STATEMENT
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PRESENTED TO
THE SUBCOMMITTEE ON CRIME,
TERRORISM, AND HOMELAND SECURITY OF
THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

AT THE HEARING ON H.R. 4109
("Prison Abuse Remedies Act of 2007")

APRIL 22, 2008

Thank you very much, Mr. Chairman Scott, Ranking Member Gohmert, and members of the Subcommittee on Crime, Terrorism, and Homeland Security. I am Sarah Hart and I currently represent (and previously represented) the Philadelphia District Attorney in prison litigation involving allegations of crowding in the Philadelphia jail system. I have also served as the Chief Counsel for the Pennsylvania Department of Corrections and as the Director of the National Institute of Justice of the United States Department of Justice. I appreciate greatly the opportunity to testify before the Subcommittee on H.R. 4109.

I. INTRODUCTION

H.R. 4109 proposes substantial amendments to the Prison Litigation Reform Act (PLRA), a bipartisan Act that passed overwhelmingly over a decade ago. H.R. 4109's amendments, if enacted, would essentially return us to the legal landscape that existed before the PLRA. Congress enacted the PLRA for good public policy reasons, and the proposed sweeping changes are not warranted. I strongly urge this Subcommittee to not support H.R. 4109.

II. WHY CONGRESS PASSED THE PLRA

Congress passed the PLRA over ten years ago for good reasons. In the 1990s, the National Association of Attorneys General (NAAG) and the National District Attorneys Association (NDAA) strongly urged Congress to address substantial problems with prison litigation. NAAG estimated that frivolous inmate lawsuits cost more than $80 million each year. Taxpayers footed the hefty bill for corrections lawyers (to defend these lawsuits), prison staff (to gather information to respond to the suits and transport the offenders to the courthouse), court clerks (to process mountains of legal filings) and judges (to rule on the claims). At that time, frivolous inmate lawsuits were swamping our Federal courts, making it more difficult for the Federal courts to address other legitimate claims.

At the same time, the attorneys general and prosecutors were especially concerned about Federal court injunctions and consent decrees that required the release of inmates or consumed substantial criminal justice resources. At the time the PLRA was passed, thirty-nine state prison systems operated under some Federal court order or injunction.[1] Some of these orders had far-reaching operational and financial implications. Texas prisons, for example, could not exceed 95% of their design capacity.[2] Given that

[1] See Overhauling the Nation's Prisons: Hearings Before the Senate Judiciary Committee, 104 Cong. (1995) (statement of John J. DiIulio, Professor of Politics and Public Affairs at Princeton).

[2] See Ruiz v. Estelle, 161 F.3d 814, 825-27 (5th Cir. 1998) (describing prison capacity limits contained in consent decrees that have the effect of requiring Texas to build more prisons); Alberti v. Klevenhagen, 46 F.3d 1347, 1352 (5th Cir. 1995) ("After years of litigation, in 1985, the State entered into a stipulation, requiring it to limit its prison population to ninety-five percent of capacity.").

Texas's prototypical prisons cost $46 million each to construct, the 95% population cap had huge financial implications.

In the 1970s and 1980s, many prison systems entered consent decrees believing that they would help improve prison conditions. These court agreements often settled difficult and potentially embarrassing lawsuits at seemingly minimal financial costs. Consent decrees also gave prison administrators leverage in the inevitable budget battles with other government agencies.[3] Consent decrees also permitted parties to craft sweeping injunctions that did not need to comply with the traditional limits on Federal court injunctions.

Prison managers ultimately found that consent decrees impaired their ability to manage prisons. Consent decree provisions that seemed wise years earlier soon became outdated and counterproductive. Despite this, consent decrees were very difficult to change. Prison managers no longer could re-evaluate and revise policies when the old ones didn't work or when new information became available. Staff was disempowered, and their ingenuity and initiative were stifled. Courts, lawyers, and court-appointed special masters often had greater control than prison managers. Congress heard from numerous witnesses who complained about the adverse effects of these longstanding injunctions.[4]

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[3] For example, prison administrators could resist budget cuts because they might suffer large fines for any variety of consent decree violations. But many later learned that such agreements could be incompatible with government fiscal restraint efforts. When, for example, Philadelphia faced bankruptcy, City officials began prioritizing social work services, in the event that future layoffs became necessary. They prioritized prison social workers ahead of every other need---including the homeless, abused and neglected children, crime victims, and AIDS patients---simply because a consent decree mandated staffing levels. Later, a court fined Philadelphia $400,000 for violating that consent decree because social workers failed to respond to inmate requests within 72 hours. Mayor Edward Rendell's chief of staff publicly criticized the fine levied against the financially distressed city as being equivalent to "realigning the deck chairs" on the sinking Titanic.

[4] See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866 & H.R. 667 Before the Committee on the Judiciary, United States Senate, 104th Cong. 1st Sess. (1995) at pp. 26-32 (testimony of William P. Barr, former Attorney General, United States Department of Justice); pp. 32-37 (testimony of Paul T. Cappuccio, former Associate Deputy Attorney General, United States Department of Justice); pp. 106-115 (testimony of O. Lane Cotter, Executive Director of the Department of Corrections for the State of Utah); pp. 37-45 (testimony of John J. Dilulio, Professor of Politics and Public Affairs, Princeton University); pp. 45-51(testimony of Lynne Abraham, District Attorney of Philadelphia); pp. 54-60 (testimony of Michael Gadola, Director, Office of Regulatory Reform, State of Michigan). See also pp. 51-52 (Resolution of December 3, 1994, National District Attorneys Association).

Prison administrators found it virtually impossible to end these counter-productive decrees. Often, these consent agreements were entered by prior political administrations and bound successor administrations to particular policy choices or budget expenditures. The standards for decree modification and termination granted great discretion to Federal judges to retain jurisdiction, sometimes for decades. Prison officials were required to demonstrate that the goals of the consent decree had been "achieved," not simply that no prisoner was suffering a constitutional deprivation. Many administrators became embroiled in difficult and costly litigation just to change minor provisions of consent decrees.

Some jurisdictions became embroiled in contractual minutiae. New York City, for example, had consent decrees so detailed that they even dictated the type of cleanser—Boraxo—required to be used to clean the floors. When prison gangs started using jewelry as gang identifiers, corrections officials couldn't simply enact a new policy to limit gang activity. They became bogged down in Federal litigation and negotiations about whether they could limit the type of jewelry an inmate could wear. These types of issues—from cleanser choices to inmate trinkets—were deemed worthy of protracted Federal Court litigation.

A number of jurisdictions were especially concerned about Federal court orders requiring the release of prisoners. For 9 years I served as the District Attorney's counsel opposing a prison population cap that required the release of tens of thousands of pretrial detainees over several years. Philadelphia's mayor had agreed to a consent decree to settle a class action lawsuit without a trial. He agreed to reduce the prison population by releasing "non-violent" offenders. Instead of individualized bail review, with Philadelphia judges considering a criminal defendant's dangerousness to others or his risk of flight, the Federal consent decree required a "charge-based" system of prison admissions. Suspects charged with so-called "non-violent" crimes---including stalking, car jacking, robbery with a baseball bat, burglary, drug dealing, vehicular homicide, manslaughter, terroristic threats, and gun charges---were not subject to pretrial detention.

Following the implementation of prisoner releases under the Federal court order, the number of fugitives in Philadelphia nearly tripled; outstanding bench warrants skyrocketed from 18,000 to 50,000. In one 18-month period (from January 1993 to June 1994), Philadelphia rearrested for new crimes 9,732 defendants released by the Federal court order. These crimes included 79 murders, 959 robberies, 2215 drug dealing cases, 701 burglaries, 2,748 thefts, 90 rapes, 14 kidnappings, 1,113 assaults, 264 gun crimes, and 127 drunk driving cases. When the new mayor (Edward Rendell) took office, he immediately attempted to terminate the consent decree. He was unable to do so under the law that existed prior to the PLRA.[5]

[5] See Prison Reform: Enhancing the Effectiveness of Incarceration: Hearings on S. 3, S. 38, S. 400, S. 866 & H.R. 667 Before the Committee on the Judiciary, United States Senate, 104th Cong. 1st Sess. (1995) at pp. 45-51(testimony of Lynne Abraham, District Attorney of Philadelphia); see also Ross Sandler & David Schoenbrod, Democracy by

Based on these concerns, Congress passed the PLRA in 1996 with strong bipartisan support and the support of the Clinton Administration.[6] The PLRA was later amended in 1997.[7] Together, these two laws form what is known as the PLRA.

Decree 183-192 (2003); Sarah B. Vandenbraak, *Bail Humbug! Why Criminals Would Rather Be In Philadelphia*, Policy Review 73 (Summer 1995) (detailed description of the impact of the Federal court injunctions).

[6] The PLRA began as various bills in the House and Senate. In the House, the provisions regulating prospective relief in prison conditions litigation first appeared in H.R. 554, 104 Cong. (1995), which was introduced by Congressman Canady on January 18, 1995, and referred to the Subcommittee on Crime of the House Judiciary Committee. The Chairman of the Subcommittee on Crime of the House Judiciary Committee, Congressman McCollum, then included them as Title III of H.R. 667, 104 Cong. (1995) (Title III), a broader bill on various aspects of incarceration that he introduced on January 25, 1995. The House Committee on the Judiciary marked up H.R. 667 a week later and sent it to the floor with an accompanying report, House Report No. 104-21 on H.R. 667, 104 Cong., 1st Sess. (Feb. 6, 1995) (Violent Criminal Incarceration Act of 1995, Title III) (hereinafter "House Report 21"), which contains important commentary on the provisions that ultimately became Section 802 of PLRA. The House passed H.R. 667 on February 10, 1995, and sent it to the Senate.

In the Senate, S. 400, 104 Cong. (1995) introduced by Senator Hutchison on February 14, 1995, contains the same early version of the PLRA provisions on prospective relief as H.R. 554 and H.R. 667. On July 27, 1995, shortly before the August recess, the Senate held a hearing on various proposals relating to prison reform, including S. 400 and H.R. 667, chaired by Judiciary Committee Chairman Hatch and Senator Abraham. On September 26, 1995, Senator Abraham introduced S. 1275, 104 Cong. (1995), co-sponsored by Senators Hatch, Specter, Kyl, and Hutchison. The core provisions are found in Section 2, which significantly modified prior versions of the prospective relief provisions. The following day, Majority Leader Dole introduced S. 1279, 104 Cong. (1995), cosponsored by Senator Hatch, Senator Abraham, the other Senate cosponsors of S. 1275, and additional Senators, including Senator Gramm, the Chairman of the Commerce-Justice-State Appropriations Subcommittee. S. 1279, 104 Cong. (1995) was a broader bill on incarceration (more similar in scope to H.R. 667). Section 2 of S. 1279 consisted of the prospective relief provisions contained in S. 1275, with a few additional modifications. On September 29, 1995, on the Senate floor, Senator Hatch then added the text of S. 1279 as an amendment to H.R. 2076, 104 Cong. (1995) the annual Commerce-Justice State appropriations bill, which had been reported to the floor by Senator Gramm's Subcommittee. See Cong. Rec. S14,756-14,759 (daily ed. Sept. 29, 1995). The Senate passed H.R. 2076 that same day and requested a conference with the House. The conference reported an agreed-upon version of the bill that retained the PLRA provisions added by the Senate with a few changes not relevant to this case. See H.R. Conf. Rep. No. 104-378, 104th Cong., 1st Sess. (Dec 1, 1995) at pp. 166-67 (discussing purposes of the PLRA). Both Houses of Congress approved the conference version of the bill, but the President vetoed it (with no reference to the PLRA provisions).

III. THE PLRA

In passing the PLRA, Congress sought to address a variety of issues. In response to concerns from state and local governments, the PLRA fashioned new rules to discourage inmates from filing lawsuits that were frivolous or unlikely to succeed. It imposed a partial filing fee system, which required inmates to pay full filing fees (usually through an installment plan); granted Federal judges greater discretion to dismiss lawsuits early in the litigation process; and established a "three-strikes" provision that barred multiple meritless filings. The PLRA, however, carefully protected legitimate claims and preserved the full power of the Federal courts to remedy constitutional violations. Since its passage in 1996, the PLRA has substantially reduced the number of meritless inmate lawsuits.

The PLRA also addressed substantial complaints from state and local officials about intrusive Federal court lawsuits. The PLRA encourages inmates to file prison grievances promptly with prison officials before filing a lawsuit, thereby alerting corrections managers to problems that need to be addressed and allowing them to resolve disputes before they turn into Federal lawsuits.

See Veto Message, Cong. Rec. H15,166-15,167 (daily ed. Dec. 19, 1995). A later version of the Commerce-Justice-State appropriations bill, still containing the same PLRA provisions, was then included in a final omnibus appropriations bill negotiated with the White House that ultimately became law. See H.R. 104-537 (Conf. Rep. To Accompany HR 3019) 104th Cong., 2d Sess., pp. 69 et seq. (April 25, 1996); Cong. Rec. HR 1895-1898 (daily ed. March 7, 1996). House Report 104-537 provides that the controlling portions of H.R. No. 104-378 "remain controlling and are incorporated herein by reference."

[7] Following the enactment of the PLRA, Congress became aware of some problems with courts refusing to issue timely rulings on termination motions and attempts to expand the powers of judges to continue old consent decrees for long periods of time even where there were no current constitutional violations. The Senate Judiciary Committee was especially concerned about positions taken by the Department of Justice in legal filings and took the unusual step of holding a hearing to examine PLRA implementation problems and possible solutions. See Implementation of the Prison Litigation Reform Act: Hearings before the Senate and House Committees, 104 Cong. (1996). The 104th Congress adjourned *sine die* the following week, so no further legislative action was taken at that time. On the first day of the next session, Senator Hatch introduced S. 3, the Omnibus Crime Control Act of 1997. Title IX of this legislation was designed to clarify various provisions of the PLRA relating to the termination standard. Section 902(3) proposed two amendments to the automatic stay language. Congress took no action on S. 3 itself. However, Members in both houses on the Judiciary and Appropriations Committees obtained the inclusion of a modified version of the language of §902(3) of S. 3 in H.R. 2267, the FY 1998 Commerce-State-Justice Appropriations Conference Report. See Act of Nov. 26, 1997, Pub.L. No. 105-119, Title I, § 123(b), 111 Stat. 2471.

The PLRA also addressed problems with sweeping consent decrees. The PLRA makes clear that standards that apply to litigated Federal court injunctions also apply to these injunctions entered by consent. The PLRA also provides a thoughtful system for ending injunctions and consent decrees that are no longer necessary to prevent constitutional violations. Under this system, injunctions more than 2 years old may remain in effect if the parties are in agreement. However, if government officials want to limit the injunction, they can ask a court to do so, and the prisoners would need to prove why it should remain in effect. This system prevents federal injunctions against state officials from remaining in effect longer than necessary.

The PLRA also established special rules for Federal court orders that would cap prison populations and release prisoners. Because these orders are the most intrusive of all and have such substantial public safety implications, the PLRA created additional protections. Under the PLRA, these orders are a last resort remedy that can only be entered by a three-judge panel.

IV. HOW H.R. 4109 WOULD CHANGE EXISTING LAW

In the next section, I address in detail how each section of H.R. 4109 would change existing PLRA provisions. At this point, I will discuss some key provisions of H.R. 4109.

A. Consent Decree/Injunctions

First and foremost, H.R. 4109 proposes to eliminate the limits on Federal court injunctions and consent decrees. By the proposed changes to 18 U.S.C. § 3626, Federal judges would now be free to enter the very types of injunctions that crippled corrections systems for decades. These proposed amendments would allow judges to approve injunctions or consent decrees that

1. were not necessary to correct constitutional violations;
2. were not narrowly drawn;
3. extended further than necessary; adversely affected public safety or the operation of a criminal justice system; or
4. violated state or local law.

In addition, H.R. 4109 proposes to eliminate the limits on consent decrees that establish prison population caps or require the release of prisoners. Quite simply, if H.R. 4109 was the law today, the Philadelphia prison cap could be reestablished as a Federal court injunction without any trial showing any constitutional violation. And, as prosecutors, we would be powerless to stop the entry of mass prisoner release Federal injunctions that trump state court sentences or pretrial detention orders.

H.R. 4109 would also return us to the time when it was virtually impossible to end longstanding Federal injunctions that were no longer necessary to remedy Constitutional violations. Quite simply, a Federal court injunction of a state official's

action should be an extraordinary event undertaken when it is essential to preserve the constitutional rights of prisoners. The PLRA supported that important public goal while carefully preserving the power of Federal courts to stop constitutional violations. Under the proposed changes in H.R. 4109, those sensible limits needed to ensure public safety, allow corrections managers to run prisons and save taxpayer dollars would be ended.

B. Exhaustion of Administrative Grievances

H.R. 4109 also proposes to end the current requirement that a prisoner exhaust administrative grievances before filing a Federal lawsuit. The PLRA exhaustion provision does not prohibit inmates from filing state lawsuits. Rather, it takes the sensible approach that prisoners should first raise their complaints with the correctional system before resorting to the Federal courts.

The H.R. 4109 proposal—to allow inmates to file Federal lawsuits first and then stay the suit while they file grievances—is bad public policy. State and local correctional officials rely on inmate grievances to alert them to problems arising in prisons. The current system allows corrections managers to learn of serious problems in the prison, take prompt action to stop them, and remedy past problems. It also provides an opportunity for alternative dispute resolution. Under the new proposal, there is no incentive for inmates to file grievances promptly.

Congress could, however, provide clarification to the courts about how to resolve exhaustion issues. The Supreme Court in Jones v. Bock, 127 S.Ct. 910 (2007), determined that exhaustion of administrative remedies is an affirmative defense in prison conditions litigation. Often this affirmative defense raises factual issues (e.g., whether the prisoner actually filed a grievance or whether the prisoner exhausted the appeal process within the grievance system). However, the exhaustion requirement was designed to provide a gate-keeping function where prisoners could not file Federal court actions unless they first had exhausted their administrative grievances. With the Jones decision, the courts lack direction about who should resolve factual issues involving exhaustion (the judge or the jury) or at what stage they should be resolved (pretrial or at trial). Currently, exhaustion issues are not resolved at the pretrial screening.

Where inmates have not exhausted administrative remedies, or there is a material issue of fact involving exhaustion, the interests of judicial economy would be better served if Congress clearly empowered the Federal judge to resolve this issue early on in the litigation. The judge could, if necessary, permit limited discovery on the exhaustion question and serve as the factfinder on issues such as whether the prisoner filed a grievance or whether the grievance procedure was actually available to the prisoner.

C. Attorneys Fees

Under current law, prisoners' attorneys are entitled to substantial attorneys fees. For example, in Philadelphia, prisoners' attorneys received $250,000 for litigating a

preliminary injunction. Other states have paid out millions of dollars in attorneys fees under the PLRA.

Prisoner attorneys now want more through the proposed amendments in H.R. 4109. They want state and local taxpayers to pay them at prevailing market rates (which in Philadelphia can be $450 per hour), to receive fees that are vastly disproportionate to the relief obtained, and to obtain fees for litigating unsuccessful claims (simply by showing that they are "related" to successful claims).

Even under current law, attorney for prisoners are paid at rates vastly more beneficial than the rates paid to persons suing the Federal government (including Iraq veterans with legitimate claims of medical malpractice or prisoners in federal prisons). For most victims of crime, there are no attorneys fees paid when they sue the person who committed criminal acts against them. Rather, like other plaintiffs in civil actions, the system of contingent fees requires the plaintiff to pay a share of the monetary damages or settlement to their lawyer. Given the normal system of attorneys fees for other plaintiffs, it makes no sense to require state and local taxpayers to pay for such disproportionately favorable attorneys fees.

V. H.R. 4109: SECTION-BY-SECTION ANALYSIS

SEC. 1. Title

- Self-explanatory.

SEC. 2. (Physical Injury)

- **Summary**: This section would seek to eliminate two provisions relating to the "physical injury" requirement. First, subsection (b) would amend the Federal Tort Claims Act (28 U.S.C. § 1346(b)) to remove the current limits on claims for emotional or mental injuries by federal prisoners. In addition, subsection (a) would eliminate the PLRA provision that extended the Federal Tort Claims Act limitation to all prisoner lawsuits. (28 U.S.C. §1346, as it would be amended by H.R. 4109(2), is set forth in the attached appendix.)

- **Analysis**: The Federal Tort Claims Act has long had a limitation on prisoner claims for emotional or mental injuries. The proposed amendments in Section 2 would eliminate this Federal Tort Claims provision[8] and matching PLRA

[8] H.R. 4109 (2) (b) would amend the Federal Tort Claims Act, 28 U.S.C. § 1346, by striking subsection (b)(2), which contains the following:

> ~~(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or~~

provision for all prisoner lawsuits.[9] These provisions were designed to shield prison officials from insubstantial claims. Courts, for the most part, have interpreted these provisions simply to bar *de minimus* claims. Prisoner advocates have argued, however, that the provisions would bar claims for sexual assaults and religious/First Amendment claims.

Despite prisoner advocates' claims, Federal appellate courts consistently hold that forcible sexual assaults include a "physical injury" and are not barred under this section.[10] Despite this clear weight of authority, some unpublished district court opinions have found such claims to be barred by the physical injury requirement.[11]

SEC. 3 (Administrative Remedies)

- **Summary**: Section 3 would eliminate the current PLRA requirement that a prisoner exhaust available administrative remedies before filing suit in Federal court. Section 3 would instead allow prisoners to file Federal lawsuits first, then stay the action to pursue administrative remedies.

~~emotional injury suffered while in custody without a prior showing of physical injury.~~

[9] H.R. 4109 (2) (a) would strike the following from 42 U.S.C. 1997e (e):

> ~~(e) Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~

[10] See, e.g., Liner v. Goord, 196 F.3d 132, 135 (2d. Cir 1999) (alleged sexual assault not barred by physical injury requirement of 1997e(e)); Styles v. McGinnis, 28 Fed. Appx. 362 (6th Cir. 2001) (claim arising out of an allegedly involuntary rectal exam was not barred by 1997e(e)); Williams v. Prudden, 67 Fed. Appx. 976 (8th Cir. 2003) (civil rights complaint based on alleged sexual assault of female prisoner by corrections officer not barred by 1997e(e)); see also, Kemner v. Hemphill, 199 F. Supp. 2d 1264 (N.D. Fla. 2002) (complaint alleging two-hour sexual assault by another prisoner not barred by 1997e(e)).

[11] Compare Smith v. Shady, No. 3:CV-05-2663, 2006 U.S. Dist. LEXIS 24754, *5-6, 2006 WL 314514 at *2 (M.D. Pa. Feb. 9, 2006) (holding that allegation that female officer grabbed the prisoner's penis and held it in her hand was *de minimus* under § 1997e(e)) with Hancock v. Payne, Civil Action No. 1:03cv671, 2006 U.S. LEXIS 1648, 2006 WL 21751 (S.D. Miss. Jan. 4, 2006) (at summary judgment stage, where prisoners failed to support complaint allegations that raised claims of consensual conduct and sexual assaults, court found that plaintiffs had failed to adequately demonstrate a genuine issue of material fact as to a physical injury).

- **Analysis**:

  - **Current law**: The current PLRA provision, found in the Civil Rights for Institutionalized Persons Act (CRIPA) at 42 U.S.C. § 1997e, requires inmates to file administrative grievances before filing a Federal lawsuit. This provision was enacted in 1996 because Congress believed that the prior CRIPA exhaustion provisions were ineffectual.

    The exhaustion requirement is strongly supported by corrections officials and government lawyers who defend prisoner lawsuits. By strengthening the grievance requirement, prison managers are more likely to be promptly alerted to problems arising in the prison, able to take immediate action to prevent similar harms to other inmates, and able to mitigate harms to the inmate who raised the issue in the grievance. This provision was also designed to promote dispute resolution without the need for a Federal lawsuit.

    With this exhaustion requirement, Congress also struck a balance between the need to encourage prompt notice to prison officials and the inmate's ability to file meritorious claims. For example, where administrative grievances are not "available" to the individual inmate, there is no exhaustion requirement. (The Federal courts have interpreted this "availability" requirement very favorably for inmates.)[12] Additionally, inmates who do not comply with exhaustion requirements are still permitted to file state court actions.

  - **Proposed Amendment**: Under the proposed amendment, an inmate would not need to exhaust grievances before filing in Federal court. Rather, the inmate could first file the complaint, and then the civil action could be stayed for up to 90 days in order to allow the prisoner to pursue administrative grievances. However, there would be no stay if the prisoner was "in danger of immediate harm."[13]

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[12] See detailed analysis and cases cited in John Boston, The Legal Aid Society, Prisoners' Rights Project, *The Prison Litigation Reform Act* 108-125 (February 27, 2006), *available at* http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf (extensive analysis and case citations relating to whether remedies are "available" under the PLRA).

[13] Specifically, Section 3 would amend 42 U.S.C. § 1997e as follows:

42 U.S.C. § 1997e**.** Suits by prisoners

~~(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies~~

- **Concerns:** Correctional managers believe that the proposed amendment would effectively eliminate the prison management benefits of prompt inmate grievances (dispute resolution, prevention of future harms, and mitigation of harms). In other words, the proposed amendments would encourage prisoners to complain first to the Federal courts before they make any attempt to alert prison managers to the purported problems or attempt to resolve the matter promptly without litigation. Opponents of this amendment also cite to (1) opinions that hold that where grievances are not "available" to a prisoner because of the actions of correctional officials, the PLRA limit does not apply;[14] (2) grievance procedures that contain explicit provisions barring staff

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~~as are available are exhausted.~~

(a) Administrative Remedies-

(1) PRESENTATION- No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.

(2) STAY- If a claim included in a complaint has not been presented as required by paragraph (1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

(3) PROCEEDING- Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved.

[14] See, e.g., Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004) (threat of criminal charges made grievances unavailable); Brown v. Croak, 312 F.3d 109, 112-13 (3d. Cir. 2002) (holding that grievance system was "unavailable" to prisoner if (as alleged) security officials told the plaintiff to wait for the completion of the investigation before grieving, and then never informed him of its completion); Dole v. Chandler, 438 F.3d 804 (7th Cir. 2006) (holding that "[p]rison officials may not take unfair advantage of the exhaustion requirement" and that " remedy becomes "unavailable" if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting"); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("We believe that a remedy that prison officials prevent a prisoner from 'utiliz[ing]" is not an 'available' remedy under § 1997e(a)…"); Miller v. Tanner, 196 F.3d 1190 (11th

from retaliation; (3) the independent "retaliation" claims that arise for such retaliator conduct;[15] and (4) the prisoner's right to pursue claims in state courts even when they have not complied with the grievance requirement.

SEC. 4. (Juveniles)

- **Summary**: The amendments in Section 4 would eliminate the following for persons under the age of 18: (1) limits on injunction orders and consent decrees (including release orders); (2) *in forma pauperis* filings*;* (3) the requirement to exhaust administrative grievances; (4) judicial screening of complaints, (5) video-conferencing technology for hearings, and (6) attorney fee limits. Most of these issues are the subject of other proposed amendments in HR 4109. Section 4 contains separate amendments that would completely exclude persons under the age of 18.

- **Analysis**:
  - **Section 4(a)**: Section 4(a) proposes to amend definitional provisions to remove persons under the age of 18 from the PLRA limits on injunctions and consent decrees.[16] Currently, 18 U.S.C. § 3626 contains very specific

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Cir. 1999) (holding that grievance decisions that stated it was non-appealable need not be appealed).

[15] Prisoners can file civil rights actions commonly known as "retaliation claims" when they are subject to retaliation for the filing of an administrative grievance. The basic law on retaliation is found in the Supreme Court's decision in Mount Healthy City Bd. of Education v. Doyle, 429 U.S. 274, 287 (1977) (discussing general elements of a retaliation claim---protected conduct by plaintiff, adverse action by defendant, and causation). The Federal courts have repeatedly held that the filing of a grievance is conduct the First Amendment protects and that retaliation against an inmate for filing a grievance is a clear basis for a separate civil rights action. See, e.g., Mitchell v. Horn, 318 F.3d 523 (3d. Cir. 2003) (allegation that false disciplinary charges were filed to retaliate for the filing of complaints against the officer states a First Amendment claim); Siggers-El v. Barlow, 412 F.3d 693 (6th Cir. 2005) (retaliation claim sustained where prisoner alleged he was punished for filing a complaint).

[16] These definitional provisions are found in 18 U.S.C. § 3626 and would be amended as follows:

> (g) Definitions. As used in this section--
> * * * * *
> (3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;
> (4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of

provisions relating to prisoner release orders (they can be entered only by a three-judge panel as a last-resort remedy following a finding of a constitutional violation for overcrowding). The amendment proposed by Section 4(a) would remove persons under the age of 18 from these provisions. Thus, there would be no statutory limits on Federal release orders for persons under the age of 18 who were convicted as adults for the crime of murder. (Additional limits on this section are proposed in Section 6 of HR 4109 and will be discussed later.)

Eliminating juveniles from the PLRA prisoner release limits is very problematic. Congress had good reasons to apply the limits on injunctions, consent decrees, and release orders to institutional lawsuits involving facilities for juvenile delinquents and juvenile convicted on adult criminal charges. Given the serious crime issues involving persons under the age of 18, Congress should act very cautiously before returning us to time when civil rights injunctions and consent decrees required the release of juvenile offenders.

In Philadelphia, for example, there was a 1978 consent decree limiting the capacity of the City's only secure juvenile detention facility. By 1990, that consent decree had been amended three times and contained provisions identical to the prisoner release orders described supra at p.4. See Santiago v. City of Philadelphia, CA No. 74-2587, 1990 U.S. Dist. LEXIS 4308 (E.D. Pa. April 4, 1990). Under this decree involving the Youth Study Center, Philadelphia was barred from holding certain juveniles in secure detention, no matter how many crimes they committed or how many times they had escaped from non-secure community placements. One juvenile, for example, was repeatedly released under this consent decree despite numerous arrests for car thefts and escapes from non-secure detention facilities. He was held in secure detention only after he stole another car, fled from police, and crashed. He killed a widower with 9 children and a young girl, and made her sister a paraplegic.[17]

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reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains prisoners ~~juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law~~;

* * * * * * * * *

(h) Exclusion of Child Prisoners—This section does not apply with respect to a prisoners who has not attained the age of 18 years.

[17] See *Boy in Fatal Joyride Had 13 Prior Arrests/Walked Away from City Detention Facilities*, Philadelphia Daily News, October 26, 1988, p. 4.

- **Section 4(b):** This subsection would amend CRIPA (Civil Rights of Institutionalized Persons Act) to remove persons under the age of 18 from the provisions contained in 42 U.S.C. § 1997e. These provisions relate to the exhaustion of administrative grievances, the judicial screening provisions, the use of video-conferencing for hearings, and attorneys fees. This exclusion of persons under the age of 18 would be accomplished by amending the current definition of "prisoner" in 1997e(h)[18] and by adding a new exclusion subsection (i).[19] (These amendments, and the other proposed amendments to 42 U.S.C. § 1997e, are in the attached appendix.) Again, the proposed provisions would apply to persons under the age of 18 who have been tried and convicted for adult charges.

  Proponents of the amendments, while seeking amendments to the overall exhaustion provisions, are focusing on whether it is fair to require juveniles to exhaust complex administrative grievances. They have argued that because juveniles lack the capacity to contract, it seems unreasonable to expect them to file written documents that can limit their future legal options. The focus seems to be on sexual assault cases. Notably, many states have been expanding the legal rights for juvenile sexual assault victims through changes to statutes of limitations (criminal and civil) and have imposed additional reporting requirements for when persons in positions of trust suspect abuse.

  So far, however, proponents have not raised significant justifications for the screening and video-conferencing provisions. Their arguments concerning the attorneys fees limits have been raised as to all inmates and do not appear to have additional specific issues particular to juveniles.

  Opponents to the amendments appear more focused on the attorneys fee limits as there have been historic concerns about whether the attorneys fee provisions provide economic incentives for sweeping institutional litigation that does not focus on the narrow constitutional issues. These concerns have applied to institutional class actions involving adult and juvenile facilities.

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[18] 42 U.S.C. §1997e(h) would be amended as follows:

(h) As used in this section, the term "prisoner" means any person <u>who has attained the age of 18 years</u> incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

[19] The new subsection, 42 U.S.C. §1997e(i) would read as follows:

<u>(i) Exclusion of Child Prisoners- This section does not apply with respect to a prisoner who has not attained the age of 18 years.</u>

- **Section 4(c):** This subsection would amend the prisoner *in forma pauperis* provisions in 28 U.S.C. §§ 1915 and 1915A to remove persons under the age of 18. The § 1915 provisions concern notice to the court concerning money in the prisoner's account and installment payments. The amendments to § 1915A would exclude persons under the age of 18 from dismissal of complaints that are frivolous, malicious, or fail to state a claim.[20] The amendments in this subsection would thus prevent application of any of these provisions to persons under the age of 18 even if they have been convicted as adults or have been emancipated.

SEC. 5. (*In Forma Pauperis* ("IFP") "three-strikes" provision)

- **Summary**: This section involves whether prisoners who have filed three or more meritless lawsuits must pay full filing fees before filing Federal lawsuits. The provision at issue is commonly known as the "three-strikes" provision.

- **Current Law**: Current IFP "installment" provisions allow prisoners to file Federal lawsuits without paying the filing fee up front but rather to make installment payments. This installment payment right is limited, however, by a "three-strikes" provision. This provision does not permit the installment payment system if a prisoner has previously filed three or more meritless lawsuits, unless he is in imminent danger of serious bodily injury. For prisoners who have "three-strikes" and do not meet the imminent danger requirement, they must pay the full filing fee before filing a Federal lawsuit.

- **Proposed Change**: Section 5 would change the current "three-strikes" provision in two ways. First, it would limit the three-strikes to those lawsuits the prisoner filed in the preceding 5 years. Second, it would limit the types of strikes--- repeated meritless lawsuits would not count as "strikes" unless the government proved that they arose to the level of "frivolous" or "malicious" actions.[21]

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[20] H.R. 4109 (4)(c) would amend the sections defining "prisoner" with the identical language. These amendments the 28 U.S.C. § 1915(h) and 1915A(c) would be as follows:

> As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

[21] Specifically, H.R. 4109 (5) would amend 28 U.S.C. § 1915(g) as follows:

> (g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions within the preceding 5 years, while incarcerated or detained in any

- **Analysis**: Caselaw is clear that prisoners do not have a constitutional right to be excused from paying filing fees prior to filing lawsuits.[22] Congress thus has great leeway in making policy choices about when IFP status should be granted to prisoners. Congress has already limited the "three-strikes" in the following ways: (1) they don't bar lawsuits, they just require prisoners to pay the full fee before they file; (2) they don't apply to state actions; and (3) they don't apply to claims where the prisoner is in imminent danger of serious bodily injury.

  Concerns: The three-strike standard rather than the time limit issue raises the greatest concerns. The proposed amendment would return to the "frivolous" or "malicious" standard which was ineffective in reducing meritless lawsuits. It remains important to discourage meritless lawsuits and to encourage prisoners to be careful about the lawsuits they file. State and local governments face significant financial costs in responding to meritless lawsuits. At the same time, inundating the Federal courts with meritless lawsuits makes it more difficult for the courts to address prisoner claims that actually have merit.

SEC. 6. (Federal Injunctions)

- **Summary**: This section would substantially amend 18 U.S.C. § 3626 and eliminate the major provisions of the Prison Litigation Reform Act (PLRA). Specifically, this section would amend the current limits on Federal court injunctions and consent decrees in prison cases. Specifically, these amendments would:
  - eliminate the provisions limiting federal court injunctions and consent decrees to the least intrusive remedies upon consideration of any adverse impact on public safety and the criminal justice system;
  - eliminate the comity provisions that limit the circumstances when state laws may be violated or state checks and balances circumvented;
  - significantly change the circumstances under which government officials can terminate consent decrees; and
  - eliminate the automatic stay provisions applicable to government-filed termination motions.

- **Subsection Analysis**:

  - **Section 6(1) (limits on injunctions and consent decrees)**: This subsection would eliminate the PLRA provisions designed to minimize adverse effects of

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facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious ~~, malicious, or fails to state a claim upon which relief may be granted~~, unless the prisoner is under imminent danger of serious physical injury.

[22] See, e.g., Wilson v. Yaklich, 148 F.3d 596 (6th Cir. 1998) (rejecting numerous constitutional challenges to the PLRA *in forma pauperis* provisions for prisoners).

Federal injunctions that aren't necessary to remedy the constitutional violation. Under 18 U.S.C. § 3626(a)(1)(A), a Federal court must tailor the injunction to ensure that it extends no further than necessary to correct the constitutional violation. In making this determination, the court must specifically consider the potential impact on the criminal justice system or public safety. Under 18 U.S.C. § 3626(a)(1)(B), a Federal court cannot require state government officials to violate state law unless there is no other way to remedy the constitutional violation. The proposed amendments in H.R. 4109 § 6(1) would eliminate these sections in their entirety.[23]

State and local officials oppose these amendments because they would return us to the pre-PLRA world of incredibly complex injunctions and consent decrees that exceed the minimum of court interference necessary to fix the constitutional problem. These types of injunctions (which would be very difficult to modify or terminate given the additional amendments in Section 6(3)) previously resulted in extensive court litigation over non-constitutional issues.[24] From a policy point of view, it is difficult to justify the burdens caused by such a system on the Federal courts, state and local officials, and taxpayers. Rather, it is better to continue with the current PLRA system of requiring that extra-constitutional provisions be contained in a "private settlement agreement" enforceable through arbitration, the use of monitors, or state courts. See 18 U.S.C. §§ 3626(c)(2).

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[23] § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.
(1) Prospective relief.
~~(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The 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. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.~~
~~(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--~~
~~(i) Federal law requires such relief to be ordered in violation of State or local law;~~
~~(ii) the relief is necessary to correct the violation of a Federal right; and~~
~~(iii) no other relief will correct the violation of the Federal right.~~

[24] See legislative history to the PLRA and hearing testimony discussed supra.

- **Subsection 6(2) (preliminary injunctions)**: This subsection would amend the provisions relating to preliminary injunctions.[25] Although it retains the limits designed to prevent overly intrusive preliminary injunctions, it eliminates provisions that allow Federal court injunctions to trump state laws (even when those provisions are not the only way to prevent the constitutional violation requiring the preliminary injunction). In addition, it eliminates the 90-day limit on preliminary injunctions. (Current law permits the 90-day injunction to continue if made final. Additionally, courts will often extend the preliminary injunction if new evidence is available.)

  This 90-day PLRA provision was originally created because many jurisdictions had preliminary injunctions remain in effect for years without the plaintiffs seeking a final injunction hearing. Officials saw this as problematic because preliminary injunctions could be based on hearsay evidence and are usually entered before full discovery.[26]

  While proponents of these amendments have argued that the 90-day time period is too short to allow for a full trial in institutional litigation, they have failed to account for Federal court orders that have extended or granted preliminary injunctions. To my knowledge, no one has pointed to any constitutional violations that have resulted from the expiration of a preliminary injunction.

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[25] H.R. 4901 §(6)(2) would amend 18 U.S.C. § 3636(2) as follows:

> (2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief ~~and shall respect the principles of comity set out in paragraph (1)(B)~~ in tailoring any preliminary relief. ~~Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.~~

[26] For example, Pennsylvania was subject to a preliminary injunction relating to tuberculosis treatment that lasted almost 4 years. See Austin v. Pennsylvania Dep't. of Corrections, 876 F. Supp 1437, 1445-46 (E.D. Pa. 1995) (describing preliminary injunction in effect from 1992). This preliminary injunction ended in 1996 after the passage of the PLRA.

- **Subsections 6(3), 6(4), 6(5), & 6(6) (termination of injunctions/consent decrees):** These subsections would amend the PLRA provisions relating to the termination of injunctions. Subsection 6(3) would change the termination standards,[27] while subsection 6(4) would allow courts entering injunctions and consent decrees to, on their own, limit the future time period when a defendant could seek to terminate the order.[28] Subsection 6(5) strikes the existing termination standard that would be replaced by the subsection 6(3) amendments.[29] Subsection 6(6) likewise would strike a reference to the provisions eliminated by subsection 6(4).[30]

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[27] H.R. 4901(6)(3) would amend 18 U.S.C. § 3626(b) as follows:

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener <u>if that party demonstrates that it has eliminated the violation of the Federal right that gave rise to the prospective relief and that the violation is reasonably unlikely to recur</u>--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

[28] H.R. 4901(6)(4) would amend 18 U.S.C. § 3626(b)(1)(B) as follows:

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A). <u>Nothing in this section shall prevent the court from extending any of the periods set out in subparagraph (A), if the court finds, at the time of granting or approval of the prospective relief, that correcting the violation will take longer that those time periods.</u>

[29] H.R. 4901(6)(5) would amend 18 U.S.C. § 3626(b)(2)-(3) as follows:

~~(2) Immediate termination of prospective relief. In 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.~~

~~(3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a~~

Under current law, an injunction issued to remedy a constitutional violation can be terminated after 2 years if (1) the defendant files a termination motion, and (2) the plaintiff fails to demonstrate that there are current constitutional violations that require the injunction. Defendants are also entitled to immediate termination of improperly entered injunctions based on this same standard. The proposed amendment in 6(3) would change the termination standard.

This proposed change in standard is problematic for a number of reasons. First, it places the burden on the defendant to show that no current constitutional violations exist and that they won't occur in the future. This is contrary to our Federal scheme of government. The Constitution presumes that state officials should run their prisons unless a Federal court removes this power to prevent a constitutional violation. The state's power to run its own prisons should not be removed when there are no existing constitutional violations but prison officials can't meet the impossible burden proving what will happen in the future.

The proposed amendments to the termination standard would be even more problematic in the consent decree context where (under the HR. 4109 standards) there would be no required finding of a constitutional violation. Thus, there could be litigation years after the fact about what exactly "gave rise to" the consent order and whether those circumstances arose to the level of a constitutional violation.

The amendments contained in subsection 6(4) eliminate the current termination standards that preclude a court from terminating an injunction or consent decree if the order remains necessary to correct a current and ongoing violation of a Federal right. They also eliminate the requirement that the courts tailor old injunctions to keep only those provisions that address the Federal violation.

~~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.~~

[30] H.R. 4901(6)(6) would amend 18 U.S.C. § 3626(b)(4) as follows:

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) ~~or (2)~~, to the extent that modification or termination would otherwise be legally permissible.

- **Subsection 6(7) (consent decrees)**: The proposed amendments here would strike the PLRA provision that specifies that consent decrees must meet the injunction standards set forth in 28 U.S.C. § 3626(a).[31]

  This provision, combined with other PLRA provisions, was considered essential by PLRA supporters to limit the broad sweeping decrees that had been entered on consent and that remained in effect for decades. At the time of the PLRA's passage, there were many examples of current prison administrators burdened by long-standing, detailed consent decrees that required them to follow costly non-constitutional mandates, abide by out-date security practices, and engage in policies that were a threat to the public, inmates and staff.

  This amendment is not needed since the PLRA explicitly permits parties to enter into "private settlement agreements." These private settlement agreements can be enforced through state law or through an enforcement mechanism chosen by the parties (such as arbitration or through the use of a monitor). The only thing that private settlement agreements do not permit is for the parties to agree that a Federal court should enforce contractual provisions that exceed constitutional requirements. Given the current crowded Federal court dockets, there is no important Federal interest served by having Federal courts in the business of enforcing non-constitutional contracts.

- **Subsection 6(8) (automatic stay)**: This subsection proposes to eliminate the automatic stay provision for termination proceedings.[32] Under current law, if

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[31] H.R. 4901(6)(7) would amend 28U.S.C. § 3626(c) as follows:

(c) Settlements.

~~(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).~~

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

[32] Section 6(8) would amend 28U.S.C. § 3626(E) as follows:

a judge does not timely rule on a termination motion, the injunction will be stayed after 90 days (30 days plus a 60-day extension) until the judge rules on the motion.

This PLRA provision was originally adopted in the 1997 amendments to the PLRA based on government concerns that courts were effectively denying government requests to terminate injunctions by refusing to rule on the termination motions.[33] Without prompt decisions on termination motions, state and local governments face huge operational and financial costs.[34]

(e) Procedure for motions affecting prospective relief.

(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

~~(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period --~~

~~(A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or~~

~~(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and~~

~~(B) ending on the date the court enters a final order ruling on the motion.~~

~~(3) Postponement of automatic stay. 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. No postponement shall be permissible because of general congestion of the court's calendar.~~

~~(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (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.~~

[33] For example, in Miller v. French, 530 U.S. 327 (2000) (upholding the constitutionality of the PLRA's automatic stay provision), the Federal judge had refused to take any action on the termination motion for over 3 years. See French v. Duckworth, 178 F.3d 437, 449 (1999) (lower court decision in Miller v. French) (Easterbrook, J., dissenting from the denial of rehearing en banc) (noting that once the district court declared the automatic stay unconstitutional two years ago it "has yet to take a single step" in ruling on the PLRA termination motion and the "process that is supposed to be rapid drags on with no end in sight"); see also Ruiz v. Estelle, 5th Cir. Order, Dec. 16, 1998 (directing district court to enter a final order by March 1, 1998 on PLRA termination motion filed in September 1996); Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991) (noting the district

While proponents of this amendment argue that the 90-day period is too short, courts have continued under the current PLRA provisions to exercise equitable jurisdiction when necessary after the expiration of the 90-day period.

SEC. 7. (Attorneys Fees)

Summary: This section would remove the current limitations on attorneys fees for prisoners. Specifically, this would amend CRIPA (the Civil Rights of Institutionalized Persons Act), 42 U.S.C. 1997e, by striking the attorneys fees provisions in subsection (d).[35]

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court's 2 1/2 year delay in ruling on an intervention motion challenging a prison population cap).

[34] For example, federal court injunctions in Michigan required the break up of the Southern Michigan State Prison and the construction of new prisons. Even though Michigan filed a PLRA termination motion on June 10, 1996, the district court blocked implementation of the automatic stay. Although the Court of Appeals granted a discretionary stay, Michigan faced five to ten million dollars in construction delay costs while awaiting a final decision on its termination motion. See Implementation of the Prison Litigation Reform Act: Hearings before the Senate and House Committees, 104 Cong. (1996) (statement of Michigan Gov. Engler).

[35] Specifically, H.R. 4109(7) would amend 42 U.S.C. § 1997e by striking (d) as follows:

~~(d) Attorney's fees.~~
~~(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--~~
~~(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and~~
~~(B)~~
~~(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or~~
~~(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.~~
~~(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.~~
~~(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established~~

Analysis: Under current law, prisoners are entitled to limited attorneys fees. These fees cap the rate at 150% of the rate for Federal court-appointed attorneys, establish a proportionality requirement, prohibit fees for ancillary litigation, and eliminate the catalyst theory as a basis for relief. Because the Civil Rights Act does not contain these same limitations, prisoners' rights attorneys want to increase the attorneys fees available for prisoner litigation. This position is, in part, based on the belief that prisoners should be treated like other civil rights plaintiffs.

Congress should not require state and local taxpayers to pay even more money to prisoner attorneys. The current fees already provide a financial incentive for focused constitutional litigation and substantial claims. Under existing provisions of the PLRA, attorneys fees for state and local prisoners are more favorable than attorneys fees available for Federal prisoners who sue the Bureau of Prisons, wounded veterans who seek recovery for malpractice by government doctors, or rape victims who sue their rapists.[36] Currently, prisoners' rights attorneys who prove constitutional violations are entitled to substantial fees. See Bowers v. City of Philadelphia (E.D. Pa. No. 06-3229) (prisoners' rights attorney awarded $250,000 for successful preliminary injunction litigation and sought to be paid at the rate of $450 per hour).

State and local taxpayers are already paying substantial fees for prisoners' attorneys for prisoner claims filed under the Americans with Disabilities Act. These fees are not limited by the PLRA and thus there are no rate limits or proportionality requirements. These fee awards do not require that the prisoners' attorneys to demonstrate that they are being cautious in expending tax dollars. The usual mechanisms for ensuring that tax dollars are being spent cost-effectively are simply not a part of the attorneys fee process. As a result, prisoners' lawyers are often funded for more work and at a higher rate than the state or local government pays for government attorneys. They likewise have little incentive to resolve matters without litigation.

~~under section 3006A of title 18, United States Code, for payment of court-appointed counsel.~~

~~(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).~~

[36] For a detailed description of attorneys fees awarded in other types of cases and how they compare to the current PLRA attorneys fee provisions, see Johnson v. Daley, 339 F.3d 582 (7th Cir. 2003) (en banc) (upholding the constitutionality of the PLRA attorneys fee provisions).

SEC. 8. (Filing Fees *in forma pauperis*)

- **Summary**: This section would amend the current *in forma pauperis* (IFP) provisions that apply to prisoners.[37] Specifically, subsection 8(1) would amend 28 U.S.C. § 1915(b)(1) to allow prisoners to pay no filing fees for their appeals, and subsection 8(2) would eliminate the payment of filing fees for complaints if they were dismissed at initial screening as frivolous or malicious or for failing to state a claim.

  This proposed IFP amendment would return us to the time when prisoners could file meritless suits at no cost. The current partial filing fee system led to a substantial reduction in meritless suits filed in the Federal courts. While prisoners with no money whatsoever can file lawsuits under the PLRA, the current IFP installment provisions require a prisoner with money to make some commitment of funds before bringing a Federal lawsuit. This is precisely the same choice that every free citizen must make when he or she decides to file a lawsuit.

SEC. 9. (Technical Amendment)

Summary: This is a technical amendment of the IFP provisions, 28 U.S.C. § 1915(a)(1), relating to the affidavit that must accompany an IFP petition.[38]

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[37] H.R. 4901 § (8)(1) & (2) together would amend 28 U.S.C. § 1915(b)(1) as follows:

> (b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action ~~or files an appeal~~ in forma pauperis, and the action is dismissed at initial screening pursuant to subsection (e)(2) of this section, section 1915A of this title, or section 7(c)(1) of the Civil Rights on Institutionalized Persons Act (42 U.S.C. 1997e(c)(1)) the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--
>
> (A) the average monthly deposits to the prisoner's account; or
>
> (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

[38] (a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit ~~that includes a statement of all assets such prisoner possesses~~ (including a statement of assets such person possesses) that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

VI. CONCLUSION

I am most thankful to the Subcommittee for the opportunity to discuss these important issues. I am, of course, available to provide the Subcommittee with whatever assistance it may need as it considers H.R. 4109.

APPENDIX

I. Amendments to PLRA limits (injunctions, consent decrees, and juveniles)

18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.

(1) Prospective relief.

~~(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The 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. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.~~

~~(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--~~

~~(i) Federal law requires such relief to be ordered in violation of State or local law;~~

~~(ii) the relief is necessary to correct the violation of a Federal right; and~~

~~(iii) no other relief will correct the violation of the Federal right.~~[39]

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief ~~and shall respect the principles of comity set out in paragraph (1)(B)~~ in tailoring any preliminary relief. ~~Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.~~[40]

(3) Prisoner release order.

(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to

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[39] H.R. 4109(6)(1) would eliminate subsections (a)(1)(A) & (B).

[40] H.R. 4109(6)(2) would amend subsection (a)(2).

remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener <u>if that party demonstrates that it has eliminated the violation of the Federal right that gave rise to the prospective relief and that the violation is reasonably unlikely to recur</u>--[41]

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A). <u>Nothing in this section shall prevent the court from extending any of the periods set out in subparagraph (A), if the court finds, at the time of granting or approval of the prospective relief, that correcting the violation will take longer that those time periods.</u>[42]

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[41] H.R. 4109(6)(3).

[42] H.R. 4109(6)(4).

~~(2) Immediate termination of prospective relief. In 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.~~[43]

~~(3) Limitation. 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.~~[44]

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) ~~or (2)~~,[45] to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.

~~(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).~~ [46]

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies. The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.

(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

~~(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--~~

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[43] H.R. 4109(6)(5).

[44] Id.

[45] H.R. 4109(6)(6).

[46] H.R. 4109(6)(7).

~~(A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or~~

~~(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and~~

~~(B) ending on the date the court enters a final order ruling on the motion.~~

~~(3) Postponement of automatic stay. 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. No postponement shall be permissible because of general congestion of the court's calendar.~~

~~(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (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.~~ [47]

**** [special master provisions, (f), not amended]*******

(g) Definitions. As used in this section--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains prisoners ~~juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law~~;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant

[47] H.R. 4109(6)(8) (amending subsections (2)-(4)).

to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

(h) Exclusion of Child Prisoners—This section does not apply with respect to prisoners who has not attained the age of 18 years. [48]

II. Amendment to CRIPA (exhaustion, attorneys fees, physical injury, and juveniles)

42 U.S.C § 1997e**.** Suits by prisoners

~~(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.~~

(a) Administrative Remedies-

(1) PRESENTATION- No claim with respect to prison conditions under section 1979 of the Revised statutes (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility shall be adjudicated except under section 1915A(b) of title 28, United States Code, until the claim has been presented for consideration to officials of the facility in which the claim arose. Such presentation satisfies the requirement of this paragraph if it provides prison officials of the facility in which the claim arose with reasonable notice of the prisoner's claim, and if it occurs within the generally applicable limitations period for filing suit.

(2) STAY- If a claim included in a complaint has not been presented as required by paragraph (1), and the court does not dismiss the claim under section 1915A(b) of title 28, United States Code, the court shall stay the action for a period not to exceed 90 days and shall direct prison officials to consider the relevant claim or claims through such administrative process as they deem appropriate. However, the court shall not stay the action if the court determines that the prisoner is in danger of immediate harm.

(3) PROCEEDING- Upon the expiration of the stay under paragraph (2), the court shall proceed with the action except to the extent the court is notified by the parties that it has been resolved.[49]

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute

[48] H.R. 4109(4)(a) (amending (g)(3) and (g)(5) and adding (h)).

[49] H.R. 4109(3) (replacing (a)).

the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

(c) Dismissal.

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

~~(d) Attorney's fees.~~

~~(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--~~

~~(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and~~

~~(B)~~

~~(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or~~

~~(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.~~

~~(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.~~

~~(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.~~

~~(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).~~ [50]

~~(e) Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~ [51]

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[50] H.R. 4109(7).

[51] H.R. 4109(2)(a).

(f) Hearings.

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply.

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

(i) Exclusion of Child Prisoners—This section does not apply with respect to a prisoner who has not attained the age of 18 years.[52]

III. Amendments to IFP Provisions (partial filing fees, screening, and juveniles)

28 U.S.C. § 1915. Proceedings in forma pauperis

(a) (1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit ~~that includes a statement of all assets such prisoner possesses~~

[52] H.R. 4109(4)(6) (amending (h) and adding (i)).

(including a statement of assets such person possesses)[53] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action ~~or files an appeal~~ in forma pauperis, and the action is dismissed at initial screening pursuant to subsection (e)(2) of this section, section 1915A of this title, or section 7(c)(1) of the Civil Rights on Institutionalized Persons Act (42 U.S.C. 1997e(c)(1))[54] the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $ 10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate [United States magistrate judge] in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title [28 USCS § 636(b)] or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of

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[53] H.R. 4109(9) (technical amendment to (a)(1)).

[54] H.R. 4109(8).

proceedings conducted pursuant to section 636(c) of this title [28 USCS § 636(c)]. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e) (1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f) (1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2) (A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions within the preceding 5 years, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious ~~, malicious, or fails to state a claim upon which relief may be granted~~, unless the prisoner is under imminent danger of serious physical injury.[55]

(h) As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.[56]

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[55] H.R. 4109(5).

[56] H.R. 4109(4)(c).

28 U.S.C. § 1915A**.** Screening

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition. As used in this section, the term "prisoner" means any person who has attained the age of 18 years incarcerated or detained in any facility who is accused of, convicted of, sentenced for, ~~or adjudicated delinquent for,~~ violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.[57]

IV. Federal Tort Claims Act (physical injury)
§ 1346**.** United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court [United States Court of Federal Claims], of:
(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
(2) Any other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) (1) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and

[57] H.R. 4109(4)(c).

after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

~~(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.~~[58]

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 [28 USCS § 6226, 6228(a), 7426, or 7428] (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179 [28 USCS §§ 3901 et seq.], the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title [3 USCS §§ 401 et seq].

[58] H.R. 4109(2)(b).