

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. [REDACTED]

[REDACTED] The government argues
that the stay should not be vacated because [REDACTED]

This argument is nonsensical. First, it appears that [REDACTED]

¹ Plaintiffs-Appellees wish to clarify that [REDACTED]

Second, and more importantly, [REDACTED]

[REDACTED] The government contends that [REDACTED]

[REDACTED] Defendant-Appellants' Memorandum in Opposition to Emergency Motion to Vacate Stay (hereinafter "Govt. Opp."), at 3. But obviously [REDACTED]

[REDACTED] Because [REDACTED]

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

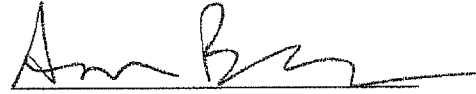
see Goodman Decl. ¶¶ 9-10, [REDACTED] in Plaintiffs-Appellees' Memorandum in Support of Emergency Motion to Vacate Stay Pending Appeal.

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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