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## The Prison Litigation Reform Act: Striking the Balance between Law and Order

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THE PRISON LITIGATION REFORM ACT:  
STRIKING THE BALANCE BETWEEN LAW AND ORDER

I. INTRODUCTION

Fifteen percent of all civil suits filed in the courts of the United States are filed by prisoners, thereby comprising one of the largest filing categories in federal court.<sup>1</sup> Ninety-seven percent of these suits are dismissed prior to trial, and of those that proceed, only thirteen percent result in any relief granted to the plaintiff.<sup>2</sup> This is the lowest success rate of any type of civil suit filed in federal courts.<sup>3</sup> As the Supreme Court of the United States has observed, the fact that even those who breach the social contract may still invoke its protection is the strength of the American jurisprudential system.<sup>4</sup> It is also its weakness. The amount of frivolous prisoner litigation threatens to choke an already overburdened judicial system.<sup>5</sup> Addressing the problem of frivolous prisoner litigation in the United States, Congress observed that:

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1. See Ashley Dunn, *A Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1 (lamenting proliferation of prisoner lawsuits in already overburdened judicial system).

2. See *id.*

3. See *id.*

4. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 335 n.20 (1982) (Stevens, J., dissenting) (quoting ROBERT BOLT, *A MAN FOR ALL SEASONS*, ACT I 147 (Three Plays, Heinemann ed. 1967)). The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here:

The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester . . . What would you do? Cut a great road through the law to get after the Devil? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

*Id.* (quoting BOLT, *supra*, at 147).

5. See Denise M. Pennick, *Limitations On Relief: Prisoner Litigations*, 1 HAW. B.J. 6, 6 (Sept. 1997) (discussing relevant statistics).

In 1995, prisoners filed 41,679 civil rights actions nationwide, more than twice as many as were filed in 1985. This number accounted for more than thirteen percent of all civil cases filed in the federal district courts. The estimated cost for these inmate lawsuits is \$81 million. In response to this flood of inmate litigation and its perceived ill-effects upon the legal system, last year Congress passed legislation designed to “bring relief to a civil justice system overburdened by frivolous prisoner lawsuits . . . [and] to restore balance to prison conditions litigation.”

*Id.*

The number of lawsuits filed by inmates has grown astronomically—From 6,600 in 1975 to more than 39,000 in 1994. These suits can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety.<sup>6</sup>

In 1996, in response to this inundation of frivolous litigation, Congress enacted the Prison Litigation Reform Act (“PLRA”).<sup>7</sup> Despite the PLRA’s substantial ameliorative effect on the judicial process, it has come under scathing attack by its detractors.<sup>8</sup> The most zealous critics argue that the act itself is unconstitutional, and should be so declared, whereas more moderate opponents merely wish to interpret it into oblivion.<sup>9</sup>

Despite that a majority of circuits uphold the act as it stands, substantial opposition to the PLRA from a minority of circuits, coupled with the controversial nature of the subject matter, makes Supreme Court review likely.<sup>10</sup> One of the most comprehensive and well-presented challenges to the Act’s constitutionality was recently decided by the United States Court of Appeals for the Third Circuit in the case of *Imprisoned Citizens Union v. Ridge*.<sup>11</sup>

6. 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole).

7. 18 U.S.C. § 3601 (1996); see *Pennick*, *supra* note 5, at 6-7 (describing passage of PLRA in response to outrage at what was perceived as abuse of legal system).

8. See, e.g., *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999) (discussing defendant inmates four-prong attack against PLRA provisions); *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998) (questioning constitutionality of PLRA); *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997) (finding automatic stay provision constitutional through tortured reading of statutory language), *vacated*, 172 F.3d 144 (2d Cir. 1999); *Imprisoned Citizens Union v. Shapp*, 451 F. Supp. 893 (E.D. Pa. 1978) (attacking constitutionality of PLRA and giving rise to *Imprisoned Citizens Union v. Ridge*).

9. See *Imprisoned Citizens Union*, 169 F.3d at 181-87 (noting how *Imprisoned Citizens Union* cases hold PLRA unconstitutional, *Benjamin* court interprets PLRA to make it consistent with constitution in its view and *Hadix* court initially took issue with PLRA’s constitutionality, but currently engaged in en banc rehearing).

10. See *id.* at 190 (addressing issue of constitutionality, and concluding that act is constitutional). See generally *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997) (finding PLRA constitutional), *cert. denied*, 118 S. Ct. 2375 (1998); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997) (upholding PLRA generally), *cert. denied*, 118 S. Ct. 2374 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997) (upholding PLRA); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996) (upholding PLRA against various constitutional challenges), *cert. denied*, 118 S. Ct. 2366 (1998). But see *Hadix*, 133 F.3d at 942 (rehearing PLRA issues in light of sister circuit opposition); *Benjamin*, 124 F.3d at 167-68 (interpreting PLRA in unique fashion in order to find it constitutional).

11. See *Imprisoned Citizens Union*, 169 F.3d at 178 (addressing on appeal four separate issues dealing with PLRA). The author of this Comment helped write and file the brief in this case and was recently asked to attend the oral argument by the Governor’s Office of General Counsel (“OGC”). The author is also working with OGC on proposed amendments to PLRA to be presented to Senator Hatch.

In addition to the constitutional issues presented by this most recent challenge to the PLRA in the Third Circuit, two collateral matters also make this topic noteworthy. Next term, the United States Congress will consider amending the PLRA, and the decision in *Imprisoned Citizens* will have a significant effect on these amendments because one of the counsel-of-record for the appellees has been asked to testify before Congress on proposed changes.<sup>12</sup> Further, Pennsylvania has recently enacted a state version of the PLRA, modeled very closely on its federal counterpart.<sup>13</sup> There is no doubt that an examination of the controversy surrounding the federal act will be of critical importance to Third Circuit practitioners dealing with either the federal or state PLRA.

As part of a consolidated omnibus bill, the provisions of the federal PLRA are codified at different locations.<sup>14</sup> Given the structural and substantive complexity of the PLRA, Part II of this Comment will examine the history of each challenged provision of the PLRA separately.<sup>15</sup> Each subsection will provide an analysis of the current state of the law with respect to a given provision of the PLRA:

- Subsection A will deal with the Three Strikes Provision;<sup>16</sup>
- Subsection B will deal with the Attorney Fee Provision;<sup>17</sup>
- Subsection C will deal with the Filing Fee Provision;<sup>18</sup>

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12. See statement of Sarah B. Vandenbraak, Chief Counsel for the Pennsylvania Department of Corrections. Ms. Vandenbraak was instrumental in drafting the federal PLRA and testifying before Congress on this matter. She is also counsel-of-record in *Imprisoned Citizens Union* and has been asked to give additional testimony before Congress when it considers amendments to PLRA next term.

13. See PR Newswire, *PA Attorney General Mike Fisher Applauds Passage of Frivolous Inmate Lawsuit Bill*, Tues., Jan. 20, 1998, at 1 (reporting on general purposes of newly enacted PLRA). A report stated:

In PA Attorney General Mike Fisher Applauds Passage of Frivolous Inmate Lawsuit Bill . . . Attorney General Mike Fisher today congratulated the state House for passing the Pennsylvania Prisoner Litigation Reform Act (Senate Bill 640), which would allow state judges to dismiss frivolous lawsuits filed by prisoners. The bill now goes to the Senate for concurrence. "This bill would allow judges to throw out blatantly frivolous lawsuits before my attorneys have to spend time, energy and tax dollars to defend them," Fisher said. "After Congress adopted a similar law in 1996, prisoners began filing their lawsuits in the state courts."

*Id.*

14. See, e.g., 18 U.S.C. § 3626(b) (1994) (containing termination of relief provision); 28 U.S.C. § 1915(g) (1994) (containing three strikes provision); 42 U.S.C. § 1988(b) (1994) (containing attorney fee provision).

15. For a discussion of each subsection, see *infra* notes 29-144 and accompanying text.

16. For a discussion of the three strikes provision, see *infra* notes 29-34 and accompanying text.

17. For a discussion of the attorney fee provision, see *infra* notes 35-43 and accompanying text.

18. For a discussion of the filing fee provision, see *infra* notes 44-50 and accompanying text.

- Subsection D will deal with the Automatic Stay Provision;<sup>19</sup>
- Subsection E will deal with the Equal Protection Argument;<sup>20</sup>
- Subsection F will deal with the Exhaustion Provision;<sup>21</sup>
- Subsection G will deal with the Remedial Power Issue;<sup>22</sup>
- Subsection H will deal with the Separation of Powers challenge;<sup>23</sup>
- Subsection I will deal with the Due Process argument;<sup>24</sup>
- Subsection J will deal with the Rules of Decision Issue;<sup>25</sup> and
- Subsection K will deal with the federal versus state power issue.<sup>26</sup>

Part III will provide an overview of the constitutionality of the PLRA with specific reference to the arguments presented in *Imprisoned Citizens Union*.<sup>27</sup> Part IV will present conclusions with respect to the PLRA's present and future applications.<sup>28</sup>

## II. CHALLENGED PROVISIONS OF THE PLRA

### A. *The Three Strikes Provision*

The PLRA's three strikes provision acts as a bar to filing a civil suit for any prisoner who has previously filed three frivolous suits, unless there is danger of serious bodily injury to the prospective plaintiff.<sup>29</sup> The three strikes provision has repeatedly survived constitutional challenges that it

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19. For a discussion of the automatic stay provision, see *infra* notes 51-61 and accompanying text.

20. For a discussion of the equal protection argument, see *infra* notes 62-71 and accompanying text.

21. For a discussion of the exhaustion provision, see *infra* notes 72-89 and accompanying text.

22. For a discussion of the remedial power of federal courts issue, see *infra* notes 90-99 and accompanying text.

23. For a discussion of the separation of powers issue, see *infra* notes 100-18 and accompanying text.

24. For a discussion of the due process argument, see *infra* notes 119-24 and accompanying text.

25. For a discussion of the rules of decision issue, see *infra* notes 125-31 and accompanying text.

26. For a discussion of the federal versus state power issue, see *infra* notes 132-44 and accompanying text.

27. For an analysis of the arguments in *Imprisoned Citizens Union*, see *infra* notes 145-205 and accompanying text.

28. For the conclusion, see *infra* notes 206-17 and accompanying text.

29. See 28 U.S.C. § 1915(g) (1994) (limiting prisoners' ability to file suit after prisoner has on three or more prior occasions brought suits adjudicated as frivolous, malicious or failing to state claim upon which relief can be granted). The PLRA provides in relevant part that:

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, 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, malicious, or fails to state a

impermissibly restricts prisoners' access to the courts.<sup>30</sup> In finding the PLRA constitutional, courts have characterized the three strikes provision as either a mild barrier to the courts, or, in some cases, no barrier at all.<sup>31</sup>

Further, courts usually interpret and apply the three strikes provision broadly.<sup>32</sup> Courts generally construe the expression in the PLRA, "imminent danger of serious physical injury," strictly.<sup>33</sup> In fact, the United States Court of Appeals for the Eighth Circuit has gone so far as to hold that "the statute's use of the present tense verb[ ] . . . 'is' demonstrates[ ] an otherwise ineligible prisoner is only eligible [for waiver of the three strikes rule] to proceed IFP [in forma pauperis] if he is in imminent danger *at the time of filing.*"<sup>34</sup>

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claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

*Id.*

30. See generally *Wilson v. Yaklich*, 148 F.3d 596 (6th Cir. 1998) (holding that § 1915(g) is not impermissibly retroactive or ex post facto, does not violate equal protection or due process and does not violate prohibition on bills of attainder), *cert. denied*, 119 S. Ct. 1028 (1999); *Rivera v. Allin*, 144 F.3d 719 (11th Cir. 1998) (rejecting prisoner's First, Fifth and Fourteenth Amendment challenges as well as retroactive challenges to § 1915(g)) *cert. denied*, 119 S. Ct. 27 (1998); *Carson v. Johnson*, 112 F.3d 818 (5th Cir. 1997) (noting that forced payment of filing fee does not prevent bringing cause of action, it merely denies plaintiff IFP status); *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997) (holding that three strikes provision is minor barrier to courts and therefore constitutional), *cert. denied*, 118 S. Ct. 192 (1997); *Parsell v. United States*, 218 F.2d 232 (5th Cir. 1955) (holding that denying leave to proceed IFP does not offend due process).

31. See *Rivera*, 144 F.3d at 721 (holding that three strikes provision is constitutionally permissible); *Wilson*, 148 F.3d at 599 (holding that § 1915(g) does not operate as enough of barrier to court to constitute constitutional violation); *Carson*, 112 F.3d at 821 (holding that three strikes provision does not, in fact, operate as absolute bar to court access); *Roller*, 107 F.3d at 227 (allowing that three strikes provision does impede access to courts, but not severely enough to threaten validity of act); *Parsell*, 218 F.2d at 232 (finding that ability of prisoners to proceed IFP is not fundamental, thus denying IFP status to prisoners does not offend due process).

32. See *In re Crittendem*, 143 F.3d 919, 920 (5th Cir. 1998) (holding that three strikes applies to writs of mandamus); *Adepegba v. Hammons*, 103 F.3d 383, 386 (5th Cir. 1996) (holding that PLRA's three strikes provision applies to appeal pending prior to effective date of PLRA).

33. See, e.g., *Rivera*, 144 F.3d at 724 (denying waiver to prisoner who alleged doctor had touched him improperly during exam); *Wilson*, 148 F.3d at 601 (holding that "reasonable fear" of assault, as opposed to assault itself, is insufficient to constitute compensable claim) (quoting *Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996)). *But cf.* *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (holding that placement of inmate near enemies constituted sufficient danger to overcome three strikes rule); *Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir. 1997) (holding that prisoner's allegation of placement in dangerous situations near hostile prisoner sufficient to remand for further consideration).

34. *Ashley*, 147 F.3d at 717.

B. *The Attorney Fee Provision*

The PLRA's attorney fee provision seeks to limit compensation in suits by prisoners to an amount that is reasonable both with respect to the amount of work done and the rate of compensation specified under § 3006A of Title 18, which sets out what constitutes a "reasonable" fee.<sup>35</sup>

The District Court for the Eastern District of Pennsylvania, relying on Supreme Court precedent, recently upheld the constitutionality of the PLRA's attorney fee provision against retroactivity and equal protection challenges.<sup>36</sup> The relevant language from the attorney fee provision, which has broad applicability, reads: "reasonable regulations that do not significantly interfere with . . . [the fundamental right] may legitimately be imposed."<sup>37</sup>

Like many other aspects of the PLRA, controversy revolves around the retroactivity of the attorney fee provision.<sup>38</sup> For example, the United States Court of Appeals for the Fourth Circuit has concluded that all attorney fees awarded after the passage of the PLRA must conform to its restric-

35. See 42 U.S.C. § 1997(d) (1994) (limiting amount of attorney's fees to those that are directly and reasonably incurred in proving plaintiff's case). The PLRA provides in relevant part:

(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 1988 of this title, 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 1988 of this title; 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 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 1988 of this title.

*Id.* See generally 18 U.S.C. § 3006A(d) (1997) (specifying hourly rates and maximum amounts for legal representation).

36. See *Collins v. Alagrín*, No. CIV.A. 95-4220, 1998 U.S. Dist. LEXIS 83, at \*7 (E.D. Pa. Jan. 9, 1998) (citing *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)).

37. *Zablocki*, 434 U.S. at 386 (1978).

38. For a discussion of the controversy surrounding attorney's fees, see *infra* notes 39-43 and accompanying text.

tions.<sup>39</sup> Conversely, the United States Courts of Appeals for the Seventh and Eighth Circuit maintain that it would be manifestly unjust to apply the PLRA's restrictions to cases pending at the time of its passage.<sup>40</sup>

The United States Court of Appeals for the Ninth Circuit's approach to determining the temporal applicability of statutes is to defer to the Supreme Court's recently articulated three-step test that: (1) examines express congressional intent; (2) engages in a broad examination of normal rules of construction; and (3) presumes that statutes are not to be applied so as to create a retroactive effect.<sup>41</sup> Under this analysis, the Ninth Circuit concludes that the PLRA is neither unconstitutional nor retroactive.<sup>42</sup> Finally, the Third Circuit recently affirmed a district court interpretation of the PLRA that allowed a successful plaintiff to recover not only the fees incurred in the case-in-chief, but also those incurred in securing the initial fees.<sup>43</sup>

### C. *The Filing Fee Provision*

The PLRA requires that inmates who cannot afford to pay the requisite fees, and are therefore proceeding in forma pauperis ("IFP"), must pay a filing fee in installments that are calculated based on the prisoner's

39. See *Alexander S. v. Boyd*, 113 F.3d 1373, 1384 (4th Cir. 1997) (finding congressional intent that PLRA attorney fee provision should apply equally to juvenile facilities and should apply retroactively), *cert. denied*, 118 S. Ct. 880 (1998).

40. See *Jensen v. Clarke*, 94 F.3d 1191, 1202 (8th Cir. 1996) (using Supreme Court's procedure for determining retroactivity) (citing *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994)); *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996) (agreeing with Eighth Circuit's rejection of retroactivity); see also *Collins v. Algarin*, No. CIV.A. 95-4220, 1998 WL 10234, at \*7-8 (E.D. Pa. Jan. 9, 1998) (holding that "[r]etroactive legislation deserves judicial attention because it may involve the legislature's 'sweep[ing] away settled expectations suddenly and without individualized consideration'") (quoting *Landgraf*, 511 U.S. at 266).

41. See *Madrid v. Gomez*, 150 F.3d 1030, 1035 (9th Cir. 1998) (describing Supreme Court's test), *withdrawn by* 179 F.3d 1252 (9th Cir. 1999). The court stated:

First, a court must determine "whether Congress has expressly prescribed the statute's proper reach"; a statute can operate retroactively only with a clear statement to that effect. Second, in the absence of such an express command, a court must engage in a broader examination of "normal rules of construction," which requires a study of statutory canons and legislative history; these rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case). Finally, if the first two steps shed no light on the temporal scope of the statute, it is necessary to fall back on a judicial default rule: Statutes are not to be applied so as to create a "retroactive effect."

*Id.* (quoting *Landgraf*, 511 U.S. at 280; *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)).

42. See *id.* at 1035 (finding PLRA constitutional because retroactivity clause is clear and unambiguous, making it consistent with Supreme Court test).

43. See *Hernandez v. Kalinowski*, 146 F.3d 196, 198-99 (3d Cir. 1998) (upholding so-called "fees on fees" argument).



financial status.<sup>44</sup> The circuit courts of appeals generally uphold the con-

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44. See 28 U.S.C. § 1915 (1994) (providing requirements for IFP proceedings). The PLRA's proceedings in IFP provision states, in relevant part:

(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 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, 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 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 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 proceedings conducted pursuant to section 636(c) of this title. 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

stitutionality of requiring inmates to pay a filing fee against equal protection, First Amendment and access to the courts arguments.<sup>45</sup> The

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, 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, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) 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.

*Id.*

45. See generally *Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir. 1997) (holding that filing fee provisions are constitutional); *Mitchell v. Farcass*, 112 F.3d 1483 (11th Cir. 1997) (holding PLRA filing fee does not violate equal protection and that filing fee provisions are rationally related to purpose of preventing abuse of courts); *Nicholas v. Tucker*, 114 F.3d 17 (2d Cir. 1997) (finding PLRA passes rational basis test, filing fee requirement does not burden inmates fundamental right of access to courts and inmates are not suspect class), *cert. denied sub nom.*, *Nicholas v. Miller*, 118 S. Ct. 1812 (1998); *Norton v. Dimazana*, 122 F.3d 286 (5th Cir. 1997) (holding that filing fee provision does not violate Constitution); *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997) (holding that filing fee does not impose unconstitutional burden on access to courts, PLRA does not burden fundamental right, indigents are not suspect class and PLRA passes rational basis scrutiny), *cert. denied*, 118 S. Ct. 192 (1997); *Shabazz v. Parsons*, 127 F.3d 1246 (10th Cir. 1997) (holding filing fee provisions constitutional).

Supreme Court has mandated waivers of filing fee provisions only where the litigant's "fundamental interest [is] at stake."<sup>46</sup>

The consensus among the circuit courts of appeals is that the filing fee provision does not apply to habeas corpus actions or to mandamus actions unless they seek relief in the nature of a 42 U.S.C. § 1983 civil rights action.<sup>47</sup> The United States Court of Appeals for the Second Circuit construes the filing fee provision strictly, holding that the obligation to pay remains even if the complaint is dismissed or if their notice was filed prior to the effective appeal date.<sup>48</sup>

The District Court for the Western District of Pennsylvania articulated a position that prisoner's law suits are being permitted to go forward in that jurisdiction prior to the payment of any portion of the filing fee.<sup>49</sup> Given the potential for improper motivation and abuse of such a credit system in the institutional setting, the Western District's interpretation of the filing fee mandate is likely to become a source of contention in future litigation, and although this issue has not been raised in *Imprisoned Citizens Union*, it should be addressed by the Third Circuit to resolve inconsistent application among the district courts in its jurisdiction.<sup>50</sup>

#### D. *The Automatic Stay Provision*

The automatic stay provision, "[p]erhaps [the] most controversial" aspect of the PLRA, mandates that "any prospective relief subject to a pending motion shall be automatically stayed" after a given period following

46. *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996).

47. *See In re Phillips*, 133 F.3d 770, 771 (10th Cir. 1998) (holding that PLRA is inapplicable to mandamus actions); *In re Stone*, 118 F.3d 1032, 1033-34 (5th Cir. 1997) (holding that PLRA may be applicable to mandamus actions depending on nature of underlying action); *Kincade v. Sparkman*, 117 F.3d 949, 950-51 (6th Cir. 1997) (holding PLRA fee payment provisions inapplicable to petition for habeas corpus); *Madden v. Myers*, 102 F.3d 74, 76 (3d Cir. 1996) (holding PLRA inapplicable to mandamus actions); *Martin v. United States*, 96 F.3d 853, 854 (7th Cir. 1996) (holding PLRA inapplicable to mandamus actions); *In re Smith*, 114 F.3d 1247, 1250 (D.C. Cir. 1997) (holding that PLRA filing fees apply to writ of prohibition where underlying action is civil in nature); *In re Nagy*, 89 F.3d 115, 116-17 (2d Cir. 1996) (holding that PLRA fee requirements apply to extraordinary writs that seek relief analogous to civil complaints, but not to writs directed at judges conducting criminal trials); *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996) (holding that habeas corpus is not civil action for purposes of PLRA).

48. *See Covino v. Reopel*, 89 F.3d 105, 106 (2d Cir. 1996) (holding that PLRA applies to notice filed prior to effective date of appeal); *Leonard v. Lacy*, 88 F.3d 181, 184-86 (2d Cir. 1996) (holding that filing fee should be assessed prior to treatment of case). *But cf. Church v. Attorney General of Va.*, 125 F.3d 210, 211 (4th Cir. 1997) (holding that PLRA provisions do not apply retroactively); *Thurman v. Gramley*, 97 F.3d 185, 188 (7th Cir. 1996) (same); *White v. Gregory*, 87 F.3d 429, 430 (10th Cir. 1996) (same).

49. *See* Conversation with Randall Sears, Deputy Chief Counsel, Pennsylvania Department of Corrections (July 10, 1998).

50. *See id.* (discussing potential abuses of credit-for-free system and such system's propensity towards future litigation).

the filing of an appropriate motion.<sup>51</sup> Prior to the 1997 amendments, the duration of the period between filing and implementation of the automatic stay of prospective relief was thirty days.<sup>52</sup> The amendment, however, now allows a court to exercise its discretion in extending the interim period by sixty days for good cause.<sup>53</sup>

In 1996, two Michigan district courts invalidated the automatic stay provision on separation of powers and due process grounds.<sup>54</sup> During the

51. Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 378 (1998) (discussing PLRA automatic stay provision—18 U.S.C. § 3626(e)(2)(1994)).

52. See 18 U.S.C. § 3626(e)(2) (stating new procedures affecting prospective relief). The current version of the PLRA states in relevant part:

(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.

*Id.*

53. See 18 U.S.C. § 3626(e)(3) (1997) (allowing postponement for good cause). Despite the amendment to this provision of the PLRA, there is still the potential for confusion over whether the amended statute would allow for a total of 60 days stay on the showing of good cause, or whether, as amended, the PLRA would afford 60 additional days, for a total of a 90-day stay. The author of this Comment was assigned to submit a proposal for amendments to the PLRA, to be considered by Senator Hatch before Congress considers enacting amendments to the PLRA next term. This issue was among those identified for attention. The proposed amendment would read as follows:

*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 [suggested addition- "additional"] days for good cause [suggested addition- "but in no event may the postponement exceed 90 days"]. No postponement shall be permissible because of general congestion of the court's calendar.

The proposed additional language serves two purposes. First, by stating that the 60-day stay is "additional" to the initial 30, and by providing the total of 90, there can be no confusion as to whether the 60-day good cause provision is in addition to, or in the alternative to the initial 30-day provision. Further, by stating that "in no event shall postponement exceed 90 days," Congress can send a message to those who challenge the constitutionality of the PLRA that this provision is constitutional even without conceding that courts should have a general power to remedy such situations "consistent with general principles of equity."

54. See *Hadix v. Johnson*, 933 F. Supp. 1362, 1366-70 (W.D. Mich. 1996) (Through the stay provision of the PLRA, Congress has usurped a role that is exclusively judicial.), *rev'd*, 133 F.3d 940 (6th Cir. 1998); *Hadix v. Johnson*, 933 F.

pendency of the appeal, Congress amended the automatic stay provision.<sup>55</sup> The PLRA's stay provision was also at issue before the United States Court of Appeals for the Sixth Circuit in *Hadix v. Johnson*<sup>56</sup> where the prisoners and the Justice Department argued that the amendment recognized a court's discretionary power, in effect, "to stay the stay," consistent with general principles of equity.<sup>57</sup> State prison officials, however, argued that the amendment did not authorize any suspension of a stay in excess of sixty days, and that "in adding § 4 Congress merely established appellate jurisdiction over district court orders suspending the automatic stay."<sup>58</sup> In *Hadix*, the Sixth Circuit agreed with the Justice Department's and prisoners' view, holding that its interpretation was necessary in order to uphold the PLRA as constitutional.<sup>59</sup> One dissenting judge, however, maintained that the Sixth Circuit's interpretation was unnecessary and observed that every other circuit addressing the issue found the automatic stay provision valid without further interpretation.<sup>60</sup> At this time, reargument of *Hadix* is being sought before the Sixth Circuit.<sup>61</sup>

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Supp. 1360, 1361 (E.D. Mich. 1996) (expressing same concern), *rev'd*, 144 F.3d 923 (6th Cir. 1998).

55. See Pub. L. No. 105-119, § 123, 111 Stat. 2440, 2470 (1997) (enacting amendments to PLRA).

56. 144 F.3d 925 (6th Cir. 1998).

57. See *id.* at 930 (arguing that if court could not "stay the stay," act violated general principles of law).

58. *Id.* at 936.

59. See *id.* at 930 ("[T]he reasonable construction espoused by the prisoners and the Department of Justice does not violate separation-of-powers principles.").

60. See *id.* at 950-52 (Norris, J., concurring in part, dissenting in part). Judge Norris maintained that the provision was not unconstitutional prior to amendment and that the amendment need not be interpreted broadly to be constitutional. See *id.* Judge Norris predicated his position on the fact that the termination provision was neither immediate nor permanent—" [A]t all times the district court retains the authority to avoid (or, alternatively, to lift) a stay by simply complying with certain substantive provisions of the PLRA." *Id.* at 951. Judge Norris's position is reflected in the holdings of every other circuit that has addressed the constitutionality of the PLRA, including its automatic stay provision. See generally *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997) (upholding constitutionality of PLRA), *cert. denied*, 118 S. Ct. 2366 (1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997) (upholding constitutionality of PLRA), *cert. denied*, 118 S. Ct. 2357 (1998); *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997) (upholding PLRA under strained construction of statutory language), *vacated en banc*, 172 F.3d 144 (2d Cir. 1999); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997) (finding that PLRA does not interfere unduly with court's power); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996) (upholding PLRA as comporting with constitutional requirements and general legal principles).

61. See Discussion with Chief Counsel Sarah Vandenbraak, Pennsylvania Department of Corrections (July 15, 1998).

E. *The Equal Protection Argument*

It is evident that the PLRA applies to inmates and not to private citizens.<sup>62</sup> Thus, broad challenges to the PLRA have been repeatedly brought on the grounds that it violates the Equal Protection Clause of the Fifth Amendment.<sup>63</sup>

The resolution of the equal protection challenge to the PLRA depends largely on the standard of review employed.<sup>64</sup> At first blush, the argument that the PLRA burdens access to the courts, a fundamental right that triggers strict scrutiny, seems plausible.<sup>65</sup> Such an analysis, however, ignores the fact that the PLRA does not deprive inmates of "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."<sup>66</sup>

In accord with this line of reasoning, the Eastern District of Pennsylvania stated that, "[T]he right of access [and] the right to relief . . . are not the same thing."<sup>67</sup> Because courts do not regard the PLRA as burdening a fundamental right and do not regard inmates as a suspect class, rational basis review is generally employed.<sup>68</sup> Several courts have held that the PLRA meets the low level test rational basis principle.<sup>69</sup> Further, given

62. See, e.g., 18 U.S.C. § 3626 (1994); 28 U.S.C. § 1915(2)(g) (1997); 42 U.S.C. § 1988 (1994).

63. See *Lewis v. Casey*, 518 U.S. 343, 370 (1996) (addressing challenges to PLRA on grounds of Equal Protection and Fifth Amendment) *Inmates of Suffolk County Jail*, 129 F.3d at 655 (addressing Equal Protection and Fifth Amendment); *Plyler*, 100 F.3d at 368 (same); *Gavin*, 122 F.3d at 1084 (addressing Equal Protection and Fifth Amendment).

64. See, e.g., *Jones v. Bruce*, 921 F. Supp. 708, 710 (D. Kan. 1996) (describing importance of standard of review employed). The court stated:

Varying standards of review apply to an equal protection challenge depending on the type of classification at issue. Where fundamental rights or a suspect classification are involved, strict scrutiny is the appropriate standard of review. An intermediate standard has been applied to gender-based classifications. Absent classifications which implicate such special interests, the rational basis test is employed.

*Id.* (citations omitted).

65. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (discussing importance of right of access to courts for prisoners).

66. *Lewis*, 518 U.S. at 351 (citing *Bounds v. Smith*, 430 U.S. 817, 825 (1977)).

67. *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 602 (E.D. Pa. 1998). See generally *Lefkowitz v. Citi-Equity Group, Inc.*, 146 F.3d 609 (8th Cir. 1998) (holding that filing fee provisions of PLRA do not deny constitutionally guaranteed access to courts).

68. See *Imprisoned Citizens Union*, 11 F. Supp. 2d at 602 (finding rational basis to be appropriate measure); see also *Inmates of Suffolk County Jail*, 129 F.3d at 660 (applying rational basis standard for PLRA statute to be appropriate); *Plyler* 100 F.3d at 373 (applying rational basis review because fundamental right is not burdened); *Jensen v. County of Lake*, 958 F. Supp. 397, 405 (N.D. Ind. 1997) (holding federalism is not rational basis in any event); *Benjamin v. Jacobson*, 935 F. Supp. 332, 357 (S.D.N.Y. 1996) (holding that rational basis is appropriate standard in this instance), *rev'd in part*, 172 F.3d 162 (2d Cir. 1997).

69. See *Imprisoned Citizens Union*, 11 F. Supp. 2d at 604 (finding that PLRA meets rational basis test); see also *Inmates of Suffolk County Jail*, 129 F.3d at 658-59

that the legislature need not "actually articulate at any time the purpose or rationale supporting its classification," the legislative history of the PLRA more than satisfies the rational basis standard.<sup>70</sup> Finally, in equal protection analysis dealing with the notion that prisoners should be treated as a suspect or quasi-suspect class, precedent indicates that prisoners may be accorded a lower level of constitutional protection than members of the general public with respect to certain rights, without violating equal protection.<sup>71</sup>

#### F. *The Exhaustion Provision*

The PLRA requires that all subordinate avenues of review must be exhausted prior to a prisoner filing suit.<sup>72</sup> There can be little doubt that the PLRA's exhaustion provision is mandatory and applies to all newly commenced actions.<sup>73</sup> There is uncertainty, however, with respect to whether the provision is applicable retroactively.<sup>74</sup> The Sixth Circuit has held that this requirement does not apply retroactively, thereby exempting cases commenced prior to the PLRA's enactment.<sup>75</sup> The District Court for the Southern District of New York, however, relying on the Second Circuit's retroactive application of filing fees, has held that the exhaustion provision should be applied retroactively.<sup>76</sup>

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(finding that PLRA passes rational basis test); *Plyler*, 100 F.3d at 373-74 (finding that PLRA survives low level rational basis scrutiny); *Jensen*, 958 F. Supp. at 404 (holding PLRA meets rational basis); *Benjamin*, 935 F. Supp. at 358 (holding that PLRA survives rational basis analysis).

70. *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., 141 CONG. REC. S14316-17 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham); 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch); 141 CONG. REC. H14105-06 (daily ed. Dec. 6, 1995) (statement of Rep. Canady). See generally *Lewis*, 518 U.S. at 343 (1996) (discussing PLRA legislative history).

71. See, e.g., *Turner v. Safley*, 482 U.S. 78, 84-91 (1987) (addressing level of protection of prisoners' rights); *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (discussing reduced rights for prisoners in voting context); *Imprisoned Citizens Union*, 11 F. Supp. 2d at 602-04 (discussing lowered level of rights of prisoners).

72. See 42 U.S.C. 1997e (1994) (requiring exhaustion of remedies before action can be brought). The PLRA states in relevant part:

Suits by prisoners

(a) Applicability of administrative remedies.

No action shall be brought with respect to prison conditions under section 1983 of this title [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.

*Id.*

73. See *Garret v. Hawk*, 127 F.3d 1263, 1264-65 (10th Cir. 1997) (describing genesis of PLRA exhaustion provision).

74. For a discussion of the retroactivity issue, see *infra* notes 75-76 and accompanying text.

75. See *Wright v. Morris*, 111 F.3d 414, 421-23 (6th Cir. 1997) (holding that PLRA does not apply to cases already pending on date of enactment, because PLRA language is clearly prospective).

76. See *Salhahuddin v. Mead*, No. 95 CIV.8581, 1997 WL 357980, at \*3 (S.D.N.Y. June 26, 1997) (resolving ambiguity so as to discourage appeal), *rev'd*,

Another related area of contention revolves around the precise meaning of exhaustion.<sup>77</sup> Courts have uniformly required complete exhaustion of all levels of appeal before seeking judicial relief.<sup>78</sup> Thus, courts do not tolerate the filing of cases while an administrative appeal is pending or the seeking of stays during litigation to allow the completion of exhaustion.<sup>79</sup> In conformance with the plain language of the provision (exhaustion of administrative remedies), the Third Circuit recently held that a plaintiff need not exhaust subordinate judicial—in addition to administrative—channels for review.<sup>80</sup> The United States Court of Appeals for the Tenth Circuit, however, makes it clear that actual administrative remedies must be exhausted, even if they would likely prove futile.<sup>81</sup>

Courts have also rejected allegations of bias, delay, lack of access to administrative remedies or nonresponsiveness as excuses for noncompliance with exhaustion provisions.<sup>82</sup> The only real exception available to prisoners arises if they can come forward with compelling evidence to make a “clear and positive” showing that administrative remedies are deficient.<sup>83</sup>

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174 F.3d 271 (2d Cir. 1999); *see also* Covino v. Reopel, 89 F.3d 105, 107 (2d Cir. 1996) (describing language “shall be brought” as inconclusive and resolving ambiguity in favor of “discouraging meritless appeals”).

77. For a discussion of the controversy surrounding exhaustion, *see infra* notes 78-88 and accompanying text.

78. *See* White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997) (denying appeal because of failure to exhaust); Morgan v. Arizona Dep’t of Corrections, 976 F. Supp. 892, 894-96 (D. Ariz. 1997) (finding exhaustion required even where inmate suggested difficulty of compliance); Hernandez v. Steward, No. 96-3222-SAC, 1996 WL 707015, at \*2 (D. Kan. Nov. 27, 1996) (requiring compliance with exhaustion provision).

79. *See* Martin v. Eneix, No. 97 Civ. 0578, 1997 WL 55961, at \*5 (N.D. Ill. Feb. 3, 1997) (requiring complete exhaustion of administrative remedies); Gary v. Illinois Dep’t of Corrections, No. 96 C 4367, 1996 U.S. Dist. LEXIS 10233 at \*5 (N.D. Ill. July 23, 1996) (denying appeal until administrative remedies had been exhausted).

80. *See* Jenkins v. Morton, 148 F.3d 257, 260 (3d Cir. 1998) (remanding district court decision that plaintiff should have exhausted statutory right of appeal to state superior court before seeking relief in federal court).

81. *See* Chavez v. Johnson, 149 F.3d 1190, 1190 (10th Cir. 1998) (rejecting plaintiff’s argument that proffered complaints and responses demonstrated futility of seeking further administrative remedy); *see also* Tafoya v. Simmons, 116 F.3d 489, 489 (10th Cir. 1997) (refusing to waive exhaustion provision, even on showing by inmate that subordinate remedies would be futile).

82. *See* Chavez, 149 F.3d at 1190 (rejecting plaintiffs argument that proffered complaints and responses demonstrated futility of seeking further administrative remedy); *see also* Tafoya, 116 F.3d at 489 (refusing to waive exhaustion provision, even on showing by inmate that subordinate remedies would be futile); Boles v. Romer, No. 96-1527, 1997 U.S. App. LEXIS 16212, at \*3-4 (10th Cir. June 30, 1997) (requiring exhaustion of administrative remedies); Jennings v. Walden, No. 96-C8310, 1996 U.S. Dist. LEXIS 19521, at \*2-3 (N.D. Ill. Dec. 31, 1997) (same); Hernandez, 1996 WL 707015, at \*2 (same).

83. *See* Linderman v. Mobil Oil Corp., 79 F.3d 647, 650 (7th Cir. 1996) (employing high standard for showing futility of exhaustion); Hickney v. Digital Equip. Corp., 43 F.3d 941, 945 (4th Cir. 1995) (requiring “clear and positive” showing of



The PLRA requires the dismissal of suits regarding "prison conditions" in which administrative remedies are not exhausted.<sup>84</sup> Although that term is not defined, courts have dismissed "failure to protect" suits, improper placement, Eighth Amendment claims, free exercise claims, publication claims, retaliation claims and discrimination claims for failure to exhaust administrative remedies.<sup>85</sup>

The current trend seems to be toward the proposition that exhaustion does not apply in situations where an inmate seeks only monetary relief that is unavailable through administrative remedies; in contrast, where both injunctive and monetary relief are sought exhaustion is required.<sup>86</sup> With inmates increasingly bringing federal claims in state court, it is worth noting that at least two courts have applied the PLRA in state proceedings.<sup>87</sup> Courts generally place the burden of pleading and proving exhaustion on the plaintiffs, and the failure to address exhaustion in some meaningful way permits a 12(b)(6) dismissal under the Federal Rules of Civil Procedure.<sup>88</sup> Recent trends indicate that documentary proof

futility); *United Paperworkers v. International Paper Co.*, 777 F. Supp. 1010, 1023 (D. Me. 1991) (holding that employee must ordinarily comply with exhaustion provisions to fullest extent).

84. See 42 U.S.C. 1997e (1994) (requiring exhaustion of administrative remedies before bringing suit).

85. See, e.g., *Turner v. Boutista*, No. 97-16149, 1998 WL 22066 (9th Cir. Jan. 15, 1998) (dismissing retaliation suit as result of failure to exhaust subordinate remedies); *White v. McGinnis*, 131 F.3d 593 (6th Cir. 1997) (dismissing retaliation suit as result of failure to exhaust subordinate remedies); *Rodriguez v. Barbary*, 992 F. Supp. 592, 593 (W.D.N.Y. 1998) (holding that use of force claims are not covered by exhaustion provision); *Morgan v. Arizona Dep't. of Corrections*, 976 F. Supp. 892, 896 (D. Ariz. 1997) (dismissing failure to protect suit as result of failure to exhaust subordinate remedies); *Thigpen v. Cook County Jail*, No. 96-C8607, 1997 U.S. Dist. LEXIS 57, at \*3 (N.D. Ill. Jan. 3, 1997) (dismissing suit as result of failure to exhaust subordinate remedies); *Oliver v. Wilkinson*, No. 87-3248-O, 1991 WL 17706, at \*1 (D. Kan. Jan. 11, 1991) (dismissing failure to protect suit).

86. See *Garret v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997) (finding exhaustion applies where injunctive and money relief are both sought, but not where money damages, unavailable through subordinate remedies, are sought); *Young v. Quinlan*, 960 F.2d 351, 356 (3d Cir. 1992) (allowing case to proceed without exhaustion); *Freeman v. Godinez*, 996 F. Supp. 822, 825 (N.D. Ill. 1998) (allowing avoidance of exhaustion where money damages are sought and are unavailable at lower level); *Polite v. Barbarin*, No. 96-C6818, 1998 WL 146687, at \*2 (S.D.N.Y. Mar. 25, 1998) (upholding exception on same grounds). *But cf.* *Jackson v. Detella*, 998 F. Supp. 901, 904 (N.D. Ill. 1998) (insisting on strict application of provision). The provision also does not apply to claims brought against other inmates or to state law claims. See, e.g., *King v. Peoples*, No. 97-CA2295, 1998 Ohio App. LEXIS 1447, at \*7 (Ohio Ct. App. Mar. 31, 1998) (citing additional circumstances in which provision does not apply).

87. See, e.g., *Rumage v. Gudmanson*, 578 N.W.2d 209 (Wis. Ct. App. 1998) (applying PLRA in state context in unpublished opinion); *King*, 1998 Lexis 1447, at \*7 (applying PLRA in state context).

88. See *Turner v. Boutista*, No. 97 C-0449, 1997 WL 337567, at \*1-2 (N.D. Cal. June 9, 1997) (holding plaintiff must show exhaustion to survive 12(b)(6) motion); *Starks v. Washington*, No. 97 C-3479, 1997 WL 282820, at \*1 (N.D. Ill. May 16, 1997) (placing burden on plaintiff to show exhaustion); *Graves v. Detella*, No.

may be required to make such a showing.<sup>89</sup>

### G. *The Remedial Power Issue*

The PLRA provides that prospective relief granted by a district court shall extend no further than is necessary to remedy the constitutional violation.<sup>90</sup> Litigants have launched a broad-based challenge to this provi-

96C-6540, 1997 WL 72080, at \*2 (N.D. Ill. Feb. 13, 1997) ("Because Graves has failed to allege that he utilized any of the administrative procedures available to him, we must grant defendant's motion.").

89. See *Brown v. Toombs*, 139 F.3d 1102, 1103-04 (6th Cir. 1998) (advising that prisoner should attach administrative finding to complaint), *cert. denied*, 119 S. Ct. 88 (1998); *Alexandroai v. California Dep't of Corrections*, 985 F. Supp. 968, 969 (S.D. Cal. 1997) (describing requirement for documentation to be attached to complaint).

90. See 18 U.S.C. § 3626 (1994). The PLRA provides in relevant part: Appropriate remedies with respect to prison conditions:

*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; the relief is necessary to correct the violation of a Federal right; and

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

(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.

(3) *Prisoner release order.*

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

sion by arguing that it impermissibly restricts the general, remedial power of the federal courts.<sup>91</sup> The remedial power of federal district courts rests in their broad discretion to fashion remedies for constitutional violations.<sup>92</sup> Opponents of the PLRA have contended that the PLRA impermissibly restricts the exercise of this power.<sup>93</sup> Further, they argue that the termination of relief provision runs afoul of the Supreme Court's requirement that a reasonable period of compliance—and evidence of such compliance—is likely to endure and is needed to precede vacatur of an injunction.<sup>94</sup>

Courts generally hold that the PLRA's "restriction" of remedies is in line with general legal principles requiring narrowly tailored remedies for constitutional violations.<sup>95</sup> Further, the District Court for the Northern District of Illinois held that § 3626(b) of the PLRA should be read to prohibit vacatur where recurring violations of a federal right exist or are likely to recur.<sup>96</sup> Such a standard is entirely consistent with existing precedent with respect to vacatur.<sup>97</sup> Finally, the Pennsylvania Department of Corrections also addressed the position that prisoners might lack standing under

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

*Id.*

91. See *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 186 (3d Cir. 1999) (holding that PLRA *preserves* right of courts to remedy violations); see, e.g., *Benjamin v. Jacobson*, 124 F.3d 162 (2d Cir. 1997) (discussing courts' remedial powers with respect to PLRA), *vacated en banc*, 172 F.2d 144 (2d Cir. 1999); *Thompson v. Gomez*, 993 F. Supp. 749 (N.D. Cal. 1997) (affirming that courts' remedial powers are not limited by PLRA).

92. See *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (describing traditional equity power of federal courts).

93. See *Benjamin*, 124 F.3d at 169 (alleging impermissible restriction of remedial power); *Green v. Peters*, No. 71-C1403, 1997 U.S. Dist. LEXIS 19646, at \*1-5 (N.D. Ill. Dec. 5, 1997) (attacking perceived limitation of courts' remedial power); *Thompson*, 993 F. Supp. at 763-64 (discussing limitation of courts' remedial power by PLRA).

94. See *Board of Educ. of Oklahoma v. Dowell*, 498 U.S. 237, 267-68 (1991) (outlining prerequisite(s) for vacatur of injunction).

95. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977) (finding analogous statute consistent with general constitutional principles); *McLendon v. Continental Can Co.*, 908 F.2d 1171 (3d Cir. 1990) (same).

96. See *Green*, 1997 LEXIS 19646, at \*1-3 (stating relief should not be vacated).

97. See *id.* It should be noted that no violation of prisoners' rights, constitutional or otherwise, was ever proven in the civil action underlying *Imprisoned Citizens Union*. See Brief for Appellees at 2, *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999) (No. 98-1536).

the *Lujan v. Defenders of Wildlife*<sup>98</sup> definition of injury-in-fact, to complain of the alleged stripping of remedial power because it is the jurisprudential system, and not the prisoners themselves, sustaining the alleged harm.<sup>99</sup>

#### H. *Termination Provision: The Final Judgment Issue*

The provision of the PLRA inviting the most constitutional challenges is the termination of relief provision that allows virtually any interested person or entity to seek termination of federal court decrees two years after they are granted.<sup>100</sup> One avenue of attack is that the PLRA termination provisions violate separation of powers.<sup>101</sup>

98. 504 U.S. 555 (1992).

99. *See id.* at 562 (“[I]njury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.”).

100. *See* 18 U.S.C. § 3626(b) (1994) (stating opportunities to terminate relief). The PLRA states in relevant part:

Appropriate remedies with respect to prison conditions: (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—

(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).

(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 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.

(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.

*Id.*

101. For a discussion of the separation of powers issue, including alleged violation of the rules of decision doctrine, curtailing of remedial powers and reopening of final judgments, see *infra* notes 102-118 and accompanying text.

Opponents of the PLRA cite to the Supreme Court's decision *Plaut v. Spendthrift Farm, Inc.*<sup>102</sup> for the proposition that Congress may not constitutionally reopen final judgments.<sup>103</sup> In resolving the question of whether consent decrees constitute final judgments, opponents rely on another Supreme Court case, *Rufo v. Inmates of Suffolk County Jail*,<sup>104</sup> which held that "a consent decree is a final judgment that may be reopened only to the extent that equity requires."<sup>105</sup>

The response to this argument is that *Rufo* goes on to add that "[a] party seeking modification of a consent decree may meet its initial burden by showing a significant change either in factual conditions or law," and, it specifically notes that consent decrees are "provisional and tentative."<sup>106</sup> In support of this position, more than a century ago, the Court held that an act of Congress could constitutionally interfere with prospective judicial relief.<sup>107</sup>

Another avenue of attack against the termination of relief provision relies on the Court's holding in *Pennsylvania v. Wheeling & Belmont Bridge Co.*,<sup>108</sup> and its "public v. private rights" distinction, which suggests that congressional power in the area it seeks to regulate in this fashion must be plenary to allow interference.<sup>109</sup> In *Imprisoned Citizen's Union v. Shapp*,<sup>110</sup> the District Court for the Eastern District of Pennsylvania rejected the argument that Congress' power to override the Court in *Wheeling* derived from its plenary power over the underlying riparian law.<sup>111</sup> Rather, the court accepted the argument that the critical distinction made in *Wheeling* was between prospective relief and money damages.<sup>112</sup>

In supporting this conclusion, courts generally rely upon the fact that the Court's holding in *Wheeling* indicated that the part of the decree subject to legislative modification was an "executory, a continuing decree."<sup>113</sup>

102. 514 U.S. 211 (1995).

103. *See id.* at 217-19 (finding that statute altering decision in case dismissed with prejudice violative of separation of powers).

104. 502 U.S. 367 (1992).

105. *Id.* at 370.

106. *Id.* at 384; *see, e.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997) (finding consent decrees modifiable); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (same); *System Fed'n No. 91 v. Wright*, 364 U.S. 642 (1961) (finding consent decrees modifiable).

107. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 432-34 (1855) (making critical distinction between completed relief and ongoing, prospective relief, for finality of judgment purposes).

108. 59 U.S. (18 How.) 421 (1855).

109. *See generally id.* (allowing congressional modification of right to stop enforcement of decree).

110. 11 F. Supp. 2d 586 (E.D. Pa. 1998)

111. *See id.* 597-99 (dispensing with "public v. private rights" argument).

112. *See id.* (stating important distinction in *Wheeling* was between prospective relief and money damages).

113. *Wheeling*, 59 U.S. at 431; *see, e.g.*, *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997) (explaining difference for continuing decrees); *Western Union Tel. Co.*

The lone exception to the general acceptance of the PLRA's constitutionality with respect to separation of powers has been the Ninth Circuit. In *Taylor v. United States*,<sup>114</sup> the Ninth Circuit held that the PLRA did not constitute a change in substantive law for reopening of judgment purposes and therefore concluded that the PLRA was unconstitutional.<sup>115</sup> The *Taylor* court concluded that the law underlying the consent decrees was the United States Constitution and not the complaints from which the decrees emerged.<sup>116</sup> The *Taylor* decision was criticized by the Eastern District of Pennsylvania in *Vazquez v. Carver*,<sup>117</sup> where the district court expressed disapprobation of the Ninth Circuit's view.<sup>118</sup>

### I. Termination Provision: The Due Process Argument

A related objection to the PLRA's termination of relief provision is that it violates due process by impermissibly abrogating vested or contractual rights.<sup>119</sup> The core of the Fifth Amendment objection to the PLRA derives from the principle that a vested judgment may not be abrogated by an act of Congress.<sup>120</sup> In response to this challenge, the Eighth Circuit held that "a judgment that is not final for purposes of separation of powers is also not final for purposes of due process."<sup>121</sup> Thus, it is clear that a "prospective order cannot become vested for due process purposes."<sup>122</sup>

An alternative due process argument suggests that the PLRA impermissibly impairs freedom of contract, by impermissibly interfering with contracts freely entered into by the prisoners and the Commonwealth in the form of consent decrees.<sup>123</sup> Although acknowledging the contractual nature of consent decrees, courts addressing this issue have characterized

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v. International Bd. of Elec. Workers, 133 F.2d 955 (7th Cir. 1943) (explaining difference for continuing decrees).

114. 143 F.3d 1178, *withdrawn*, 158 F.3d 1017 (9th Cir. 1998).

115. *See id.* (holding PLRA unconstitutional, against finding of every other circuit to address issue).

116. *See id.* at 1181-84 (expressing disagreement with other circuits and finding PLRA unconstitutional).

117. 18 F. Supp. 2d 503 (E.D. Pa. 1998).

118. *See id.* at 512 (criticizing *Taylor* decision).

119. For a discussion of the contention surrounding the due process aspects of the PLRA's termination provision, see *infra* notes 120-24 and accompanying text.

120. *See McCullough v. Virginia*, 172 U.S. 102, 123 (1898) (maintaining that right conferred by Article III court violates due process).

121. *Gavin v. Branstad*, 122 F.3d 1081, 1091 (8th Cir. 1997) (describing critical difference between final money judgment and prospective relief subject to modification in future).

122. *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 600 (E.D. Pa. 1998); *see, e.g., Gavin*, 122 F.3d 1081 (holding judgment that is not final has not yet vested for due process purposes); *Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (stating that decree is not final judgment for separation of powers purposes).

123. For a discussion of the freedom of contract argument, see *infra* note 124 and accompanying text.

consent decrees as “private” and therefore have employed the “arbitrary and irrational” test in upholding the PLRA.<sup>124</sup>

### J. Termination Provision: The Rules of Decision Act

Another avenue for attacking the PLRA’s termination provision relies on the principle that Congress may not dictate to a court how to decide a specific case.<sup>125</sup> This argument is known as the “rule of decision” doctrine.<sup>126</sup> It is based primarily upon the Supreme Court’s decision in *United States v. Klein*.<sup>127</sup> Congress does, however, have the power to establish standards by which cases are decided.<sup>128</sup>

Courts have acknowledged that the distinction between prescribing an outcome and merely changing applicable law can be confusing.<sup>129</sup> The Fourth Circuit and several district courts decided that the PLRA’s effect clearly falls on the constitutional side of this dichotomy.<sup>130</sup> Several circuits also held that the PLRA is consistent with the general requirement that courts employ the least intrusive remedy that will still be effective to remedy a constitutional violation.<sup>131</sup>

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124. See *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985) (describing different levels of scrutiny relative to public or private nature of rights affected by contract); see, e.g., *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997) (finding that PLRA meets rational basis test), *cert. denied*, 118 S. Ct. 2366 (1998); *Gavin*, 122 F.3d 1081 (same); *Imprisoned Citizens Union*, 11 F. Supp. 2d at 586 (same).

125. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871) (holding that allowing statute to prescribe how court should decide case would violate separation of powers inherent in structure of United States Constitution).

126. See *id.* at 146 (discussing rule of decision doctrine).

127. 80 U.S. (13 Wall.) 128 (1871).

128. See *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 437-38 (1992) (drawing distinction between proscribing decision and merely providing standards by which decision is to be made, thereby leaving crucial matter of actual decision to judiciary).

129. See *Benjamin v. Jacobson*, 124 F.3d 162, 174 (2d Cir. 1997) (discussing fine distinction between permissible and impermissible actions by Congress in this situation), *vacated*, 172 F.3d 144 (2d Cir. 1999).

130. See *Gavin v. Branstad*, 122 F.3d 1081, 1089 (8th Cir. 1997) (“The PLRA leaves judging to the judges, and therefore it does not violate the *Klein* doctrine.”); *Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996) (holding that PLRA provides standards for courts, but does not dictate conclusions); see also *Robertson*, 503 U.S. at 438 (upholding legislation that changes law, not results court must achieve); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 188 (3d Cir. 1999) (holding PLRA termination provision was constitutional); *Green v. Peters*, No. 71-C1403, 1997 U.S. Dist. LEXIS 19646, at \*5 (N.D. Ill. Dec. 5, 1997) (same); *Thompson v. Gomez*, 993 F. Supp. 749, 763 (N.D. Cal. 1997) (holding that PLRA changes application of law but does not impermissibly mandate decisions).

131. See *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986) (quoting *Ruiz v. Estelle*, 679 F.2d 1115, 1145 (5th Cir. 1982), *amended by*, 688 F.2d 266 (5th Cir. 1982) (holding that least intrusive remedy is required)).

K. *The Federal Versus State Power Issue*

The Second Circuit adopted the unique view that the termination provision of the PLRA requires the cessation of federal intervention, but leaves the underlying order intact and capable of enforcement by the appropriate state court.<sup>132</sup> The Second Circuit, however, stands alone in adhering to this interpretation.<sup>133</sup> In fact, in the face of the contrary holdings of the First, Fourth, Sixth, Eighth and Eleventh Circuits, the Second Circuit is now reconsidering its position en banc.<sup>134</sup>

In addition to this recent move to reconsider, even the original opinion is replete with concessions, suggesting that the Second Circuit's original interpretation is debatable.<sup>135</sup> Thus, the Second Circuit's uncertain position hardly constitutes adequate authority for making a decision that is opposite of the conclusion arrived at by the remaining, unanimous sister circuits.

Finally, a central issue was raised before the Senate Judiciary Committee—the PLRA's ability to counteract the expansion of often out-dated consent decrees.<sup>136</sup> The Second Circuit's construction of the PLRA would defeat this goal by allowing a plaintiff simply to seek enforcement of such decrees in state court.<sup>137</sup>

132. See, e.g., *Benjamin*, 124 F.3d at 166-67 (permitting immediate termination of "prospective relief", making nonfederal aspects of consent decree entered in prison litigation unenforceable by federal courts, and maintaining that nonfederal provisions remain binding, and enforceable by state courts).

133. See *Kuzinski*, *supra* note 51, at 390 (stating "none of the other circuit courts have employed the same interpretation").

134. See generally *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998) (failing to make distinction between termination of remedy and termination of decree), *cert. denied*, 118 S. Ct. 2368 (1998).

135. See, e.g., *Benjamin*, 124 F.3d at 166-67 (including such tentative language as: "the provision is ambiguous," "[a]t a glance, the second interpretation seems plausible," "in fact, such a reading has significant linguistic problems" and "a remarkable twisting of language").

136. See generally *Implementation of Prison Rights Legislation: Implementation of the Prison Litigation Reform Act of 1995 Before the United States Senate Judiciary Committee*, available in 1996 WL 556532 (F.D.C.H. Sept. 25, 1996) (containing multiple statements indicating intent of termination provision to allow states to "get out from under" consent decrees whose nature and duration were beyond comprehension of negotiators).

137. See 18 U.S.C. § 3626(b) (1994) (discussing when relief may be terminated). The PLRA states in relevant part:

Appropriate remedies with respect to prison conditions: 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—

...

(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 neces-



Regardless of whether the PLRA seeks to sweep both federal and state courts within its ambit, some critics argue that even if a federal court finds the PLRA constitutional, it should stay its termination order so that the issue may be raised before a state court prior to the execution of that order.<sup>138</sup> Such a decision would be contrary to the plain meaning of the PLRA, against the overwhelming majority of precedent on the matter and incompatible with congressional intent.<sup>139</sup>

The PLRA requires immediate vacation of existing orders that are not supported by a sufficient finding of constitutional violations.<sup>140</sup> In fact, the language in the section entitled "Immediate termination of prospective relief" reads:

[A] defendant . . . 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.<sup>141</sup>

By phrasing the relevant clause "shall be entitled to the immediate termination," the drafters of the PLRA left no doubt as to their intention. The use of the imperative "shall," and the description of the relief in terms of the defendant's entitlement, indicate that a court does not have discretion in this matter.<sup>142</sup> Further, the use of the term "immediate," in both

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sary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

*Id.*

138. See *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 189 (3d Cir. 1999) (seeking stay of federal enforcement of termination provision so that state remedies might be addressed); *Benjamin*, 124 F.3d at 180 (discussing staying federal enforcement while other claims are litigated); *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 609-11 (E.D. Pa. 1998) (refusing to stay federal enforcement).

139. For a discussion of the semantics of the language of the PLRA, see *supra* note 134 (examining plain meaning); see also *Taylor v. United States*, 143 F.3d 1178, 1180 (9th Cir. 1998) (criticizing Second Circuit's view), *withdrawn*, 158 F.3d 1059 (9th Cir. 1998); *Dougan v. Singletary*, 129 F.3d 1424, 1426 n.4 (11th Cir. 1997) ("We decline to follow the Second Circuit's view."); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997) (noting but not reaching Second Circuit's view); *Demike v. Fauver*, 3 F. Supp. 2d 540, 543 (D.N.J. 1998) (declining to follow Second Circuit's view); NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTIONS § 46.07, at 126 (1992) (requiring construction of statutes consistent with purpose).

140. See 18 U.S.C. § 3626(b)(2) (stating that PLRA requires immediate vacation of existing orders not supported by sufficient finding of constitutional violations).

141. *Id.*

142. See Brief of Appellees at 47, *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999) (No. 98-1563) (discussing plain meaning of language of PLRA and concluding that termination is mandatory upon sufficient showing by moving parties).

the title of the section and the relevant clause, demonstrates that a stay of execution of any kind was not contemplated.<sup>143</sup> Finally, if the drafters of the PLRA intended the possibility of a stay, they likely would have included it in the "limitations" section that follows § 3626(b)(2).<sup>144</sup>

### III. SUMMARY AND ANALYSIS OF ISSUES IN *IMPRISONED CITIZENS UNION v. RIDGE*

Until *Imprisoned Citizens Union*, the Third Circuit had not dealt with a broad-based challenge to the constitutionality of the PLRA.<sup>145</sup> Since the passage of the PLRA in 1996, only nine Third Circuit opinions addressed the Act. In *Gibbs v. Cross*,<sup>146</sup> the Third Circuit made the critical observation that the three strikes provision does not preclude a prisoner from bringing a lawsuit altogether after having filed three or more frivolous claims; rather, the prisoner would simply be denied the assistance of proceeding in forma pauperis under such circumstances.<sup>147</sup>

In *Gibbs v. Ryan*,<sup>148</sup> the Third Circuit was called upon again to decide a narrow issue regarding the application of the three strikes provision of the PLRA.<sup>149</sup> The court held that the three strikes provision could not be used to deny in forma pauperis status granted before the enactment of the PLRA, regardless of any subsequent violation of the Act's three strikes provision.<sup>150</sup>

The Third Circuit in *Johnson v. Horn*<sup>151</sup> addressed only the limitation on prospective relief imposed by the PLRA, and the issue was rendered moot by the compliance of prison officials on that issue.<sup>152</sup> Although the court raised some provocative questions, it went on to conclude that as a

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143. See *id.* at 46-47 (discussing congressional intent of ending court orders).

144. See 18 U.S.C. § 3626 (b)(2).

145. For a discussion of PLRA cases addressed by the Third Circuit, see *infra* notes 146-64 and accompanying text.

146. 160 F.3d 962 (3d Cir. 1998).

147. See *id.* at 965 ("The bar imposed by this provision does not preclude an inmate from bringing additional suits. It does, however, deny him or her the right to obtain in forma pauperis status.").

148. 160 F.3d 160 (3d Cir. 1998).

149. See *id.* at 162 ("We are thus presented with yet another issue under the PLRA. We must decide the narrow question of whether a district court may apply § 1915(g) to revoke in forma pauperis status that had been granted prior to enactment of the PLRA. We conclude it can not.").

150. See *id.* at 162-63 (holding that three strikes provision cannot be used to deny grant of in forma pauperis already given before enactment of PLRA).

151. 150 F.3d 276 (3d Cir. 1998).

152. See *generally id.* (dealing with issue of whether district court's order to prison officials to provide inmate with kosher diet at state's expense constituted prospective relief in violation of PLRA). The issue was rendered moot when the officials made and complied with the concessions that the inmate was entitled to a kosher diet and that they were not entitled to charge him for it; officials provided the inmate with all relief to which he was entitled, eliminating any case or controversy. See *id.*

result of the mootness issue, the answers would have to wait for "another day."<sup>153</sup> In *Hernandez v. Kalinowski*<sup>154</sup> the Third Circuit addressed only the issue of whether an inmate was entitled to compensation for time spent litigating for attorney fees (so-called fees-on-fees) and concluded that he was entitled to the fees.<sup>155</sup> In arriving at this conclusion, the court acknowledged that the PLRA did not explicitly require the awarding of "fees-on-fees," but found this to be an implicit requirement based on its assessment of congressional intent.<sup>156</sup>

Additionally, the Third Circuit in *Jenkins v. Morton*,<sup>157</sup> in a brief opinion, simply held that the PLRA's Exhaustion Provision did not apply to subordinate judicial remedies, but only to the administrative mechanisms.<sup>158</sup> In *Keener v. Pennsylvania Board of Probation and Parole*,<sup>159</sup> the court upheld the retroactive application of the PLRA's three strikes provision.<sup>160</sup> The Third Circuit gave due deference to the Supreme Court's

153. *Id.* at 287. The court noted:

The Prison Officials argue that the district court ordered them to continue providing [inmate] Shore with the cold kosher diet and to refrain from charging him for it without making findings required by § 3626(a). This argument presents several important PLRA interpretive issues, for example: (1) what, if any, specific findings does the PLRA require a district court to make before granting prospective relief? and (2) must a party challenging the district court's entry of prospective relief make a motion to terminate that relief—pursuant to § 3626(b)—in the district court before taking an appeal to this Court? We must leave these questions to another day, however, because the concessions made by the Prison Officials at oral argument render these issues moot.

*Id.*

154. 146 F.3d 196 (3d Cir. 1998).

155. *See id.* at 198-99 (holding that successful prisoner in civil rights case was entitled to recover fees for time spent preparing and litigating fee application, that is, "fees on fees," under the PLRA).

156. *See id.* at 200 ("Congress enacted PLRA with the principal purpose of deterring frivolous prisoner litigation by instituting economic costs for prisoners wishing to file civil claims.") (quoting *Lyon v. Krol*, 127 F.3d 763, 764 (8th Cir. 1997)).

157. 148 F.3d 257 (3d Cir. 1998).

158. *See id.* at 259-60 (holding that state inmate was not required to exhaust state judicial remedies in challenging sanctions imposed as result of disciplinary proceedings to comply with PLRA requirement that inmate exhaust "administrative remedies" before bringing § 1983 action or other action under federal law).

159. 128 F.3d 143 (3d Cir. 1997).

160. *See id.* at 144-45 (demonstrating deference to sister circuits). The court stated:

Three courts of appeals have already applied those criteria to this provision of the PLRA and ruled that lawsuits dismissed as frivolous prior to the enactment of the PLRA count as "strikes". . . . We see no basis to differ with that result. We thus now join those circuits in holding that dismissals for frivolousness prior to the passage of the PLRA are included among the three that establish the threshold for requiring a prisoner to pay the full docket fees unless the prisoner can show s/he is "under imminent danger of serious physical injury." The district court noted that nothing in Keener's complaint, in which he appeared to be alleging that

requirement that statutes should be closely scrutinized before being applied retroactively, but decided the issue in conformity with three sister circuits that upheld retroactive application of the PLRA's three strikes provision at that time.<sup>161</sup> Finally, the Third Circuit, in *Santana v. United States*<sup>162</sup> and *Madden v. Myers*,<sup>163</sup> held that the PLRA's filing fee requirement did not apply to appeals when the underlying litigation is not of the type contemplated by Congress in the passage of the PLRA (e.g., Writs of Mandamus or Habeas Corpus).<sup>164</sup>

The current litigation, *Imprisoned Citizens Union v. Ridge*, had its genesis over a quarter of a century ago in a consolidated complaint filed on behalf of the prisoners of several State correctional facilities against then-Governor Milton Shapp.<sup>165</sup> The prisoners challenged the conditions of confinement in a number of facilities, and the Eastern District of Pennsylvania approved the resulting consent decree.<sup>166</sup>

On September 23, 1997, the Department of Corrections sought to terminate the consent decree in accordance with the Termination Provision of the recently enacted PLRA.<sup>167</sup> In response, the Imprisoned Citizens

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he has been hindered in obtaining release on parole after completion of his minimum sentence, suggests that Keener is in any imminent danger of serious physical injury.

*Id.* (citations omitted).

161. *See id.* at 144. The court articulated:

In *Landgraf v. USI Film Products* . . . the Supreme Court directed courts to determine the retroactive application of a new statute which does not expressly prescribe its reach by ascertaining whether its application to pending cases would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. Three courts of appeals have already applied those criteria to this provision of the PLRA and ruled that lawsuits dismissed as frivolous prior to the enactment of the PLRA count as "strikes" under § 1915(g) . . . . We see no basis to differ with that result.

*Id.* (citations omitted).

162. 98 F.3d 752 (3d Cir. 1996).

163. 102 F.3d 74 (3d Cir. 1996).

164. *See id.* at 76-77 (holding writ of mandamus is neither "civil action" nor "appeal" within plain meaning of PLRA and failure to apply PLRA to bona fide mandamus petitions would not frustrate Congress' purpose in enacting PLRA; writ is not "action," but procedural mechanism through which court of appeals reviews carefully circumscribed and discrete category of district court orders, and appeal within meaning of PLRA means appeal of civil action; moreover, PLRA was intended primarily to curtail frivolous prison litigation brought under § 1983 and Federal Torts Claims Act); *Santana*, 98 F.3d at 755-56 (holding that filing fee payment requirements of PLRA with regard to "civil actions" do not apply to habeas corpus petitions or to appeals from denial of such petitions).

165. *See Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 181-82 (3d Cir. 1999) (discussing history of current litigation and detailing terms of original consent decree, demonstrating level of intrusiveness on day-to-day administration of prison).

166. *See generally Imprisoned Citizens Union v. Shapp*, 451 F. Supp. 893 (E.D. Pa. 1978) (providing initial judicial approval of consent decree at issue).

167. *See Imprisoned Citizens Union*, 169 F.3d at 182 (citing outcome of *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586 (E.D. Pa. 1998)).

Union, on behalf of the prisoners, filed a broadly based challenge to the constitutionality of the PLRA.<sup>168</sup> On April 27, 1998, the District Court for the Eastern District of Pennsylvania issued an opinion rejecting the plaintiffs' challenges to the PLRA.<sup>169</sup> On appeal, the plaintiffs-appellants alleged that enactment of the PLRA: (1) exceeded Congressional power, (2) violated separation of powers by disturbing final judgments, (3) contravened the Rules of Decision doctrine and interfered with federal court's remedial power, (4) violated Equal Protection and (5) only denied enforcement of the consent decrees on the federal level.<sup>170</sup>

Appellants further argued that Congress exceeded its authority in promulgating the PLRA by eliminating an area of federal court power.<sup>171</sup> Appellees responded by pointing out that the PLRA does not eliminate the power of federal courts, but merely regulates it, consistent with the grant of power of the United States Constitution.<sup>172</sup> In support of this practice, they cited *Lauf v. E.G. Shinner*,<sup>173</sup> in which the Supreme Court upheld analogous federal legislative restrictions.<sup>174</sup>

In addition, appellees noted that section five of the Fourteenth Amendment to the United States Constitution provides an alternative, independently sufficient grant of power for the enactment of such legislation.<sup>175</sup> The Fourteenth Amendment, they argued, gave Congress both

168. See *id.* (noting prisoners asked court to declare PLRA termination provision unconstitutional).

169. See generally *Imprisoned Citizens Union*, 11 F. Supp. 2d at 586 (denying challenges to PLRA and refusing to hold defendants in contempt).

170. See *Imprisoned Citizens Union*, 169 F.3d at 183 (enumerating inmates' challenges to PLRA).

171. See Brief of Appellees at 14-16, *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999) (No. 98-1536) (responding to inmates, argument that Congress exceeded its power in passing PLRA).

172. See *id.* at 17-19 (citing U.S. CONST. art. III, § 1).

173. 303 U.S. 323 (1938).

174. See Brief of Appellees, *supra* note 171, at 17-19 (upholding analogous regulation). In *Lauf* the Supreme Court upheld the Norris-LaGuardia Act of 1932, 29 U.S.C. § 107 (1932), "even though it severely restricted the power of federal courts to issue injunctions or temporary restraining orders in labor disputes, including suits by employers to enjoin union picketing." *Id.* at 18-19. For a further examination of this type of interaction between Congress and the courts, see Gordon Young, *A Critical Reassessment of the Case Law Bearing on Congress' Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 168 n.198 (1995).

175. See Brief of Appellees, *supra* note 171, at 21 (explaining independent Congressional authority). The brief stated:

Although Congress' power to regulate the federal courts alone authorizes the enactment of PLRA, the Fourteenth Amendment also empowers Congress to define the appropriate remedies in prison litigation for civil rights violations. Section 5 of the Fourteenth Amendment provides that [t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. Section 5 is itself a positive grant of legislative power.

*Id.*

the power to enact the Civil Rights Act, upon which the current action is based, and the power to limit any remedies arising under the PLRA.<sup>176</sup> Appellees noted that it was an exercise of this very congressional power in passing the Civil Rights Act that allowed the plaintiffs to bring the original complaint in the first place.<sup>177</sup> The *Imprisoned Citizens Union* decision makes no mention of a general attack on Congress' statutory power, but rather moves directly into the inmates' specific arguments that the PLRA violates the Constitution.<sup>178</sup>

Under the principle of separation of powers, appellants challenged the constitutionality of the PLRA on the grounds that it seeks to reopen final judgments, that it violates the Rules of Decision doctrine and that it compromises a federal court's remedial power.<sup>179</sup> Recapitulating the evolution of the *Plaut v. Spendthrift Farms* line of cases, appellees effectively argued that consent decrees are not final judgments within the meaning of *Plaut*.<sup>180</sup> Appellees cited the Supreme Court's acknowledgment that consent decrees are prospective in nature and subject to periodic reappraisal.<sup>181</sup> The Third Circuit agreed with appellee's position, noting that the exception to the general prohibition on reopening final judgments when the nature of the relief is prospective "is not new: 'its roots burrow deep into our constitutional soil.'"<sup>182</sup>

With respect to the Rules of Decision argument, appellants relied on *United States v. Klein*, a seminal case in the evolution of separation of powers, in which a statute sought to deny the government's opponents access to judicial review.<sup>183</sup> Appellees effectively argued that the PLRA does not seek to dictate the outcome, but rather merely the standards of federal

176. *See id.* (noting that Congress maintains power under Fourteenth Amendment to enact legislation and create remedies to enforce legislation).

177. *See id.* (describing how Civil Rights Act allows prisoners to bring their claims).

178. *See Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 182-83 (3d Cir. 1999) (making no mention of general constitutional challenge).

179. *See id.* at 183-88 (examining these three arguments under rubric of separation of powers).

180. *See* Brief of Appellees, *supra* note 171, at 27-30 (arguing that general prohibition on reopening final judgments exists except where judgments are prospective and ongoing in nature).

181. *See id.* (listing Supreme Court holdings that imply consent decrees may be revoked).

182. *Imprisoned Citizens Union*, 169 F.3d at 183-84 (citing *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 656 (1st Cir. 1997) (tracing principle back to 1855 Supreme Court case, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), that allowed congressional modification of judicial order where nature of relief was prospective and ongoing)).

183. *See* Brief of Appellees, *supra* note 171, at 35-37 (discussing appellants reliance on *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871) (articulating principle that Congress may not enact legislation compelling courts to reach particular decision)).

court decisions.<sup>184</sup> Appellees had a great weight of sister circuit authority on their side, distinguishing the PLRA from the statute at issue in *Klein*.<sup>185</sup> Once again, the Ninth Circuit was the sole dissenting voice.<sup>186</sup> And once again, the Third Circuit agreed with appellees, categorically stating that the PLRA “does not ‘direct the outcome of this case and similarly situated pre-PLRA consent decrees’. . . [but rather] provides only the standard to which courts must adhere, not the result they must reach.”<sup>187</sup>

With respect to the contention that the PLRA interferes with the remedial power of federal courts, appellees denied, as a threshold matter, that appellants had standing to assert this claim.<sup>188</sup> Following the Supreme Court’s holding in *Lujan v. Defenders of Wildlife*, appellees argued that this claim alone fails to state an injury to the plaintiffs, and is, rather, a policy argument that should not be raised in this forum.<sup>189</sup> Further, appellees demonstrated multiple avenues for remedies available to the federal courts in such instances, notwithstanding the passage of the PLRA.<sup>190</sup> Options included the retention of injunctive relief and contempt sanctions, ordering the release of prisoners and the continuation of consent decrees themselves where necessary to cure constitutional violations.<sup>191</sup>

Without addressing the appellees standing argument, the Third Circuit rejected the claim that the PLRA interferes with courts’ inherent re-

184. *See id.* (explaining critical difference between establishing principles for making decision and establishing rule so strict that it dictates outcome).

185. *See id.* (discussing difference between statute at issue in *Klein* and PLRA as supported by other circuit decisions).

186. *See generally* Taylor v. Arizona, 143 F.3d 1178 (9th Cir. 1998) (holding that PLRA unconstitutionally prescribes rule of decision), *withdrawn*, Taylor v. United States, 158 F.3d 1059 (9th Cir. 1998).

187. *Imprisoned Citizens Union*, 169 F.3d at 187 (quoting *Taylor*, 143 F.3d at 1184).

188. *See* Brief of Appellees, *supra* note 171, at 38 (arguing that because almost all of initial plaintiff class are no longer incarcerated and because all of initial constitutional violations addressed in consent decree no longer exist, plaintiffs lack standing under *Lujan* standard of injury-in-fact to bring present action).

189. *See id.* (arguing that under *Lujan* prisoners have suffered no constitutional violation and effectiveness of PLRA cannot be addressed).

190. *See id.* at 39 (describing alternatives still available to federal courts under PLRA). The alternatives are set forth in the brief:

PLRA does not prevent federal courts from remedying constitutional violations. Rather, it requires the court to prioritize its remedies so as to minimize intrusions into traditional state functions. The courts, however, retain the ability to grant full injunctive relief and contempt sanctions. The courts can still enter intrusive orders or require the release of state prisoners, if such relief is essential to cure the constitutional violation. Indeed, even in the face of a PLRA termination request, the courts retain the ability to keep consent decrees in place if they remain necessary to cure continuing constitutional violations.

*Id.*

191. *See id.* (suggesting alternative remedies for constitutional violations).

medial powers.<sup>192</sup> The court held that the PLRA merely requires that any relief a court chooses to grant shall be “narrowly drawn” and shall adopt the “least intrusive means necessary to correct the violation of the Federal right.”<sup>193</sup> Again, the Third Circuit made explicit its disagreement with the Ninth Circuit’s view.<sup>194</sup>

While conceding that the PLRA treats prisoners differently from other people, appellees neutralized appellants equal protection claims by arguing for the relatively liberal rational basis standard of review.<sup>195</sup> They cited substantial authority for the propositions that prisoners are not a suspect class and that the termination provisions at issue do not burden a fundamental right.<sup>196</sup> The rational basis principle would uphold the PLRA “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>197</sup> The Third Circuit agreed with appellees advocacy of rational basis review and found that the PLRA “advances unquestionably legitimate purposes—to minimize prison micro-management by federal courts and to conserve judicial resources.”<sup>198</sup>

The appellants’ final argument was that even if the federal court finds the PLRA constitutional, it should stay the termination order sought by appellees “until such time as the state courts enforce the contractual aspects of this action’s consent decree[s].”<sup>199</sup> Appellants found support for this argument in the Second Circuit’s holding in *Benjamin v. Jacobson*.<sup>200</sup> Yet, as appellees observed, the remaining circuit courts of appeals addressing this issue agree that the Second Circuit’s interpretation is neither an accurate interpretation of the PLRA’s intent or plain meaning, nor constitutionally required.<sup>201</sup>

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192. See *Imprisoned Citizens Union*, 169 F.3d at 188 (stating that standards established by PLRA are “consistent with well-established limitations on courts’ authority to issue prospective injunctive relief”).

193. *Id.*

194. See *id.* (“We disagree with the Ninth Circuit’s conclusion.”).

195. See Brief of Appellees, *supra* note 171, at 40 (arguing for employment of rational basis test as most appropriate standard of review for PLRA). “Prisoners are not a suspect class. Prisoners cannot show that the termination provisions burden a fundamental right.” *Id.* Thus, application of the rational basis test is appropriate. See *id.*

196. See *id.* (noting cases that suggest prisoners are not suspect class and should apply rational basis standard).

197. *Heller v. Doe*, 509 U.S. 312, 320 (1993).

198. *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 189 (3d Cir. 1999) (citing *Lewis v. Casey*, 518 U.S. 343, 349 (1996)).

199. Brief of Appellees, *supra* note 171, at 46 (quoting brief for appellant at 44).

200. 935 F. Supp. 332 (S.D.N.Y. 1996) (holding that even if federal court lacks power to enforce terminated decree, enforcement may still be sought in state court) *rev’d in part*, 172 F.3d 144 (2d Cir. 1999).

201. For a discussion of the interpretation of the language of PLRA on this issue, see *supra* note 134 (examining plain meaning); *Taylor v. United States*, 143 F.3d 1178, 1181 (9th Cir. 1998) (criticizing Second Circuit’s view); *Dougan v. Singletary*, 129 F.3d 1424, 1426 n.4 (11th Cir. 1997) (“We decline to follow the Sec-



The Third Circuit agreed with appellees that the unambiguous language of the PLRA commands immediate termination should the statute's requirements be met.<sup>202</sup> The court refused to stay the termination on the grounds that appellees might violate certain contractual aspects of the agreement with appellants, governed solely by Pennsylvania state law.<sup>203</sup> The court further noted that, "[I]nmates are therefore free to pursue relief in Pennsylvania courts."<sup>204</sup> Joining its sister circuits in affirming the general constitutionality of the PLRA, the Third Circuit upheld the decision of the District Court for the Eastern District of Pennsylvania, holding that there was no abuse of discretion in the decision of the lower court.<sup>205</sup>

#### IV. CONCLUSION

*Imprisoned Citizens Union v. Ridge* was something of a David and Goliath case. As counsel for appellants observed at oral argument, "I am reminded of the reputed comment of Lady Astor as the iceberg crashed through her bulkhead on the Titanic—I know I ordered ice, but this is ridiculous."<sup>206</sup> The overwhelming weight of authority, both legislative and judicial, was on the side of the appellees.<sup>207</sup> On the other side of the argument, were the two surviving members of the original plaintiff class that had obtained the consent decree at issue, over a quarter of a century ago, and the relatively scant resources of the Imprisoned Citizens Union.<sup>208</sup> Of the two circuits whose opinions lent any support to the appellant's position, one was already in the process of rehearing the applicable case.<sup>209</sup>

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ond Circuit's interpretation."); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997) (noting but not reaching Second Circuit's interpretation); *Demike v. Fauver*, 3 F. Supp. 2d 540, 543 (D.N.J. 1998) (declining to follow Second Circuit's view); SINGER, *supra* note 139, § 46.06 (requiring construction of statutes consistent with purpose).

202. See *Imprisoned Citizens Union*, 169 F.3d at 189 ("We cannot accept this argument without ignoring the plain language of the PLRA.")

203. See *id.* at 190 ("Mere speculation that the defendants might refuse to honor alleged contractual obligations is insufficient to support a finding of 'current and ongoing violations of [a] Federal right.'" (quoting 18 U.S.C. § 3626(b)(3)).

204. *Id.*

205. See *id.* at 189-90 (noting that lower court did not err in denying appellants motion to deny termination as remedy for alleged contempt of consent decree by appellees because PLRA contemplates no such remedy and civil contempt order would have no coercive effect in any event).

206. Noted by the author attending oral argument before the United States Court of Appeals for the Third Circuit Court of Appeals, Sept. 17, 1998.

207. For an assessment of the relative balance of authority, see *supra* notes 29-144 and accompanying text.

208. See Brief of Appellees, *supra* note 171, at 3 ("Today, only two of the original twenty-one (21) members of the plaintiff class remain incarcerated in any of the six (6) state correctional institutions.")

209. For further discussion of the Second Circuit's position, see *supra* notes 8-9 & 132.

With due deference to the Ninth Circuit's contrary and unpopular position on many of the PLRA's provisions, the overwhelming majority of federal appellate jurisdictions agree with appellee's interpretation of the PLRA.<sup>210</sup> Given this extreme disparity, some might wonder why this case should attract more than cursory attention. There are two reasons. First, inmates will continue to comprise one of the most litigious segments of society.<sup>211</sup> Challenges to the federal PLRA will not be entirely disposed of by the decision in *Imprisoned Citizens Union*, and congruent challenges to the state PLRA are likely to emerge.<sup>212</sup> Given the sheer mass of inmate litigation, it behooves the informed practitioner to have at least a passing familiarity with these issues.

Further, there exists a more compelling reason to watch the progress of this case through the Third Circuit closely. The legal system of the United States is predicated on the notion that all people are entitled to the protection of the law.<sup>213</sup> Prisoners constitute an unpopular and often invisible portion of the population, and it would be all too easy to trammel their legal rights into oblivion.<sup>214</sup> Such is already the status quo in some other countries.<sup>215</sup> If the United States is to continue to champion the

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210. For a discussion of the Ninth Circuit's approach, see *supra* notes 41, 114-18 & 186. *But cf.* Keener v. Pennsylvania Bd. of Probation and Parole, 128 F.3d 143, 144-45 (3d Cir. 1997) (describing great weight of sister circuit authority, and holding consistent with those circuits). The court stated:

Three courts of appeals have already applied those criteria to this provision of the PLRA and ruled that lawsuits dismissed as frivolous prior to the enactment of the PLRA count as "strikes". We see no basis to differ with that result. We thus now join those circuits in holding that dismissals for frivolousness prior to the passage of the PLRA are included among the three that establish the threshold for requiring a prisoner to pay the full docket fees unless the prisoner can show s/he is "under imminent danger of serious physical injury."

*Id.*

211. See Ashley Dunn, *A Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1 (noting statistical trend toward increased prisoner litigation).

212. This conclusion is supported by the general trend of state legislation litigation to follow the pattern established by its federal counterpart and the fact that the Pennsylvania state PLRA is a relatively recent state law development.

213. See *Wilson v. Garcia*, 471 U.S. 261, 278 (1985) ("[E]very person within the United States is entitled to equal protection of the laws and to those 'fundamental principles of liberty and justice' that are contained in the Bill of Rights and 'lie at the base of all our civil and political institutions.'") (citations omitted).

214. See *Murray v. Dosal*, 150 F.3d 814, 821 (8th Cir. 1998) (Heaney, J., dissenting) (underscoring danger of allowing prisoners to be easy target, in dissenting opinion), *cert. denied*, 119 S. Ct. 1467 (1999). Judge Heaney concluded, "Courts have an obligation to protect minority interests when the Constitution is violated by majoritarian will. I am deeply troubled when constitutional rights are trampled in the name of political expediency, and prisoners are certainly an easy political target." *Id.*

215. See *Coumou v. United States*, No. CIV.A. 93-1465, 1997 WL 644091, at \*7 (E.D. La. Oct. 17, 1997) (noting in passing existence of "foreign port where the foreign nation's reputation for human rights of its prisoners is well-known to be poor").

ideal of a progressive, liberal tradition of jurisprudence, it must embark on any effort to curtail legal rights with due caution.<sup>216</sup> It must accord the most strict scrutiny to the resulting legislation, regardless of how unsympathetic the opponent-class may be. It must not sacrifice the principles of law as an expedient to achieving order. As Sir Thomas More is reputed to have said, "I'd give the Devil benefit of law, for my own safety's sake."<sup>217</sup>

*Peter Hobart*

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216. *See, e.g.*, *United States v. Jones*, 527 F.2d 817, 825 (D.C. Cir. 1975) (extolling virtues of United States leadership as enlightened power in global legal arena). "[The United States] can provide valuable leadership by . . . establishing the Federal Government as an enlightened example for our States and other members of the community of nations." *Id.*

217. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 335 (1982) (quoting *BOLT*, *supra* note 4, at 147). For a more complete version of this quotation, see *supra* note 4 and accompanying text.