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**Testimony of Caroline Fredrickson, Director of the American
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Project
For the House Judiciary Subcommittee on Crime, Terrorism,
and Homeland Security
Regarding the Prison Abuse Remedies Act of 2007 (H.R. 4109)
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The ACLU and its National Prison Project welcome this opportunity to present to the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security our position on the Prison Abuse Remedies Act of 2007 (H.R. 4109) and to urge the Subcommittee to support this long overdue fix of the Prison Litigation Reform Act of 1995 (PLRA).

Introduction

The American Civil Liberties Union is a nationwide, non-partisan organization with more than 500,000 members, dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. Consistent with that mission, the ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of prisoners. The National Prison Project (NPP) is the only program in the United States that litigates conditions of confinement cases on a national basis; at any given time we have cases pending in twenty to twenty-five states.

The NPP has over 36 years of experience advocating for humane conditions in America's prisons. We know that prisons by their nature present an ever-present threat of abuse because prison officials—of necessity—are given enormous power over the lives and well-being of their charges. In order to prevent abuse of that power, prisons need effective forms of oversight to ensure that public officials cannot violate their legal obligations with impunity. In our nation, the federal courts have traditionally provided this necessary oversight because they ensure that no matter how disfavored and disenfranchised the individual, he or she has the opportunity to seek vindication of his or her rights in the courtroom. Indeed, through the implementation of oversight by the federal courts in the 1970's and 1980's, the country's prisons were transformed—from dungeons that betrayed American ideals of innate human dignity—to modern, correctional institutions.¹

This progress took many years to achieve, and it requires constant vigilance to maintain. Nonetheless, by the mid-1990s some began to argue that prison litigation had become as much a problem as a solution, by producing too many frivolous lawsuits that took up the time of the courts and correctional officials. Congress responded to these concerns by passing the Prison Litigation Reform Act of 1995 as part of an appropriations bill and the PLRA became law on April 26, 1996.²

In passing PLRA, however, it was never the intention of Congress to prevent the federal courts from addressing the serious constitutional violations and assaults on human dignity that were prevalent in America's prisons before the courts began to ensure that rule of law prevailed in those institutions. Indeed, both the House and Senate sponsors of the bills that became the PLRA noted that the Act was not intended to interfere with meritorious conditions of confinement cases. Indeed, a sponsor of the law, Representative Charles T. Canady (R-Florida), stated that the PLRA's provisions "will not impede meritorious claims by inmates but will greatly discourage claims that are without merit."³

¹ See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1979); *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980); *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977).

² Pub. L. 104-134 (Apr. 26, 1996).

³ 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995).

Now that we have over eleven years of experience with the effects of the PLRA, it is apparent that the Act has been quite effective in reducing the burden of frivolous prisoner litigation. The year before PLRA was enacted, prisoners and jail detainees filed federal cases at a rate of 26 per thousand prisoners; a decade later, the rate had decreased to eleven per thousand.⁴

At the same time, however, PLRA has had a disastrous effect on the ability of prisoners, particularly prisoners without access to counsel, to have their non-frivolous cases adjudicated on the merits. Certain provisions of the PLRA have kept countless serious prisoner claims from reaching the courts, including claims of brutal physical and sexual abuse; gross mistreatment of incarcerated children; disgusting and inhumane conditions; and deadly refusals to provide medical and mental health treatment. The Prison Abuse Remedies Act (PARA) addresses these unintended consequences of the PLRA by amending the Act to restore prisoners' ability to challenge conditions of confinement that violate their constitutional rights while preserving the provisions that effectively weed out frivolous lawsuits.

The Prison Abuse Remedies Act (PARA)

PARA presents a thoughtful response to a very complex problem. It carefully balances the need to allow courts to exercise their role in protecting the constitutional rights of prisoners with the need to reduce the burden of frivolous lawsuits. PARA thus leaves the core of the PLRA intact. This core is the PLRA's Preliminary Screening Requirement. Under this requirement, courts are required to summarily dismiss *all* prisoner cases that are frivolous, malicious, fail to state a legal claim on which relief can be granted, or that seek damages from a defendant who is immune from them. These claims are dismissed without service of process on the defendants and without requiring prison officials or their attorneys to respond.⁵

The Preliminary Screening Requirement is the successful provision of the PLRA that achieves the stated ends of the law. Other provisions of the PLRA, however, have gone too far and these are the provisions that the PARA addresses.

The NPP supports PARA in its entirety. Below we discuss the pertinent sections of PARA, why they are needed to correct the excesses of the PLRA, and how each provision improves oversight and accountability in our nation's prisons.

Section 2 - Showing of Physical Injury Not Mandatory for Claims (42 U.S.C. § 1997e(e); 28 U.S.C. § 1346(b)(2))

The PLRA Problems: The "physical injury" requirements of PLRA set forth in 42 U.S.C. § 1997e(e) and 28 U.S.C. § 1346(b)(2) epitomize the unintended consequences of some provisions of the law. These provisions require that, in order to sue for compensatory damages in a civil rights case in federal court, prisoner must demonstrate a physical injury before he or she can win

⁴ U.S. Dep't of Justice Office of Justice Programs Bureau of Justice Statistics, http://www.uscourts.gov/judicial_business/c2_asep97.pdf; Margo Schlanger & Giovanna Shay, American Const. Soc'y, *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act 2* (2007), available at <http://www/acslaw.org/files/Shlanger%20Shay%20PLRA%20Paper%203-28-07.pdf>.

⁵ 28 U.S.C. 1915(e)(2); 28 U.S.C. 1915A; 42 U.S.C. 1997e(c)(1).

damages for mental or emotional injuries.⁶ Many of the unintended consequences flow from the fact that most federal courts have applied this provision to bar damages claims involving all constitutional violations that intrinsically do not involve a physical injury.⁷

Under the PLRA, federal courts bar prisoners from seeking recompense in cases where important constitutional rights are implicated. The following are a few examples of cases in which prisoners are denied relief because they have no “physical injury”:

- Actions challenging the denial of prisoners’ religious rights guaranteed by the Constitution and protected by Congress in the Religious Land Use and Institutionalized Persons Act;⁸
- An action challenging sexual assault including forcible sodomy in the absence of other physical injury;⁹
- Cases challenging a prisoner’s false arrest and illegal detention;¹⁰
- A case where prison officials failed to protect a prisoner from repeated beatings that resulted in cuts and bruises.¹¹
- An action challenging placement in filthy cells and exposure to the deranged behavior of psychiatric patients;¹²
- A challenge to a prison official’s deliberately causing a prisoner to experience pain and depression by denying him psychiatric medications;¹³ and
- A case of deliberate, unauthorized disclosure of a prisoner’s HIV-positive status.¹⁴

The cases represent serious unconstitutional conditions, but PLRA leaves the courts with few options to remedy such violations.

The PARA Fix: The PLRA’s “physical injury” requirement serves no useful function because the Preliminary Screening Requirement of the law already disposes of truly frivolous cases. Instead, this provision of PLRA merely interferes with the ability of prisoners who have suffered

⁶ Some courts have held that the “physical injury” requirement bars compensatory damages but not nominal or punitive damages. *See, e.g., Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). *But see Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

⁷ *See, e.g., Royal v. Kautzky*, 375 F.3d 720 (8th Cir. 2004) (damages are not available based on retaliation for exercise of First Amendment rights); *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002) (violation of due process rights); *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001) (no damages for violation of religious rights); *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (damages are not available for violation of religious rights); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) (damages are not available for violation of privacy rights). *But see Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999) (damages are available for violation of First Amendment rights if prisoner is not seeking compensation for mental or emotional injury); *Cannell v. Lightner*, 143 F.3d 1210 (9th Cir. 1997) (allowing damages for violations of religious rights).

⁸ 42 U.S.C. § 2000cc-(1)-(2) (2007). For examples of cases denying compensatory damages for violations of religious rights, *see Searles, supra note 7; Allah, supra note 7. But see Cannell, supra note 7.*

⁹ *See Hancock v. Payne*, 2006 WL 21751 at *1, 3 (S.D. Miss. Jan. 4, 2006) (complaints that officers forcibly sodomized prisoners barred by provision); *Smith v. Shady*, 2006 WL 314514 at *2 (M.D. Pa. Feb. 3, 2006) (complaint that correctional officer grabbed penis barred by provision).

¹⁰ *Young v. Knight*, 113 F.3d 1248, 1997 WL 297692 (10th Cir. June 5, 1997); *see also Colby v. Sarpy Co.*, 2006 WL 519396 (D. Neb. Mar. 1, 2006) (dismissal of a claim of wrongful confinement for four months).

¹¹ *Luong v. Hatt*, 979 F. Supp. 481 (N.D. Tex. 1997).

¹² *Harper v. Showers*, 174 F.3d 716 (5th Cir. 1999).

¹³ *Weatherspoon v. Valdez*, 2005 WL 1201118 (N.D. Tex. May 17, 2005).

¹⁴ *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998).

real violations to be made whole under our legal system. PARA addresses these inequities created under the PLRA by eliminating the mandatory physical injury requirement for seeking compensatory damages set forth in 42 U.S.C. § 1997e(e) and 28 U.S.C. § 1346(b)(2). Thus, a prisoner with a meritorious constitutional claim will be able to seek compensatory damages for the violation of his or her rights – just like any other civil rights plaintiff.

Section 3 – Staying of Non-frivolous Civil Actions to Permit Resolution through Administrative Processes (42 U.S.C. § 1997e(a))

The PLRA Problems: The PLRA requires courts to dismiss a prisoner’s case if he or she has not satisfied all internal complaint procedures at his facility prior to filing suit. 42 U.S.C. § 1997e(a). On the face of it, this is a sound idea. We want to encourage correctional facilities to manage problems and improve conditions without court intervention. Unfortunately, in practice, this provision of PLRA has done the most damage to the ability of prisoners to present meritorious constitutional claims.¹⁵

This is true for a number of reasons. First, there is the reality of prisoner demographics. Prisoners, as a general matter, have very low rates of literacy and education.¹⁶ Moreover, the number of severely mentally ill and cognitively impaired persons in prison is staggering. According to the most recent report by the U.S. Department of Justice, Bureau of Justice Statistics, 56% of State prisoners, 45% of Federal prisoners, and 64% of jail prisoners in the United States suffer from mental illness.¹⁷ And experts estimate that people with mental retardation may constitute as much as 10 percent of the prison population.¹⁸ As a result, the PLRA’s exhaustion requirement has proven to be a trap for the unschooled and the disabled.

Second, there is the reality of how prison internal complaint procedures or grievance systems often operate. Deadlines are very short in many grievance systems, almost always a month or less, and not infrequently five days or less.¹⁹ Nonetheless, these deadlines, many measured in hours or days rather than weeks or months, operate as statutes of limitations for federal civil rights claims. Moreover, a typical system does not have just one deadline that could lead to forfeiture of

¹⁵ See Giovanna E. Shay & Joanna Kalb, *More Stories of Jurisdiction Stripping and Executive Power: The Supreme Court’s Recent Prison Litigation Reform Act (PLRA)*, 29 Cardozo Law Review 291, 321 (2007) (reporting that in a study of cases in which an exhaustion issue was raised after the Supreme Court decision in *Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378 (2006), all claims survived exhaustion in fewer than 15% of reported cases).

¹⁶ The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17-19 (2003), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102>.

¹⁷ James, Doris J. & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics Special Report 1, Department of Justice, Bureau of Justice Statistics, December 14, 2006.

¹⁸ Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at www.thearc.org/faqs/crimqa.html.

¹⁹ See *Woodford v. Ngo*, *supra* note 15 at 2402 (Stevens, J., dissenting) (noting that most grievance systems have deadlines of 15 days or less, and that the grievance systems of nine states have deadlines of between two to five days).

a claim; it may have three or more such deadlines as prisoners must appeal to various levels of a grievance system.²⁰

Other technical obstacles arise all the time that lead to prisoners being denied their right to sue. The rules may require that grievances be submitted only on approved forms, and the forms may not be available.²¹ The forms may be available, but only from the staff member who is responsible for the action the prisoner wishes to challenge.²² Many grievance system rules give administrators discretion not to process grievances if the prisoner has filed too many; some systems also require that only one subject be raised on each grievance submitted.²³ Further, it is a routine practice for grievances not to be given responses by staff in a timely manner, whether or not the system rules indicate a deadline for staff responses. There may be ambiguity about what issues are grievable, or a difference between what the rules say and actual practice by administrators. Even a highly educated prisoner, or the rare prisoner with access to legal advice, will be unsure how to proceed when there is no literal way to comply with the rules in circumstances like these.²⁴ For illiterate, mentally ill, or cognitively challenged prisoners, these convoluted administrative systems are virtually impossible to navigate. Thus, constitutional claims for many of the most vulnerable are lost irrevocably under PLRA because of technical misunderstandings rather than lack of legal merit.

Another problem with the current exhaustion requirement of PLRA is the insurmountable obstacle it creates for the prisoner with a meritorious claim who needs immediate injunctive relief.²⁵ As currently written, PLRA requires that a prisoner go through all the levels of the grievance system until the system provides a final decision, even though a particular system may require three to six months to fully exhaust. In such cases, the PLRA exhaustion requirement completely prevents litigation of the claim for relief.

Third, there is a well-established practice of threatening and retaliating against prisoners who file grievances. Under some grievance regimes, prisoners are even forced to obtain grievance forms from or file their grievances with the very same persons who have abused them or violated their

²⁰ Appendix A of this testimony provides a typical grievance form used in the Maryland Department of Correction along with the detailed “Steps for Filing Grievances” handout that the ACLU of Maryland developed to try to help prisoners understand the actual procedural steps involved in completing the grievance process.

²¹ See, e.g., *Spaulding v. Oakland Co. Jail Medical Staff*, 2007 WL 2336216 at *2 (E.D. Mich. Aug. 15, 2007) (lawsuit dismissed despite prisoner’s claim that he was unable to obtain required grievance form).

²² See, e.g., *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001) (prisoner failed to exhaust because grievance system refused to consider grievance submitted on wrong form).

²³ See, e.g., *Harper v. Laufenberg*, 2005 WL 79009 at *3 (W.D. Wis. Jan. 6, 2005) (prisoner failed to exhaust because grievance system refused to consider grievance that it considered to raise two complaints rather than one).

²⁴ These are all problems that staff at the National Prison Project encounter routinely as we attempt to advise prisoners on how to avoid losing their rights to sue.

²⁵ See, e.g., *Williams v. CDCR*, 2007 WL 2384510 at *4 (E.D. Cal., Aug. 17, 2007) (claim of suffering from food poisoning); *Ford v. Smith*, 2007 WL 1192298 at *2 (E.D. Tex., Apr. 23, 2007) (claim of threat to personal safety); *Aburomi v. United States*, 2006 WL 2990362 at *1 (D.N.J., Oct. 17, 2006) (claim of cancer recurrence needing immediate treatment).

rights in some way. Many prisoners are simply too afraid to file grievances for fear of the consequences—and with good reason.²⁶

Further, too often, there is an inverse relationship between the responsiveness of the grievance system and the importance of the issue. Even if routine complaints are handled reasonably well, grievances that implicate misconduct or abuse by prison staff, such as complaints about serious injuries, are the most likely to be subject to a strict interpretation of the system's rules or to simply disappear. Because of the likelihood that a decision that the prisoner failed to exhaust according to the grievance system's technical rules will immunize the potential defendants from both damages and injunctive relief,²⁷ the PLRA establishes an incentive for prison officials to use their grievance systems as a shield against accountability, rather than an effective management tool.

The PARA Fix: Section 3 of PARA strikes the balance between promoting effective internal prison management and preserving important prisoner rights. PARA amends the PLRA's exhaustion provision set forth in 42 U.S.C. § 1997e(a) by allowing the court to stay a case for 90 days if a prisoner has failed to present his claim for administrative review before filing a federal suit. During those 90 days, prison officials are allowed to consider the complaint and resolve it before the litigation proceeds. PARA thereby ensures that correctional agencies are afforded a real opportunity to review a prisoner's complaint before a federal court hears it. This legislative fix provides an incentive for correctional agencies to solve problems while at the same time not allowing prisoners the opportunity to bypass internal review of their complaints. PARA accomplishes these important goals, but unlike the PLRA, it does so without undermining meritorious civil rights claims.

Recognizing the realities of prisoner's lives and correctional management, PARA also reverses the overly technical interpretations of the PLRA exhaustion requirement that courts have added since the law's enactment. Instead of requiring strict technical compliance with complicated grievance procedures, PARA re-establishes the spirit of administrative exhaustion by requiring a "reasonable notice" standard for prisoner complaints. PARA requires that prior to filing suit a prisoner must give prison officials within the facility in which his or her claim arose, reasonable notice of that claim. And the prisoner must comply with this provision within the generally applicable limitations period for filing suit.

Section 4 – Exemption of Juveniles from the Prison Litigation Reform Act (18 U.S.C. § 3626; 42 U.S.C. § 1997e; 28 U.S.C. § 1915; 28 U.S.C. § 1915A)

The PLRA Problem: The stated purpose of the PLRA has always been to reduce frivolous prisoner litigation. And as we noted above, it has accomplished this goal, but it has also gone too far. The inclusion of child prisoners under the PLRA is perhaps the most glaring example of this

²⁶ See, e.g., *Pearson v. Welborn*, 471 F.3d 732, 745 (7th Cir. 2006) (affirming jury verdict that prisoner was sent to a "supermax" facility for a year in retaliation for First Amendment-protected complaints about conditions); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), cert. denied, 535 U.S. 1095 (2002).

²⁷ See *Woodford*, *supra* note 15 (prisoner who has not complied with rules of the grievance system has failed to exhaust, so lawsuit must be dismissed).

problem. Incarcerated youth do not file lawsuits—frivolous or otherwise. They simply were never part of the problem the PLRA was designed to address.

At the same time, youth are especially vulnerable to abuse in institutions, and so the need for court oversight if abuse occurs is particularly important. The recent revelation of widespread sexual abuse within the Texas juvenile system, in which boys and girls were sexually and physically abused by staff, and faced retaliation, including being thrown into an isolation cell in shackles if they complained, is just one example of the potential for child abuse in unmonitored correctional institutions.²⁸ Unfortunately the Texas scandal is not an isolated event; staff sexual and physical abuse and harassment of youth in custody has been an issue from New York to Hawaii.²⁹ Because youth in custody are uniquely at risk for abuse and because confined youth have never been a source of frivolous litigation, none of the restrictions in PLRA should apply to these youth.

The PARA Fix: PARA provides the greater protections that incarcerated youth need. Recognizing their special vulnerabilities and the fact that they were never part of the problem the PLRA sought to fix, Section 4 of PARA revises the definition of prisoner in all the various sections of the PLRA so that the law is no longer applicable to incarcerated kids who are under 18 years of age.

Section 5 – Modification of Ban on Multiple *In Forma Pauperis* Claims (28 U.S.C. § 1915(g))

The PLRA Problem: Under the PLRA, a prisoner who has three complaints or appeals dismissed as frivolous or malicious, or for failure to state a claim, is forever barred from filing a claim or an appeal if he or she cannot pay the full filing fee up-front—regardless of indigent status.³⁰ Since few prisoners have the \$350 filing fee at their disposal, this provision creates a lifetime ban from the federal courts in most circumstances.

While no one wants to encourage the filing of frivolous actions, the penalties should not be so severe as to bar claims such as racial discrimination, sexual abuse, and religious discrimination because the prisoner made three mistakes in filing a case. First, it is particularly difficult for prisoners to know if a complaint is frivolous or does not state a claim because they currently have few sources of accurate legal advice or information. Only 1% of all prisoner cases even involve

²⁸ See Gregg Jones, et al., *TYC Facilities Ruled by Fear*, Dallas Morning News, March 18, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnes/stories/031807dnprotycretalii>.

²⁹ See, e.g., Stop Prisoner Rape, *The Sexual Abuse of Female Inmates in Ohio* (Dec. 2003), available at <http://www.spr.org/pdf/sexabuseohio.pdf> (including discussion of sexual assaults by staff in juvenile wing of facility); American Civil Liberties Union of Hawai'i, "Hawai'i Youth Correctional Facility to Pay Over Half a Million Dollars for 'Relentless Campaign of Harassment' of Gay and Transgender Youth" (June 15, 2006) (threats of violence and physical and sexual assault), available at <http://www.acluhawaii.org/news.php?id=24>; Letter from Deval Patrick, Civil Rights Division of U.S. Department of Justice to Louisiana Governor Mike Foster, July 15, 2006, available at <http://www.usdoj.gov/crt/split/documents/lajuvfind3.htm> (describing physical and sexual assaults on youth held in secure juvenile facilities in Louisiana); American Civil Liberties Union & Human Rights Watch, *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls* 44-56, 63-71 (2006).

³⁰ The PLRA provides a limited exception to this rule if prisoner is experiencing an "imminent danger of serious physical injury." See 28 U.S.C. § 1915(g) (2007).

private attorneys.³¹ And since the Supreme Court’s 1996 decision in *Lewis v. Casey* substantially cut back on the scope of the constitutional right of prisoners to assistance in filing complaints, many correctional systems have discarded their law books and shut down programs to assist prisoners in filing meaningful legal papers.³²

Further, it is frequently not easy for anyone to determine whether a particular complaint is frivolous or fails to state a claim—even trained professionals. Courts routinely dismiss cases for “failure to state a claim” even where licensed attorneys are handling the cases. Moreover, courts themselves frequently disagree over the legal standards for “failure to state a claim” and such disputes often reach up to the Supreme Court. Given that attorneys and judges are not held to an absolute understanding of what exactly constitutes “failure to state a claim” under the law, it makes little sense to impose such a severe and incomprehensible standard on unrepresented, often barely literate prisoners.

The PARA Fix: Section 5 of PARA preserves the purpose of the PLRA to discourage frivolous litigation while ending the draconian application of the lifetime ban on a prisoner’s qualification for indigent status. First, PARA limits the scope of the provision from all suits ever filed in a prisoner’s lifetime to “the preceding five years.” This provision prevents so-called “frequent flyers” from abusing the indigency provisions while placing a reasonable limit on the law’s application.

PARA also recognizes that the goals of reducing frivolous litigation can be satisfied by limiting the application of this provision to prisoners who file malicious lawsuits, rather than the broader category of prisoners who make legal mistakes or simply do not understand what claims may be redressed under the law. It should be noted that PARA’s fix to the PLRA does not prevent federal courts from applying appropriate sanctions on an individual basis to prisoners who are found to abuse the indigency provisions.³³

Section 6 – Judicial Discretion in Crafting Prison Abuse Remedies (18 U.S.C. § 3626)

The PLRA Problems: PLRA contains a number of restrictions on the powers of federal courts to issue effective relief in prison conditions litigation. Together and separately, these various restrictions work to make it more difficult to eliminate dangerous and degrading conditions in our nation’s prisons.

Unnecessary Interference with Injunctive Standards: PLRA provides a set of standards that are supposed to limit the power of federal courts to issue injunctions in prison conditions cases. This language originally led to confusion in the courts because it reiterates the Article III justiciability requirement that a court find a violation of individual prisoners’ rights in order to enter relief. These provisions, however, simply reflect the standards for injunctive relief previously developed

³¹ *Johnson v. Daley*, 339 F.3d 582, 601 (7th Cir. 2003) (Diamond Rovner, J., dissenting) (internal citations omitted).

³² *Lewis v. Casey*, 518 U.S. 343 (1996).

³³ See, e.g., *Olivares v. Marshall*, 59 F.3d 109 (9th Cir. 1995) (in a case pre-dating PLRA, holding that the district judge was entitled to impose partial filing fee on indigent prisoner who appeared to be manipulating indigency status).

in the federal courts and so they do not by themselves change the law applicable to injunctive relief in prison cases.³⁴

Interference with Emergency Judicial Relief: PLRA limits all preliminary injunctions in conditions of confinement cases to 90 days.³⁵ As a result, even if a court finds that prisoners face an imminent threat of physical harm, its preliminary injunction may expire before the court can hold a full trial and decide whether final injunctive relief is warranted.

Promotion of Frequent Mini Trials and Termination of Relief: Some of the greatest harm from the PLRA restrictions on the powers of federal courts comes from the provisions that allow prison officials to repeatedly challenge injunctions, and the provisions that require the complete termination of injunctions if the court fails to find a constitutional violation at the time of retrial. Under PLRA, the court is required to retry, at the defendants' request, any award of injunctive relief two years after the relief was first granted, and every single year thereafter. In addition, the court must terminate injunctive relief unless there is a "current and ongoing" constitutional violation. In other words, the only injunction that a federal court is authorized to continue after such a retrial is an injunction that has not worked to eliminate the constitutional violation. If the injunction has worked, but the constitutional violation is **highly likely** to return in the absence of the injunction, that injunction must nonetheless terminate. This limitation on the power of the courts to prevent constitutional violations applies even if the defendants intend to begin violating the law just as soon as the injunction is lifted. In fact, even where defendants have announced their intention to begin violating the Constitution once court review is suspended, courts must still terminate injunctive relief under PLRA!³⁶

Prevention of Settlement: Another unjustified limit on the powers of the federal courts is the provision of PLRA that bars public officials from entering into consent decrees unless they admit a violation of law.³⁷ This PLRA provision undermines our system of settlement in the federal courts because it eliminates the advantages of settling meritorious cases. For example, PLRA leaves officials with the choice of engaging in expensive and time-consuming litigation that they expect to lose because they know conditions are dangerous and disgusting or admitting to liability that is likely to haunt them in any damages actions growing out of the conditions. Given these options, political reality often forces officials to engage in litigation where they would otherwise settle if PLRA did not interfere. As a result, instead of reducing the burden of prison litigation, PLRA often adds to that burden because it prevents settlement of meritorious cases.

³⁴ See *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000) (except for the limitations on consent decrees, the prospective relief provisions of PLRA reflect "essentially the same" limits on federal injunction as does the general law because no injunction should require more than is necessary to correct the underlying constitutional violation); *Smith v. Ark. Dep't of Correction*, 103 F.3d 637, 647 (8th Cir. 1996) (PLRA merely codifies existing law and does not change the standards for whether to issue an injunction).

³⁵ 18 U.S.C. § 3626(a)(2) (2007).

³⁶ See *Para-Profl Law Clinic at SCI-Graterford v. Beard*, 334 F.3d 301, 304 n.1, 306 (3d Cir. 2003) (PLRA requires termination of injunctive relief even though defendants have announced plans that are likely to lead to a return of the constitutional violation); see also *Castillo v. Cameron County*, 238 F.3d 339, 353 (5th Cir. 2001); *Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000).

³⁷ 18 U.S.C. § 3626(c) (2007) prohibits federal courts from approving consent decrees that omit findings that the relief is necessary to correct a violation of the Constitution or other federal law by subjecting consent decrees to the same jurisdictional limits that apply to contested orders pursuant to 18 U.S.C. § 3626(a) (2007).

Automatic Stay of Judge-Ordered Relief: The PLRA’s automatic stay provision requires that if a party merely files a motion to terminate or modify an existing injunction, the court must suspend the relief within 30 days until the motion is ruled upon.³⁸ This means that, if the court is unable to reach a final decision on whether the defendants are still violating the Constitution because of the complexity of the issues or congestion in the court’s docket, the injunction is suspended and the adjudicated constitutional violations may resume.³⁹ This provision of the PLRA deprives plaintiffs of previously ordered relief. Further, because the stay provision is automatic and mandatory, it gives some defendants a perverse incentive to file repeated motions to terminate prospective relief before the relief has actually accomplished the results originally ordered by the court.

The PARA Fixes: Although PLRA alters the playing field for prison reform cases in a multitude of ways, PARA does not seek to alter the vast majority of the PLRA’s prospective relief provisions under 42 U.S.C. § 3626. Instead, it seeks to restore the most fundamental judicial powers of the federal courts to enter orders remedying prison conditions that violate the law. It accomplishes this task by providing narrowly tailored fixes to the most harmful provisions and by removing unnecessary and confusing language in the law.

Elimination of Unnecessary Interference with Injunctive Standards: PARA eliminates the confusing language of Section 3626(a)(1)(A), (B) and (b)(2)-(3). As mentioned above, this language has been considered unnecessary by the courts and should therefore be stricken. Striking Section 3626(a)(1)(A) also frees the courts to allow settlement of cases between litigants more readily because it removes the requirement that courts have to find a violation of a federal right in order to approve a settlement. In order to effectuate this discretion in the law, PARA also strikes paragraphs (b)(2) and (b)(3) of Section 3626. PARA’s revisions of Section 3626 do not, however, undermine the requirement that any proposed relief by the court be narrowly drawn and minimally intrusive.

Restoration of the Courts’ Discretion to Issue Necessary Emergency Judicial Relief: Under PLRA prisoners can be denied the protections all other persons receive under our laws because the courts simply run out of time. Recognizing this problem, PARA restores the ability of the courts to issue emergency relief for longer than 90 days, if such relief is necessary, by striking the final sentence of Section 3626(a)(2).

Rationalization of the PLRA’s Termination Provisions: The PLRA created an alternate framework for the monitoring of injunctive relief. PARA seeks to rationalize this framework so that it operates to lessen the burden on courts and equalize the burden on defendants and plaintiffs. In Section 3626(b)(1)(A), PARA adds language to clarify that termination of prospective relief requires the party moving for termination to prove: (1) that the violation of the federal right that is the subject of the prospective relief has been eliminated; and (2) that the violation of the right is “reasonably unlikely” to recur. This change reflects the need to hold rights violators accountable for curing their present violations and to ensure that violators know they are also responsible for ensuring that violations do not occur in the future.

³⁸ 18 U.S.C. § 3626(e)(2) (2007). If good cause is shown, the court can extend the automatic stay of relief to 90 days. 18 U.S.C. § 3626(e)(3) (2007).

³⁹ 18 U.S.C. § 3626(e) (2007).

PARA also changes—but does not eliminate—the automatic termination provisions of PLRA. In Section 3626(b)(1)(B), PARA gives discretion to the federal court to extend the time limits for termination of prospective relief on a case-by-case basis. In order to extend these time limits, however, the court must find at the time of granting or approving relief that correcting the violation will take longer than the time periods laid out in PLRA. This discretion is especially important because many cases obviously are far too complicated to resolve in one or two years and the PLRA’s imposition of the automatic termination provisions unnecessarily burdens the courts with frequent re-litigation of known violations. PARA recognizes that judges themselves are most frequently in the best position to determine the time needed to cure violations and for the relief ordered to have its effect.

Removing Barriers to Settlement: PARA affirms the importance of settlement in our judicial system and recognizes that when cases have merit, the goal should be for all parties to come to a mutually agreeable settlement. Because PLRA prevents this goal by forcing defendants to admit the violation of a federal right before a settlement can be approved, PARA eliminates this provision of the law by striking both Section 3626 (a)(1)(A) and (c)(1).

Elimination of Automatic Stay of Relief: PARA recognizes that court-ordered relief should not be suspended automatically just because one party in a lawsuit files a motion to terminate or modify relief. Courts order injunctive relief after much deliberation and this relief should not be suspended without the benefit of equally serious deliberation. Given the realities of court dockets and the complex nature of prisoner cases, even 90 days is often insufficient time for courts to rule on such motions. PARA therefore removes Sections 3626(e)(2)-(e)(4) from PLRA so that courts and prevailing parties are no longer burdened by the automatic stay provision. At the same time, PARA does not interfere with the PLRA’s requirement that judges rule on such motions in a timely manner.⁴⁰

Section 7 – Restore Attorneys Fees for Prison Litigation Reform Act Claims (42 U.S.C. § 1997e(d))

The PLRA Problem: Under current law, civil rights plaintiffs who prove their cases are generally entitled to recover reasonable attorneys’ fees. This rule, created by Congress in 42 U.S.C. § 1988, grew out of the recognition that many victims of civil rights violations would never be able to obtain legal representation without a fee-shifting provision, and therefore serious civil rights abuses would go unchecked. As a result, Section 1988 provides payment of a reasonable fee to prevailing parties in civil rights litigation. Under Section 1988 fees are not possible for a frivolous case. In fact, sanctions may be imposed by the court for such litigation.

Despite the intent of Congress expressed in Section 1988, and the existing protections against frivolous litigation embodied in that law, the PLRA limits recovery of Section 1988 attorneys’ fees by imposing a fee-cap on the hourly rate lawyers may recover in successful cases; the cap is far below market rates. PLRA further limits recoverable attorneys’ fees by requiring that a fee award be no more than 150% of any damages awarded to the plaintiff. Therefore, if a plaintiff is awarded \$1.00 in nominal damages, the attorney is awarded \$1.50 in fees, regardless of the quality

⁴⁰ 18 U.S.C. § 3626(e)(1) (2007).

of work done, hours expended, or the importance of the constitutional right vindicated. Such nominal damage awards are not uncommon in prisoner civil rights cases where juries dislike the plaintiff even though they acknowledge the liability of defendants, or where they are unsure what value to place on the violation of a constitutional right.⁴¹

PLRA imposes restrictions on prisoner cases that are not imposed on other civil rights cases, and that have nothing to do with the purpose of PLRA; by definition, cases in which the prisoner prevails by proving a violation of the Constitution or federal statute are not frivolous. PLRA fee restrictions do nothing to alter the status quo for the prisoner who brings the frivolous or trivial lawsuit. It serves only to create a significant disadvantage for those presenting significant, meritorious challenges.

The results of the PLRA fee restrictions are devastating. While a few major law firms have done heroic work in this area by undertaking *pro bono* litigation,⁴² many small law offices that specialize in general civil rights cases have stopped taking prisoner cases.⁴³ The fees provisions of PLRA, which are of substantially more concern to lawyers in solo practice or in small firms than to practitioners in large firms, have thus contributed to a substantial decline in the number of lawyers who will consider taking a prisoners' rights case, a trend exacerbated by the ban on representation of prisoners imposed on the Legal Services Corporation.⁴⁴ It has also been the experience of the NPP that lawyers around the country, who formerly were willing and able to take on important prisoner civil rights cases, can no longer do so because of the harsh economic disincentives established under PLRA.

The PARA Fixes: Because prisoners are uniquely at risk of abuse, it is particularly dangerous to make it difficult for prisoners to obtain lawyers. Accordingly, it is critically important that the few lawyers willing to handle such cases have the incentives that are provided in other civil rights cases to ensure that constitutional protections remain a reality in practice as well as theory. Since removing the current disincentives for legal representation of prisoners cannot undermine the goal of discouraging frivolous prisoner litigation, this provision of PLRA is repealed under PARA. PARA therefore returns prisoner cases to the status quo for all civil rights litigants under Section 1988—a status quo that prohibits fees for frivolous litigation, but allows a prevailing party to petition the court for “a fee large enough to induce competent counsel to handle the plaintiff’s case, but no larger.”⁴⁵

Section 8 – Filing Fees *In Forma Pauperis* (28 U.S.C. § 1915(b)(1))

⁴¹ See *Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000) (awarding \$1.00 and \$1.50 in fees where pre-trial detainee was bound into a restraint chair with a towel over his mouth and lost consciousness).

⁴² Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. Law Rev. 550, 601 (2006) (noting that there has been an increase in *pro bono* litigation by large firms)

⁴³ This statement is based on the experience of staff of the National Prison Project in providing advice and support to private lawyers litigating conditions of confinement claims in the eleven years since PLRA; *but see* Schlanger, *supra* note 42 (finding insufficient evidence to express an overall conclusion on the effect on private litigators of the restrictions in PLRA).

⁴⁴ See Omnibus Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(15), 110 Stat. 1321, 1321-55.

⁴⁵ *Simpson v. Sheahan*, 104 F.3d 998, 1002 (7th Cir. 1997).

The PLRA Problem: The PLRA radically changes the standards for the access of indigents to our courts. Under PLRA, indigent prisoners, unlike any other category of indigent litigants in the federal courts, must pay the entire filing fee of \$350 in the district court. At the time of filing, a percentage of the prisoner's available funds must be paid, with the remainder subtracted from his or her institutional account over time.⁴⁶ Given that many prisoners have no work options, and even those prisoners who are allowed to work earn just a few dollars a day at best, this provision enormously penalizes prisoners, especially those who file meritorious claims.

The PARA Fix: PARA recognizes that imposing filing fees effectively discourages frivolous lawsuits by prisoners. At the same time, however, the current exclusion of all prisoner suits from indigent status goes too far and places an enormous burden on poor prisoners with legitimate claims. In order to cure this problem, PARA requires that only those prisoners who file cases that are quickly dismissed under PLRA's Preliminary Screening Requirement for being frivolous, malicious, failing to state a claim, or seeking monetary relief from a defendant who is immune from such relief, are required to pay the entire \$350 filing fee over time. Prisoners who file *non-frivolous* lawsuits and appeals are to be treated like all other indigent litigants.

⁴⁶ See 28 U.S.C. § 1915(a), (b) (2007).