No. 17-779

In the Supreme Court of the United States

JASON PARKER,
Petitioner,

v.
MONTGOMERY COUNTY CORRECTIONAL FACILITY/BUSINESS OFFICE MANAGER, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the "three strikes" provision of the federal *in forma pauperis* statute, 28 U.S.C. § 1915(g), afford a prisoner *in forma pauperis* status with respect to an appeal from a third qualifying dismissal without demonstrating that the prisoner is in imminent danger of serious physical injury?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES – CONT'D.

CASES:

STATUTES:

TABLE OF AUTHORITIES – CONT'D.

RULES OF COURT:

STATEMENT OF THE CASE

Jason Parker ("Parker"), a prolific *pro se* litigant, initiated as many as 40 civil lawsuits over a short period of time in federal district court, with some of them being filed while he was incarcerated at the Montgomery County Correctional Facility ("MCCF"). Pet. App. 5a-7a. The action which is the subject of the appeal below concerned difficulties Parker experienced when attempting to obtain a prison account statement from MCCF to support *in forma pauperis* petitions for civil lawsuits he was filing. *Id.* at 7a.

Parker's complaint against MCCF, the County of Montgomery, and various individual defendants sought $5 million in compensatory damages and $50,000 in punitive damages "for each day they go without sending Plaintiff his documents[.]" 3d Cir. App. 82a. The complaint, however, never alleged facts to make a plausible demonstration that he irreparably lost the opportunity to pursue any non-frivolous legal claim as a result of the delay he experienced in receiving his account statement (which was eventually provided to Parker by MCCF). *See Id.* at 17a, 69a-87a.

Before Parker's complaint was served upon the defendants, the district court screened it pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and dismissed the action for failure to state a claim. Pet. App. 8a. The district court also denied Parker leave to amend his complaint, finding that amendment would be futile. *Id.* This dismissal was Parker's "third strike" pursuant to the "three strikes rule" of the Prison Litigation Reform Act of 1995 ("PLRA"), 28 U.S.C.

§ 1915(g).[1] Under section 1915(g), each action or appeal a prisoner files that is dismissed on grounds of being "frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted" counts as a "strike." *Id.* After a prisoner accumulates three strikes, he cannot file another action or appeal *in forma pauperis* – that is, he cannot file unless the prisoner pre-pays the full court filing fee. *Id.* The only exception to this rule is if the prisoner faces imminent danger of suffering a serious physical injury. 28 U.S.C. § 1915(g).

Parker filed a notice of appeal from the district court's dismissal of his action, along with a motion for leave to proceed *in forma pauperis*. Pet. App. 8a. The U.S. Court of Appeals for the Third Circuit appointed counsel for Parker and then invited counsel for MCCF and the County of Montgomery to participate in briefing and argument on the *in forma pauperis* motion, without their appearance being "construed as consent to service or jurisdiction in any other respect."

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[1] Section 1915(g)'s "three strikes rule" provides:

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

28 U.S.C. § 1915(g). Lower courts routinely use the vernacular term "strike" to mean a qualifying "dismiss[al]" on a "prior occasion[ ]". *See, e.g., Patton v. Jefferson Corr. Ctr.*, 136 F.3d 458, 463 n.8 (5th Cir. 1998).

Pet. App. 8a-9a. The Third Circuit directed counsel to address "the question left unanswered by the Supreme Court in *Coleman v. Tollefson*, 135 S. Ct. 1759 (2015), *i.e.*, whether the [PLRA] affords a prisoner [*in forma pauperis*] status with respect to an appeal from a third qualifying dismissal under 28 U.S.C. § 1915." 3d Cir. App. 29a.

The Third Circuit answered that question in the negative, denying Parker's motion to proceed with his appeal *in forma pauperis*.[2] *Parker v. Montgomery Cty. Corr. Facility/Business Office*, 870 F.3d 144 (3d Cir. 2017). Based upon the plain language of section 1915 and the Supreme Court's reasoning when interpreting that statute in its unanimous *Coleman* decision, the court of appeals held "that the imposition of a third strike in a district court is an 'occasion' that is 'prior' to its appeal, and that § 1915(g) therefore must apply to an appeal from the imposition of a third strike." *Id.* at 152.

REASONS FOR DENYING THE WRIT

The court of appeals below correctly found that *Coleman* "mark[ed] a sea change in the interpretation of the three strikes rule[.]" *Parker,* 870 F.3d at 149. Prior to *Coleman*, there was no significant circuit split. All circuits to review the issue had concluded that a third strike dismissal in the district court could be reviewed on appeal *in forma pauperis* – although one circuit (the Seventh) disagreed with the others on the procedural vehicle for doing so. The reasoning of

[2] The court of appeals also denied Parker's motion invoking the imminent danger exception of section 1915(g). 870 F.3d at 154 n.12.

Coleman, however, called into doubt the basis for the view commonly held pre-*Coleman* that a third strike dismissal was not effective until appellate rights were exhausted.

Since *Coleman*, only two circuits have issued precedential decisions on this issue – the Ninth Circuit and now the Third Circuit below. The Ninth Circuit has hewed to a pre-*Coleman* interpretation of the three strikes rule. The Third Circuit, in contrast, correctly recognized that, under *Coleman*'s reasoning, a third strike dismissal in the district court precludes an *in forma pauperis* appeal, absent a showing that the prisoner is in imminent danger of serious physical injury. The circuit split created by the decision below is a shallow one that should be given time to resolve at the circuit level. At this point, it would be premature for this Court to grant certiorari and consider the question presented.

I. Before *Coleman*, There Effectively Was No Split In The Circuits On The Availability Of *In Forma Pauperis* Appellate Review Of A Third Strike Dismissal Of An Action

1. Before *Coleman*, a solid majority of circuits held, as the Third Circuit did in *Ball v. Famiglio*, 726 F.3d 448 (3d Cir. 2013), "that a dismissal does not count as a strike until it has been affirmed on appeal, or the opportunity to appeal has otherwise concluded." *Id.* at 465. "That rule would, of course, mean that dismissal of an action that gave rise to an appeal would not count as a strike for purposes of that appeal, even if it had been on one of the grounds enumerated in § 1915(g)." *Id.* at 465 n.22. In addition to the Third Circuit, the Second, Fourth, Fifth, Sixth,

Ninth, Tenth and D.C. Circuits had championed this view.[3]

The Seventh Circuit stood alone pre-*Coleman* in finding that a district court's "authorization [of *in forma pauperis* status for an appeal from a third strike dismissal] was contrary to the language of the statute. Three strikes and you're out." *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002) (Posner, Kanne & Evans, JJ.). Even so, Judge Posner wrote that the prisoner litigant "had a perfectly good remedy, which was to ask us for leave to proceed *in forma pauperis"* under Fed. R. App. 24(a)(5).[4] *Id.* This approach, he asserted, allowed appellate review of the district court dismissal but did "not require twisting the statute and allowing a fourth strike." *Id.* While Parker characterizes the circuits as being in "longstanding and persistent conflict" pre-*Coleman* (Pet. 12), the circuits were, in fact, consistent in outcome and nearly unanimous in rationale.

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[3] *See Chavis v. Chappius,* 618 F.3d 162, 169 (2d Cir. 2010); *Henslee v. Keller*, 681 F.3d 538, 543 (4th Cir. 2012); *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996); *Coleman v. Tollefson*, 733 F.3d 175, 178 (6th Cir. 2013); *Silva v. DiVittorio*, 658 F.3d 1090, 1098-99 (9th Cir. 2011); *Pigg v. F.B.I.*, 106 F.3d 1497, 1497-98 (10th Cir. 1997) (per curiam); *Thompson v. DEA*, 492 F.3d 428, 432-33 (D.C. Cir. 2007).

[4] In the course of deciding "whether indeed [the prisoner] had three strikes" and therefore was disqualified from *in forma pauperis* status, Judge Posner opined, the court of appeals could determine whether "the district court might have erred in dismissing [the prisoner's] complaint for failure to state a claim." *Robinson,* 297 F.3d at 541. If so, the court of appeals could grant the prisoner's Rule 24(a)(5) motion to proceed *in forma pauperis* on appeal. *Id.*

2. Like the other circuits that refused, pre-*Coleman,* to count a dismissal as a strike until any appeal had concluded, the Third Circuit reasoned in *Ball* that considering a strike to accrue at the moment of dismissal might have been more consistent with a "hyper-literal" reading of section 1915(g), but it "risk[ed] inadvertently punishing nonculpable conduct" by preventing an appeal from an erroneous third strike dismissal or by allowing the limitations period for a prisoner's fourth action to expire before an improperly awarded strike could be reversed on appeal. 726 F.3d at 465 (quoting *Jennings v. Natrona Cty. Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999)).

In *Coleman*, however, this Court unanimously found – contrary to the critique *Ball* exemplifies – that a literal reading of section 1915(g) is precisely what is required. "A prior dismissal on a statutory ground counts as a strike even if the dismissal is the subject of an appeal. That, after all, is what the statute literally says." 135 S. Ct. at 1763. *Coleman* thus held that "a prisoner who has accumulated three prior qualifying dismissals under § 1915(g) may not file an additional suit *in forma pauperis* while his appeal of one such dismissal is pending." *Id*. at 1765.

Coleman left unresolved a question that was not raised by its facts – namely, whether section 1915(g) "afford[s] a prisoner *in forma pauperis* status with respect to an appeal from a *third* qualifying dismissal[.]" *Id*. (original emphasis). At the same time, *Coleman* left in serious doubt the viability of circuit decisions such as *Ball*, which, contrary to the plain meaning of the text of section 1915(g), effectively permitted a fourth strike by allowing an *in*

forma pauperis appeal from a third strike dismissal in the district court. *See Coleman*, 135 S. Ct. at 1763 ("Linguistically speaking, we see nothing about the phrase 'prior occasions' that would transform a dismissal into a dismissal-plus-appellate-review."). Given the sea change *Coleman* brought to the interpretation of section 1915(g), the presence and extent of a circuit split must be assessed only after *Coleman*.

II. The Post-*Coleman* Circuit Split Is A Shallow One Which Should Be Given Further Time To Resolve At The Circuit Level

The post-*Coleman* split is as shallow as it possibly could be, with just one circuit on each side of the issue. The manner in which this split recently developed suggests more time should be permitted to address this issue at the circuit level.

A. Only The Third And Ninth Circuits Have Decided The Question In Precedential Opinions Issued After *Coleman*

1. The Ninth Circuit was the first court of appeals to decide, after *Coleman*, whether section 1915(g) affords an prisoner *in forma pauperis* status with respect to an appeal from a third qualifying dismissal in the district court. In *Richey v. Dahne*, 807 F.3d 1202 (9th Cir. 2015), the Ninth Circuit clung to a pre-*Coleman* interpretation of the term "prior occasions," holding that "the phrase 'prior occasions' is most sensibly read as referring to strikes imposed in prior-filed suits, not those imposed in an earlier stage of the same suit." 807 F.3d at 1209. *Richey* engaged in little analysis of the language of section 1915(g) to arrive at

its conclusion; instead, *Richey* focused upon the concern that "[d]enying IFP review of a district court's third strike dismissal would prevent us from performing our 'appellate function'[.]" *Id.* *Richey*'s holding, however, conflicts with the literal language of the three strikes provision, which, as *Coleman* found, treats a qualifying appellate dismissal as an "occasion" in its own right, separate and apart from the dismissal of an action by the district court. 28 U.S.C. § 1915(g) (a strike is "an action or appeal … that was dismissed on" one of three specified grounds); 135 S. Ct. at 1763.

2. The court of appeals below is the only other circuit to issue a precedential opinion after *Coleman* on the question at hand. While "not unsympathetic to the concerns that motivated the Ninth Circuit in *Richey*," the Third Circuit held that it "must adhere to the apparent intent of Congress as embodied in the language of § 1915(g)," as well as "to *Coleman*'s instruction to read that language literally." *Parker*, 870 F.3d at 151-52. The court of appeals expressed its "reluctan[ce] to create circuit splits" but nevertheless did so because "[a] compelling basis exists here" in light of *Coleman*. *Id.* at 152.

3. Parker states that the Tenth Circuit has "already indicated since *Coleman* that [its] position[ ] remain[s] unchanged" from *Pigg*, 106 F.3d at 1497-98, which reversed a district court order denying permission to appeal *in forma pauperis* from a third strike. Pet. 12. But it is premature at best, and may prove incorrect at worst, to count the Tenth Circuit as being on the Ninth Circuit's side of the ledger. The two post-*Coleman* decisions Parker cites from the

Tenth Circuit (*Burnett* and *Dawson*)[5] are unreported. Under the Local Rules of the Tenth Circuit, these decisions are not precedential.[6] *See* U.S.C.S. Ct. App. 10th Cir. R. 32.1(A).

Most recently, in a third unreported decision, a Tenth Circuit panel found that "[n]either this court nor the Supreme Court has yet resolved whether the district court's order dismissing [the prisoner's] complaint in this action constitutes a third strike that would prohibit [the prisoner] from proceeding IFP in this appeal." *Flute v. United States,* No. 17-1401, 2018 U.S. App. LEXIS 1882, *5-6 (10th Cir. Jan. 25, 2018) (citing *Coleman*). *Flute* then "decline[d] to resolve that open question[.]" *Id.* at *6. The Tenth Circuit is not on the Ninth's Circuit's side of the ledger. The Tenth Circuit is on the fence. Like the Second, Fourth, Fifth, Sixth, and D.C. Circuits, the Tenth Circuit has not, at the time of this brief's filing, resolved *Coleman*'s effect on Circuit precedent. At present, this is the shallowest of all circuit splits, with only one circuit on each side of the issue post-*Coleman*.

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[5] *Burnett v, Miller,* 631 F. App'x 591, 604 (10th Cir. 2015); *Dawson v. Coffman,* 651 F. App'x 840, 842 n.2 (10th Cir. 2016).

[6] *Burnett* and *Dawson* also were decided when the Ninth Circuit alone had addressed the impact of *Coleman*. After *Burnett* and *Dawson*, the Third Circuit weighed in with the precedential opinion at issue here.

B. The Third Circuit's Change Of View In Light Of *Coleman* Suggests That The Resulting Split Should Be Given More Time To Mature

Before the court of appeals below decided that Parker could not pursue an *in forma pauperis* appeal from the district court's third strike dismissal of his action, the circuit's case law dictated the opposite result. Four years earlier, the Third Circuit had stressed that "dismissal of an action that gave rise to an appeal would not count as a strike for purposes of that appeal, even if it had been on one of the grounds enumerated in § 1915(g)."[7] *Ball*, 726 F.3d at 465 n.22.

The court of appeals below addressed *Ball* head on in light of *Coleman*, declaring that "*Coleman* abrogates *Ball* … [on] the issue of tabulating strikes while an appeal is pending." *Parker*, 870 F.3d at 149 n.8. *Ball* had concluded dismissively that it would take a "hyper-literal" reading of section 1915(g) to regard a third strike dismissal in the district court as immediately effective despite an appeal. 726 F.3d at 465. Thereafter, *Coleman* found that "[a] prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an

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[7] *Ball* "le[ft] open the question of whether a prisoner accrues a strike as soon as a dismissal by the district court is affirmed by a court of appeals, or only when the Supreme Court has denied or dismissed a petition for writ of certiorari or the time for filing one has passed." 726 F.3d at 465 n.22. *Ball* nonetheless went on to observe that "the logic of our present decision would indicate waiting for the certiorari period to close is appropriate." *Id.* Thus, *Ball* signaled that the three strikes rule of section 1915(g) might be read to permit not only a fourth strike in the court of appeals but also a fifth strike in this Court.

appeal. That, after all, is what the statute literally says." 135 S. Ct. at 1763. Upon its own review of the statutory text, and of *Coleman*'s interpretation of that text, the court of appeals below concluded "that the literal reading of § 1915(g) that we had rejected in *Ball* is precisely what is required in deciding when a strike takes effect[.]" 870 F.3d at 150. The court of appeals found that *Coleman*'s rationale undercut the reasoning at the root of pre-*Coleman* circuit decisions, such as *Ball,* which had refused to give immediate effect to a district court's third strike dismissal of an action.

The opinion of the court of appeals below illustrates that pre-*Coleman* decisions are not reliable indicators of a circuit's ultimate determination of the effect of *Coleman* upon circuit precedent. *Coleman* brought substantial change to the interpretation of the three strikes rule – change so substantial that it caused the Third Circuit to declare that its prior rule from *Ball* had been abrogated.

With only the Third and the Ninth Circuits having decided the impact of *Coleman* on the question presented, it is inaccurate to say that "the Third Circuit finds itself in the minority of [a] well-developed circuit conflict." Pet. 9. Let the circuits – informed by *Coleman* – issue precedential decisions in cases where prisoners seek *in forma pauperis* appeals from third strike dismissals. Post-*Coleman* case law must mature before one can conclude that there is "widespread disagreement" here (*id.*), warranting this Court's review.

C. The Solicitor General's Position, Relied Upon By The Ninth Circuit, Was Not Informed By *Coleman*'s Rationale

Parker makes much of the fact that "the Solicitor General has already staked out a position" contrary to the result in the court of appeals below. Pet. 19. When *Coleman* was before this Court, the Solicitor General had argued that "the statute [should be read] to afford a prisoner *in forma pauperis* status with respect to an appeal from a *third* qualifying dismissal – even if it does not allow a prisoner to file a *fourth* case during that time." 135 S. Ct. at 1765 (emphasis in original). At that time, the Solicitor General "believe[d] that the statute, in referring to dismissals 'on 3 or more *prior* occasions,' means that a trial court dismissal qualifies as a strike only if it occurred in a prior, *different*, lawsuit." 135 S. Ct. at 1765 (citation omitted; emphasis in original). This Court did not express agreement with the Solicitor General's position in *Coleman*, but the Ninth Circuit, in *Richey*, squarely rested its holding upon that position. 807 F.3d at 1209 ("We agree with the Solicitor General's interpretation of § 1915.").

The Solicitor General's position in *Coleman* on the issue now at hand proved to be inconsistent with the reasoning of the eventual decision. *See* 135 S. Ct. at 1763 ("Linguistically speaking, we see nothing about the phrase 'prior occasions' that would transform a dismissal into a dismissal-plus-appellate-review."). As the court of appeals observed below, *Coleman* "recognized that 'actions' and 'appeals' are treated separately, and must each be considered distinct 'occasions' … [, which] leads us to the inescapable conclusion that the imposition of a third strike in a

district court is an 'occasion' that is 'prior' to its appeal[.]" 870 F.3d at 152 (citation omitted). Section 1915(g), therefore, "must apply to an appeal from the imposition of a third strike." *Id*.

The Solicitor General's position is not set in stone. It was formulated without the benefit of the unanimous *Coleman* decision's reasoning, thus calling into question whether the Solicitor General would take the same position now. A conflict between the Solicitor General's pre-*Coleman* position and the post-*Coleman* decision of the court of appeals below is not reason enough to hear this case.

III. The Decision Below Was Correct

Relying particularly upon pre-*Coleman* arguments as framed by the Solicitor General, and straying from the plain meaning of section 1915(g), Parker posits that the Third Circuit reached an incorrect result below. The court of appeals, however, correctly interpreted section 1915(g) in light of *Coleman* and the statute's plain language.

Parker contends that "[n]othing in the text of section 1915(g) deprives a prisoner who accrues a third strike in the district court of the ability to proceed *in forma pauperis* in challenging that strike." Pet. 15. The court of appeals, however, identified the specific statutory language which required it to "conclude that [Parker] is subject to the restrictions set forth in § 1915(g) for purposes of this appeal." 870 F.3d at 153. "[B]ased upon the plain language of § 1915(g), we think it clear that Parker 'has, on 3 or more prior occasions, … brought an action or appeal in a Court of the United States that was dismissed on

… grounds [that it is frivolous, malicious, or fails to state a claim.']" *Id.* (quoting 28 U.S.C. § 1915(g)).

As the court of appeals explained, the unanimous *Coleman* decision "recognized that 'actions' and 'appeals' are treated separately, and must be considered distinct 'occasions.'" 870 F.3d at 152 (citing *Coleman*, 135 S. Ct. at 1763). This, in turn, "leads us to the inescapable conclusion that the imposition of a third strike in a district court is an 'occasion' that is 'prior' to its appeal, and that § 1915(g) therefore must apply to an appeal from the imposition of a third strike." *Id.*

Parker advances the Solicitor General's pre-*Coleman* view, adopted by the Ninth Circuit in *Richey*, that "'[t]he phrase 'prior occasions' is most sensibly read as referring to strikes imposed in prior filed suits, not to those imposed in an earlier stage of the same suit.'" *Richey*, 807 F.3d at 1209 (quoting Brief for the United States as Amicus Curiae in *Coleman* ("U.S. *Coleman* Br.") at 26); *see* Pet. 15-16. But *Richey* tellingly contrasted the Solicitor General's reading of "prior occasions" with that of *Coleman*, which "based its holding on 'the plain language of' § 1915(g), stating that, '[l]inguistically speaking, we see nothing about the phrase 'prior occasions' that would transform a dismissal into a dismissal-plus-appellate-review.'" *Id.* (quoting *Coleman*, 135 S. Ct. at 1763). *Richey* never adequately explained its choice of the Solicitor General's interpretation of "prior occasions" over that of this Court in *Coleman*.

Parker argues that, under the Third Circuit's interpretation of "prior occasions," "the word 'prior' could be deleted from the statute without substantive

effect." Pet. 16. This argument also is derived from the Solicitor General's *amicus* brief in *Coleman*, which Parker quotes in his petition. *See* Pet. at 16. (quoting U.S. *Coleman* Br. at 26). The term "prior," though, has meaning under the interpretation advanced by the court of appeals. "'[P]rior' sets a temporal parameter, referring only to strikes accrued earlier in time than the notice of appeal." 870 F.3d at 153. Thus, "[i]f the statute did not include the term 'prior,' then *any* strikes, including those issued after a prisoner files an appeal but before IFP status is awarded or denied, could contribute to the strike count." *Id.* (emphasis in original).

In addition to analyzing section 1915(g)'s plain meaning, the court of appeals examined "what the statute does *not* do, and what the statute easily could have done if Congress had intended it: the statute does *not* create an express exception to § 1915(g) treating an appeal from an order imposing a third strike differently from any other instance in which the prisoner wishes to bring an action or appeal." *Id.* (emphasis in original). Nothing in the plain language section 1915(g) supports *Richey*'s adoption of the Solicitor General's pre-*Coleman* view that "prior occasions" should be read to refer to strikes imposed in prior-filed suits. The exception to the three strikes rule that Parker seeks for *in forma pauperis* appeals from third strike dismissals in the district courts would require re-writing the statute.

Ultimately, "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

On the basis of section 1915(g)'s plain language, *Coleman* found that "[a] prior dismissal on a statutorily enumerated ground counts as a strike even if the dismissal is the subject of an appeal." 135 S. Ct. at 1763. On the basis of that same plain language, the Third Circuit was correct to conclude that a third strike dismissal in the district court precludes an *in forma pauperis* appeal, absent a showing that the prisoner is in imminent danger of serious physical injury. With time, other circuits will follow suit. There is no need for the Court to take up this matter at this relatively early juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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