No. 10-1758

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

COMMONWEALTH OF PUERTO RICO, *et al.*,

Defendants-Appellees

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

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

In our opening Brief as Appellant, the United States argued that the district court abused its discretion in denying our motion for civil contempt by relying on clearly erroneous findings of fact that the defendants were "reasonably diligent" in attempting to comply with the January 8, 2009, Stipulated Order; failing to make any findings on defendants' degree of noncompliance with the order; and inappropriately relying on defendants' intentions rather than their efforts to excuse noncompliance. In their appellee brief, defendants argue that this appeal is moot;

that it is not ripe for adjudication by this Court; that the United States was obligated to prove defendants had the ability to comply; and that the district court did not abuse its discretion in denying the United States' motion for civil contempt. Each of defendants' arguments is without merit.

1. As we explain in detail below, this appeal is not moot. Contrary to defendants' contention, the automatic stay of the Stipulated Order under the PLRA does not render the district court's contempt decision unreviewable by this Court on mootness grounds. The automatic stay under the PLRA – brought about by the district court's failure to rule upon defendants' motion to terminate or modify the Stipulated Order filed *after* the United States moved for contempt – is by definition a temporary measure. It does not automatically bring defendants into compliance with or void the Stipulated Order. The United States moved the district court to hold defendants in contempt on July 2, 2009, and the district court denied that motion on March 25, 2010. The United States' right to appeal from that adverse decision is in no way affected by the temporary stay brought about in the interim by the PLRA. Defendants' contention that this stay somehow renders this appeal moot makes no sense, and has no legal support whatsoever. See pp. 4-7, *infra*.

2. Nor is this appeal "unripe" because of defendants' unresolved motion to terminate or amend the Stipulated Order. The district court's decision denying the United States' motion for civil contempt was a final decision, and an order denying

contempt is ordinarily appealable. The fact that the district court has not terminated or modified the Stipulated Order does not mean that this appeal is not "ripe" for this Court's review. A ruling on defendants' motion to terminate or modify the Stipulated Order was not a condition precedent to resolution of the United States' motion for contempt. Moreover, there is no hypothetical harm in this case that has not yet ripened into a controversy suitable for judicial review. Rather, this appeal presents concrete legal issues, not abstractions. See pp. 8-10, *infra*.

3. Finally, contrary to defendants' assertions, the district court clearly abused its discretion in refusing to grant the United States' contempt motion, filed after months of absolute noncompliance with the Stipulated Order's clearly delineated hiring goals. Defendants had the burden of showing they were unable to comply, and they cannot meet this heavy burden by pointing to self-imposed austerity measures such as a hiring freeze. Puerto Rico may not sacrifice the safety of its incarcerated youth, compliance with Constitutional requirements, and obedience to a court order to its internal budgetary policies. See pp. 10-20, *infra*.

ARGUMENT

I

THE AUTOMATIC STAY MANDATED BY THE PLRA DOES NOT MOOT THIS APPEAL

Defendants argue (Br. 20-28)[1] that the United States' appeal is moot because Section 3626(e)(2)(A)(ii) of the PLRA provides for an automatic stay of injunctive relief 180 days after defendants' cross-motion to terminate or modify the consent decree.[2] Defendants essentially claim (Br. 22) that the lower court could not properly rule on the contempt motion while the stay was in place, and that this appeal accordingly is moot.

Contrary to defendants' contention, the temporary stay imposed by the PLRA does not render this appeal moot. To be sure, the temporary stay may enable defendants to argue that they may not properly be held in contempt for their

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[1] "Br. _" refers to pages in the defendants' appellee brief. "U.S. Br. _" refers to pages in the United States' brief as appellant. "Doc. _" refers to documents filed in the district court, by docket number. Page numbers used are those assigned in the header added during electronic processing. "J.A. _" refers to pages in the Joint Appendix.

[2] The PLRA provides in relevant part: "Any motion to modify or terminate prospective relief * * * shall operate as a stay during the period * * * beginning on the 180th day after such motion is filed [and] ending on the date the court enters a final order ruling on the motion." See 18 U.S.C. 3626(e)(2).

actions or inactions during the time that the stay is in effect.[3] But that is not what the United States is seeking here. Rather, our position is that the district court abused its discretion in failing to hold the defendants in contempt for their conduct *prior to* the filing of our contempt motion on July 2, 2009. We have not argued – and do not now contend – that defendants should have been held in contempt on the basis of conduct that occurred *after* the date on which the PLRA stay went into effect, *i.e.*, January 31, 2010.[4]

While the PLRA stay temporarily relieves the defendants of their obligation to comply with the Stipulated Order while the stay is in effect, that is all it does. Obviously, it did not prevent the district court from ruling on defendants' motion to terminate or modify the Stipulated Order. After all, under the PLRA, the Stipulated Order is stayed only until "the court enters a final order ruling on the motion." See 18 U.S.C. 3626(e)(2)(B). The district court inexplicably failed to

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[3] Unlike an injunction, a stay is merely "[t]he postponement or halting of a proceeding, judgment, or the like," and thus does not alter the validity of an order that is stayed. Black's Law Dictionary 1548 (9th ed. 2009); see also *Dorelien* v. *Ashcroft*, 317 F.3d 1314, 1321 (11th Cir. 2003) ("[T]he verb 'to stay' is inherently ephemeral."); *Andreiu* v. *Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (en banc) (noting a stay is unlike an injunction because of its temporary nature).

[4] Defendants' actions after the stay went into place are relevant to show they have not purged themselves of contempt.

rule on that motion, which was filed on August 4, 2009. [5] As a result of that failure, the "temporary" stay afforded defendants by the PLRA has remained in effect for nearly 11 months, and presumably will remain in effect at least until this Court enters its decision in this appeal.

Similarly, this stay did not deprive the district court of jurisdiction to adjudicate the United States' long-pending contempt motion. By operation of the PLRA, the Stipulated Order was only stayed, not voided. Nothing in the PLRA relieved the district court of its obligation to adjudicate the United States' contempt motion. The district court never questioned its jurisdiction to rule upon the contempt motion while the PLRA stay was in effect, and the defendants never contended otherwise.

A fortiori, it follows that the PLRA stay does not deprive this Court of jurisdiction over this appeal on mootness grounds. Defendants' argument in essence is that appellate courts lack jurisdiction to resolve issues concerning orders that have been stayed; *i.e.*, that a stay of an order renders that order void for all purposes. There is of course no support for this novel proposition, and federal courts of appeals routinely exercise jurisdiction over orders that have been stayed

[5] On May 5, 2010, defendants moved to terminate five other settlement provisions, including several requiring that they provide an appropriate education for disabled juveniles. Doc. 901. The court has not ruled on this motion either, and those provisions are now stayed.

by district courts, by the courts of appeals themselves, or by operation of law. See 13C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 3533.3.2 (3d ed. 1998) ("Mere temporary abeyance * * * does not moot further review.").

The cases defendants cite in an attempt to establish mootness are inapposite. This case is unlike *Diffenderfer* v. *Goméz-Colón*, 587 F.3d 445, 450 (1st Cir. 2009), in which this Court held an appeal moot after Puerto Rico passed a statute implementing plaintiffs' request; *Overseas Military Sales Corp.* v. *Giralt-Armada*, 503 F.3d 12, 17 (1st Cir. 2007), in which appellant conceded appellee was correct; and *CMM Cable Rep., Inc.* v. *Ocean Coast Properties, Inc.*, 48 F.3d 618, 621 (1st Cir. 1995), in which appellant sought to enjoin an event that had already occurred. Nor is this case comparable to contempt cases in which compliance could no longer be accomplished, as when a grand jury expired, rendering a recalcitrant witness unable to comply with an order to testify. See, *e.g.*, *United States* v. *Harris*, 582 F.3d 512, 519 (3d Cir. 2009) (noting that "termination of the underlying proceeding" mooted contempt), cert. denied, 130 S. Ct. 1749 (2010).

This case presents no comparable circumstances. Accordingly, this Court should reject defendants' contention that this appeal is moot.

II

THE PENDING MOTION TO TERMINATE OR MODIFY THE STIPULATED ORDER DOES NOT RENDER THIS APPEAL UNRIPE FOR THIS COURT'S REVIEW

This Court should likewise reject defendants' argument that it lacks jurisdiction because this appeal is not yet ripe for appellate review (Br. 28-30). According to defendants (Br. 28), the United States' appeal of the contempt finding is not yet ripe because the district court has not yet ruled upon their motion to terminate or modify the Stipulated Order. This argument is frivolous.

Like their mootness argument, defendants' ripeness argument is based upon a misunderstanding of the effect of a stay upon the ability of federal courts to adjudicate matters properly presented to them. See pp. 4-7, *supra*. The pendency of the stay did not prevent the district court from resolving our contempt motion, nor does it prevent this Court from resolving our appeal from the denial of that motion. Contrary to defendants' suggestion, resolution of their motion to terminate or modify the Stipulated Order was not a condition precedent to resolution of the United States' contempt motion.

Again, in this appeal, we are asking the Court to reverse the district court's denial of our motion for contempt, filed on July 2, 2009. We do *not* contend that the actions or inactions of the defendants after the PLRA stay went into effect are a basis for a finding of contempt. What we do contend, however, is that the PLRA

stay did not deprive the district court of jurisdiction to decide our contempt motion, nor does it somehow render this appeal "unripe" for this Court's review. In other words, the fact that the Stipulated Order was stayed on January 31, 2010, does not prevent this Court from holding in this appeal that the district court abused its discretion in finding that the defendants were not in contempt of that order in July 2009.

In fact, this appeal does not present any issue of ripeness at all. The United States filed a motion for contempt, the district court denied that motion, and the United States has appealed.[6] There is no hypothetical injury here that has not ripened into a controversy suitable for judicial review. Rather, this appeal involves "concrete legal issues, presented in [an] actual case[], not abstractions." *United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947), quoting *Electric Bond & Share Co.* v. *Securities & Exch. Comm'n*, 303 U.S. 419, 443 (1938); see also *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (noting "some concrete action" that "harms or threatens to harm" establishes ripeness).

[6] Generally, once a court enters a judgment denying a contempt motion, the order is appealable. *Sanders* v. *Monsanto Co.*, 574 F.2d 198, 199 (5th Cir. 1978); see also *Morales-Feliciano* v. *Parole Bd. of Puerto Rico*, 887 F.2d 1, 3-4 (1st Cir. 1989), cert. denied, 494 U.S. 1046 (1990).

Accordingly, contrary to defendants' contention, this appeal presents an actual controversy suitable for this Court's review at this time. [7]

III

THE DISTRICT COURT ASBUSED ITS DISCRETION IN REFUSING TO GRANT THE UNITED STATES' CONTEMPT MOTION

Defendants do not contend that they have complied with the hiring requirements they agreed to undertake in the Stipulated Order or that they have maintained the staffing ratios those hiring goals were meant to accomplish. Instead, they describe internal administrative hurdles, belatedly attack the validity of the order, claim to be confused by the terms of the order they helped draft, and assert that their minimal efforts (initiated only after the United States filed its contempt motion) are sufficient to preclude a contempt citation. Defendants include extensive descriptions of their own austerity policies as an excuse for blatant noncompliance, as if the court's order required nothing more than that one

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[7] The cases defendants cite are not to the contrary. *Griggs* v. *Provident Consumer Disc. Co*., 459 U.S. 56 (1982) (per curiam), did not involve a contempt decision. Instead, appellant filed a notice of appeal from a judgment while a motion to amend that same judgment was pending. Relying on Rule 4(a)(4) of the Federal Rules of Appellate Procedure, the Court unsurprisingly pointed out that the notice of appeal was "a nullity." *Id*. at 61. And in *Watson* v. *Boyajian*, 403 F.3d 1, 4-5 (1st Cir. 2005), this Court held that, where the bankruptcy court entered an order with a caveat requesting any proposed modifications within ten days, the order was nevertheless final and appealable after the applicable deadline for a notice of appeal had passed.

defendant, Juvenile Institutions Administration, file certain paperwork to request funds within the co-defendant Governor's Administration. "[V]aried efforts to work towards compliance through different venues" other than hiring (Br. 61), however, do not constitute compliance with the Stipulated Order. Fulfillment of hiring goals requires *hiring*, and the court's order required more than just "looking for creative ways * * * to move towards improving its staffing ratios" without actually committing Commonwealth funds towards compliance (Br. 6).[8]

Moreover, defendants' "creative" and "varied" alternatives to compliance have not been as effective as they would have this Court believe.[9] As the United

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[8] Defendants also note that they have closed various facilities through the years, and "[a]ll of the closings and consolidations were implemented as part of the Defendants' plan to achieve compliance with the staff to juvenile ratios set for in ¶ 48." Br. 15 n.8. In actuality, many institutions were closed because of their decrepit and dangerous physical conditions. Doc. 703-2 at 56; Doc. 843 at 8; Doc. 885-2 at 3; Doc. 863 at 8-9, J.A. 476-477. Regardless, the facilities closings do not represent compliance with the Stipulated Order's hiring requirements.

[9] Defendants state that the United States' criticism of their staff transfers to the Ponce Girls institution is "based on outdated information and is not accurate." Br.16 n.9, 60 & n.30. On December 23, 2009 (while the United States' contempt motion was pending), the monitor reported that defendants had stated that officers from the closed Ponce Boys facility would be reassigned to covered facilities, but instead "it appears that many of the officers have been reassigned to Ponce Girls." Doc. 873 at 4. In that same report, the monitor noted that defendants increased the number of officers serving at sites where there were no youths in custody. Doc. 873 at 4; see also U.S. Br. 41. Even if defendants did re-deploy officers after the monitor's December 2009 report, their initial failure to put the officers where they were needed for compliance is significant. Of course, the most important evidence (continued…)

States explained in its brief (U.S. Br. 16-26), boys in Puerto Rico's care continue to endure extremely dangerous conditions. Between the spring of 2008 and the monitor's report for the fall of 2009, the monitor and his staff reported "hundreds of incidents of assault, self-mutilation, and sexual molestation. In each instance, the incidents took place when the Paragraph 48 staffing requirements were not being met." Doc. 873 at 6.[10] The Stipulated Order was designed to bring a speedy end to staffing problems. But since its approval in January 2009, defendants have consistently disregarded their duty to the court and the promises they made in the stipulation.[11]

(...continued)
of defendants' noncompliance is their months-long, absolute failure to hire any staff members towards the monthly hiring goals.

[10] The monitor's reports also tracked widespread problems with supervision of suicidal youths over the years. Defendants accuse the United States of "misrepresent[ation]" for including summaries of this information in its brief, suggesting only actual deaths from suicide are relevant. Br. 8. The United States merely cited monitor's reports of "suicide incidents," "suicidal incidents," suicide "attempt[s]" and similar events, including non-fatal incidents. U.S. Br. 17, 24 (noting four incidents required hospitalization); Doc. 754-2 at 11; Doc. 770-2 at 25 (noting more than a hundred such incidents in 2007); Doc. 851-2 at 63, J.A. 231; Doc. 885 at 36, J.A. 254 (noting more than a hundred incidents in 2009, with 95 requiring ambulatory treatment and six requiring hospitalization). Certainly, the high level of suicide-related events requiring medical treatment (happening on average almost twice a week in 2009) raises significant concerns about youth safety, regardless of whether boys died.

[11] Defendants stipulated that staffing was a problem, that the hiring goals were necessary, and that they were narrowly drawn in accordance with the (continued…)

As the United States argued in its opening brief (U.S. Br. 35-42), the district court failed to make appropriate findings about the defendants' degree of compliance or ability to comply. Contrary to defendants' contention (Br. 58), the record does not show that the district court "could readily have found * * * substantial if not full compliance" with staffing provisions.[12] And even if there were some evidence suggesting substantial compliance, this Court would still need to remand the case to the district court for the entry of appropriate findings. See U.S. Br. 46.

A. The Stipulated Order Was Clear

Defendants argue (Br. 24, 46) that they should be excused from the agreement set forth in the Stipulated Order because it is vague.[13] Defendants'

(...continued)
requirements of the PLRA. Doc. 813 at 2-3, J.A. 166-167. They have repudiated all these statements in short order.

[12] Defendants claim that the district court could reasonably find that their hiring of 138 staff members was "substantial compliance." Br. 55, 57-58, 62. Defendants cite nothing in the record or outside of it to indicate how they arrived at this number. It certainly was not before the district court. At the time the court decided the contempt motion, defendants had hired only 43 new youth services officers. Doc. 892 at 2, J.A. 634; Doc. 896-2 at 1, J.A. 256; U.S. Br. 3.

[13] Contrary to defendants' assertions (Br. 32 & n.14), the United States included the straightforward hiring provision in its opening brief and argued it was explicit. U.S. Br. 31-32. Below, the United States argued that the order was "clear and concise," Doc. 846 at 2, J.A. 195; Doc. 846-2 at 4, J.A. 197, and "clear and unambiguous." Doc. 846-2 at 6, J.A. 204.

claims of misunderstanding are disingenuous, as they did not ask the district court to clarify the ending date; rather, they urged the court to relieve them of any hiring obligations. Nor did defendants convey their alleged confusion before they chose to ignore the Stipulated Order. Indeed, they acknowledged their hiring obligations in requesting that the court terminate the provision, "so that the defendants are no longer obligated * * * to hire fifty new employees every month." Doc. 850 at 25, J.A. 419; U.S. Br. 20-21. Furthermore, defendants helped draft the order they now attack. Their argument that they are confused by language in a document that they participated in drafting rings hollow.

Moreover, even if defendants were uncertain as to how many months they would be required to meet hiring goals, they could be certain that that number was greater than zero. While "uncertainty about the scope and purport of an order should be resolved in favor of a putative contemnor," no reasonable reading of the Stipulated Order would suggest defendants have no duty to meet the hiring goals. See *Project B.A.S.I.C.* v. *Kemp*, 947 F.2d 11, 18 (1st Cir. 1991). Before the United States moved for contempt, defendants hired *no one*. While the motion was pending, they still hired fewer staff members than they were obliged to hire in a single month. Accordingly, defendants cannot reasonably claim any "fair ground of doubt as to the wrongfulness of [their] conduct." Br. 32 (quoting *Stein Indus.* v. *Jarco Indus.*, 33 F. Supp. 2d 163, 170 (E.D.N.Y. 1999)).

B. Defendants Misstate The Burden Of Proof

Contrary to defendants' assertion (Br. 23-24, 32-34), the United States was not required to prove defendants could comply with the obligations they undertook when they agreed to the Stipulated Order. As the United States explained in its opening Brief (U.S. Br. 38-40), an inability to comply is a *defense* to contempt, and the potential contemnor bears the burden of proof.

This Court's decision in *United States* v. *Saccoccia*, 433 F.3d 19 (2005), is not to the contrary. Defendants misconstrue the case by taking this Court's language out of context. Br. 24. *Saccoccia* did not explicitly state who had the burden of proof, as defendants' ability to comply was not at issue in that case. Rather, the Court simply noted that "the proof must establish (1) that the alleged contemnor had notice that he was within the order's ambit; (2) that the order was clear and unambiguous; (3) that the alleged contemnor had the ability to comply; and (4) that the order was indeed violated." *Saccoccia*, 433 F.3d at 27 (internal quotation marks and citations omitted).

In making their argument, defendants also omit controlling, contrary authority from the Supreme Court and this Court. The Supreme Court has explained that "[i]n a civil contempt proceeding * * * of course, a *defendant* may assert a present inability to comply with the order in question," and "in raising this defense, the *defendant* has a burden of production." *United States* v. *Rylander*, 460

U.S. 752, 757 (1983) (emphases added); see also *United States* v. *Bryan*, 339 U.S. 323, 330 (1950) (holding government did not have to show compliance was possible as "one charged with [criminal] contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply."). Accordingly, "an alleged contemner has the burden of showing a current inability to comply with a court order, and * * * must overcome a presumption of ability to comply with a court order." *Hicks* v. *Feiock*, 479 U.S. 1305, 1306 (1986).

This Court made clear in *Fortin* v. *Commissioner of Massachusetts Department of Public Welfare*, 692 F.2d 790, 796 (1982), that "impossibility would be a defense to contempt," and *defendant* "had the burden of proving impossibility." See also *Morales-Feliciano* v. *Parole Bd. of Puerto Rico*, 887 F.2d 1, 5 (1st Cir 1989) (noting *defendant* had not shown inability to comply), cert. denied, 494 U.S. 1046 (1990). Indeed, the burden "is difficult to meet," and "the test of impossibility may be particularly strict" in litigation regarding public welfare. *Fortin*, 692 F.2d at 796-797.

Moreover, it is entirely appropriate that defendants bear this burden, as "the relevant facts are peculiarly within [their] knowledge." *United States* v. *Fleischman*, 339 U.S. 349, 363 (1950) (noting that, even in a case of criminal contempt, defendant bears the burden of explaining noncompliance). *Fleischman*'s

reasoning is fully borne out in this case, as the United States should not be and is not required to review the Commonwealth's budget and indicate which funds it should have allocated for compliance. Rather, the Commonwealth had the burden to show it could not comply – a burden it has plainly failed to meet.

C. Defendants' Own Austerity Measures Do Not Relieve Them Of Responsibility To Comply With Court Orders

In this case, the Commonwealth did not satisfy the "particularly strict" burden to show inability to comply, where it simply chose not to fund compliance. *Fortin*, 692 F.2d at 797. This Court should reject the Commonwealth's argument that "the court cannot expect it to do better" in meeting the self-imposed obligations undertaken through the Stipulated Order. *Morales-Feliciano*, 887 F.2d at 5. Generalized, assorted news clippings about the Commonwealth's overall budget deficit, reports that longstanding Commonwealth employees in other agencies have been fired, and adoption of broad austerity measures do not show that the Commonwealth was incapable of allocating funds for compliance.

Defendants may not plead impossibility where hiring freezes are self-imposed. *Eck* v. *Dodge Chem. Co*., 950 F.2d 798, 803 (1st Cir. 1991). The Governor, one of the defendants in this case, implemented the hiring freezes. Doc. 836-6 at 1-4, J.A. 388-390. Indeed, when defendants agreed to the monthly goals, the Commonwealth was already under a hiring freeze. Doc. 856 at 7, J.A. 427; Doc. 754-2 at 3-4; Doc. 756-2 at 3; Doc. 770-2 at 20; Doc. 786 at 2, J.A. 285; see

also *Colon-Perez* v. *Department of Health of Puerto Rico*, 623 F. Supp. 2d 230, 237 (D.P.R. 2009) (noting hiring freezes). Defendants hardly needed "a fortune teller" (Br. 44) to reasonably predict and plan for continuing budgetary constraints.

Furthermore, the freezes did not bar hiring "required * * * by order of the court"; where "essential to protect the health, safety and well being of citizens"; or "necessary to provide basic need to residents of institutions or facilities of the State." Doc. 836-6 at 2, J.A. 389. Such exemptions – all of which apply to this case – were authorized through the Management and Budget Office, an executive agency under the defendant Governor's control.

This case is therefore unlike those defendants cite as showing proper judicial discretion. In *New York State Association for Retarded Children, Inc.* v. *Carey*, 631 F.2d 162-163 (2d Cir. 1980), for example, the district court ordered the Governor to implement reforms "subject to any legislative approval that may be required." The legislature specifically withheld requested funds by deleting the entire budget item. *Id*. at 163; see also *id*. at 169 (Order on Petition for Rehearing) (noting that the district court may consider newly discovered evidence that the Governor would be able to comply using federal funds).

Nor is this case like *United States* v. *Massachusetts*, 890 F.2d 507, 510 (1st Cir. 1989), in which this Court approved the district court's finding of compliance despite "a slight shortfall" in required staffing. In that case, independent monitors

"perceived no serious problem with staffing." *Id.* at 509. And in *Monarch Life Insurance Co.* v. *Ropes & Gray*, 65 F.3d 973, 977, 984 n.13 (1st Cir. 1995), this Court *affirmed* the lower court's finding of contempt. Citing authority particular to the bankruptcy setting, it also affirmed the bankruptcy court's decision not to impose sanctions for the violation. *Id*. at 984 n.13.

Defendants' minimal compliance in this case compares unfavorably with that achieved in *Langton* v. *Johnston*, 928 F.2d 1206, 1222 (1st Cir. 1991), in which there was "notable progress" and "substantial compliance." This Court also noted that the district court in *Langton* had, throughout that litigation, "demonstrated [its] willingness to impose significant demands on the commonwealth when necessary." *Ibid*. Staffing shortages at the treatment center for sexually dangerous individuals were "beyond the defendants' reasonable control" in *Langton*. *Id*. at 1216, 1222. Unlike defendants here – who point to internal budgetary constraints as the primary difficulty – officials in *Langton* had routinely authorized a large staff, but were unable to recruit enough workers to fill open slots. The Court noted a problematic "staff exodus," and concluded that "the location of the facility, anxiety over its future, and the violent nature of the population served to dissuade many potential applicants from accepting positions there." *Id*. at 1216, 1219.

By sacrificing compliance with the court's order to budgetary goals, defendants have not undertaken "all the reasonable steps within [their] power to insure compliance." Br. 35 n.16 (quoting *Balla* v. *Idaho State Bd. of Corrs.*, 869 F.2d 461, 466 (9th Cir. 1989)). This, the Commonwealth acknowledges, is required to avert a finding of contempt. *Ibid*. On this record, it is clear that defendants have fallen far short of meeting this standard. [14]

[14] Defendants note that, as a general matter, this Court shows greater deference to the trial court's administration of public law litigation than in purely private litigation. Br. 56; see also *Project B.A.S.I.C.*, 947 F.2d at 16. It is also true, however, that this Court is more likely to intervene where, as here, "the consequences of failure to comply [are] quite serious," and where there is an important interest at stake. *Massachusetts Ass'n of Older Americans* v. *Commissioner of Pub. Welfare*, 803 F.2d 35, 39 (1st Cir. 1986); see also *Fortin*, 692 F.2d at 795.

CONCLUSION

This Court should reverse the district court's denial of the United States' motion for contempt, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 4,900 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/April J. Anderson
APRIL J. ANDERSON
Attorney

Date: December 16, 2010

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2010, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/April J. Anderson
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