (E.D. Va. 2012) (barring employment claims brought by a foreign employee despite the fact that decisions on employment were made in the U.S. because "no matter where the allegedly unlawful decision is made, it is implemented at the claimant's worksite").

States was palpably erroneous. Even the most generous reading of SMUG's Amended Complaint cannot yield an inference, let alone an express allegation, that Lively did anything illegal in the U.S., much less committed a "crime against humanity." SMUG's handful of U.S.-based allegations are inventoried at p. 5, *supra*. But, neither speaking or writing about visits to Uganda, nor writing books that allegedly "vilify" sexual conduct with "false" information, nor reviewing and commenting upon proposed-but-never-enacted legislation, nor assisting others in pursuing never-enacted legislation, is a "crime against humanity." Indeed, as demonstrated in section I(C), *infra*, such activities would be protected as core political speech even if the legislation in question had been enacted into law, which indisputably has never happened here. And, in any event, Lively's alleged domestic conduct in this case pales in comparison with conduct found insufficient for jurisdiction elsewhere. *See, e.g.*, *Giraldo*, 2013 WL 3873960, at *5-6 (no ATS jurisdiction even where U.S. mining operator and its U.S.-based individual officers allegedly assisted Colombian paramilitaries in the killing of Columbian civilians by providing logistical support, funds and decisional leadership from the U.S.).

The palpable jurisdictional error of the district court is further evidenced by the fact that it stands **alone** in its erroneous reading of *Kiobel*. Every other court that has examined these same asserted grounds for circumventing *Kiobel* – and there have been at least eight – has rejected them as a matter of law, concluding that **neither the American citizenship of the defendant, nor his alleged planning,**

preparatory or assistive acts in the U.S., are sufficient to confer ATS jurisdiction over human rights abuses that took place on foreign soil.[4]

So obvious and grave was the district court's jurisdictional error here, that this Court's neighboring Circuit has employed the extraordinary mandamus procedure to correct a similarly errant trial court in a case involving much more and sinister U.S. conduct. In *Balintulo*, foreign victims of crimes against humanity sought to "resist

[4] The eight cases are discussed more fully in Lively's Motion to Certify Interlocutory Appeal (Ex. 5, pp. 4-11). In brief, they are: *Balintulo*, 727 F.3d at 189-193 ("*Kiobel* plainly bars the plaintiffs' [ATS] claims" against U.S. corporate defendants who allegedly "took affirmative steps" in the U.S. to aid and abet crimes against humanity in South Africa); *Doe v. Exxon Mobil Corp.*, 527 F. App'x 7 (D.C. Cir. 2013) (vacating "in light of *Kiobel*" an earlier decision in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 26 (D.C. Cir. 2011), which held that Indonesian plaintiffs could sue a U.S. company for human rights abuses in Indonesia); *Giraldo*, 2013 WL 3873960, at *5, 8 (no ATS jurisdiction to entertain claims that "Defendants (citizens and entities from the United States) committed acts in the United States in furtherance of human rights abuses in Colombia," because the alleged violations of international law took place in Columbia); *Adhikari v. Daoud & Partners*, 09-CV-1237, 2013 WL 4511354 (S.D. Tex. Aug. 23, 2013) (*Kiobel* precludes ATS jurisdiction over claims against a U.S. company alleged to have planned and coordinated within the U.S. violations of international law in Nepal and Iraq); *Al Shimari v. CACI Int'l, Inc.*, -- F.Supp.2d --, 1:08-CV-827 GBL/JFA, 2013 WL 3229720 (E.D. Va. June 25, 2013) (dismissing for lack of jurisdiction ATS claims of Iraqi citizens alleging that U.S. contractor and its Virginia employees planned and coordinated from the U.S. war crimes in Iraq); *Ahmed-Al-Khalifa v. Queen Elizabeth II*, 5:13-CV-103-RS-CJK, 2013 WL 2242459, *1 (N.D. Fla. May 21, 2013) (dismissing foreign plaintiff's ATS claims against President Obama and U.S. corporations who allegedly aided and abetted from the U.S. the South African apartheid); *Ahmed-Al-Khalifa v. Obama*, 1:13-CV-49-MW/GRJ, 2013 WL 3797287, *1-2 (N.D. Fla. July 19, 2013) (*Kiobel* precludes jurisdiction over ATS claim that President Obama conspired to "persecute" individuals abroad); *Mwangi v. Bush*, CIV.A. 5:12-373-KKC, 2013 WL 3155018, *2, 4 (E.D. Ky. June 18, 2013) (dismissing foreign plaintiff's ATS claims against former President George Bush and his family, who allegedly orchestrated conduct from the U.S., visited Kenya from the U.S., and conspired with Kenyans to abuse plaintiff in Kenya).

this obvious impact of the *Kiobel* holding on their [ATS] claims," 727 F.3d at 189, by emphasizing that the defendants were U.S. citizens (Ford, Chrysler and IBM), and by claiming that they "took affirmative steps in this country" to aid and abet the South African apartheid. *Id*. at 192. Plaintiffs' factual allegations included that IBM manufactured computer hardware and software in, and provided technical support **from the U.S.**, and that Ford and Chrysler manufactured vehicles, parts and equipment **in the U.S.**, all with the knowledge and purpose of enabling the South African government's crimes against humanity in South Africa. *Id*. at 182-83.

After the trial court refused to dismiss the case, the Second Circuit accepted mandamus review and directed the court to enter judgment on the pleadings for the defendants, because "the Supreme Court's *Kiobel* decision **plainly** forecloses the plaintiffs' claims **as a matter of law**." *Id*. at 194 (emphasis added). Noting that "[t]he Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States," the Second Circuit cautioned that "[l]ower courts are bound by that rule and they are without authority to 'reinterpret' the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants." *Id*. at 189-90. The Second Circuit made clear that:

> In *all* cases, therefore the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign. In other words, a common-law cause of action brought under the ATS cannot have extraterritorial reach **simply because some judges, in some cases, conclude that it should**.

Id. at 192 (emphasis added) (italics in original; bold emphasis added).[5]

The same outcome should obtain here, where the alleged U.S. conduct of Lively is more sparse and tenuous, not to mention constitutionally protected. A writ of mandamus should issue to correct the jurisdictional error of the lower court.

B. The District Court is Clearly without Jurisdiction because there is no Clearly Defined and Universally Accepted Prohibition on Persecution Based upon Sexual Orientation.

Under the ATS, federal courts only have jurisdiction to adjudicate the very narrow subset of international law norms that are "specific, universal and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Lower courts are not free to recognize new international torts; instead, they must engage in "vigilant doorkeeping" to maintain a "narrow class" of actionable torts. *Id.* at 729.

"[T]he requirement of universality goes not only to recognition of the norm in the abstract sense, **but to agreement upon its content as well**." *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995) (emphasis added) (dismissing ATS claims for "cruel, inhuman, or degrading treatment" because, although proscribed generally by "major international agreements on human rights," there was no universal agreement as to what specific acts constitute this tort). "[T]he offense must be based on present day, **very widely accepted** interpretations of

[5] After declaring the trial court's error, the Second Circuit did not actually issue a writ, but commanded the court to grant judgment on the pleadings in light of *Kiobel*. *Balintulo*, 727 F.3d at 194. This Court has routinely employed this procedure, *see Ramirez v. Rivera-Dueno*, 861 F.2d 328, 335 (1st Cir. 1988); *In re Perry*, 859 F.2d at 1050, and there is a "frequent practice of withholding actual issuance of a writ after declaring the trial court's error." 16 Fed. Prac. & Proc. Juris. § 3932.2 (2d ed.).

international law: **the specific things the defendant is alleged to have done must violate what the law already clearly is**." *Mamani v. Berzain*, 654 F.3d 1148, 1152 (11th Cir. 2011) (emphasis added) (dismissing ATS claim for crimes against humanity because, although some crimes against humanity are recognized, there is no universal consensus that the specific conduct alleged constitutes such crimes).[6]

The district court recognized that no nation on earth criminalizes "persecution" specifically based upon sexual orientation or transgender grounds; that no court has ever imposed liability for this type of "persecution" as a crime against humanity; and that "the international treaties and instruments that provide jurisdiction over crimes against humanity list particular protected groups **without specifying LGBTI people**." (Ex. 4 at 25) (emphasis added). Had the court observed its "vigilant doorkeeping" duty, it would have ended the inquiry at that point.

Instead, the court flung the jurisdictional doors wide open, and divined an international prohibition on "persecution" on sexual orientation grounds from one international agreement – the Rome Statute – which defines "persecution" as the "intentional and severe deprivation of fundamental rights contrary to international

[6] *See also*, *Forti v. Suarez-Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988) ("To be actionable under the [ATS] the proposed tort must be characterized by universal consensus in the international community as to its binding status *and its content*. In short, it must be a universal, *definable*, and obligatory international norm.") (italics in original) (dismissing ATS claim because of "definitional gloss" and lack of universal agreement over the elements of the asserted norm); *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118, 125 (2d Cir. 2013) (affirming dismissal of ATS claim because "there continues to be strenuous disagreement among States **about what actions do or do not constitute terrorism** ….") (emphasis added).

law by reason of the identity of the group or collectivity." (Ex. 4 at 24). In an unprecedented move, the court extended the Rome Statute to cover persecution based upon sexual orientation grounds, and did so not because the treaty expressly includes sexual orientation in its short list of protected classes, but because it has a "savings clause" which the court felt deserves "a generous interpretation of what groups enjoy protection under international norms." (*Id*. at 24-28). In becoming the first tribunal – worldwide – to expand the Rome Statute in this manner, despite its limited ATS jurisdiction, the trial court usurped its authority in three major respects.

First, the court ignored the Supreme Court's holding that an international treaty which does "not itself create obligations enforceable in the federal courts" cannot be used to derive the existence or content of international norms. *Sosa*, 542 U.S. at 734-35. The Rome Statute is precisely this sort of instrument, because it was **expressly rejected** by the United States. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 36 n.22, 39 (D.C. Cir. 2011) ("The Rome Statute does not constitute customary international law") *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).[7]

Second, given the patent *contradictio in terminis*, no other court has ever found that a "clearly defined" and "universally accepted" international norm

[7] *See also, Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 118 (2d Cir. 2008) (rejecting the Geneva Protocol as source of customary international law during the Vietnam conflict because of "the nature and scope of the reservations to ratification"); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 258 (2d Cir. 2003) (rejecting the American Convention on Human Rights as a source of customary international law because the U.S. has not ratified it, which "indicat[es] that this document has not even been universally embraced by all of the prominent States within the region in which it purports to apply").

percolates silently within the "savings clause" of even a binding international treaty, let alone one that has been expressly rejected. If an international treaty is silent, then by definition it cannot supply a "clearly defined" norm. *Mamani*, 654 F.3d at 1152 (only norms defined with specificity trigger ATS jurisdiction -- "[h]igh levels of generalities will not do"). Since "[t]he ATS is no license for judicial innovation," *id.*, such groundbreaking extension of the Rome Statute should be left for another tribunal in another land, not a federal court in a nation that has rejected the treaty outright and that strictly polices the limited jurisdiction of its courts.

Third, and most importantly, in concluding that the newly minted prohibition on sexual orientation "persecution" is "universally recognized," the district court ignored **SMUG's own statistics** which demonstrate that **the majority** of nations routinely engage in what the Rome Statute calls "intentional and severe deprivation of fundamental rights" with respect to sexual orientation and conduct.[8] Lively's statistics mirrored those provided by SMUG (Ex. 2, pp. 31-36), so there was no dispute as to the state of international affairs.

[8] SMUG's own statistics demonstrate that the protections it advances for sexual orientation and conduct are not implemented in half or more of the world's nations. (Opp. to Mot. to Dismiss, dkt. 38, pp. 42-43) (excerpt attached as Exhibit 10) (**only 6 countries** "have explicit constitutional prohibitions against discrimination based on sexual orientation"; **only 19 countries** "prohibit[] discrimination in employment based on gender identity"; **only 20 countries** "grant asylum due to a claim of persecution based on sexual orientation"; **only 24 countries** prohibit "incitement to hatred based on sexual orientation"; **only 52 countries** "prohibit discrimination based on sexual orientation in employment"; and **only 113 countries** "have moved to repeal" laws criminalizing homosexual conduct, **though not all have succeeded**). Although the number fluctuates, this Court may judicially notice that **there are upwards of 200 countries in the world**.

The court reasoned that just because "a group continues to be vulnerable to widespread, systematic persecution" does not mean that the prohibition is less "universal" for ATS purposes. (Ex. 4 at 29). This is directly contrary to the Supreme Court's teaching in *Sosa*, where the Court held that it is one thing to label **a handful** of rogue nations as international law breakers and find that a norm is universally accepted notwithstanding their refusal to abide by it, but another thing entirely to conclude that **a majority** the world's countries are rogue states, while the **minority** are following a "universally accepted" norm:

> It is not that violations of a rule logically foreclose the existence of that rule as international law. Nevertheless, **that a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule.**

Sosa, 542 U.S. at 738 n.29 (emphasis added) (internal citation omitted).

In *Sosa*, the Court concluded that an asserted norm against arbitrary arrest and detention was not sufficiently "universal" to confer ATS jurisdiction even though it had been enshrined **in at least 119 national constitutions**. *Id*. at 736, n.27.[9] If acceptance of a rule by 119 out of 200+ nations falls short of "full realization" as required for ATS jurisdiction, surely the same fatal shortcoming befalls the "norms" advanced by SMUG which, according to its own statistics, are followed by only six,

[9] The Supreme Court considered a "survey of national constitutions," *Sosa*, 542 U.S. at 736 n.27, and that survey, in turn, indicated that "[t]he right to be free from arbitrary arrest and detention is protected in at least 119 national constitutions." Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 260-61 (1993).

twenty or fifty-two nations at most.

Moved by "[t]he history and current existence of discrimination against LGBTI people," the district court improperly shifted its focus from what international law clearly **is**, to what the court thinks it **should** be. (Ex. 4 at 29). In doing so, the court again departed from the Supreme Court's admonishment that judges do not have "any residual common law discretion" under the ATS to rectify perceived injustices "in the present, imperfect world" by exercising jurisdiction over "an **aspiration** that exceeds any binding customary rule having the specificity we require." *Sosa*, 542 U.S. at 738 (emphasis added); *see also Mamani*, 654 F.3d at 1152 ("We do not look at these ATS cases from a moral perspective, but from a legal one. We do not decide what constitutes desirable government practices.").

Finally, even if there were a "clearly defined" and "universally accepted" international norm against "persecution" based upon sexual orientation or transgender status, that norm would not cover "**the specific things the defendant is alleged to have done**." *Mamani*, 654 F.3d at 1152 (emphasis added). SMUG alleges that Lively did no more than (1) "vilify" sexual practices through false and offensive public speeches, books and writings; and (2) pursue legislation – and train and encourage others to pursue legislation – restricting homosexual rights, which legislation was never enacted. Whatever "persecution" means, it cannot mean that pure speech and public advocacy of laws are now criminal endeavors, least of all when the advocacy has led to no new laws.

In sum, "for ATS cases[,] judicial creativity is not justified," and, instead, "judicial restraint is demanded." *Mamani*, 654 F.3d at 1156-57 (citing *Sosa*, 124 S.Ct. at 2762-63). Mandamus intervention is necessary to restrain the authority of the lower court and restore it to its constitutional limits.

C. Lively's Alleged Conduct is Core Political Speech Protected by the First Amendment.

The district court accepted Lively's premise that the First Amendment trumps "international law," and covered him in Uganda, but refused dismissal because the First Amendment does not protect "criminal activity." (Ex. 4 at 58-62).[10]

The proposition that Lively's alleged speech and conduct is somehow "criminal activity" is both unprecedented and breathtaking. Critically, SMUG does not allege that Lively contributed any conduct to the eight alleged acts of "persecution." (Ex. 1, ¶¶ 165-228). After providing a 41-page and 164-paragraph description of Lively's speech – supposedly only for "context," since SMUG claims that its suit "is not … premised on [Lively's] anti-gay speech or writings" (Ex. 1, ¶¶ 11-12) – the Amended Complaint contains a discrete section that describes in great detail the eight acts of persecution on which the suit **is** "premised." (Ex. 1, ¶¶ 165-

[10] The supremacy of the Free Speech Clause of the First Amendment over "international law," its portability to Uganda, and its protection of Lively's speech and alleged conduct are fully discussed in Lively's Motion to Dismiss. (Ex. 2 at 17-26). The district court's struggle with whether or not a different subsection of the First Amendment (the Petition Clause) protects the petitioning of foreign governments (Ex. 4 at 62-63) is not relevant, either because the speech at issue is separately protected by the Free Speech Clause, or because Mr. Lively's alleged petitioning indisputably has not led to the enactment of any laws.

228). One must search far and wide within this section to even find Lively's name, let alone an allegation that Lively did or assisted any of these acts. (*Id*.)

SMUG, therefore, does not claim that Lively advocated or incited anyone to imminent violence. (*Id*.) *See N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982) (**Only** "advocacy [which] is directed to inciting or producing **imminent** lawless action **and** is **likely** to incite or produce such action" is actionable) (emphasis added) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). SMUG also does not claim that Lively provided locations for Ugandan police to "raid" (Ex. 1, ¶¶ 165-185); nor that he provided names of people for Ugandan police to arrest (*id*. at ¶¶ 186-193, 209-214); nor that he provided names of homosexuals for Ugandan tabloids to "out" (*id*. at ¶¶ 215-225); nor that he encouraged anyone to do any of these specific things. (*Id*. at ¶¶ 165-228).

The only connection that SMUG does allege between Lively and these eight "persecutory" acts, is his **speech** criticizing homosexual promotion and conduct, and his **advocacy**, not of violence, but simply of laws that restrict the public promotion and display of homosexuality. (*Id*. at ¶¶ 43-93). The sinister and nefarious "conduct," "strategy," "scheming" and "plotting" that SMUG attributes to Lively is nothing more than Lively's alleged teaching of Ugandans how to pursue laws that restrict homosexual rights, **which laws were never enacted**. (*Id*.) SMUG's entire theory of liability against Lively is encapsulated in paragraph 93 of the Amended Complaint, where SMUG alleges that Lively's peaceful and non-violent speech and

advocacy was so denigrating to homosexuals, that it "invited, induced and encouraged" people whom Lively never even met to commit violent acts which Lively never advocated, and then not "imminently," but rather many months and even years removed from Lively's visits to Uganda. (*Id*. at ¶ 93).[11]

The district court's failure to instantly recognize that Lively's alleged "conduct" is **not** "criminal activity" but protected speech was indisputably erroneous. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011). "[C]itizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988). "[T]hreats of vilification or social ostracism," are "constitutionally protected and beyond the reach of a damages award." *Claiborne Hardware Co.*, 458 U.S. at 926.

Lively's alleged association with four Ugandan citizens for the purpose of lawfully opposing the expansion of homosexual rights cannot be "criminal activity," even if those alleged co-conspirators had subsequently committed crimes.[12] *Claiborne Hardware Co.*, 458 U.S. at 920 ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which

[11] Indeed, Lively has condemned these violent acts, and has praised the Ugandan courts for punishing them. (Ex. 2, p. 12; Ex. 3 ¶¶ 9, 37-38, 86, 140, 161).

[12] Critically, however, the four individuals with whom Lively allegedly associated in Uganda are not the same as those who allegedly committed the eight acts of persecution. (*Compare* Ex. 1, ¶¶ 94-164 *with* ¶¶ 165-228).

committed acts of violence"). This Court's seminal decision in *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), mandates the application of *strictissimi juris* to SMUG's allegations because they involve speech "within the shadow of the First Amendment." *Id*. at 172. Under this doctrine, Lively could not be liable for the eight alleged acts of persecution unless he "**personally agreed to employ the illegal means contemplated**." *Id*. at 176 (emphasis added). If Dr. Spock could not be liable for the crime of draft card burning committed by others, even though he explicitly advocated that crime and was physically present during its commission, *id*. at 176-79, Lively cannot be liable for the alleged persecution here, because SMUG does not and cannot allege that Lively "personally agreed to employ" the alleged police raids, false arrests and tabloid outings.

At bottom, the court's Order carries the astounding implication that Americans engaged in the public debate over sexual rights – for example by "conspiring" to pass constitutional amendments denying marriage to homosexual couples, by "plotting" to defeat local ordinances requiring cross-gender bathroom use, or by "scheming" to defeat the passage of the Employer Non-Discrimination Act – are guilty of the "crime against humanity of persecution," because they have engaged in the "intentional and severe deprivation of fundamental rights contrary to international law." To question the wisdom of such advocates, and to oppose them in the political process is one thing, but to open the door for declaring them *hostis humanis generis*, as the district court has done here, is quite another.

The court's decision is so contrary to bedrock First Amendment principles that it warrants immediate correction, even though the Order itself does not prohibit speech. *In re Asbestos Sch. Litig.*, 46 F.3d at 1289-94 (requiring immediate dismissal via mandamus because the challenged speech was protected, and "the district court's decision is squarely inconsistent with … *Claiborne Hardware Co*."). *See also*, section II, *infra*. The Petition should be granted.

II. LIVELY HAS EXHAUSTED ALL ALTERNATIVES AND HAS NO OTHER ADEQUATE MEANS TO AVOID IRREPARABLE HARM.

Prior to filing this Petition, Lively exhausted all other avenues for relief. When the district court denied his Motion to Dismiss, Lively sought certification of an interlocutory appeal under 28 U.S.C. 1292(b). (Ex. 5). The court summarily denied certification stating that "[n]o substantial question of law exists," (Ex. 6 at dkt. 71), even though all other post-*Kiobel* courts had dismissed ATS claims against U.S. citizens as a matter of law, *see* note 4, *supra*, and even though the only other court to retain ATS jurisdiction (against foreign defendants on inapposite facts) *sua sponte* certified its decision for interlocutory appeal. *See* p. 9, *supra*. Lively even asked the district court to reconsider its denial of interlocutory certification (Ex. 7), which the court again summarily "DENIED." (Ex. 6 at dkt. 75). Nevertheless, "a ruling that raises substantial questions of judicial power under the ATS and threatens to affect significant American foreign policy objectives cannot be insulated from immediate review **simply because a lower court refuses to certify the order for appeal**." *Balintulo*, 727 F.3d at 188 (emphasis added).

Short of mandamus, an end-of-case appeal is now Lively's only recourse. However, where, as here, there is "something about the order, or its circumstances, [that] would make an end-of-case appeal ineffectual or leave legitimate interests unduly at risk," mandamus is warranted. *In re Pearson*, 990 F.2d at 656. An end-of-case appeal is not a viable remedy here for at least three reasons.

First, allowing the court to exercise jurisdiction where it is clearly absent would be a sufficiently grave affront to the Constitution to warrant immediate intervention. *United States v. Horn*, 29 F.3d 754, 770 (1st Cir. 1994) ("the case for mandamus here [is] especially compelling because it … poses an elemental question of judicial authority involving precisely the sort of Article III-type jurisdictional considerations that traditionally have triggered mandamus review"). As this Court has held, "[s]ubject matter jurisdiction is not a nicety of legal metaphysics but rests instead on the central principle of a free society that courts have finite bounds of authority." *Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95, 101 (1st Cir. 2001) (mandamus review is appropriate where order "was entered when there was no federal jurisdiction"). For this reason, questions of judicial authority are the "classic exceptional instance justifying interlocutory review." *In re U.S.*, 426 F.3d at 5.

Second, SMUG is attempting to use the non-existent jurisdiction of a U.S. court to compel involuntary discovery from a foreign sovereign, and to establish that the Ugandan government, its members of Parliament and its high ranking officials have committed crimes against humanity in the governance of their people. This is a

key and required element of SMUG's claim that Lively aided and abetted the Ugandan government in the "persecution" of "sexual minorities," because there can be no secondary ATS liability without proving that "the principal violated international law." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp.2d 633, 668 (S.D.N.Y. 2006) *aff'd*, 582 F.3d 244 (2d Cir. 2009). SMUG's aiding and abetting claims against Lively cannot succeed unless SMUG proves, **and the district court adjudges**, that members of the Ugandan Parliament and high ranking government officials have committed crimes against humanity.[13]

Such an indictment by a U.S. court against a sovereign would be perilous in any case, let alone here, where the court is clearly without jurisdiction. *Mamani*, 654 F.3d at 1152 (granting interlocutory appeal and requiring dismissal of ATS claims for failure to plead a specific and universal international norm, because "[w]e know and worry about the foreign policy implications of civil actions in federal courts against the leaders (even the former ones) of nations"); *Balintulo*, 727 F.3d at 187 (granting mandamus review to carefully scrutinize ATS jurisdiction, because "ATS suits often create particular risks of adverse foreign policy consequences").

Third, while "the **general** burdensomeness of litigation, **standing alone**," does not warrant mandamus intervention, *In re Pearson*, 990 F.2d at 661 (emphasis added), "[t]he harm here goes far beyond the mere burden and expense of protracted

[13] In the proposed discovery plan, Lively attempted to shield the sovereign Ugandan government from involuntary discovery. (Ex. 8, p. 3, ¶ f). Signaling its intent to compel such involuntary, transnational discovery, SMUG opposed this protection (*id.*), and the court rejected it. (Ex. 9, p. 2).

litigation." *In re Perry*, 859 F.2d at 1047. Unless this Court intervenes, Lively will be required to engage in 18 months of transnational discovery on multiple continents and protracted motion practice even before reaching trial. (Ex. 9). ATS cases routinely take a decade or more to resolve. (Ex. 7, p. 11 & n.3). Requiring Lively to undertake such a complex feat at so great a cost, only to vindicate clearly protected First Amendment rights, would chill the exercise of those rights by him and others and warrants mandamus intervention. *In re Perry*, 859 F.2d at 1047-48 (granting mandamus review to redress First Amendment claim).

That the challenged Order itself does not directly prohibit speech does not negate the need for mandamus. *In re Asbestos Sch. Litig.*, 46 F.3d at 1295 (requiring dismissal of action via mandamus because challenged conduct was protected by First Amendment). As then-Circuit Judge Alito recognized, the mere "threat of such liability" has an "inhibiting effect" on speech, and justifies mandamus intervention even where "the district court's ruling did not directly prohibit" speech. *Id*.; *see also*, *Nat'l Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 378-79 (S.D.N.Y. 1980) ("The threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself").

Few people would ever engage in the political process if the cost of doing so was having to defend through discovery and summary judgment a transnational crimes against humanity suit brought by their political adversaries. Here, this is SMUG's admitted purpose in bringing this suit – to make it "too costly" for Lively

and others to engage in speech and advocacy that offends SMUG. (Ex. 2 at pp. 10-11 & n.10). The district court itself recognized "the chilling effect that can occur when potential tort liability is extended to unpopular opinions that are expressed as part of a public debate on policy," (Ex. 4 at 64-65), but erroneously concluded that such burdens could be imposed at least through "discovery" and summary judgment (*id*. at 65), which is at least 18 months and many transnational depositions away. (Ex. 9). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This Court should intervene to prevent such injury.

Finally, even if irreparable harm were absent, which it is not, this Court should still decide these weighty and novel issues now, via advisory mandamus.[14]

III. MANDAMUS IS APPROPRIATE UNDER THE CIRCUMSTANCES.

In Uganda, as in the United States, a fierce public debate is taking place about sexual rights. In some instances, Ugandan actors have abandoned civil discourse and resorted to violence or other unlawful means. SMUG has successfully appealed to

[14] "Advisory mandamus … is appropriate when the issue presented is novel, of great public importance, and likely to recur." *United States v. Horn*, 29 F.3d 754, 769-70 (1st Cir. 1994). "When advisory mandamus is in play, a demonstration of irreparable harm is unnecessary." *In re Sony BMG Music Entm't*, 564 F.3d 1, 4 (1st Cir. 2009). The jurisdictional questions and First Amendment issues raised here are the "big game" suitable for advisory review. *Horn*, 29 F.3d at 770. This Court has never decided these questions. The effect of a defendant's U.S. citizenship and domestic conduct under *Kiobel* has already come up at least nine times (*see* pp. 12-13 & n.4, *supra*), and is likely to recur. And if mere advocacy of laws restricting sexual rights is now a "crime against humanity" rather than core, protected political speech, American citizens should receive fair warning forthwith that such advocacy, even when unsuccessful, could render them the enemy of mankind.

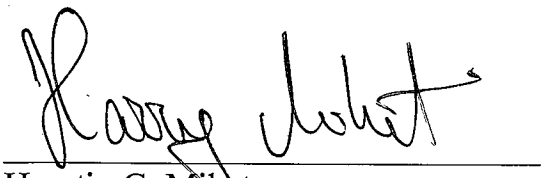
the Ugandan judiciary to step in, punish the offenders, and impart justice. Nevertheless, SMUG now seeks to involve a United States court an ocean away in its struggle. But, however sympathetic SMUG's plight might be, that involvement comes at too high a price – transgressing the clearly delineated jurisdictional boundaries of Article III of the United States Constitution, and criminalizing speech and political conduct that lies at the core of the First Amendment. Mandamus relief is appropriate under these circumstances because it is the only means left to enforce and protect these constitutional values that no court has the authority to sacrifice, even for the most sympathetic causes.

CONCLUSION

The Petition should be granted, the Order Denying Motion to Dismiss should be vacated, and the Amended Complaint dismissed with prejudice in its entirety.[15]

[15] A dismissal on First Amendment grounds would bar the entire Amended Complaint. However, mandamus intervention would be necessary and warranted even for a dismissal solely on ATS jurisdictional grounds, which would technically spare SMUG's two state law claims for conspiracy and negligence (Counts 4-5), because dismissal of the ATS claims (Counts 1-3) would: (1) vindicate the Article III limitations on the lower court's jurisdiction (sect. I(A)-(B), II, *supra*); (2) lessen the adverse foreign policy implications attendant to SMUG's aiding and abetting claims under the ATS (sec. II, *supra*); (3) eliminate the need for the anticipated and protracted expert discovery on what "international law" provides (Ex. 9, ¶¶ 7-9); and (4) require the district court to take a closer look at the viability of the state law claims, rather than permit them to piggyback on the non-viable ATS claims. A closer review will reveal that the state law claims are barred by the statutes of limitations (Ex. 2, pp. 64-68), and are themselves non-viable (*id*. at 69-73), because, for example, there is no such thing as the "negligent" creation through speech of a "virulently hostile environment." (*Id*. at 70).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, HORATIO G. MIHET, hereby certify that on December 5, 2013, I served copies of the foregoing Petition for Writ of Mandamus (with exhibits) on the following parties by Federal Express, standard overnight mail:

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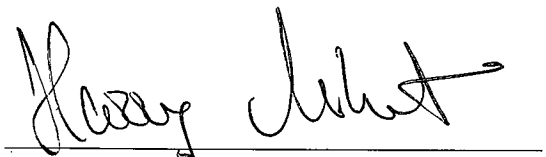

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