Please Pass the Dictionary: Defining *De Minimis* Physical Injury Under the Prison Litigation Reform Act § 1997e(e)

Elizabeth A. Etchells[*]

ABSTRACT: In an attempt to control nonmeritorious and frivolous prisoner litigation, Congress drafted the Prison Litigation Reform Act ("PLRA") in 1995. The legislative debate over the PLRA was largely anecdotal, and Congress neglected to define many of the key terms in the bill, including the physical injury requirement codified at 42 U.S.C. § 1997e(e). This forced lower federal courts to interpret many of the PLRA's key provisions. Since the PLRA's passage, these federal courts have largely agreed that a qualifying injury under the PLRA must be more than de minimis *but need not be significant. However, a circuit split has developed over the definition of* de minimis *injury with regard to failure to protect claims under the Eighth Amendment. This Note argues that the Supreme Court should adopt the Ninth Circuit's definition of* de minimis *injury because the restrictive approach of the Fifth Circuit is unnecessary. Further, the Ninth Circuit's expansive definition most closely aligns with Congress's intent, while the Fifth Circuit's narrow definition prevents meritorious lawsuits from being litigated.*

* J.D. Candidate, The University of Iowa College of Law, 2015; M.A., Durham University, 2003; B.A., Bradley University, 2000. I would like to thank the Volume 99 and 100 *Iowa Law Review* editors and student writers for their skilled and dedicated work. Molly McPartland and Whitney Martin, I will forever appreciate your sharp minds and bright smiles. Alex Pratt, thanks so much for your never-ending flexibility and keen editing. Rosie Romano, since you edited the very first draft of this Note, it's only fitting that you use your Bluebook ninja skills on the final draft. I would also like to thank my family and friends, especially Katie and Sean McCarthy, Rich Cotton, Laura and Cara Farmer, Ashley Brosius, Milly Dick, and Emily Sohn, for picking me up when I (literally) fell down. And finally—Ross Etchells, thank you for your unfailing awesomeness and for reminding me that Leslie Knope wouldn't quit.

> "It is hard to conceive of any relationship between two adults in America being less equal than that of prisoner and prison guard. . . . [T]he extreme inequality of the daily relationship between prisoners and their jailers leads very naturally into abuses of many flavors, from small humiliations to hideous crimes."[1]
>
> *Piper Kerman, Orange is the New Black*

I. INTRODUCTION

Over the last 40 years, the United States prisoner population has increased by over 500%.[2] By 2012, approximately one in every 35 adult Americans, or about 2.9% of all "adult residents," was in jail, in prison, or on probation or parole.[3] Incarceration is now such a common occurrence in America that the topic is experiencing a pop culture boom. Television programs like *Orange is the New Black* target the adult market, while childhood mainstay *Sesame Street* broaches the difficult topic to young children using songs and puppets.[4] While the children's programming is educational, the adult programming largely avoids confronting any of the thorny issues associated with incarceration.[5] Instead, the prevalence of jokes about topics like prison rape reflects a general comfort, both by those creating the jokes and those consuming them, with laughing at horrific events befalling a uniquely vulnerable and politically unpopular group: convicted criminals.[6] This attitude mirrors that of most state and federal legislatures, where

---

1. PIPER KERMAN, ORANGE IS THE NEW BLACK: MY YEAR IN A WOMEN'S PRISON 129–30 (2011) (describing the author's direct observation of the relationship between female prisoners and correctional officers).

2. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2014), *available at* http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

3. *See* LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 1 (2013), *available at* http://www.bjs.gov/content/pub/pdf/cpus12.pdf.

4. *See Last Week Tonight with John Oliver* (HBO television broadcast July 20, 2014), *available at* https://www.youtube.com/watch?v=_Pz3syET3DY. *Last Week Tonight* includes news "segments that can last anywhere from 15 to 20 minutes and often pack as much research as a front-page story you might see from a traditional outlet like a newspaper." Brian Steinberg, *How John Oliver and HBO Shattered TV's Comedy-News Format*, VARIETY (July 2, 2014, 10:47 AM), http://variety.com/2014/tv/news/how-john-oliver-and-hbo-shattered-tvs-comedy-news-format-1201257084/. One industry analyst and academic describes it as follows, "I suspect that John Oliver and his writers may have a wonderful and satirically subversive mission: I think the humor is there to serve the story." *Id.* (internal quotation marks omitted).

5. *Last Week Tonight with John Oliver*, *supra* note 4 (including a clip of a *Sesame Street* skit explaining to children why their friends' parents may be in jail).

6. *Id.* (collecting clips including prison-rape jokes from popular television shows and movies and explaining: "At least *Sesame Street* is actually talking about prison, the rest of us are much happier completely ignoring it, perhaps because it's so easy not to care about prisoners: they are by definition convicted criminals. In fact, it's so easy not to care, that we are *really* comfortable making jokes about one of the most horrifying things that can potentially happen to them").

politicians have long avoided broadening the rights of prisoners or independently bettering prison conditions even in the face of serious civil rights deprivations.[7] Federal courts, instead, have been largely responsible for protecting the constitutional rights of incarcerated individuals, especially by granting these prisoners access to the courts.[8]

From the 1960s through the mid-1990s, prisoner-initiated lawsuits successfully challenged conditions of confinement,[9] bettering the care for tens of thousands of incarcerated individuals. However, as the prison population continued to increase so too did total prisoner litigation.[10] Noting this surge, Congress began to worry that nonmeritorious and frivolous lawsuits were overburdening federal courts.[11] In 1995, Congress began considering the Prison Litigation Reform Act ("PLRA") as a method to control nonmeritorious prisoner lawsuits by imposing strict limitations on when prisoners could initiate lawsuits, and in April 1996, President Bill Clinton signed it into law.[12] Proponents touted the PLRA as a grand solution that would reduce the courts' expenditure of resources on prisoner lawsuits.[13] However, while the PLRA spent a year circulating through Congress, legislators put in a minimal amount of work at both the drafting and debate stages.[14] Congress, for example, failed to consider the courts' existing doctrine on prisoner-initiated litigation, both deliberately and as a result of

---

7. *See id.*

8. Amy Petré Hill, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 235 (2002).

9. *See* William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV 651, 652–53 (2004) ("Times have changed and while those representing inmates have no difficulty in finding issues about which to litigate, correctional agencies and staff do not walk around with bulls-eyes on their chest nearly as often as was once the case. . . . Most administrators have a healthy respect for the threat of court intervention and may actually ascribe greater power to the federal courts than in fact the courts now have."); *see also* Darryl M. James, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465, 469–70 (2011) (discussing the importance of inmates' access to the courts).

10. *See* Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1663 (2002) (discussing the increase in suits brought by prisoners since the 1950s).

11. *See id.* at 1662 ("[S]enator after senator joined a chorus of voices condemning prisoner lawsuits as frivolous, meritless, and wasteful.").

12. *See id.* at 1659–60 (tracing the congressional debate on the Prison Litigation Reform Act, its path through the House of Representatives and Senate, and President Bill Clinton's decision to sign the bill).

13. *See* 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) ("The time and money spent defending these cases are clearly time and money better spent prosecuting violent criminals, fighting illegal drugs, or cracking down on consumer fraud.").

14. *See* Winslow, *supra* note 10, at 1662 (explaining that the Senate held limited discussions of the bill on only 11 days over the 14 months it was under consideration and those discussions centered on describing frivolous and nonmeritorious prisoner litigation).

the hasty drafting, and the PLRA often did not define critical words and phrases.[15]

This poor drafting has forced the federal courts to interpret many of the PLRA's key provisions. One such provision, codified in 42 U.S.C. § 1997e(e), mandates that a prisoner must have "a prior showing of physical injury" to sue for a mental or emotional injury.[16] However, the PLRA does not define physical, mental, or emotional injuries.[17] Given the absence of a legislative definition, most federal courts of appeal have agreed with the Fifth Circuit's application of Eighth Amendment principles in *Siglar v. Hightower*—"injur[ies] must be more than *de minimis*, but need not be significant."[18] However, beyond this analytical agreement, a messy circuit split has developed between the narrow and expansive definitions of "*de minimis*" physical injury with regard to Eighth Amendment failure to protect claims.[19]

This Note argues that the United States Supreme Court should adopt the Ninth Circuit's expansive definition of "*de minimis*" physical injury rather than the Fifth Circuit's narrow definition. In doing so, this Note also addresses the concerns the Fifth Circuit's approach implicates. Part II explores the history of Eighth Amendment failure to protect claims, surveys the PLRA's legislative history, and analyzes the congressional intent behind the PLRA. Part III presents the majority and minority definitions of *de minimis* physical injury among the circuit courts of appeals. Part IV argues that the Ninth Circuit's expansive definition most closely aligns with Congress's vision and argues that the Fifth Circuit's narrow definition prevents meritorious lawsuits from being litigated. This Note concludes by recommending uniform application of the Ninth Circuit's definition of *de minimis* physical injury under 42 U.S.C. § 1997e(e).

II. HISTORY OF PRISONER ACCESS TO THE COURTS

For most of American history, prisoners were thought of "as 'slaves of the state,'" and, as such, courts refused to hear most prisoner-initiated cases.[20] This conception of prisoners as "beneath the notice of [both state and] federal courts"[21] did not change until Chief Justice Earl Warren's liberal-leaning Supreme Court responded to the bevy of prisoner-related civil rights litigation in the 1960s and 1970s.[22] During that time, the United States

15. Michael M. O'Hear, *Not So Sweet: Questions Raised by Sixteen Years of The PLRA and AEDPA*, 24 FED. SENT'G REP. 223, 223 (2012) (discussing the judicial and legislative developments of the PLRA since its passage).

16. 42 U.S.C. § 1997e(e) (2012).

17. *Id.*

18. Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997); *see also infra* Part II.B.3.

19. *See infra* Part III (describing the circuit split).

20. Hill, *supra* note 8, at 235.

21. *Id.* This Note deals only with prisoner litigation in federal courts.

22. *See id.*

Supreme Court began to protect some of the constitutional rights of prisoners by affirming incarcerated prisoners' right to sue, right to access to law libraries, and right to due process when punished in prison.[23] However, such successes did not wholly remedy the deep vulnerability of prisoners to serious civil rights deprivations. Despite court intervention, such deprivations have continued to occur. Further, in almost every state, prisoners lose their right to vote during and after incarceration,[24] completely removing their voice from the political process and leaving litigation as the only available means of defending rights and advocating reform.[25] Part II describes the 40-year expansion of prisoner access to federal courts and the post-PLRA constriction of such access.

A. ACCESS TO COURT PRESERVES PRISONER RIGHTS AND ABILITY TO ADVOCATE REFORM

Over the last four decades, prisoner-initiated litigation—rather than legislation—has produced the most consequential changes to the prison system.[26] There are multiple reasons for this. First, historically, federal courts have frequently possessed the only meaningful oversight of correctional institutions.[27] It is likely that without such intervention, or the threat thereof, conditions inside American prisons and jails would still resemble those of the 1960s.[28] Second, given prisoners' near-complete lack of access to other avenues of political participation,[29] any rights prisoners retain are illusory without the possibility of court intervention.[30] Third, because protecting the civil rights of convicted criminals has never been a politically popular position, many legislatures have prioritized minimizing spending on prisons rather than the rehabilitation and care of the prison population. In turn, legislation is unlikely to address prisoner civil rights concerns.[31] And fourth, as individual wardens and correctional officers control the enforcement of prisoner rights,

23. *See id.* at 235 n.102 (listing several cases addressing prisoners' claims).

24. *See Felony Disenfranchisement*, THE SENTENCING PROJECT, http://www.sentencingproject.org/template/page.cfm?id=133 (last visited Nov. 5, 2014) (depicting state-by-state felony disenfranchisement policies that exclude prisoners in all states except Maine and Vermont from voting while in prison).

25. *See* James, *supra* note 9, at 469–71 (explaining why litigation is such an important option for prisoners to seek reform).

26. Robyn D. Hoffman, Note, *Adding Insult to Injury?: The Untoward Impact of Requiring More Than De Minimis Injury in an Eighth Amendment Excessive Force Case*, 77 FORDHAM L. REV. 3163, 3185 (2009).

27. *Id.* at 3184–85.

28. Collins, *supra* note 9, at 668.

29. Prisoners could, of course, still contact legislators and other elected officials to voice their concerns. However, since prisoners in all but two states lack the ability to influence election results through voting, elected officials are unlikely to be responsive to their concerns. *See Felony Disenfranchisement*, *supra* note 24.

30. *See* Collins, *supra* note 9, at 667–68.

31. *See* James, *supra* note 9, at 470.

lawsuits are uniquely well positioned to challenge improper actions by such officials.[32] However, legislation has not been wholly ineffective. While litigation has undoubtedly proved to be more successful than legislation, the following sections address three means through which both have provided prisoners greater access to the federal court system.

1. 42 U.S.C. § 1983 Provides Prisoners Access to the Federal Courts

First, prisoners often obtain access to the federal court system through 42 U.S.C. § 1983, which allows individuals to assert constitutional or federal statutory rights against government actors.[33] Section 1983 does not create any new federal rights, but rather allows a cause of action for already existing rights.[34] The statute provides a "[c]ivil action for deprivation of rights" as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[35]

That is, in order to state a viable claim under § 1983, a plaintiff must assert that a state or local official violated his or her constitutional or statutory rights.[36]

While Congress enacted § 1983 in 1871, the provision was not used to "check[] abuses by state officials" until almost a century later in *Monroe v. Pape*.[37] In *Monroe*, the Supreme Court held "that actions taken by an officer in his or her official capacity are deemed to have occurred 'under color of law' even if" the actions violate state law or are not performed pursuant to any

---

32. *Id.*

33. *See* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 1 (2d ed. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sec19832.pdf/$file/sec19832.pdf.

34. Albright v. Oliver, 510 U.S. 266, 271 (1994) ("Section 1983 . . . merely provides 'a method for vindicating federal rights elsewhere conferred.'" (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979))).

35. 42 U.S.C. § 1983 (2012); *see also* Graham v. Connor, 490 U.S. 386, 393–94 (1989) (noting that the Constitution, and not § 1983, is the source of rights for excessive force claims brought under § 1983); Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (noting that the phrase "Constitution and laws" means 42 U.S.C. § 1983 provides remedies for violations of rights created by federal statutes, as well as those created by the Constitution).

36. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 497–99 (6th ed., 2012); *see also* 42 U.S.C. § 1983.

37. SCHWARTZ & URBONYA, *supra* note 33, at 2. In fact, the new statute was hardly used at all: between 1871 and 1920, just 21 cases were brought under § 1983. CHEMERINSKY, *supra* note 36, at 505.

official policy.[38] Individuals injured by such actions done under color of law have a federal cause of action under § 1983.[39] Since *Monroe*, the Court has expanded this principle by holding that municipalities, as well as states, may be held liable under § 1983.[40] Further, starting with the Civil Rights Act of 1964 and continuing through the present, Congress allowed most prevailing plaintiffs in civil rights lawsuits, like those filed under § 1983, to recover attorneys' fees under 42 U.S.C. § 1988.[41]

2. Eighth Amendment Failure to Protect Claims and 42 U.S.C. § 1983

Second, and also arising under § 1983, "failure to protect" claims provide another means of access to the courts. When inmates assert that prison officials have failed to protect them from other inmates or conditions in the jail or prison, their underlying constitutional claim is a violation of their rights under the Eighth Amendment.[42] Such a violation is actionable under § 1983.[43] The Eighth Amendment's prohibition of "cruel and unusual punishments"[44] "imposes duties" upon prison officials to provide humane—though not comfortable—prison conditions and to ensure inmates are free from violence at the hands of other inmates.[45] When the Supreme Court addressed this issue in *Farmer v. Brennan*, it noted that because prisoners have been stripped of physical freedom, they lack the means to protect themselves or to provide basic necessities of life.[46] As such, the Court concluded prison officials are obligated to provide necessities, including "adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"[47]

To state a viable failure to protect claim, "[the plaintiff] must show (1) an 'objectively, sufficiently serious' deprivation, meaning that he [or she] was incarcerated under conditions posing a substantial risk of serious harm, and (2) that the defendant was deliberately indifferent to the substantial risk of serious harm."[48] Circuit courts have also applied this two-part standard to

38. CHEMERINSKY, *supra* note 36, at 509; *see also* Monroe v. Pape, 365 U.S. 167, 187 (1961).

39. SCHWARTZ & URBONYA, *supra* note 33, at 2.

40. *Id.* at 2–3 (discussing the Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978)).

41. *Id.* at 4; *see also* HENRY COHEN, CONG. RESEARCH SERV., AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 25–26 (2008), *available at* http://fas.org/sgp/crs/misc/94-970.pdf (noting that "[a]ll federal civil rights laws permit awards of attorneys' fees).

42. Farmer v. Brennan, 511 U.S. 825, 832–33 (1994).

43. 42 U.S.C. § 1983 (2012).

44. U.S. CONST. amend. VIII (stating in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

45. *Farmer*, 511 U.S. at 832–33.

46. *See id.* at 832.

47. *Id.* (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).

48. Schoelch v. Mitchell, 625 F.3d 1041, 1046 (8th Cir. 2010) (citation omitted) (quoting *Farmer*, 511 U.S. at 834).

inmate attacks, prison conditions, "detention beyond the termination of a sentence,"[49] and "medical treatment claims."[50] However, direct or indirect simple negligence by or on behalf of prison officials does not violate a prisoner's Eighth Amendment rights.[51]

3. Prisoner-Initiated Litigation Successfully Protects Prisoner Rights and Challenges Prison Conditions

Third, in addition to the legislation itself, expanded use of § 1983 starting in the 1960s was a watershed moment for prisoner-initiated lawsuits.[52] Once judges' hands-off approach to prisoner-rights claims began to crumble under the leadership of the Warren Court, organizations like the American Civil Liberties Union ("ACLU") started litigating on behalf of prisoners.[53] This allowed the sometimes brutal conditions inside American prisons to be exposed, and even conservative-leaning jurists like former Chief Justice William Rehnquist acknowledged the necessary role of the federal judiciary in correcting these wrongs.[54]

Since then, prisoner lawsuits have demonstrated constitutional violations as well as correctional officers' negligence and failure to follow policies, and have brought to light issues deserving of public attention, if not court intervention.[55] For example, states including Arkansas and Texas have abandoned the practice of prisoners guarding their peers, a policy rife with opportunity for abuse, only because of court intervention.[56] In fact, the judiciary's role in reforming jails and prisons has been nearly as expansive as the Court's role in school desegregation.[57]

Even now, a half-century after the Warren Court, many legal contributors continue to argue for continued judicial intervention in the prison system.[58] In 2006, the Commission on Safety and Abuse in America's Prisons ("the Commission") recommended in a report that the courts remain open to

---

49. 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:30 (4th ed. 2014) (citations omitted).

50. 3 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: FEDERAL EVIDENCE § 1.07(B) (5th ed. 2014).

51. NAHMOD, *supra* note 49, § 3:28.

52. *See* Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 208–09 (2004).

53. Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 298 (2007).

54. *Id.* at 298–99.

55. Collins, *supra* note 9, at 668.

56. *Id.*

57. James E. Robertson, *The Prison Litigation Reform Act as Sex Legislation: (Imagining) a Punk's Perspective of the Act*, 24 FED. SENT'G REP. 276, 278 (2012).

58. Hoffman, *supra* note 26, at 3184–85.

prisoner-initiated litigation.[59] One member of the Commission, former Chief Judge of the Third Circuit Court of Appeals John J. Gibbons, testified before the House of Representatives on the issues of prison conditions and abuse.[60] Gibbons noted the numerous successes of federal judicial intervention, "including a reduction in overcrowding, the revamping of out-of-date prisons, improved medical and health services for prisoners, and a decrease in the use of excessive force."[61] Gibbons' testimony highlights the positive changes that litigation has spurred within the prison system since the 1960s, especially with regard to failure to protect violations.

B. CONGRESS CONSTRICTS PRISONER ACCESS TO THE COURTS BY ENACTING THE PLRA

Despite these undisputed successes, by the mid-1990s Congress had become concerned that the continually increasing number of prisoner-initiated lawsuits—the vast majority of which were unsuccessful—were overburdening the federal courts.[62] In response to these concerns, Congress enacted the PLRA in an attempt to limit frivolous prisoner lawsuits and to allow federal courts the time to consider more meritorious claims.[63] On the floor of the Senate, then-Senator Bob Dole famously listed the types of nonmeritorious grievances the PLRA would prevent: "[G]rievances [such] 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."[64]

With the PLRA, Congress made sweeping changes to the availability of courts to prisoners, but it did so with very few words.[65] This Note focuses on the PLRA's physical injury requirement, which mandates that prisoners may not sue for mental or emotional injury without also suffering a physical

59. *Id.* at 3184 (describing the Commission as "a twenty-one member nonpartisan panel comprised of a former circuit court judge, attorneys, seasoned correctional officers, civic leaders, and former prisoners" charged with examining serious problems facing the prison system).

60. *Id.*

61. *Id.*

62. *See* Shay & Kalb, *supra* note 53, at 299; Peter Hobart, Comment, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 981–82 (1999). In his Comment, Hobart explained that prisoner-initiated lawsuits had risen from 6600 in 1975 to over 39,000 in 1994. *Id.* Moreover, these lawsuits held the lowest rate of success of any type of civil suit in the federal system, with 97% of lawsuits dismissed before trial and "only [13%] resulting in any relief." *Id.* at 981.

63. 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) ("The crushing burden of these frivolous suits makes it difficult for the courts to consider meritorious claims.").

64. 141 CONG. REC. S14,626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole).

65. *See* 42 U.S.C. § 1997e (2012).

injury.[66] Another key provision requires that prisoners exhaust all available administrative remedies before filing in federal court.[67] Combined, these cornerstones of the PLRA contain only 77 words. As a result of this brevity, courts have had to define key terms of the PLRA as prisoner litigation has arisen, whether Congress intended to leave this responsibility up to the judiciary or not. Part III will address the divergent approaches to defining the physical injury requirement of § 1997e(e).[68]

1. Legislative History of the PLRA

Commentators agree that the "PLRA hardly exemplifies Congress at its best."[69] While the law did address established concerns relating to frivolous and nonmeritorious prisoner litigation, it did so in a politically charged "election-year setting" without rigorous debate.[70] In fact, in the Senate, only then-Senator Joe Biden brought up examples of meritorious prisoner lawsuits that court intervention had remedied, including "physical abuse of children in an overcrowded juvenile detention center" and correctional officers' repeated sexual abuse of female prisoners.[71] Now-late Senator Paul Simon also issued a rare caution by reminding his colleagues that however egregious prisoners' crimes may have been, they are uniquely vulnerable to civil rights abuses.[72]

Many examples of frivolous, nonmeritorious lawsuits that members of Congress cited in the debate were anecdotal.[73] The "chunky peanut butter case," where a prisoner purportedly sued under the Eighth Amendment because he received smooth peanut butter after ordering chunky, has been associated with the PLRA debate since the beginning.[74] However, even at the time *Newsweek* columnist George F. Will first publicized the case, Chief Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit admonished Will for not telling the whole story.[75] Chief Judge Newman emphasized that the case had more to do with the prisoner not receiving a $2.50 credit at the prison store once he had returned the peanut butter than

66. *Id.* § 1997e(e).

67. *Id.* § 1997e(a).

68. *See infra* Part III (explaining the circuit split).

69. O'Hear, *supra* note 15, at 223.

70. *Id.*; *see also* Winslow, *supra* note 10, at 1666–67. ("Absent from the vociferous dialogue . . . was any significant discussion about meritorious prisoner suits and the constitutional protections afforded to prisoners.").

71. Winslow, *supra* note 10, at 1667.

72. *Id.*

73. *See* O'Hear, *supra* note 15, at 223.

74. *See* George F. Will, *1995: Oh, a Revolution*, NEWSWEEK, Dec. 25, 1995, *available at* EBSCOhost, No. 9512217575 (commenting on the chunky peanut butter litigation).

75. *See* Winslow, *supra* note 10, at 1656 (recounting Chief Judge Newman's response to Will's *Newsweek* article).

with a lack of chunky peanut butter.[76] He told readers, "Though some prisoner—and nonprisoner—suits are frivolous, we ought not to ridicule them all by perpetuating myths."[77] The congressional debate was similarly one-sided, generating a strong impression that most, if not all, prisoner "lawsuits are inherently frivolous and meritless."[78] In contrast, Congress rarely brought up meritorious suits.

2. The Physical Injury Requirement of 42 U.S.C. § 1997e(e)

After the PLRA's enactment, commentators thought several of its provisions were controversial enough for the Supreme Court to grant review.[79] For example, the lower courts would have benefited from Supreme Court clarification of § 1997e(e),[80] which states, "a prisoner confined in a jail, prison or other correctional facility" cannot bring a federal civil action "for mental or emotional injury suffered while in custody without a prior showing of physical injury."[81] Proponents of the PLRA's physical injury requirement believed it would preserve a right of action for meritorious suits while providing a way for federal courts to quickly dismiss the archetypal frivolous lawsuit.[82] During debate, members of Congress cited examples of such frivolous suits that ought to be quickly dismissed: suits brought as "recreational activit[ies]"[83] that involved allegations like food preferences, exposure to disliked music, and disenchantment with the brand or sizing of prison clothing.[84]

---

76. *See id.* (noting that Chief Judge Newman's clarification "reminded readers that" $2.50 is significant to a prisoner with limited funds).

77. *Id.* (internal quotation marks omitted).

78. *See id.* at 1658.

79. Hobart, *supra* note 62, at 982 ("[S]ubstantial opposition to the PLRA from a minority of circuits, coupled with the controversial nature of the subject matter, makes Supreme Court review likely.").

80. In 1999, three years after Congress enacted the PLRA, the Act was considered a "likely" candidate for Supreme Court review. *See id.* That prediction never materialized with regard to the physical injury requirement. Multiple lower court cases acknowledge the continued lack of guidance from Congress or the Supreme Court regarding the definition of *de minimis* physical injury. *See, e.g.*, Oliver v. Keller, 289 F.3d 623, 626 (9th Cir. 2002) ("In drafting § 1997e(e), Congress failed to specify the type, duration, extent, or cause of 'physical injury' that it intended to serve as a threshold qualification for mental and emotional injury claims."); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (noting "the absence of any definition of 'physical injury' in the new statute").

81. 42 U.S.C. § 1997e(e) (2012). *Compare* Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (noting that a "majority of courts hold [that 42 U.S.C. § 1997e(e)] applies to all federal prisoner lawsuits" including First Amendment claims), *with* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (holding that "§ 1997e(e) does not apply to First Amendment [c]laims").

82. Chen, *supra* note 52, at 210 (noting that "proponents claimed that the federal courts were seriously burdened by overly litigious prisoners with frivolous suits").

83. 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl).

84. Chen, *supra* note 52, at 211.

Unfortunately for potential plaintiffs, however, the Supreme Court has not reviewed this section of the PLRA, and those circuit courts of appeal that have done so vary in their chosen standards.[85] Despite this lack of uniformity, most courts have agreed that injuries must be "more than *de minimis* but need not be significant" to satisfy the physical injury requirement.[86] However, beyond this analytical starting point, circuits are split as to what the phrase "*de minimis*" means.

3. The Fifth Circuit Uses Eighth Amendment Precedent to Create the "*De Minimis* But Not Significant" Standard

Shortly after the PLRA became law, the Fifth Circuit Court of Appeals applied Eighth Amendment standards to determine that an inmate's "injury must be more than *de minimis*, but need not be significant"[87] to be actionable under the PLRA. The court in *Siglar v. Hightower* recognized that while the PLRA did not define physical injury, the concept is well defined in excessive force cases.[88] In such cases, no constitutional protection is afforded for injuries caused by a *de minimis* use of force.[89] The *Siglar* court created a parallel standard for physical injuries under the PLRA by formulating the "more than *de minimis*, but not significant" test: "[W]e hold that the well established Eighth Amendment standards guide our analysis in determining whether a prisoner has sustained the necessary physical injury to support a claim for mental or emotional suffering."[90] The court then concluded that the bruise at issue, which lasted three days, was a *de minimis* injury.[91] Other circuit courts of appeal, however, have had difficulty defining and applying the *Siglar* standard in practice.

III. CIRCUITS DEVELOP DIVERGENT DEFINITIONS OF *DE MINIMIS* PHYSICAL INJURY IN FAILURE TO PROTECT CLAIMS UNDER 42 U.S.C. § 1997E(E)

While *Siglar* established the "*de minimis* but not significant" standard, the Fifth Circuit offered no guidelines by which to define or to classify injuries in future claims.[92] As a result, while other circuits have chosen to implement the *Siglar* standard as a starting point,[93] they have also adopted very different

85. *See infra* Part III (describing the circuit split).

86. Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997); *see also infra* Part II.B.3 (explaining the Fifth Circuit's *de minimis* standard).

87. *Siglar*, 112 F.3d at 193.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.*

93. Perez v. United States, 330 F. App'x 388, 389 (3d Cir. 2009) (applying the *Siglar* standard); Jarriett v. Wilson, 162 F. App'x 394, 400 (6th Cir. 2005) (same); Oliver v. Keller, 289 F.3d 623, 626–27 (9th Cir. 2002) (joining the Second, Fifth, and Eleventh Circuits by holding an injury must be more than *de minimis*, but need not be significant); Brown v. Mungo, C/A No.

definitions of *de minimis*. In practice, this means that one circuit could dismiss a claim that is actionable in another. The following Subpart discusses three such definitions.

A. THE MAJORITY VIEW: THE FIFTH CIRCUIT

Shortly after the *Siglar* decision, a Fifth Circuit district court observed that the Fifth Circuit Court of Appeals' decision in *Siglar* provided no clarifying principles for defining "*de minimis*" under the PLRA.[94] Thus, Fifth Circuit district courts were left with an undefined instruction regarding the validity of prisoner litigation under the PLRA.[95] As one of the first district courts to address the issue after *Siglar*, the United States District Court for the Northern District of Texas, in *Luong v. Hatt*, attempted to provide solid parameters.[96]

First, the court reasoned that inmate failure to protect claims should be judged through a comparison to how free individuals would manage similar injuries.[97] Second, the court defined a physical injury as "an observable or diagnosable medical condition requiring treatment by a medical care professional . . . not a sore muscle, an aching back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks."[98] Within the Fifth Circuit, the *Luong* definition is still adhered to in adjudicating PLRA claims.[99] And, even outside the Fifth Circuit, the *Luong* definition has informed the way most district and circuit courts frame the physical injury requirement of the

8:13-394-JMC-JDA, 2013 WL 1768662, at *3 (D.S.C. Mar. 29, 2013) (same, by a district in the Fourth Circuit); Skandha v. Savoie, 811 F. Supp. 2d 535, 539 (D. Mass. 2011) (same, by a district in the First Circuit); Clifton v. Eubank, 418 F. Supp. 2d 1243, 1245–46 (D. Colo. 2006) (same, by a district court in the Tenth Circuit); Montemayor v. Fed. Bureau of Prisons, No. CIV.A. 02-1283 GK, 2005 WL 3274508, at *5 (D.D.C. Aug. 25, 2005) (same); Hardin v. Fullenkamp, No. CIV. 4-99-CV-80723, 2001 WL 1662104, at *7 (S.D. Iowa June 22, 2001) (same, by a district court in the Eighth Circuit).

94. Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997) ("The Fifth Circuit in *Siglar v. Hightower* offered no definition of what is a physical injury, or a *de minimis* injury." (emphasis added) (citation omitted)). At the time, no other court had considered the definition of *de minimis* physical injury under the PLRA.

95. *See generally id.* (arguing that the only vague standard the Fifth Circuit Court of Appeals offered was that a *de minimis* injury was not sufficient to satisfy the physical injury requirement of the PLRA).

96. *See id.* at 485–86 (noting the lack of definition in pre- and post-PLRA cases and providing an explanation of how courts should analyze PLRA physical injury claims).

97. *Id.* at 486 (asserting that a failure to protect claim " should utilize the same approach to the nature of the injury and whether it actually falls under the new statute with regard to being a physical injury as to how people in a free world setting . . . would treat such injuries").

98. *Id.* at 486.

99. *See generally* Taylor v. Owner, La. Corr. Servs., Inc., No. 3:11-CV-0323, 2011 WL 2559856 (W.D. La. May 17, 2011), *report and recommendation adopted*, No. 3:11-CV-0323, 2011 WL 6170657 (W.D. La. June 28, 2011) (applying *Luong de minimis* injury standards to inmate injury claim in 2011); Miller v. Thibideux, No. 2:06-CV-833, 2008 WL 4999226 (W.D. La. Sept. 30, 2008) (applying the *Luong de minimis* injury standards to inmate injury claim).

PLRA.[100] The First,[101] Third[102] and Eleventh[103] Circuits, for example, all utilize the *Luong* definition.

B. THE MINORITY VIEW: THE NINTH CIRCUIT

The Ninth Circuit Court of Appeals, in contrast, did not consider the definition of *de minimis* until several years after both *Siglar* and *Luong*, in *Oliver v. Keller*.[104] In *Oliver*, the Ninth Circuit first noted that Congress' failure to define any terms in 42 U.S.C. § 1997e(e) presented a challenge for the judiciary.[105] The court then affirmed the *Siglar* standard as consistent with congressional intent[106] and agreed that the "*de minimis* but not significant" standard comports with well established Eighth Amendment standards.[107] However, the Ninth Circuit refused to endorse the Fifth Circuit's conception of *de minimis* force and *de minimis* injury as equivalents.[108]

The Ninth Circuit's definition of *de minimis* injury is instead more expansive than the Fifth Circuit's.[109] In *Oliver*, the parties advocated for opposite definitions of *de minimis* injury. The prisoner argued that any physical injury meets the requirements of § 1997e(e).[110] The government, on

100. *See infra* Parts III.B & C (explaining the various definitions of *de minimis* injury within the other circuits).

101. Skandha v. Savoie, 811 F. Supp. 2d 535, 538–39 (D. Mass. 2011). In settling on the *Luong* definition, a First Circuit district court relied on similar cases in the Fifth, Ninth, and Sixth Circuits that followed the *Luong* court. *Id.* at 538–39.

102. Perez v. United States, 330 F. App'x 388, 390 (3d Cir. 2009) (distinguishing the prisoner's injuries as more than *de minimis* under the *Luong* definition).

103. Harris v. Garner, 190 F.3d 1279, 1286 (11th Cir. 1999), *reh'g en banc granted, opinion vacated*, 197 F.3d 1059 (11th Cir. 1999), *opinion reinstated in part on reh'g*, 216 F.3d 970 (11th Cir. 2000) (joining the Fifth Circuit in coupling PLRA physical injury claims with Eighth Amendment standards).

104. Oliver v. Keller, 289 F.3d 623, 625 (9th Cir. 2002) (noting that defining *de minimis* was "an issue of first impression").

105. *Id.* at 626 ("[T]he phrase 'physical injury' does not wear its meaning on its face. . . . Congress failed to specify the type, duration, extent, or cause of 'physical injury' . . . [n]or did it define the meaning or limits of 'mental or emotional injury.'").

106. *Id.* at 627–28 (noting with approval the Second, Fifth, and Eleventh Circuits' use of the more-than-*de minimis*-but-need-not-be-significant standard). The Third Circuit has also used statutory construction analysis to come to a conclusion similar to that of the Ninth Circuit regarding Congress' intent behind the PLRA. Mitchell v. Horn, 318 F.3d 523, 535–36 (3d Cir. 2003) (holding that Congress intended to reduce frivolous prisoner lawsuits but refusing to adopt a test that would prevent those with real injury from litigating their claims, and thus, following the lead of the "Fifth, Ninth and Eleventh Circuits in requiring a less-than-significant-but-more-than-*de minimis* physical injury as a predicate to allegations of emotional injury").

107. *Oliver*, 289 F.3d at 628.

108. *Id.* ("In ruling that the requisite physical injury must be more than *de minimis* for purposes of § 1997e(e), we are not importing the standard used for Eighth Amendment excessive force claims, which examines whether the use of physical *force* is more than *de minimis*.").

109. *See id.* at 627–28.

110. *Id.* at 627

the other hand, argued that the narrow *Luong* standard should apply.[111] The Ninth Circuit held that neither interpretation of the statute was correct.[112] The court reasoned that the prisoner's interpretation "would ignore the intent behind the statute[,]" while the *Luong* standard would "adopt an even more restrictive approach than" described in *Siglar*.[113] That is, one "proposed standard require[d] too little" while the other "require[d] too much."[114]

In short, the Ninth Circuit's definition of *de minimis* physical injury spans the middle ground. The *Oliver* court further offered the prisoner's three alleged injuries as examples of *de minimis* injuries for PLRA purposes: muscle pain from prison sleeping arrangements, non-severe injuries from a prison fight, and "a painful canker sore."[115] Recent Ninth Circuit cases have continued to affirm the *Oliver* court's characterization of the *Luong* standard "as overly restrictive," indicating that injuries need not last the two to three weeks mentioned in *Luong* nor be so serious that a free person would seek medical attention to clear the *de minimis* bar.[116] Further, these cases also compared physical injuries to those classified as *de minimis* in *Oliver*.[117] In 2008, the Ninth Circuit further clarified its approach by holding that both recurrent bladder infections and bedsores caused by the deliberate indifference of prison officials are non-*de minimis* injuries that would clear even the physical injury bar set in *Luong*.[118]

C. MISCELLANEOUS APPROACHES: OTHER CIRCUITS

Other circuits have developed additional approaches to defining *de minimis* physical injury under the PLRA, including routinely comparing and analogizing injuries in a new claim to those from prior cases.[119] The Second Circuit, for example, used "common sense" to hold that sexual assaults are

111. *Id.* at 628.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 629.

116. Pierce v. Cnty. of Orange, 526 F.3d 1190, 1224 (9th Cir. 2008); *see also* Rencher v. Bannister, 543 F. App'x 697, 697–98 (9th Cir. 2013) (applying the *Oliver de minimis* standard).

117. *See Rencher*, 543 F. App'x at 697–98; *Pierce*, 526 F.3d at 1224 (giving examples of non-*de minimis* injuries).

118. *Pierce*, 526 F.3d at 1224.

119. *See, e.g.*, Perez v. United States, 330 F. App'x 388, 389–90 (3d Cir. 2009) (holding that whether an asthma attack is a *de minimis* injury is an issue of material fact after comparison to the *de minimis* injuries in *Siglar* and *Jarriett*); Jarriett v. Wilson, 162 F. App'x 394, 400–01 (6th Cir. 2005) (finding leg swelling, pain, and cramps *de minimis* after comparison to *Siglar* and *Luong*); *Oliver*, 289 F.3d at 628–29 (finding back and leg pain and canker sore *de minimis* after applying the test from *Siglar*); Skandha v. Savoie, 811 F. Supp. 2d 535, 539 (D. Mass. 2011) (holding, after comparison to *Jarriett*, that whether cold conditions aggravating arthritis and a spinal fusion constitute a *de minimis* injury is a genuine issue of material fact); Clifton v. Eubank, 418 F. Supp. 2d 1243, 1246–48 (D. Colo. 2006) (finding that physical pain combined with physical effects can suffice to show more than *de minimis* injury after survey of cases and tort law).

above the *de minimis* threshold.[120] District courts in the Fourth Circuit have acknowledged the *Siglar* standard without comment on the definition of *de minimis* injury.[121] Further narrowing the physical injury requirement, the Seventh Circuit made explicit that exposure to substances that may cause a future injury is not an injury under the PLRA.[122] The Eighth Circuit has chosen to apply the *Siglar* standard, but "[d]etermining what satisfies the sufficiently serious injury requirement is . . . claim-dependent."[123] After surveying the case law, the Tenth Circuit relied on tort rules to define *de minimis* physical injury under the PLRA.[124] Finally, the D.C. Circuit has clarified that bodily manifestations of emotional distress do not meet the requirement—that is, the physical injury cannot be caused by mental discomfort.[125]

IV. THE SUPREME COURT SHOULD ADOPT THE NINTH CIRCUIT'S EXPANSIVE DEFINITION OF *DE MINIMIS* INJURY

The Supreme Court should adopt the Ninth Circuit's expansive definition of *de minimis* physical injury under the PLRA. In doing so, the Court would ensure all circuit courts of appeals uniformly apply the same standard, thus clarifying the law nationwide. First, the Ninth Circuit Court of Appeals' test most closely mirrors Congress's intent when it enacted the PLRA, whereas the Fifth Circuit's narrow reading potentially bars meritorious claims. Second, federal judges have powerful procedural tools for dismissing frivolous suits under 28 U.S.C. § 1915 and Federal Rule of Civil Procedure 12(b)(6). These tools, in conjunction with the Ninth Circuit's *de minimis* injury standard, provide an effective means of controlling the types of prisoner litigation Congress was most concerned about. Finally, the PLRA provides judges with even more procedural tools to dismiss nonmeritorious suits and discourage inmate litigation.

---

120. Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999); *see also* Dolberry v. Levine, 567 F. Supp. 2d 413, 417–18 (W.D.N.Y. 2008) (referencing *Liner* and collecting cases to compare actual *de minimis* and non-*de minimis* injuries). The PLRA was later amended to include sexual assaults as non-*de minimis* injuries. *See* 42 U.S.C. § 1997e(e) (Supp. I 2013) (including the phrase "or the commission of a sexual act").

121. *See* Brown v. Mungo, No. 8:13-394-JMC-JDA, 2013 WL 1768662, at *3 (D.S.C. Mar. 29, 2013).

122. Zehner v. Trigg, 952 F. Supp. 1318, 1323 (S.D. Ind. 1997), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

123. Irving v. Dormire, 519 F.3d 441, 446 (8th Cir. 2008); *see also* Hardin v. Fullenkamp, No. CIV. 4-99-CV-80723, 2001 WL 1662104, at *7 (S.D. Iowa June 22, 2001) (noting the Eighth Circuit's approval of *Siglar*-type test).

124. *Clifton*, 418 F. Supp. 2d at 1246.

125. Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998); *see also* Mateo v. Sinclair, No. 08-2242 (JDB), 2009 WL 3806076, at *1 (D.D.C. Nov. 12, 2009) (including additional examples of injuries that do not meet the PLRA requirement).

A. The Ninth Circuit's Test Enforces Congress's Intent Behind the PLRA and Grants Judges the Flexibility to Allow Meritorious Claims While Barring Frivolous Ones

Congress's stated intent for the Prison Litigation Reform Act was to address the rate of frivolous prisoner litigation—not to bar meritorious prisoner litigation.[126] When meritorious claims were rarely discussed during debate, it was to caution legislators about the vulnerability of inmates and the utility of judicial intervention.[127] The Ninth Circuit's more expansive standard enforces this legislative intent and gives judges the flexibility to quickly eliminate frivolous claims while also allowing meritorious claims to proceed. The Fifth Circuit's test, in contrast, is so restrictive as to bar claims Congress did not intend to prohibit.

However, there is common ground between the two tests. Across all of the circuits, most PLRA physical injury claims fall into one of two categories—those that clearly surpass or clearly fall below the PLRA's physical injury bar under either *Luong* or *Oliver*.[128] Injuries that clearly surpass the PLRA bar are those that can be categorized as near the "significant" side of the "*de minimis* but need not be significant" scale.[129] These injuries, which include heart attacks, fetal injury or death, asthma attacks, and prison conditions aggravating a prior severe injury, would likely be sufficient under either the *Luong* or *Oliver* standards.[130] Injuries that fall below the *de minimis* threshold under either test, however, include leg and back pain, minor bruises, scratches, canker sores, and interaction with mildly caustic cleaning products.[131] These injuries are so commonplace that courts generally deem them *de minimis*.

---

126. *See supra* Part II (describing the history and purpose of the PLRA).

127. Winslow, *supra* note 10, at 1666–67.

128. Williams v. Smith, Nos. 4:10-CV-04085 & 4:10-CV-04194, 2012 WL 3815674, at *10 (W.D. Ark. Aug. 14, 2012) (noting "the case law . . . is instructive" for determining the meaning of *de minimis*).

129. Injuries that do not fit into either of the above categories necessarily require investigation by a fact-finder to resolve genuine factual questions. *See Clifton*, 418 F. Supp. at 1248 (reserving responsibility for differentiating between *de minimis* and non-*de minimis* injuries to the judge or jury when a genuine question of material fact exists); *see also* Perez v. United States, 330 F. App'x 388, 389–90 (3d Cir. 2009) (holding that a genuine issue of material fact exists with regard to whether an asthma attack is a *de minimis* injury); Skandha v. Savoie, 811 F. Supp. 2d 535, 539 (D. Mass. 2011) (holding that a genuine issue of material fact exists with regard to whether cold conditions aggravating arthritis and a spinal fusion constitute a *de minimis* injury).

130. *See* Irving v. Dormire, 519 F.3d 441, 448 (8th Cir. 2008) (finding that a punch resulting in two months of breathing difficulty is greater than *de minimis*); Mata v. Saiz, 427 F.3d 745, 754–55 (10th Cir. 2005) (finding that a heart attack satisfies the physical injury requirement); Sealock v. Colorado, 218 F.3d 1205, 1210 n.6 (10th Cir. 2000) (same); *Clifton*, 418 F. Supp. 2d at 1248 (finding that delayed labor resulting in stillbirth of an otherwise viable fetus far exceeds *de minimis* physical injury).

131. *See* Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997) (advocating a "'common-sense' category approach" as an appropriate *de minimis* standard); *see also* Jarriett v. Wilson, 162

Given this common ground between the two standards, adopting the Ninth Circuit's test would not undermine the PLRA's ability to lessen the type of claims about which Congress was concerned. However, adopting the Fifth Circuit's test jeopardizes prisoner claims. For example, those relating to injuries that last less than the two to three weeks specified but still cause extraordinary pain would not be sufficient for a claim. The Ninth Circuit's test would, in contrast, allow a factfinder to first examine these injuries and then dismiss the claim if the court determines it is frivolous.[132]

B. PRE-PLRA METHODS OF DISMISSING NONMERITORIOUS AND FRIVOLOUS PRISONER LITIGATION ARE STILL AN EFFECTIVE MEANS OF CONTROL

Even though the Ninth Circuit's approach is more expansive, it is unlikely that its nationwide implementation would flood the judiciary with frivolous and nonmeritorious prisoner-initiated claims. Prior to the passage of the PLRA, federal judges had multiple options for dismissing such suits under 28 U.S.C. § 1915(d) and Federal Rule of Civil Procedure 12(b)(6).[133] Those options are still in place today, and they provide an effective means of controlling nonmeritorious or frivolous claims.

Many, if not most, prisoner lawsuits are filed in forma pauperis ("IFP"), and 28 U.S.C. § 1915(e) gives judges express powers to dismiss IFP suits.[134] The statute states, "[T]he court shall dismiss the case at any time if the court determines that . . . 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."[135] Congress included this provision because taxpayers fund IFP litigation, rendering it necessary to provide prisoners with some disincentive to filing lawsuits that are unlikely to succeed.[136] Dismissals based on § 1915 are efficient, often happening sua sponte before service of process on the defendants.[137] This measure protects defendants by allowing them to avoid preparing an answer, and it saves the court time by eliminating the documentation required in physical injury cases.[138]

F. App'x 394, 401 (6th Cir. 2005) (finding leg "swelling, pain, and cramps" *de minimis*); Oliver v. Keller, 289 F.3d 623, 629 (9th Cir. 2002) (finding back and leg pain and a canker sore *de minimis*); Ellis v. Bass, 982 F.2d 525, 1992 WL 369484, at *1 (8th Cir. Dec. 16, 1992) (finding that the injuries suffered by plaintiff's being doused with "two five-gallon buckets with [a] bleach, cleanser, and water" mixture *de minimis*).

132. *See Oliver*, 289 F.3d at 629.

133. Winslow, *supra* note 10, at 1671–73.

134. 28 U.S.C. § 1915(e)(2) (2012). IFP status provides courts with a way to legally recognize a prisoner's indigent status and proceed with litigation recognizing the plaintiff's inability to pay court costs. *Id.*

135. *Id.*

136. Winslow, *supra* note 10, at 1671.

137. *Id.* (quoting Neitzke v. Williams, 490 U.S. 319, 394 (1989)).

138. *Id.* (quoting *Neitzke*, 490 U.S. at 394).

Before the PLRA, judges also used the powers granted under § 1915 to dismiss exactly the types of cases Congress designed the Act's physical injury requirement to address.[139] One noteworthy case involved a prisoner claiming that a lack of hair cleaning products constituted an Eighth Amendment violation.[140] In that case, the judge rebuked the prisoner litigant for being the type of recreational litigator Congress feared by limiting his ability to file future IFP suits and imposing monetary fines.[141] Thus, § 1915 can be used both independent of the PLRA physical injury requirement and in conjunction with it to effectively and efficiently address Congress's concerns about frivolous prisoner litigation overburdening the federal courts.

Four years before the PLRA, the Supreme Court reviewed this use of § 1915 with approval.[142] In *Denton v. Hernandez*, the Court explicitly allowed judges to dismiss frivolous suits "when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them."[143] As a result, when such suits were filed post-*Denton*, lower courts were able to evaluate the complaints with a common-sense attitude. If the claim was theoretically possible but "[stood] genuinely outside the common experience of humankind," the court did not have to investigate the claim further.[144] Thus, the court swiftly dismissed a prisoner's IFP action claiming his family and friends were being persecuted by prison officials and that the same officials were subjecting him to witchcraft.[145] Courts were also able to use this flexibility to look at all the claims in an action, some of which may have been frivolous and some of which may have been meritorious.[146]

Finally, before the PLRA's enactment, federal courts also used Federal Rule of Civil Procedure 12(b)(6) motions to dismiss baseless prisoner lawsuits. This rule is particularly useful in the PLRA context because prison officials, as government employees, usually assert a qualified immunity defense.[147] If the defendants are covered by qualified immunity, the prisoner plaintiff has failed to state a claim upon which relief can be granted, and the suit will be dismissed.[148] Further, Federal Rule of Civil Procedure 11 requires parties to lawsuits to make "nonfrivolous" claims supported "by existing

139. *See supra* note 64 and accompanying text.

140. Scher v. Purkett, 758 F. Supp. 1316, 1316 (E.D. Mo. 1991).

141. *Id.* at 1317.

142. *See* Denton v. Hernandez, 504 U.S. 25, 33 (1992).

143. *Id.*

144. Robinson v. Love, 155 F.R.D. 535, 536 (E.D. Pa. 1994).

145. *Id.*

146. Winslow, *supra* note 10, at 1672.

147. *See id.* at 1673.

148. FED. R. CIV. P. 12(b)(6) (providing that "failure to state a claim upon which relief can be granted" is a basis for challenging a lawsuit).

law."[149] Judges have also used this rule to throw out nonmeritorious claims, especially by repeat prisoner litigants.[150]

C. *THE PLRA PROVIDED JUDGES WITH ADDITIONAL TOOLS TO DISMISS NONMERITORIOUS AND FRIVOLOUS PRISONER LAWSUITS*

Further, other sections of the PLRA granted federal judges new tools, applicable with or without the physical injury requirement, to use in doing away with such suits.[151] These additional options for dismissing nonmeritorious and frivolous prisoner lawsuits mean that the narrow interpretation of the physical injury requirement by the Fifth Circuit is unnecessary. Judges are easily able to dismiss the type of claims Congress was concerned about while more expansively interpreting the physical injury requirement under the Ninth Circuit's language. As a result, judges can be faithful to Congress's PLRA purpose and the physical injury requirement by utilizing these tools in conjunction with the Ninth Circuit's definition of *de minimis* injury.

When the PLRA passed, Congress strengthened § 1915 in several ways.[152] First, prisoners are now required to pay the legal fees associated with IFP actions.[153] This imposes upon them the same economic disincentive that private individuals have against filing suits. In fact, it arguably provides an even higher disincentive for prisoners because they will be paying the fees over time from a very limited pool of resources. Thus, prisoners now have a double disincentive to filing frivolous suits—a high risk of dismissal and the likely loss of scarce monetary resources. Second, still wary of recreational litigants, Congress included a "three strikes" provision in the new § 1915(g).[154] Now, if a prisoner files three suits that are dismissed as frivolous, future suits will be allowed only if there is "imminent danger of serious physical injury."[155] Finally, post-PLRA courts are now allowed to dismiss non-IFP prisoner civil rights claims that they consider to be "frivolous or malicious."[156]

V. CONCLUSION

When Congress and President Bill Clinton enacted the PLRA in 1996, the physical injury requirement of section 1997e(e) was left undefined. While Congress was vocally concerned with controlling nonmeritorious and

149. FED. R. CIV. P. 11(b)(2).

150. Winslow, *supra* note 10, at 1673.

151. *See* 42 U.S.C. § 1997e (2012). For example, the statute includes an exhaustion requirement, which is codified at 42 U.S.C. § 1997e(a).

152. Winslow, *supra* note 10, at 1674–75.

153. 28 U.S.C. § 1915(b) (2012).

154. *Id.* § 1915(g).

155. *Id.*

156. Winslow, *supra* note 10, at 1675.

frivolous prisoner litigation, the legislative debate regarding the PLRA was not extensive and lacked substance. Since then, the federal courts have largely agreed that a qualifying injury in the failure to protect context under the PLRA must be more than *de minimis* but need not be significant. However, a circuit split has developed over the definition of *de minimis* injury in this context. The lack of a nationwide standard causes uneven implementation of the physical injury requirement and forces courts to spend time defining the terms left undefined in the statute. The Supreme Court and the circuit courts of appeal should adopt the Ninth Circuit's definition of *de minimis* injury because the Ninth Circuit's approach is most aligned with Congress's intent in passing the PLRA.