No. 99-582

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD A. FRENCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 99-582

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD A. FRENCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents contend that review is unwarranted in this case. Respondents acknowledge (Br. in Opp. 7-10), however, that the court of appeals squarely held that the automatic stay provision of the Prison Litigation Reform Act of 1995 (PLRA), 18 U.S.C. 3626(e) (Supp. IV 1998), is unconstitutional. This Court's review is warranted for that reason alone. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

2. Review is also warranted because there is a conflict in the circuits concerning the correct interpretation of the automatic stay provision. The Fifth and Sixth Circuits have held that the automatic stay provision does not divest a district court of authority to suspend

the automatic stay when the party opposing an immediate termination motion can satisfy the traditional standards for obtaining interim equitable relief. *Ruiz* v. *Johnson*, 178 F.3d 385, 395 (5th Cir. 1999); *Hadix* v. *Johnson*, 144 F.3d 925, 937, 945 (6th Cir. 1998). In contrast, the court below held that the automatic stay provision specifies that, after the statutory postponement period ends, a decree "must be set aside at least for a period of time, no matter what the equities, no matter what the urgency of keeping it in place." Pet. App. 19a.

Respondents concede (Br. in Opp. 4-5) that the decision below conflicts with the decisions in *Ruiz* and *Hadix*. In their view, however, the conflict is only theoretical, because the decision below permits prison officials to seek an interim stay of the decree pending resolution of an immediate termination motion.

Under the Fifth and Sixth Circuits' decisions, however, if an immediate termination motion is not resolved within 90 days, the statutory stay automatically goes into effect unless those *opposing* the immediate termination motion can show that the automatic stay should be suspended under traditional equitable standards. That means that, in order to avoid an automatic stay, those opposing the stay must ordinarily show that an automatic stay of the existing remedial order will cause them irreparable injury and that they are likely to defeat the immediate termination motion. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). In contrast, under the decision below, if the immediate termination motion is not resolved within 90 days, the relief contained in a court-ordered decree will remain in effect unless *prison officials* can establish a basis for suspending the existing relief in the decree under traditional equitable standards. In particular, in order to obtain a stay of the decree, prison officials would have to show

that the decree is causing them irreparable injury and that they are likely to prevail on the merits of their termination motion. Even then, a court may deny interim relief if it concludes that other equitable factors justify leaving the decree in effect pending a resolution of the motion. See *Yakus* v. *United States*, 321 U.S. 414, 440 (1944).

Because a party seeking interim equitable relief has the burden of making a threshold showing of irreparable injury and probability of success, and because a court has discretion to deny interim relief even when such a showing is made, the question whether those seeking termination of a decree or those opposing it have the burden of demonstrating that interim equitable relief is warranted can have significant practical consequences. Indeed, it is precisely that difference that is reflected in the automatic stay provision. Absent the enactment of the automatic stay provision, prison officials would have the burden of justifying interim equitable relief. The automatic stay provision effectively shifts the burden to those opposing a termination of relief to establish a basis for interim equitable relief. The conflict between the decision below and the decisions in *Ruiz* and *Hadix* therefore warrants review.

3. Respondents also argue (Br. in Opp. 5-7) that the decision below does not impair the purposes of the automatic stay provision, because the court below stated (Pet. App. 21a) that "district courts must conform their actions to the time limits in § 3626(e)(2) unless compelling reasons for setting them aside can be articulated." That argument is unpersuasive for two reasons.

First, the rule announced by the court below is quite different from the regime that Congress sought to impose. Under the court of appeals' rule, if the district court does not resolve the case within 90 days, the

result is to leave the decree in place at least for the duration of an appeal by state officials, and until the case is resolved if the court articulates a compelling reason for the delay. Under the statute, by contrast, the presumptive result of delay is for the statutory stay to take immediate effect; the decree remains in place only if the court finds traditional equitable grounds for suspending the stay.

Second, even assuming the court of appeals' rule is identical in substance to the rule Congress sought to impose, the court below failed to provide any rationale for its holding that a court must comply with the statutory time limit unless it has a compelling reason for setting it aside. If an Act of Congress is constitutional, a court must comply with its terms, regardless of how strong the court's reasons are for setting them aside. If, on the other hand, a statute is unconstitutional, a court would not need any reason, much less a compelling reason, for failing to comply with its mandate. The court of appeals therefore had no authority to declare the automatic stay provision unconstitutional, and then direct lower courts to follow its mandate unless they have compelling reasons for setting it aside. See *Reno* v. *ACLU*, 521 U.S. 844, 882-884 (1997) (after declaring a statute unconstitutional, a court may leave intact textually severable provisions and may impose a limiting construction when the statute is readily susceptible to such a construction, but it may not rewrite the law to conform to constitutional requirements).

4. Finally, respondents contend (Br. in Opp. 7-10) that the court of appeals correctly held that, if the automatic stay provision strips federal courts of authority to issue interim equitable relief, it is unconstitutional. The cases cited by petitioner demonstrate that, if the

statute were interpreted to foreclose a court from suspending the automatic stay under traditional equitable standards, it would raise a serious constitutional question. But that is simply another reason that the court of appeals should have interpreted the statute not to foreclose a court from issuing such interim relief. The court of appeals' failure to interpret the statute in a way that would have avoided a serious constitutional question warrants this Court's review.

* * * * *

For the reasons discussed above as well as those set forth in our petition, the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1999