



September 27, 2005

Ms. Roseann B. MacKechnie
Clerk, United States Court of Appeals
for the Second Circuit
United States Courthouse
40 Foley Square
New York, NY 10007

Attn: Tracy Young

Re: Doe v. Gonzales, No. 05-4896
(District Court No. 3:05cv1256 JCH, D.Conn.)

Dear Ms. MacKechnie:

Attached for filing **under seal** in the above-captioned case is (1) Plaintiffs-Appellees' Reply Memorandum in Support of Emergency Motion to Vacate Stay Pending Appeal; and (2) Certificate of Service. I have included the original and four copies of each.

Thank you for your assistance.

Sincerely,



Ann Beeson

cc: Scott R. McIntosh
Civil Division, Room 7259
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Kevin J. O'Connor
United States Attorney's Office
Connecticut Financial Center
157 Church Street, 23rd Floor
New Haven, CT 06510

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

JOHN DOE; AMERICAN CIVIL LIBERTIES
UNION; AMERICAN CIVIL LIBERTIES
UNION FOUNDATION,

Plaintiffs-Appellees,

v.

ALBERTO GONZALES, in his official
capacity as Attorney General of the United
States; ROBERT MUELLER, in his official
capacity as Director of the Federal Bureau of
Investigation; JOHN ROE, Federal Bureau
of Investigation, in his official capacity,

Defendants-Appellants.

**PLAINTIFFS-APPELLEES'
REPLY MEMORANDUM IN
SUPPORT OF EMERGENCY
MOTION TO VACATE STAY
PENDING APPEAL**

No. 05-4896

(No. 3:05cv1256 JCH)
(D.Conn.)

SEALED

**PLAINTIFFS-APPELLEES' REPLY MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION TO VACATE STAY PENDING APPEAL**

As plaintiffs amply demonstrated in their Memorandum in Support of Emergency Motion to Vacate Stay Pending Appeal, the stay pending appeal entered by this Court on September 20, 2005 should be vacated. The information the stay was designed to keep secret pending appeal has now been disclosed in *The New York Times* and on federal court websites, and has been widely-disseminated to the public. The government argues that the stay should not be vacated because the court removed the protected information from PACER soon after the government learned that the information was available there. This argument is nonsensical. First, it appears that the information was available on PACER for approximately 20 days before the parties and the court became aware of it.¹

¹ Plaintiffs-Appellees wish to clarify that the John Doe plaintiff's identity was available on PACER and the district court website from August 31, 2005 until September 21, 2005,

Second, and more importantly, the information that was made available on PACER was subsequently published in *The New York Times*. The government contends that the publication of the information in *The New York Times* was irrelevant because "it is improbable at best" that the subject of the NSL could have "confirmed" the Times article against PACER. Defendant-Appellants' Memorandum in Opposition to Emergency Motion to Vacate Stay (hereinafter "Govt. Opp."), at 3. But obviously any target would have been tipped off by the publication of the *Times* article without any need to "confirm" the information elsewhere. Because the genie is out of the bottle, there is no longer any justification for continuing the stay.

The government also errs in arguing that vacating the stay would render their appeal moot, and would require this Court to vacate the district court's preliminary injunction. *See* Govt. Opp., at 6. Contrary to the government's assertion, simply vacating the stay would not render this appeal moot. Where a plaintiff continues to demonstrate that they "have suffered, or be[en] threatened with, an actual injury" that can be redressed, a case is not moot. *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 51 (2d Cir. 2004). By contrast, "[a] case or controversy becomes moot either when the injury is healed and only prospective relief has been sought, or when it becomes impossible for the courts to redress the injury through the exercise of their remedial powers." *Fund for Animals v. Babbitt*, 89 F.3d 128, 133 (2d Cir. 1996).

This case is not moot because even if the stay pending appeal is vacated, plaintiffs remain at risk of prosecution for violating 18 U.S.C. §2709(c) absent the district court's

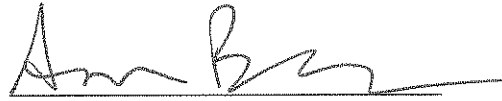
see Goodman Decl. ¶¶ 9-10, which is approximately 20 days, not 12 days as mistakenly indicated in Plaintiffs-Appellees' Memorandum in Support of Emergency Motion to Vacate Stay Pending Appeal.

injunction. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 630 (1982) (holding that where a company relied on a preliminary injunction to take action pending appeal that otherwise might violate a law, the case was not moot because the government could still seek to impose criminal or civil liability absent a ruling on the merits from the appellate court). Thus, even if the stay is vacated, plaintiffs face the same threat of prosecution for exercise of their First Amendment rights asserted at the outset of this litigation. *Cf. United States v. Suleiman*, 208 F.3d 32, 36 (2000) (a live controversy remains even if the original injury ceases, but “some concrete and continuing injury” exists).

The government has provided no assurance whatsoever that it would not prosecute plaintiffs for disclosing their identity as an NSL recipient absent the district court injunction. Without that assurance, plaintiffs must rely on the district court’s injunction to speak without fear of prosecution. *See, e.g., Suster v. Marshall*, 149 F.3d 523, 527 (6th Cir. 1998) (finding that an appeal from a preliminary injunction was not moot because a reversal of the district court’s injunction would compromise plaintiffs’ interests “as they ha[d] received no assurances that grievances w[ould] not be pursued and penalties not imposed”); *see also Etuk v. Slattery*, 936 F.2d 1433, 1443 (2d Cir. 1991) (“Absent some unambiguous assurance that the INS will not revert to its old policies, plaintiffs plainly have a continuing stake in the outcome of this litigation.”). Thus, because vacating the stay will not moot this appeal, the principle enunciated in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), simply does not apply. Vacating the stay does not moot the appeal and does not require vacating the district court’s injunction.

For the reasons stated above, plaintiffs respectfully ask this Court to vacate the stay pending appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ann Beeson", with a horizontal line underneath it.

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Defendants-Appellants.

No. 05-4896

(No. 3:05cv1256 JCH)
(D.Conn.)

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2005, I filed and served the foregoing: (1)
Plaintiffs-Appellees' Reply Memorandum in Support of Emergency Motion to Vacate Stay
Pending Appeal, by causing copies to be sent via electronic mail and delivered by overnight
courier to:

Scott R. McIntosh
Douglas N. Letter
Civil Division, Room 7259
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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