

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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.

No. 05-4896

The government originally gagged the ACLU from disclosing the text that appears below in white on black background, originally arguing that its release would threaten national security. The government has now given up its legal battle over the gag and agreed that the information could be released to the public.

MEMORANDUM IN OPPOSITION TO  
EMERGENCY MOTION TO VACATE STAY

1. On September 20, this Court issued a stay pending expedited appeal to preserve the status quo, prevent significant harm to the public interest, and forestall the plaintiffs from mooted the government's appeal by disclosing the identity of the NSL recipient in this case. Barely 48 hours later, the plaintiffs have returned to this Court to urge that the stay be vacated.

The occasion for the plaintiffs' motion is [REDACTED]

[REDACTED]. But  
as the plaintiffs themselves acknowledge, [REDACTED]

[REDACTED]. To the contrary, [REDACTED]

number, email address, and, to obtain same-day access (the only option that would have permitted access before the information was withdrawn from the database), credit card information. See <<https://pacer.psc.uscourts.gov/cgi-bin/regform.pl>>. Even assuming that the subject of the NSL saw and read the New York Times article as soon as it was published and knew enough to turn to PACER, a person who does not wish to be identified by the government in the first place is hardly likely to respond to the article by submitting this kind of comprehensive self-identification to a database operated by the government itself. Thus, the specter of "official confirmation" via PACER is an illusory one: whether or not the subject of the NSL theoretically could have obtained confirmation of the Times article from PACER, there is no reason to think that he or she actually did.

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For these reasons, the plaintiffs' "cat is out of the bag" argument misses its mark. The mere publication of an article that purports to identify the NSL recipient does not let the cat out of the bag. Nor does an inadvertent and unauthorized release of information by another branch of the government, particularly when the information was withdrawn before the subject of the NSL had any realistic opportunity to seek it out for confirmation of the article.

In addition to relying on the New York Times article, the plaintiffs also note that one of their redacted filings previously available on the district court's ECF web site contained inadvertently unredacted references to Library Connection. These references were never discovered by the news media, and there is no evidence that they were ever discovered by anyone else, particularly by the

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<sup>1</sup> The plaintiffs assert that Library Connection's identity was available on PACER beginning on August 31 Goodman Dec. ¶ 9. Even if that date is correct (and the plaintiffs' declaration does not demonstrate that it is), there is no reason to think that the subject of the NSL would have gone there prior to the publication of the New York Times article on September 21.

subject of the NSL. A member of the public who wishes to access the district court's ECF website must register first with PACER. See <<https://ecf.ctd.uscourts.gov/cgi-bin/login.pl>>. The plaintiffs do not suggest that the subject of the NSL is likely to have registered with PACER and scoured the hundreds of pages of redacted filings in search of such an error and discovered this one prior to the publication of the Times article, and the document has since been removed from the public docket over the plaintiffs' objection (Goodman Dec. ¶ 12).

Nevertheless, the plaintiffs claim that this error demonstrates a lack of due diligence on the part of the government. Motion at 6. That suggestion ignores extraordinarily limited time that the district court provided for the government to identify needed redactions in the parties' papers. As explained in the attached declaration of the government's trial counsel, the district court issued an oral order on the afternoon of August 30 that directed the parties to prepare and file redacted versions of all pleadings (other than the already-redacted complaint) before 10:00 a.m. the next day, when the court was scheduled to hear oral argument on the plaintiffs' preliminary injunction motion. See Declaration of Carlton E. Greene ¶ 2 (Exhibit B *infra*). As a result, the government was compelled to review and redact approximately 167 pages of filings, containing a vast number of direct and indirect references to Library Connection, in less than 24 hours, at the same time that the government's attorneys were preparing for the next morning's hearing. *Id.* ¶ 3. Given the sudden and extremely short deadline imposed by the district court, the government can hardly be faulted for failing to catch every single one of the many scores of references to Library Connection in the numerous filings at issue. Under these circumstances, the wonder is not that the error cited by the plaintiffs occurred during the extraordinarily expedited redaction process, but instead that a greater

number of references did not slip through. And, to repeat, even the plaintiffs do not suggest that this error itself brought Library Connection's identity to the actual attention of the public.

2. For the foregoing reasons, the publication of the New York Times article does not itself moot this appeal. However, the appeal will become moot if this Court vacates the stay and Library Connection thereupon publicly discloses its identity. See, e.g., *Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1<sup>st</sup> Cir. 1979). If that happens, the government will have been deprived of its opportunity to obtain appellate review of the district court's ruling regarding the constitutionality of Section 2709(c). In that event, the only appropriate course of action would be for this Court to vacate the district court's then-unreviewable ruling.

"It is well-established that, when a matter becomes moot on appeal, federal appellate courts will generally vacate the lower court's judgment except where actions attributable to one of the parties rendered the appeal moot or the district court judgment had already been subjected to appellate scrutiny to which the losing party was entitled.\* \* \*." *Catazano v. Wing*, 277 F.3d 99, 108 (2d Cir. 2001). The Supreme Court established this basic rule in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and it has been followed by this Court on numerous occasions since then. See, e.g., *Russman v. Board of Educ. of Enlarged City School Dist. of City of Watervliet*, 260 F.3d 114, 121-22 (2d Cir. 2001); *Van Wie v. Pataki*, 267 F.3d 109, 115 (2d Cir. 2001); *Haley v. Pataki*, 60 F.3d 137, 142 (2d Cir. 1995).

*Munsingwear* vacatur is particularly appropriate when the appeal is rendered moot by actions over which the appellant itself has no control. As the Supreme Court has explained, "[a] party who seeks review of the merits of an adverse ruling, but is frustrated [from obtaining review] by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S.*

*Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). And “[t]he same is true when mootness results from unilateral action of the party who prevailed below.” *Id.*; *Russman*, 260 F.3d at 122 (“where the appellee has caused the case to become moot, we vacate the district court’s judgment to prevent the appellee from insulating a favorable decision from appellate review”).

In the event that this Court lifts its stay and **Library Connection** discloses its identity, this appeal will present a classic occasion for vacatur under *Munsingwear*. **Unlike the mere publication of the New York Times article,** the public disclosure of **Library Connection’s** identity by **Library Connection** itself following the lifting of the stay will render this appeal moot and divest this Court of Article III jurisdiction to review the district court’s First Amendment ruling. See, e.g., *In re Burger Boys, Inc.*, 94 F.3d 755, 759 (2d Cir. 1996). The government has done everything in its power to avoid that outcome and preserve this controversy for appellate review: it has filed an expedited appeal, sought and obtained a stay pending appeal, and is now opposing the plaintiffs’ efforts to vacate the stay. If this appeal is rendered moot, it will be despite, rather than because of, the government’s efforts. And vacatur would be equally appropriate **if this court were to disagree with the government and view the publication of the most recent New York Times article as the mooting event, for neither the publication of the article nor the underlying error in managing the PACER database involved any action by the Executive Branch to moot the case.**

The precedents of the Supreme Court and this Court make absolutely clear that, when an appellant is deprived of its right to appellate review of a district court decision in this fashion, it “ought not in fairness be forced to acquiesce in the judgment,” but instead is entitled to have the judgment vacated. *Bonner Mall*, 513 U.S. at 25. To allow the judgment to stand would be to permit the plaintiffs to “insulat[e] a favorable decision from appellate review.” *Russman*, 260 F.3d at 122.