STATEMENT
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PRESENTED TO
THE SUBCOMMITTEE ON CRIME,
TERRORISM, AND HOMELAND SECURITY OF
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AT THE HEARING ON THE NATIONAL PRISON RAPE COMMISSION REPORT AND STANDARDS

JULY 8, 2009

I thank you for the opportunity to testify today. I have worked in the criminal justice system for most of my career. During my career as a prosecutor, I thought that it was appropriate that the opinions and input of prosecutors and their professional associations were always sought and valued by those crafting criminal justice law and policy. One of the most significant disappointments I have experienced since assuming my current duties has been the willingness of lawmakers at the state and federal level to affect correctional law and policy with little or no meaningful input from the correctional professionals who operate America's prisons. This hearing is a step in the right direction.[1]

There are numerous groups with interests in correctional policy: inmate advocates, labor, education, victims, and, of course, lawyers. However, there is no group of professionals who have a broader, more expansive view of and stake in the safe, secure and humane operation of prisons than state correctional administrators, directors, and commissioners: from daily operations and policy, to workforce and labor issues, to programming, to balancing annual budgets and drafting legislation, these professionals offer balance and experience that can only be obtained by leading and managing in such a demanding environment, where budgets and public policy are so often out of sync.

Background

On June 23, 2009, the National Prison Rape Elimination Act (PREA) Commission (Commission) released its report (final report) and proposed standards to prevent, detect, respond to and monitor sexual abuse of incarcerated or detained individuals throughout the United States. See National Prison Rape Elimination Commission, Report and Standards, available at http://nprec.us/publication/. Prison

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[1] Some explanation for the brevity of my prepared testimony is in order. I initially received a request to testify before this subcommittee on June 24, 2009. I serve as a member of our state's Sentencing Reform Commission, and on June 26-27, I attended a working retreat for that Commission, sponsored and hosted by the Pew Center for the States, Public Safety Performance Project. I prepared this testimony as I vacationed with my family from June 27 through July 5. Ironically, I was deposed for most of the day on July 6 (alas, not in an inmate case) and traveled to Washington yesterday. That short notice and those competing commitments are responsible for the brevity that I am hopeful each of you will welcome.

administrators, directors and commissioners voiced their opinions and concerns about the commission, the process and the report at appropriate times during the commission's work.[2]

The final report will now be reviewed by the Attorney General. The final report advocates for significant federal mandates to be imposed on federal and state prisons, in the form of certain standards proposed by the Commission. Among those recommendations are two proposed changes to the Prison Litigation Reform Act (PLRA). The language of the final report reveals the commission's overarching view of the PLRA: "The Commission is convinced that the PLRA that Congress enacted in 1996 has compromised the regulatory role of the courts and the ability of incarcerated victims of sexual abuse to seek justice in court."

In fact, PLRA was a bipartisan measure passed by Congress and signed by President Clinton for a host of good reasons. In the 1990s, many estimated that frivolous inmate lawsuits cost more than $80 million each year. Taxpayers paid the bills for corrections lawyers (to defend these lawsuits), prison staff (to gather information to respond to the suits and transport the offenders to the courthouse), court clerks (to process mountains of legal filings) and judges (to rule on the claims). Inmate lawsuits were swamping our federal courts, making it more difficult for the federal courts to address other legitimate claims.

But, the concerns addressed by PLRA went beyond mere frivolous lawsuits. PLRA was intended to lessen the need for litigation by encouraging prison systems to adopt meaningful and legitimate administrative procedures for addressing inmate complaints and concerns. By doing so, the hope was that many lawsuits, even legitimate lawsuits, would be avoided as prison administrators were allowed to correct obvious problems and improve procedures before resort was had to federal courts.[3]

The bigger issues addressed by PLRA were federal court injunctions and consent decrees requiring the release of inmates and/or consuming substantial criminal justice resources. Prior to the PLRA, thirty-nine state prison systems operated under some

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[2] For a summary of this process and input, please see ASCA's letter and memorandum to The Honorable Reggie B. Walton, Chair of PREC, dated December 3, 2008. Attachment 1.

[3] In this respect, PLRA has been successful. See FN's 7, 8, and 9.

federal court order or injunction.[4] Some of these orders had far-reaching operational and financial implications. Texas prisons, for example, could not exceed 95% of their design capacity.[5] Given that Texas's prototypical prisons cost $46 million each to construct, the 95% population cap had huge financial implications.

In the 1970s and 1980s, many prison systems entered consent decrees believing that they would help improve prison conditions. These court agreements often settled difficult and costly lawsuits at seemingly minimal financial costs. Consent decrees also gave prison administrators leverage in the inevitable budget battles with other government agencies.[6] Consent decrees also permitted parties to craft sweeping injunctions that did not need to comply with the traditional limits on federal court injunctions.

However, prison managers ultimately found that consent decrees impaired their ability to manage prisons. Changing budgetary and political environments meant that consent decree provisions that once seemed wise soon became outdated and counterproductive. But, consent decrees were difficult to change and often defied the will of the elected branches of government and the will of voters. Prison managers and elected officials could no longer re-evaluate and revise policies when the old ones didn't work, when conditions changed, or when new information became available. Staff was powerless, and their ingenuity and initiative were stifled. Courts, lawyers, and court-appointed special masters often had greater control than prison managers. To escape the

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

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

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

decrees, it was insufficient and irrelevant that no inmate was suffering a constitutional deprivation. Good practices and constitutional conditions became irrelevant as prison officials were often required to demonstrate that the case specific goals of some years-old consent decree had been "achieved."

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

PREA Recommendations Regarding the PLRA

In its final report, the Commission recommends two changes to the PLRA. These proposed changes are not new. Instead, these recommendations are simply the latest reincarnation of familiar attempts to rollback the bipartisan reforms of the PLRA. These recommendations are premised on the same arguments made by opponents to the PLRA before its passage; they are modified only slightly to conform to the anecdotal evidence "findings" repeated in the final report.[7] Part I, Chapter 4 of the report states in pertinent part:

> The Commission recommends that Congress amend the administrative exhaustion provision and physical injury requirement in the PLRA to remove barriers to the courts for victims of sexual abuse. In the meantime, corrections officials must take immediate steps to change unreasonable administrative policies. The Commission understands that officials should have an opportunity to investigate and respond to a complaint before having to defend themselves in court. This is both fair and conserves scarce resources in the way the framers of PLRA intended. However, there is no reason that a sexually victimized prisoner should have to file a grievance within several days or weeks after being sexually

[7] For a more thorough treatment of the legislative history of the PLRA and recent efforts to roll back those reforms, please see the testimony of Sarah Hart on H.R. 4109, "Prison Abuse Remedies Act of 2007," presented to the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives, April 22, 2008. This summary modified and used with permission.

assaulted or successfully complete every step of a complex process to seek protection and compensation in court.

Proposed Rollback of the Exhaustion Requirement of PLRA

The commission's report advocates somehow diminishing the PLRA's exhaustion requirement for victims of sexual abuse. However, the final report stops short of recommending how the exhaustion requirements of the PLRA should be amended to exempt victims of sexual abuse.

The PLRA requires that inmates exhaust all administrative remedies before filing a federal action. Specifically, the PLRA provides as follows: "No action shall be brought with respect to prison conditions under section 1983 of this title, 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." 42 U.S.C. § 1997e(a). This provision replaced a former discretionary approach that required only limited exhaustion in the discretion of the district court.

As interpreted and applied by federal courts, the exhaustion requirement has been successful in reducing frivolous lawsuits and in settling untold thousands of legitimate complaints, decently and in good order, without resort to federal courts. Inmates now have meaningful and predictable avenues of redress. For these reasons and many others, PLRA enjoys support by corrections officials, labor, elected leaders at the state and federal level, and judges. By strengthening the grievance requirement, PLRA has ensured that prison managers are likely to be promptly alerted to problems arising in prisons; that they are able to take immediate action to prevent similar harms to other inmates; and, that they are able to mitigate harms to the inmate(s) who raised the issue in the grievance.

With this exhaustion requirement, Congress struck a balance between the need to encourage prompt notice to prison officials and the inmate's ability to file meritorious claims. For example, where administrative grievances are not "available" to the individual inmate, there is no exhaustion requirement. (Federal courts have interpreted

this "availability" requirement very favorably for inmates.)[8] Additionally, inmates who do not comply with exhaustion requirements are still permitted to file state court actions.

Since passage of the PLRA, federal courts have been circumspect in relying on the exhaustion requirements of the PLRA while carefully interpreting the PLRA to include reasonable limits on the requirement that inmates exhaust administrative remedies. A few such cases have reached the U.S. Supreme Court. In **Porter v. Nussle, 534 U.S. 516 (2002)**, the Supreme Court examined the breadth of the exhaustion requirements of the PLRA. In that case, the inmate bypassed the grievance process and filed an action alleging excessive force, arguing that excessive force claims were not included in the exhaustion requirement. The Supreme Court disagreed, holding "[42 U.S.C.] 1997e(a)'s exhaustion requirement applies to all prisoners seeking redress for prison circumstances or occurrences." The Court described the purpose of the PLRA's exhaustion requirement as follows:

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance, might improve prison administration and satisfy the inmate thereby obviating the need for litigation. In other instances, the internal review might filter out some frivolous claims. And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.

Id. at 524-25. The Court also noted that prison authorities have an interest in receiving prompt notice of, and opportunity to take action against, officer brutality.

In **Woodford v. Ngo, 548 U.S. 81 (2006)**, the Court held that an inmate must follow procedural rules, including filing a timely grievance in order to comply with the exhaustion requirement. The Court explained that the PLRA attempts to "eliminate unwarranted federal-court interference with the administration of prisons" and afford corrections officials time and opportunity to address complaints internally before

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

allowing the initiation of a federal case. Id. at 93. The Court ruled that requiring proper exhaustion served those goals by giving inmates an effective incentive to make full use of the prison grievance process. The Court also cited statistics showing that prisoner petitions represented between 8.3% and 9.8% of new filings in federal district court between 2000 and 2005, four years after passage of PLRA. The Court noted that this equated to about one new prisoner case every other week for each of the active and senior district judges in the country.[9]

In **Jones v. Bock, 549 U.S. 199 (2006)**, the Supreme Court affirmed that the exhaustion requirement is not without limits by holding that failure to exhaust is an affirmative defense under the PLRA, and inmates are not required to specially plead or demonstrate exhaustion in their complaints. The Court also ruled that exhaustion is not necessarily inadequate simply because an individual being sued was not named in the grievances and that if an inmate lawsuit contains both procedurally valid and procedurally barred claims, the district court should dismiss the procedurally barred claims while leaving intact the procedurally valid claims.

Against this legal backdrop, the final report recommends that Congress amend the exhaustion requirement to remove "barriers to the courts for victims of sexual abuse." The commission argues that incarcerated persons experiencing the trauma of sexual abuse, as well as those with vulnerabilities such as mental illness or developmental disadvantages may have extreme difficulty filling out the correct forms and meeting strict deadlines.[10]

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[9] Statistics from the Administrative Office of U.S. Courts suggest that PLRA is functioning precisely as predicted and as intended. While inmate filings decreased in the years immediately following passage of PLRA, since 2000 the number of inmate petitions has leveled off. See Attachment 2. In other words, federal courts are still hearing meritorious claims from inmates, while less substantial issues are being addressed administratively, without clogging federal dockets.

[10] The commission's proposed standard for correctional administrative policy provides some insight into its position on an amended exhaustion requirement. The standard is contained in a section of the report which advocates against "unreasonable administrative policies" and argues there is no reason a sexually victimized inmate should have to file a grievance within several days or weeks after being sexually assaulted or successfully complete every step of a complex process in order to seek compensation and protection in court. Apparently, the commission believes that ANY policies that require inmates to make a timely report of sexual abuse are unreasonable, per se, as the commission's proposed standard requires corrections agencies to adopt a policy deeming administrative remedies exhausted ninety days after sexual abuse is reported, even if someone other than the victim makes the report and regardless of when the abuse actually occurred. In doing so, the commission demonstrates a lack of concern for further victimization of

The Commission attempts to link "incarcerated persons experiencing the trauma of sexual abuse" with "those with vulnerabilities such as mental illness or developmental disadvantages." While these two groups may at times overlap, the report cites no support for the proposition that victims of sexual assault are more likely than other inmates to have difficulty availing themselves of administrative remedies. The Commission may have believed that this rhetorical slight of hand was necessary to create such a connection because of the absence of reliable or even anecdotal evidence of such a connection.

As for the commission's concerns about vulnerable inmates, courts have explicitly ruled that inmate grievance policies and procedures must be accessible to all inmates, cannot be overly complex or burdensome, and cannot allow for staff retaliation.[11] Furthermore, courts and commonly accepted correctional standards require that mentally ill and developmentally vulnerable inmates be afforded treatment,

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inmates: failure to at least require that inmates report sexual assault, especially in legitimate cases, would jeopardize the safety of other inmates and create more victims by the same perpetrator(s).

[11] See, e.g., Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004) (threat of criminal charges made grievances unavailable); Brown v. Croak, 312 F.3d 109, 112-13 (3d. Cir. 2002) (holding that grievance system was "unavailable" to prisoner if (as alleged) security officials told the plaintiff to wait for the completion of the investigation before grieving, and then never informed him of its completion); Days v. Johnson, 322 F.3d. 863 (5th Cir. 2003) (noting the inmates' personal ability to access the grievance system could render the system unavailable); Pavey, v. Conley, 170 Fed. Appx. 4, 2006 WL509447 (7th Cir. 2006) (unpublished) (grievance procedure might not be "available" to inmate who could not write and was isolated from others who could help him); Muniz v. Goord, 2007 WL 2027912, (M.D. Pa, 2008) (denying dismissal for non-exhaustion where inmate said he was in the hospital during the period for filing a grievance);Dole v. Chandler, 438 F.3d 804 (7th Cir. 2006) (holding that "[p]rison officials may not take unfair advantage of the exhaustion requirement" and that " remedy becomes "unavailable" if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting"); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("We believe that a remedy that prison officials prevent a prisoner from 'utiliz[ing]" is not an 'available' remedy under § 1997e(a)..." where prisoner could not get grievance forms for transferring prison system); Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999) (holding that grievance decisions that stated it was non-appealable need not be appealed); Langford, v. Ifediora, 2007 WL 142423 (E.D. Ark 2007) (holding plaintifss aget, deteriorating health and lack of general education, combined with failure to provide him assistance in preparing grievances raised and issue of "availability" of remedies). The 4th Edition of ACA Standards, Standard 4-4284, provides as follows: "**There is a written inmate grievance procedure that is made available to all inmates and that includes at least one level of appeal.** Comment: A grievance procedure is an administrative means for the expression and resolution of inmate problems. The grievance mechanism should include provisions for the following: written responses to all grievances, including the reasons for the decision; response within a prescribed, reasonable time limit, with special provisions for responding to emergencies; supervisory review of grievances; participation by staff and inmates in the procedure's design and operation; access by all inmates with guarantees against reprisals; applicability over a broad range of issues; and means for resolving questions of jurisdiction."

counseling and assistance in such matters.[12] Ironically, the Commission's own final report acknowledges that courts will not allow prison administrators to play "hide and seek" with administrative remedies.[13] Equally significant is that the Commission's final report simply ignores the reality that inmates have unfettered access to state courts; the PLRA does not impact the operation of state courts or limit access thereto.

But, even as applied to federal courts, the final report cites no evidence in support of its premise: that PLRA erected such a "barrier" to federal courts for victims of sexual abuse.[14] In fact, after months of gathering anecdotal evidence from former inmates and inmate advocates across the nation, the commission failed to include even a single reported or unreported federal court case whereby the PLRA effectively or explicitly prevented an actual victim of sexual abuse from accessing federal courts.

In summary, eliminating the exhaustion requirement of PLRA, would eliminate the prison management benefits of prompt inmate grievances (dispute resolution, prevention of future harms, and mitigation of harms) and encourage prisoners to complain first to the Federal courts before they make any attempt to alert prison managers to the purported problems or attempt to resolve the matter promptly without litigation.

Proposed Rollback of the Physical Injury Requirement of the PLRA

The final report states the Commission is convinced victims of sexual abuse are losing avenues for relief because they cannot prove physical injury.[15] Currently, the

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[12] Greason v. Kemp, 891 F.2d. 829 (11th Cir. 1990) (holding that an inmate's constitutional right to mental health care is clearly established); Inamtes of Alleghany County Jail v. Pierce, 587 F.Supp. 638 (D.C. Pa 1980) (holding that prisoners are entitled to psychological or psychiatric attention).

[13] In endnote 54 to Part II, Chapter 4, the final report includes the following citations for this proposition: *Goebert v. Lee County*, 510 F.3d 1312, 1323 (11th Cir. 2007). See also *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003); *Camp v. Brennan*, 219 F.3d 279 (3d Cir. 2000); *Davis v. Berks County*, 2007 U.S. Dist. LEXIS 9892, 2007 WL 516128 (E.D. Pa. 2007).

[14] In fact, as the Supreme Court noted in Ngo, even after PLRA, inmates clearly have ample access to federal courts as inmate filings still accounted for approximately 9% of filings in federal court. And, inmate filings leveled off and actually began to increase again within a few years after passage of PLRA. See Attachment 2.

[15] This change would require the elimination of two provisions of federal law relating to the "physical injury" requirement. First, the Federal Tort Claims Act (28 U.S.C. § 1346(b)) would have to be amended to remove the current limits on claims for emotional or mental injuries by federal prisoners. Second, the

PLRA requires that an inmate prove physical injury to receive compensatory damages. This provision was designed to shield prison officials from insubstantial claims. However, the final report states that "a few courts" have ruled sexual assault alone does not constitute a physical injury. In support of this significant contention, the final report cites only one unreported federal court case, from the U.S. District Court for the Southern District of Mississippi.[16] However, only a single federal circuit has ever used language even suggesting such a conclusion.[17] With near unanimity, federal courts have interpreted these provisions simply to bar *de minimus* claims: despite claims to the contrary, federal appellate courts consistently hold that forcible sexual assaults include a "physical injury" and are not barred under this section.

In spite of this uncontested legal history, the report contends the physical injury requirement of PLRA fails to take into account real emotional and psychological injuries that follow sexual assault.[18] And, while the final report appears to recommend some change in this regard, it fails to recommend any specific language for such an amendment to the PLRA.

To support its recommended rollback of the physical injury requirement of PLRA, the final report resorts to manufacturing a legal problem where none exists: federal courts have not allowed the physical injury requirement to serve as a barrier in inmate cases

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PLRA provision that extended the Federal Tort Claims Act limitation to all prisoner lawsuits would have to be deleted. (28 U.S.C. §1346, as it would be amended by H.R. 4109(2), is set forth in the attached appendix.)

[16] The supporting endnote in the final report is number 56 of Part I, Chapter 4: *Hancock v. Payne*, 2006 WL 21751, *3 (S.D.Miss 2006); Schlanger, M., & Shay, G. (2009). Preserving the rule of law in America's jails and prisons: The case for amending the Prison Litigation Reform Act. *Journal of Constitutional Law*, 11(1), 139–154. (See FN 13 below.)

[17] The U.S. Court of Appeals for the 5th Circuit has found sexual assault alone is not necessarily sufficient to meet the physical injury requirement. Copeland v. Numan, 250 F.3d 743 (5th Cir. 2001) (unpublished). The following courts have held sexual assault alone is sufficient to meet the physical injury requirement: Liner v. Goord, 196 F.3d 132 (2d Cir. 1999); Williams v. Prudden, 67 Fed.Appx. 976 (8th Cir. filed May 19, 2003) (unpublished); Solliday v. Spence, 2009 WL 559526 (N.D. Fla. filed March 2, 2009) (unpublished); Kahle v. Leonard, 2006 WL 1519418 (D.S.D. filed May 26, 2006) (unpublished).

[18] Of course, PREA and federal constitutional standards already require that correctional agencies provide for protected reporting, impartial investigation, and for appropriate treatment and counseling in sexual assault cases. And, the final report recommends even more specific standards. Additionally, most states have statutes that mirror those standards, ACA standards include detailed and strict requirements in such cases and the author is unaware of any state prison system that does not have statutes or policies requiring investigation and protection of the alleged victim in all reported cases, and treatment and counseling in all substantiated or appropriate cases.

alleging sexual assault. This is confirmed by the Commission's own legal research as cited in the final report. Having no real legal problem to address, the report is left, once again, to recommend changes to PLRA without any specific recommendations for such changes.

Conclusion

For over twelve years, the PLRA has served as an example of a measured response to specific problems associated with inmate litigation in federal courts. The legislative history of PLRA and the subsequent implementation by federal courts reflects a carefully crafted and balanced concern for the safe and orderly operation of prisons and the constitutional rights and concerns of inmates.

Contrary to the anecdotal evidence and sweeping allegations about PLRA contained in the final report, PLRA represents a legislative triumph in the complex overlap of prisons and courts. Frankly, it is a success that may be unmatched in modern Congressional history. Unless and until specific and targeted changes to PLRA are supported by compelling, objective evidence, Congress should resist calls for unwarranted and unspecified changes to this carefully crafted, balanced, and bipartisan legislative/judicial success story.