No. 07-1592

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

THE COMMONWEALTH OF PUERTO RICO, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1345 because this case was brought by the United States under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.* On April 10, 2007, the court entered an order pursuant to 18 U.S.C. 3626(e)(3) delaying by 60 days an automatic stay under the Prison Litigation Reform Act (PLRA). PR Br. Add. 1-7.[1]

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[1] This brief uses the following abbreviations: "PR Br. __" is the page number of Appellants' opening brief; "PR Br. Add. __" is the page number of the addendum to Appellant's opening brief; "US Br. Add. __" is the page number of the addendum to the United States' brief; "App. __" is the page number of Appellants' Appendix; "Doc. __" is the number of the entry on the district court docket sheet.

The defendants (collectively Puerto Rico or the Commonwealth) filed their notice of appeal on April 12, 2007. App. 98-99.

This Court lacks jurisdiction over the appeal. As explained in greater detail in Argument I of this brief (pp. 16-17, *infra*), the district court's interlocutory order postponing the automatic stay by 60 days is not appealable. See 18 U.S.C. 3626(e)(4). Accordingly, this Court should dismiss the appeal for lack of appellate jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the Court has jurisdiction over this appeal.

2. Whether a district court loses its authority under 18 U.S.C. 3626(e)(3) to delay the automatic stay under the PLRA, if the court waits until the 31st day after the filing of a termination motion before issuing its order delaying the stay.

STATEMENT OF THE CASE

In August 1994, the United States filed suit against the Commonwealth of Puerto Rico and some of its officials under CRIPA, alleging unconstitutional conditions in the Commonwealth's juvenile detention facilities. Doc. 1. In 1997, the parties reached a comprehensive settlement designed to remedy constitutional violations at those facilities. App. 20-53; Doc. 25. Puerto Rico and the United States stipulated that the terms of the settlement complied with the requirements of the PLRA. App. 15, 25. The district court entered the settlement agreement as a

consent order after explicitly finding that the agreement satisfied the PLRA. US Br. Add. 1-4; Doc. 26.

On March 8, 2007, Puerto Rico filed a motion under the PLRA seeking "immediate termination" of the prospective relief contained in the consent decree. App. 54-58. In its motion, Puerto Rico alleged – contrary to its stipulation in 1997 (see App. 25) – that the consent decree did not satisfy the requirements of the PLRA when it was entered. App. 57.

The PLRA provides that the filing of a motion to terminate prospective relief shall operate as a stay of such relief during the period beginning 30 days after the filing of the motion and ending on the date the court rules on the motion. 18 U.S.C. 3626(e)(2). The statute authorizes the district court to postpone the effective date of the automatic stay for up to 60 days for good cause. 18 U.S.C. 3626(e)(3).

The United States filed a response on March 22, 2007, asking the district court to deny Puerto Rico's motion to terminate. App. 60-78. In the alternative, the United States requested that the court grant a 60-day postponement, pursuant to 18 U.S.C. 3626(e)(3), of the automatic stay authorized by the PLRA. App. 60-61, 75-77.

On April 10, 2007, the district court issued an order pursuant to 18 U.S.C. 3626(e)(3) postponing the effective date of the automatic stay for 60 days, until June 6, 2007. PR Br. Add. 1-7.

Puerto Rico has appealed that postponement order to this Court. App. 98-99. In addition, Puerto Rico has filed a motion asking this Court to stay the postponement order pending appeal.

STATEMENT OF FACTS AND STATUTORY OVERVIEW

1. The Prison Litigation Reform Act (PLRA) sets forth standards for the entry and termination of prospective relief in civil actions challenging conditions at prison facilities. See 18 U.S.C. 3626. Under the PLRA, prospective relief in prison condition cases "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. 3626(a)(1)(A). Consistent with this requirement, the statute provides that a district court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Ibid.*

The PLRA provides for "immediate termination" of relief that does not conform to that standard. 18 U.S.C. 3626(b)(2). It specifies that "[i]n any civil action with respect to prison conditions, a defendant or intervener shall be entitled

to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Ibid.*

But the PLRA also "expressly limits the court's termination power." *Laaman* v. *Warden, N.H. State Prison*, 238 F.3d 14, 16 (1st Cir. 2001). "Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. 3626(b)(3).

In addition to permitting a party to move for termination of decrees that were entered without the necessary findings, the PLRA also permits a party to seek termination of any prison-conditions decree two years after entry of the relief. 18 U.S.C. 3626(b)(1)(i). Motions that are based on the two-year passage of time are subject to the same important limitation as motions that are based on the absence of necessary findings. The relief may not be terminated if the court finds that it remains necessary to correct a current and ongoing violation, and that it is

narrowly drawn and the least intrusive means to correct the violation. 18 U.S.C. 3626(b)(3).

The PLRA establishes special procedures that govern motions for termination. A court is required to "promptly rule" on such a motion. 18 U.S.C. 3626(e)(1). In addition, under the automatic stay provision at issue here, the filing of a motion for termination "shall operate as a stay during the period * * * beginning on the 30th day after such motion is filed * * * and * * * ending on the date the court enters a final order ruling on the motion." 18 U.S.C. 3626(e)(2). A court "may postpone the effective date of an automatic stay * * * for not more than 60 days for good cause," but no postponement is permissible "because of general congestion of the court's calendar." 18 U.S.C. 3626(e)(3).

2. As previously noted, the parties reached a comprehensive settlement in 1997 that was designed to remedy the unconstitutional conditions that were the subject of the United States' CRIPA suit against the Commonwealth. App. 20-53; Doc. 25. The parties stipulated that the settlement agreement complied with the requirements of the PLRA. App. 15, 25. Specifically, Puerto Rico stated that

> [f]or purposes of this civil lawsuit only and in order to settle this matter, Defendants agree and represent to the Court that the prospective relief set forth in this agreement complies in all respects with the provisions of 18 U.S.C. § 3626(a)(1) & (c)(1).

App. 25.

In October 1997, the United States moved for entry of the settlement agreement as an order of the court and asked the district judge to make a finding that the agreement complied with the PLRA. App. 13-18. With its motion, the United States filed the affidavit of Orlando Martinez, the former Court Monitor, who attested, *inter alia*, that youths confined in the Commonwealth's juvenile facilities were unsafe and not protected from harm. App. 15-17; Doc. 554-4 (Martinez Affidavit) ¶¶ 6, 41. Mr. Martinez cited several serious incidents involving physical and sexual assaults by youths and excessive force by staff. Doc. 554-4 (Martinez Affidavit) ¶¶ 40-49. The former Monitor concluded that the remedial measures set forth in the settlement agreement were necessary, narrowly tailored, and the least intrusive means to correct the deficiencies in the juvenile facilities. *Id.* at ¶¶ 5, 8, 13, 19, 22, 27, 30, 35, 40, 50, 52, 57, 60; App. 17.

At approximately the same time, the United States filed a Second Amended Complaint alleging that the Commonwealth violated the constitutional rights of juveniles confined in its residential detention and training facilities. App. 1-12. That complaint alleged, among other things, that the Commonwealth subjected juveniles to "unsanitary, unsafe, and vermin infested physical conditions that pose serious health and safety risks" (App. 8), failed to protect them from fire hazards (App. 8-9), failed to protect them from abuse by staff members of the facilities

(App. 9), and failed to provide them adequate mental health care and treatment for alcohol and drug abuse (App. 7-8).

On December 12, 1997, the district court approved and entered the settlement agreement as a consent order and retained jurisdiction to enforce the decree. US Br. Add. 3-4. In approving the agreement, the district court found "that the conditions at the juvenile detention and training facilities of the Commonwealth of Puerto Rico as described in the Affidavit of Monitor Martinez violate the Federal rights of the juveniles housed in those facilities, as alleged in the Second Amended Complaint filed by the United States on October 7, 1997." US Br. Add. 3; PR Br. Add. 4. In addition, the court found that "the relief provided by the Settlement Agreement is narrowly drawn, extends no further than necessary to correct the violation of the Federal rights, and otherwise complies with the limitations on relief set forth in the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)." US Br. Add. 3; PR Br. Add. 4.

3. In the years since the entry of the consent decree, the United States has repeatedly expressed concern to the district court about Puerto Rico's failure to comply with Paragraph 78 of the decree (App. 41-42), which requires the Commonwealth to report and to take prompt administrative action in response to allegations of abuse and other mistreatment of juveniles in its facilities. See, *e.g.*,

Doc. 554-2; Docs. 303, 396, 429, 448, 452, 648; see also Doc. 554-2 at 4-5. For example, in February 2006, the United States notified the court that "over 3,000 abuse allegations have been reported by Commonwealth juvenile facilities" during the period 2003-2005 (Doc. 554-2 at 1-2; see *id.* at 5, 7), and that those incidents included allegations of "extreme violence against youths by staff and other youths, such as sexual assaults, physical abuse, unjustified use of chemical irritants, punches to the head, infliction of electrical shocks with cables, and numerous self-inflicted lacerations with razor blades while under preventive supervision by staff." Doc. 554-2 at 2; see Doc. 554-2 at 6-9. At that time, the United States advised the court that "hundreds of abuse allegations remain unresolved, often for years; corrective action is rarely taken; staff face little prospect of discipline for abusive practices; and youths continue to be subjected to ongoing harm and injury." Doc. 554-2 at 1.

In November 2006, the United States filed a motion for a temporary restraining order and preliminary injunction to prohibit Puerto Rico from allowing staff members criminally charged with abuse or mistreatment of youths from having contact with juveniles in facilities operated by or on behalf of the Commonwealth's Administration of Juvenile Institutions ("AIJ" in Spanish). Doc. 641; Doc. 641-2. The United States presented evidence that at least nine AIJ staff members had been criminally charged with abusing and neglecting youths in

the Commonwealth's juvenile facilities, and that as of August 2006, at least three of those individuals continued to have contact with youths in those facilities. US Br. Add. 8 (Doc. 641-4 (Romero Affidavit) at 4 (¶13)). After investigating the situation, the United States' expert concluded that "[t]he Commonwealth's failure to take prompt action to separate these suspected abusers from having contact with juveniles places juveniles at a significant risk of harm and violates Paragraph 78 of the Consent Decree." US Br. Add. 7-8 (Doc. 641-4 (Romero Affidavit) at 3-4 (¶11)). In response to the United States' motion, the district court issued an order on December 4, 2006, requiring the Commonwealth to prevent staff charged with abuse from having contact with confined juveniles while criminal proceedings and related investigations were pending. App. at 72.

In February 2007, the Monitor reported that approximately 1,200 allegations of abuse were reported by the facilities in 2006. US Br. Add. 10; Doc. 664-2 at 26. Of these, approximately 700 involved injuries to youths. *Ibid.* In addition, the Monitor reported 12 allegations of juvenile-on-juvenile sexual assaults and six allegations of staff-on-juvenile sexual conduct at the Commonwealth's facilities. US Br. Add. 10-15; Doc. 664-2 at 26-31. The Monitor also reported a number of significant fire safety hazards in the juvenile facilities during 2006. Doc. 664-2 at 3-9.

Since late 2006, the district court has held at least three status conferences at which she has instructed the parties to discuss the proper implementation of Paragraph 78 of the Consent Decree to ensure juveniles are protected from abuse and mistreatment. Docs. 648, 657, 677; App. 68. The most recent of these conferences occurred on March 5, 2007. Doc. 677.

4. On March 8, 2007 – just three days after the status conference concerning Paragraph 78 of the consent decree – Puerto Rico filed a motion under the PLRA seeking "immediate termination" of the prospective relief mandated by the decree. App. 54-58.

On March 22, 2007, the United States filed an opposition to the motion (App. 60-78), urging the court to "make written findings" pursuant to the PLRA that the consent decree "remains necessary and appropriate." App. 60, 69. The United States advised the district court that "[t]he current record amply demonstrates that the Defendants have failed to correct long-standing deficiencies contributing to ongoing violations of juveniles' federal rights in critical areas addressed by the Consent Decree, including protection from harm, mental health and substance abuse care, and fire safety." App. 69; accord App. 65.

In the alternative, the United States requested that the court postpone the automatic stay for an additional 60 days, pursuant to 18 U.S.C. 3626(e)(3). App. 60-61, 75-77. The United States asserted that "good cause" existed for such an

extension because "even temporarily denying the Consent Decree's protections to juveniles would increase the harms to which they are already exposed." App. 61; see also App. 69, 75, 77-78. The United States further explained that a 60-day postponement was appropriate to give the federal government an opportunity to evaluate the conditions at the 12 juvenile facilities covered by the consent decree. App. 61; see App. 69, 77.

Puerto Rico filed a reply on April 3, 2007 (Doc. 685), and the United States filed its sur-reply on April 9, 2007 (Doc. 687).

On April 10, 2007, the district court issued an order pursuant to 18 U.S.C. 3626(e)(3) postponing the automatic stay for 60 days, until June 6, 2007. PR Br. Add. 2-7; see App. 96. In finding "good cause" to grant a 60-day postponement of the automatic stay, the court emphasized that there is a "substantial backlog in the investigation of allegations of abuse against detained juveniles," and that Puerto Rico has "not disputed the information provided by plaintiff that nine staff members were recently arrested for abusing and neglecting youths in the juvenile facilities and that at least one of them continued thereafter to have contact with youths." PR Br. Add. 6. Other factors cited by the district court in finding "good cause" for a postponement were "the scope of the deficiencies which led to the Court's involvement in this case and the fact that for nine years defendants have tacitly acknowledged the need for continued court monitoring." PR Br. Add. 7.

In its order, the court also rejected Puerto Rico's assertion that the prospective relief contained in the 1997 consent decree failed to comply with the PLRA. PR Br. Add. 5. Emphasizing that Puerto Rico had stipulated in 1997 that the decree complied with the PLRA, the court concluded that its "findings as to the narrowness/need/intrusiveness criteria [under the PLRA] are based on the very nature of the myriad deficiencies acknowledged by the Commonwealth at their juvenile facilities, which by their very magnitude and severity dictated the type of relief that the defendants themselves agreed to and asked the Court to provide for." PR Br. Add. 5. The court further explained that "[t]he remedies and prospective relief agreed to [in the 1997 consent decree] matched specific deficiencies existent at the time in the detention facilities which ranged from the need to have access to running water and potable drinking water, to education, to mental health, trained staff and fire safety, among others." PR Br. Add. 5.

On the same day that the court issued its order, Puerto Rico filed a motion to reconsider, arguing that the district court had no authority under 18 U.S.C. 3626(e)(3) to grant the 60-day postponement of the stay. App. 107-110. Asserting that the automatic stay had taken effect on April 9, 2007 (one day before the court issued its order),[2] Puerto Rico argued that as soon as the stay took effect,

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[2] Puerto Rico has asserted (App. 108) that April 9, 2007, was the 30th day after the filing of the motion to terminate, and thus was the date that the automatic stay took effect under the PLRA. In fact, the 30th calendar day following March

(continued...)

the district court lost its authority under Section 3626(e)(3) to grant a postponement. App. 107-110.

The district court denied the motion to reconsider on April 12, 2007. App. 95-97. Emphasizing that "[a]t no time has this Court attempted to circumvent the mandatory stay," App. 96, the district judge explained that her order "merely set a fixed period of time within the statutory limits established by § 3626(e)(2) & (3), recognizing the mandatory nature of the stay provisions." App. 96. In its order denying the motion to reconsider, the court directed Puerto Rico to "comply with the Court Order that the Monitor and his experts be granted immediate access to the juvenile facilities so that the next quarterly report, which addresses PLRA issues, be timely filed." App. 97.

5. The district court has scheduled an evidentiary hearing for May 7, 2007, at which the United States must present evidence that the prospective relief is still warranted under the PLRA. Doc. 689 at 2. In that order, the court "admonished" the defendants "that they are to give access to the Monitor and his experts to allow

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[2](...continued)
8, 2007 (the date the motion was filed) was Saturday, April 7, 2007. Puerto Rico apparently takes the position that the next business day – Monday, April 9 – should be deemed the 30th day for purposes of the PLRA.

To avoid confusion, the United States will treat April 9 as the 30th day for purposes of this brief. The United States' argument in this brief would be the same, however, even if April 7 were considered the 30th day.

them to prepare the first quarterly report for the year 2007 which shall be submitted to the Court by no later than April 30, 2007." Doc. 689 at 2-3.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction over the appeal. Puerto Rico seeks review of an order entered pursuant to 18 U.S.C. 3626(e)(3) that postponed by 60 days the automatic stay authorized by the PLRA. In 18 U.S.C. 3626(e)(4), Congress explicitly excluded Section 3626(e)(3) orders from the list of interlocutory decisions immediately appealable under 28 U.S.C. 1292(a)(1). Consequently, this Court should dismiss the appeal for lack of jurisdiction.

2. In the event this Court determines that it has appellate jurisdiction, it should affirm the district court's 60-day postponement order. Puerto Rico argues that a district court loses authority under 18 U.S.C. 3626(e)(3) to grant a 60-day postponement of an automatic stay if the court fails to order the postponement within 30 days of the filing of the motion to terminate. The Commonwealth's interpretation of the statute is untenable. The district court's postponement order fully complied with 18 U.S.C. 3626(e)(3). Contrary to Puerto Rico's contention, neither the statutory language nor the decision in *Miller* v. *French*, 530 U.S. 327 (2000), requires that a 60-day postponement order be issued within 30 days of the filing of a termination motion.

Moreover, Puerto Rico's interpretation of the statute, if endorsed by this Court, could interfere with the district court's ability to fulfill its statutory obligation to determine whether prospective relief remains necessary in this case. Appellants have made clear that, if this Court overturns the 60-day postponement order, Puerto Rico will rely on the automatic stay to argue that the Monitor has no authority to perform the duties ordered by the district court. This interference with the Monitor's duties could impede the district court's factfinding on the motion to terminate, which is set for an evidentiary hearing on May 7, 2007.

Finally, the equities weigh heavily in favor of the 60-day postponement. Overturning the postponement of the stay would likely increase the risk of harm to the juveniles confined in the Commonwealth's facilities. Puerto Rico has not identified any injury that it would suffer if the 60-day postponement remains in force, much less injury that would outweigh the risk of harm to the juveniles.

ARGUMENT

I

THIS COURT LACKS JURISDICTION OVER THE APPEAL

This Court should dismiss the appeal for lack of appellate jurisdiction. Puerto Rico has appealed an order entered pursuant to 18 U.S.C. 3626(e)(3) that postponed by 60 days the automatic stay authorized by the PLRA. That interlocutory order is not appealable, as the PLRA makes clear:

> Any order staying, suspending, delaying, or barring the operation of the automatic stay described in [18 U.S.C. 3626(e)(2)] (*other than an order to postpone the effective date of the automatic stay under [18 U.S.C. 3626(e)(3)]*) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

18 U.S.C. 3626(e)(4) (emphasis added). Because Congress has explicitly excluded Section 3626(e)(3) orders from the list of interlocutory orders appealable under 28 U.S.C. 1292(a)(1), this Court lacks jurisdiction over Puerto Rico's appeal.

II

THE DISTRICT COURT HAD AUTHORITY TO DELAY THE AUTOMATIC STAY BY 60 DAYS

On April 10, 2007, the district court invoked its authority under 18 U.S.C. 3626(e)(3) to delay by 60 days the automatic stay of the consent decree's prospective relief. Puerto Rico does not dispute on appeal that the district court had "good cause" (see 18 U.S.C. 3626(e)(3)) for ordering a 60-day postponement. Nor does Puerto Rico dispute that the 60-day postponement would have been valid if it had been issued on April 9, 2007, instead of April 10, 2007. Instead, Puerto Rico contends that, because of a one-day delay in issuing the postponement order, the district court lost its authority under 18 U.S.C. 3626(e)(3) to delay the stay by

60 days. Puerto Rico's interpretation of the statute is untenable,[3] and, if endorsed by this Court, could interfere with the district court's ability to fulfill its statutory obligation to determine whether prospective relief remains necessary in this case.

A. The District Court's Issuance Of The Postponement Order Complied With The Statutory Language

The PLRA states that a motion to terminate prospective relief "shall operate as a stay during the period * * * beginning on the 30th day after such motion is filed * * * and * * * ending on the date the court enters a final order ruling on the motion." 18 U.S.C. 3626(e)(2)(A) & (B). The statute further provides that the district court "may postpone the effective date of an automatic stay specified in [18 U.S.C. 3626(e)(2)(A)] for not more than 60 days for good cause." 18 U.S.C. 3626(e)(3).

Nothing in this statutory language compels the conclusion that a district court's authority to grant a 60-day postponement expires 30 days after the motion to terminate has been filed. If Congress had intended to impose such a limitation, it could easily have done so by adding the italicized phrase below to the language of Section 3626(e)(3): "*No later than the 30th day following the filing of the motion to terminate*, the court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause." But

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[3] This Court reviews interpretations of the PLRA *de novo*. *Inmates of Suffolk County Jail* v. *Rouse*, 129 F.3d 649, 653 (1st Cir. 1997).

that phrase is notably absent from the legislation that Congress actually passed. This Court should reject Puerto Rico's invitation to rewrite Section 3626 to create a limitation that Congress omitted from the text of the statute.

Congress did not implicitly impose such a limitation by using the word "postpone" in Section 3626(e)(3). In interpreting a statute, this Court will "assume that the words of the statute comport with their ordinary meaning." *Laaman* v. *Warden, N.H. State Prison*, 238 F.3d 14, 16 (1st Cir. 2001). In ordinary usage, "postpone" simply means "[t]o put off to a later time," *Random House Dictionary of the English Language, Unabridged* 1512 (2d ed. 1987), or to "delay." *Webster's Third New Int'l Dictionary, Unabridged* 1773 (1993). That is precisely what the district court did here when it changed the effective date of the stay from April 9, 2007, to June 6, 2007. Thus, the district court's action in this case qualifies as a "postpone[ment]" under the common meaning of that term.

It is immaterial that the automatic stay had begun one day prior to the district court's issuance of its postponement order. Under the ordinary usage of the English language, one can "postpone" something even though it has already started. A baseball game, for example, can be "postponed" because of bad weather even though a few innings of the game have already been played. Similarly, a stay can be postponed even after it has been in place for one day. The court's action here thus fits comfortably within the plain language of the statute.

The Second Circuit's decision in *Benjamin* v. *Jacobson*, 172 F.3d 144 (2d Cir.) (en banc), cert. denied, 528 U.S. 824 (1999), illustrates that a court has power under the PLRA to re-set the effective date of the automatic stay, even if more than 30 days have elapsed since the filing of the motion to terminate. In *Benjamin*, the motion to terminate a consent decree was filed on May 24, 1996. See *Benjamin* v. *Jacobson*, 935 F. Supp. 332, 358 n.21 (S.D.N.Y. 1996), aff'd in part, rev'd in part, 172 F.3d 144 (2d Cir. 1999). The district court granted the motion to terminate and vacated the consent decree. On March 23, 1999, the Second Circuit reversed and remanded the case to give the plaintiffs an opportunity to present evidence supporting the need for a continuation of the prospective relief. In doing so, the Second Circuit re-set the effective date of the automatic stay:

> Since the district court here did not allow plaintiffs to make a record with respect to the need for a continuation of prospective relief, we instruct that the 30-day period prior to the commencement of the automatic stay is to be deemed to begin on the day following the issuance of our mandate herein.

172 F.3d at 166. Thus, nearly three years after the filing of the motion to terminate, the Second Circuit re-set the effective date of the automatic stay so that it would not begin until 30 days after the issuance of the mandate. *Benjamin* thus supports our position that a court's authority to modify the effective date of the automatic stay does not expire 30 days after the filing of the motion to terminate.

B. The District Court's Postponement Order Is Fully Consistent With The Supreme Court's Decision in Miller v. French

In attacking the district court's order, Puerto Rico relies heavily (PR Br. 3, 6-7) on the Supreme Court's decision in *Miller* v. *French*, 530 U.S. 327 (2000). In fact, *Miller* provides no support for Puerto Rico's strained interpretation of the statute. *Miller* simply did not address the question presented in this case – whether a 60-day postponement order under 18 U.S.C. 3626(e)(3) is invalid if not issued within 30 days of the filing of the motion to terminate.

The issue in *Miller* was whether district courts retained equitable authority to enjoin the automatic stay *indefinitely*, even beyond the 60-day postponement authorized by 18 U.S.C. 3626(e)(3). The district court in *Miller* had enjoined operation of the automatic stay altogether, rather than simply postponing the stay. See *Miller*, 530 U.S. at 334-335. The Supreme Court held that district courts do not have inherent equitable authority to enjoin operation of the statute's automatic stay provisions, because allowing courts to retain such power "would effectively convert the PLRA's mandatory stay into a discretionary one." *Id.* at 341. In reaching that conclusion, the Supreme Court drew a distinction between enjoining the automatic stay indefinitely (an action inherently at odds with the mandatory nature of the stay) and a 60-day *postponement* of the automatic stay (a delay that is expressly authorized by statute and preserves the mandatory nature of the automatic stay provisions). See *id.* at 340.

The district court's order in the present case does not run afoul of *Miller*. The court here did not enjoin the stay indefinitely or otherwise bypass the limitations imposed by 18 U.S.C. 3626(e)(3). Instead, the district court adhered strictly to the 60-day limit that Section 3626(e)(3) imposes on the length of the postponement. As the district judge emphasized in denying Puerto Rico's motion to reconsider:

> At no time has this Court attempted to circumvent the mandatory stay. * * * Our Order of April 10, 2007 merely set a fixed period of time within the statutory limits established by § 3626(e)(2) & (3), recognizing the mandatory nature of the stay provisions.

App. 96. Under the district court's ruling, the automatic stay will take effect at the end of the 60-day period if the court has not yet decided Puerto Rico's motion to terminate. Thus, in contrast to the district court in *Miller*, the district judge here is adhering to PLRA's automatic stay requirements, not trying to override them.

C. Puerto Rico's Interpretation, If Adopted By This Court, Could Significantly Interfere With The District Court's Ability To Fulfill Its Statutory Duty To Assess Whether Prospective Relief Remains Necessary In This Case

Puerto Rico has revealed that, if this Court upholds its interpretation of the statute, it will rely on the automatic stay to argue that the Monitor has no authority to perform the duties ordered by the district court. Specifically, in its stay pending appeal filed with this Court on April 12, 2007, Puerto Rico stated the following:

> [T]he Court's Monitor, who acts in this case exclusively under authority given by the challenged prospective relief order, has been instructed by the district court to visit institutions and prepare a report

> for the Court on defendants/appellants' motion to terminate prospective relief. If the challenged prospective relief order is currently stayed, as the defendants/appellants believe and argue herein in appeal, the *Court's Monitor has no authority whatsoever to perform any functions, and his acts after the stay commenced are a nullity*.

Defendants Appellants' Urgent Motion Requesting Expedite[d] Resolution Of This Appeal And For Stay Pending Appeal Of Order From Which Appeal Is Undertaken at 2, in *United States* v. *Puerto Rico*, No. 07-1592 (1st Cir.) (emphasis added). Similarly, Puerto Rico has recently invoked the automatic stay to try to limit the United States' access to the Commonwealth's juvenile facilities and records (see Docs. 691-4 at 1 & 691-1 at 4) – access that is critical in order for the United States to prepare for the evidentiary hearing scheduled for May 7, 2007, on the motion to terminate.

It thus appears that, if this Court were to overturn or stay the district court's 60-day postponement order, Puerto Rico plans to use the appellate decision as justification to bar access to the court Monitor and to limit the United States' fact gathering at the Commonwealth's juvenile facilities. By interfering with such fact gathering, Puerto Rico could significantly impede the district court's ability to carry out its statutory responsibilities under the PLRA, which provides that

> [p]rospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the

> Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. 3626(b)(3); see *Laaman*, 238 F.3d at 16. The information provided by the Monitor and the United States obviously will be highly relevant to the district court's determination under Section 3626(b)(3). The risk that Puerto Rico will use the automatic stay as a way to inhibit the district judge's factfinding is an additional reason why this Court should uphold the 60-day postponement of the automatic stay.

D. The Equities Weigh Heavily In Favor Of Upholding The District Court's 60-Day Postponement Order

Puerto Rico has failed to explain what harm it has suffered, or will suffer, as a result of the district court's one-day delay in issuing its postponement order. As previously explained, the Commonwealth has not disputed that the 60-day postponement order would have been valid and enforceable if the court had issued it on April 9, 2007, instead of April 10.

On the other hand, overturning the 60-day postponement order would likely increase the risk of harm to juveniles in the Commonwealth's custody. Since 2003, the Commonwealth's facilities have reported thousands of allegations of abuse against juveniles in their custody, including allegations of "extreme violence against youths by staff and other youths, such as sexual assaults, physical abuse, unjustified use of chemical irritants, punches to the head, infliction of electrical

shocks with cables, and numerous self-inflicted lacerations with razor blades while under preventive supervision by staff." Doc. 554-2 at 2, 6-9. As recently as February 2007, the Monitor reported 12 allegations of juvenile-on-juvenile sexual assaults and six allegations of staff-on-juvenile sexual conduct at the Commonwealth's facilities. US Br. Add. 10-15; Doc. 664-2 at 26-31.

The Commonwealth has failed to diligently investigate allegations of abuse in its facilities. As the district court noted in granting the 60-day postponement, "there has been [a] substantial backlog in the investigation of allegations of abuse against detained juveniles," including "not only delays in the investigation and processing of mistreatment complaints but also of virtual inaction during periods regarding their investigation." PR Br. Add. 6. In light of these deficiencies in the Commonwealth's compliance, freeing Puerto Rico of its obligation under Paragraph 78 of the decree to promptly investigate allegations of abuse will likely compound the serious problem that already exists.

Moreover, until late last year, Puerto Rico allowed employees criminally charged with abuse of juveniles to have contact with youths in its facilities. The fact that Puerto Rico refused to separate juveniles from these criminally charged individuals until ordered to do so by the district court in December 2006 further illustrates that suspending the consent decree is likely to increase the risk of harm that the juveniles already face.

This serious risk of harm to the juveniles, when weighed against the Commonwealth's failure to identify any injury that it will suffer if the decree remains in force until June 6, 2007, weighs heavily in favor of the district court's decision to grant a 60-day postponement. Thus, in addition to being consistent with the statutory language and Supreme Court precedent, the district court's postponement order is strongly supported by the equities in this case.

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction. In the alternative, the Court should affirm the district court's order postponing the automatic stay by 60 days.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12 and contains 6,232 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by Federal Express, overnight delivery, on:

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