No.

In the

Supreme Court of United States

Yoel Weisshaus,

Petitioner,

vs

Port Authority of New York and New Jersey, et al,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Two separate lawsuits charge the same toll increase as exceeding the fair approximation of facilities and excessive to the benefit conferred because the toll funds the rebuilding of the World Trade Center. *Automobile Club of New York, Inc.* aka *AAA* case, which was filed 9-days after this case, survived dismissal under the dormant commerce clause. However, this case was sua sponte dismissed for the right to travel assuming its *probability* as minor restrictions with a mere effect even if burdening travel.

1. Does 28 U.S.C. § 1915(e)(2) sua sponte require dismissal without giving the plaintiff every favorable inference?

2. Can a lower court replace the compelling justification requirement of *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) for the conjecture of *minor restrictions* and *mere effect* where there is a showing of a constitutional violation?

PARTIES TO THE PROCEEDINGS

The petitioner is Yoel Weisshaus.

The respondents are Port Authority of New York and New Jersey, John Doe, and Jane Doe, 1-20.

The following non-respondents were exempted from appeal in the circuit court: the State of New York; New York State Assembly; New York State Senate; The State of New Jersey; New Jersey State Legislature; New Jersey State Assembly; and New Jersey State Senate.

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Yoel Weisshaus ("Weisshaus"), proceeding *pro se*, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the Court of Appeals (Appendices "App.," 3a-12a) with the order denying the timely petition of en banc rehearing (App., 13a-14a) is not in the Federal Reporter. The district court's (Batts, *J*) sua sponte dismissal before an adversarial response (App., 15a-22a) entering civil judgment (App. 23a-24a), and the order (Preska, *J*) misconstruing the request to file for reconsideration, denying such motion (App., 25a-29a) is also not in the Federal Reporter.

JURISDICTION

By jurisdiction under 28 U.S.C. § 1291, the Second Circuit adjudged this case 20 September 2012, and denied a timely petition for rehearing 8 January 2013. Under 28 U.S.C. § 2101(c), Associate Justice Ginsburg extended 7 June 2013 to timely file for certiorari. App. 1a. Jurisdiction of this Court now rests under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

28 U.S.C. § 1915 is recited in the appendix (49a-59a), focus is on subsections (d) and (e)(2).

SCOPE OF REVIEW

Certiorari is warranted because this petition considers a conflict in federal law among all the circuits that requires this Court's resolution. Sup. Ct. Rule 10(a) and (c). In addition to this case involving public importance, such conflict causes departure from procedure and this Court's precedent, both on the standard of review and evaluation of merits, calling for the Court to exercise its supervisory powers to resolve the conflict.

Since this case is at its beginning, Weisshaus makes this petition without waiving any facts or law not incorporated herein that may be addressed further in the lower courts.

STATEMENT OF THE CASE

The Port Authority of New York and New Jersey ("Port Authority") provides Hudson River crossings for the public, and it is reasonable to pass its cost on travelers. However, this action challenges the sudden 50+% increase in toll prices that the Port Authority announced—as ur-

gently needed—on August 5, 2011, and enacted August 19, with a formula involving harsh penalties for payment in cash. The toll prices since 2001 have increased 300%, from $4 to $12, in less than 10 years. Currently the average toll is $13. Such increase is unlike all the previous years combined from 1971 through 2000, where a 300% increase was carried over 30-years, and went from only $1 to $4. Indeed, the tolls for an automobile now exceeds—per crossing—twofold what a person earns under the local wages per hour.

Initially, the Port Authority justified the sudden increase, including the imposition of cash penalties, under the *premise* that revenue raised is needed for rebuilding of the World Trade Center. Interestingly enough, that *premise* changed immediately after the filing of this lawsuit became public with the Port Authority advising that the money is going for various other expenses. Such expenses were not approved by the respective legislatures yet the toll increased. Additionally, much information and data concerning the price increase are still unclear. For instance, the Port Authority claims to be financially destitute concerning expenses of daily operations, but immediately after the enactment of toll hikes, its officials received notable raises and

bonuses. "In some cases, the undisclosed extra pay added more than 25 percent to the salaries." *Hidden pay at Port Authority: Some bosses make thousands over salary*, NorthJersey.com, The Record, 15 November 2011

The general facts outlined in the complaint state that the Port Authority, which is a bi-state agency, has the discretion of imposing and adjusting the toll prices on its bridges and tunnels. Weisshaus is a traveler who is dependent upon public roads, including Port Authority bridges and tunnels, to commute to work and to manage family needs. The toll prices enacted became effective September 18, 2011, went from $8 to $12 instantly, with the express goal of going to $18 per axel within the next few years. In August 2011, the price was confirmed as conclusive, disregarding compliance with public notice laws and barely offering public hearings. Thus, the complaint alleges that, per the official reasoning of the defendants, the toll increase is to fund real estate such as the rebuilding of the World Trade Center, and for similar purposes not approved by the state legislature. Therefore, the toll increase is unjust and unreasonable because it exceeds the fair approximation of facilities and the price exceeds the benefit conferred.

The complaint also pleads sufficient facts to describe injury. The drastic increase in price infringes on travel, inasmuch as the minimum toll price exceeds twofold what a person earns under the common (local/minimum) wage, thereby injuring Weisshaus and those similarly situated, at the income level. Therefore, burdening the flow of interstate travel for employment between New Jersey and New York. In addition, the excessive price places individuals of lower income, such as Weisshaus, in unfortunate positions without enough money to pay the *amount*, resulting in financial penalties. The complaint also pleads that the levy interferes with interstate travel with a price that includes penalties for not being able to 'afford to pay toll because of income,' which is classified as the $2 "penalty" for payment in cash. Therefore, the complaint seeks to prevent further injury due to increases that are unjust and unreasonable, as there is no other adequate remedy except judicial recourse.

Subsequently—nine (9) days after Weisshaus filed this action—the Automobile Club of New York and New Jersey, known as "AAA," followed suit under the same premise. AAA alleges that the toll increase far exceeds its fair approximation of facilities by designating its revenues to rebuild the World Trade Center. In a remark-

able contrast, AAA survived Port Authority's motion to dismiss. *Automobile Club of New York, Inc. v. Port Authority of New York & New Jersey*, 842 F. Supp. 2d 672, 674 (S.D.N.Y. 2012). Unlike AAA's complaint, where the indistinguishable toll is challenged, and regardless of filing 9 days beforehand, this case was dismissed sua sponte—prior to an adversarial response—and without leave to cure its deficiencies.

On appeal, while remanding the case for further review, the Second Circuit misguidedly determined the *probability* of the right to travel. The circuit concluded, because "travelers do not have a constitutional right to the most convenient form of travel" charging and using toll revenue in excess of the benefit conferred does not amount to infringing upon travel. App. 7a. Thus, the Second Circuit errs—beyond an explicable rationale—that a levy on travel to fund private real estate is not related to travel. Notwithstanding, the price imposes cash payment penalties, and albeit the levy *amount* is too excessive than the *amount* the average traveler earns. Even though the circuit recognized a procedural cause of action as plausible under 42 U.S.C. § 1983, it affirmed dismissal based on its *probability* of *mere effect* and *minor restriction*. That confusion on procedure stems from the uncertainty

as to what and how the *plausibility* review applies to an *ex parte* threshold review prior to an adversarial response under 28 U.S.C. § 1915. App. 6a-7a. Thus, the Second Circuit applied a far more rigid review than expected in other preliminary proceedings.

PROCEEDINGS BELOW

The complaint and in forma pauperis filed September 19, 2011 in the Southern District for New York (App. 15a) was *sua sponte* dismissed with prejudice on October 24—prior to issuing summons—without leave to amend or to be heard. App. 23a. Then, the district court issued an order on December 8 denying reconsideration, by misconstruing Weisshaus' letter requesting an extension to file for reconsideration as the actual motion. App. 25a. On December 22, Weisshaus amended the November 16 notice of appeal to incorporate the denial order.

The Port Authority, which abstained from the appeal until Weisshaus obtained ex parte status, asked to file a brief. Then, the Port Authority *sua sponte* sought to file an appellee appendix without indentifying the documents it sought to include. Weisshaus offered the Port Authority the opportunity to identify the documents it wants to include. The Port Authority

responded with a strike rather than identifying the documents, on which Weisshaus filed an opposition. The circuit heard this case on September 11, 2012, which was transcribed by a court reporter. App. 30a-48a. The circuit remanded on the dormant commerce clause, but affirmed the other legal theories. 11a

REASONS FOR GRANTING CERTIORARI

I. The Second Circuit's decision conflicts with repeated holdings from this Court applying the user fee test to evaluate a *plausibility* for the right to travel; conflicts with other circuits, and unnecessarily frustrates the review as to what constitutes *unjust* and *unreasonable* by replacing the *compelling justification* requirement with its own precedents of *minor restrictions* and *mere effects.*

In sum, Certiorari should be granted because the Second Circuit, in holding *minor restrictions* and *mere effect* on a sua sponte review, "decided an important question on federal law in a way that conflicts with relevant decisions from this Court." See Sup. Ct. R. 10. The Second Circuit faced the challenge of whether an expense

on travel for unauthorized uses, such as to rebuild the World Trade Center and whether charging a *penalty* for a payment in cash burdens the right to travel. In that proceeding, there was no adversarial response to the complaint. The Second Circuit "erred by consulting its own precedents, rather than those of this Court" *Parker v. Matthews,* 567 U.S. ___, ___, 132 S.Ct. 2148, 2155 (2012)(Per Curiam) in concluding that the penalty and the levy on travel for real estate, rise only to a *mere effect* on the traveler and therefore, is permissible as *minor restrictions* on travel. 7a

Moreover, the Second Circuit replaced the three-prong test for the conjecture of a *mere effect* and *minor restrictions* and went beyond the *plausibility* question. Such a review was not on whether the Port Authority has a *compelling justification* for the minor restrictions, and/or whether the complaint is *plausible* in pleading all elements for a cause of action. The circuit instead focused on the *probability* of the merits without an adversarial response in the district court. Compelling justification requires an adversarial response as held by this Court, "the State must come forward with a compelling justification." *See Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, at (a) (1986)

a. The Second Circuit prefers its own rule of *minor restrictions* and a *mere effect,* squarely conflicting with this Court.

The Second Circuit states that it prefers its own rule to this Court, even if the toll can be shown to be unjust and unreasonable, as it reads:

> As a general matter, 'the right to travel is implicated in three circumstances: (1) when a law or action deters such travel; (2) when impeding travel is its primary objective; and (3) when a law uses any classification which serves to penalize the exercise of that right.'[1]
>
> However, 'travelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right.' 'Merely having an effect on travel is not sufficient to raise an issue of constitutional dimension.'

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[1] Reciting *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 140 (2d Cir. 2010) from *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) at (a)

(Internal citation omitted) App. 7a. This holding is *here* and in *Selevan v. New York Thruway Authority*, 11-5370-cv (2nd Cir. 3-27-2013) at 7. According to the Second Circuit, the three-prong test of *Attorney General of N.Y. v. Soto-Lopez* on what impacts travel does not matter. Even if tolls fund real estate ventures, the price classifies a payer with penalties, and exceeds twofold earnings under the common local wage, moreover nothing can measure *plausibility* because even an excessive toll is only a *minor restrictions* and *mere effect,* and therefore not probable. According to the *user fee test,* a levy on travel is *reasonable* only "if it (1) is based on some fair approximation of the facilities' use, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 356 (1994) The Second Circuit deems it appropriate to invalidate a right to travel claim on pre-threshold as *mere effect* and *minor restrictions* no matter how severe the impact is. Therefore, I ask this Court to resolve what test defines *unjust* and *unreasonable* as *facial plausibility* for a claim on the right to travel.

b. The Second Circuit conflicts with this Court's case law by separating the *user fee test* from the *right to travel*.

Both causation of 'fair approximation of facilities' and 'excessive to the benefit conferred' adjudged in *Evansville Airport v. Delta Airlines,* 405 U.S. 707 (1972) if the right to travel rose to a cause of action. There, the parties litigated whether a fee on airlines to cover a facility cost amounted to a burden on travel. This Court held that a levy "hinders the right to travel" when the charge exceeds "the cost of the facility," or where the charge is not "necessary to promote a compelling state interest." *Id* at 714

The Second Circuit differs because they have only a *mere effect* and amount only to *minor restrictions*, even though the burden on the right to travel is probative if Weisshaus is injured by an expense on travel for unauthorized uses such as rebuilding the World Trade Center and is faced with penalties for cash payment. Hence, the Second Circuit conflicts with "[t]he principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context." *Id*

Similarly, the Second Circuit provides no reason why the user fee test does not apply to *plausibility* of the right to travel, squarely conflicting with *Massachusetts* where this Court applied the user fee test to determine plausibility on a right to travel claim:

> "…claims based on the Commerce Clause and on the right to travel a $1 head tax on commercial airline passengers. We held that such taxes are valid so long as they (1) do not discriminate against interstate commerce, (2) are based upon some fair approximation of use, and (3) are not shown to be excessive in relation to the cost to the government of the benefits conferred."

Massachusetts v. United States, 435 U.S. 444, 464 (1978). In addition, state taxes on travel are invalid when funding local needs, outside of travel. *See Maryland v. Louisiana*, 451 U.S. 725, 726 (1981)

c. The Second Circuit holding of *minor restrictions* and *mere effect* is wrong and invalidates *Saenz v. Roe,* 526 U.S. 489 (1999).

In California, where the state faced an overflow of migrants' in its welfare program of

Aid to Families with Dependent Children, the state sought a *minor restriction* to limit the benefits for one year at the same level of the migrants' previous state. Such amendment was just a *mere effect* on travel; however, it still violated the right to travel. *See Saenz v. Roe,* 526 U.S. 489, 490 (1999)

The Second Circuit squarely conflicts with *Saenz v. Roe* by holding that *minor restrictions* and *mere effect* on travel are legal. Notwithstanding, where the toll is so extreme, to fund real estate, even if the toll makes it practically impossible for impoverished itinerants (job related travelers) to enter the State without giving up nearly a day's earnings. If an expense on travel to fund real estate is no burden, because it is a *minor restriction* with a *mere effect*, then a durational requirement to accomplish residency is legal according to the Second Circuit, notwithstanding *Saenz v. Roe*. Therefore, the Second Circuit's limitations on the right to travel must be set aside.

d. The levy, which exceeds the benefits conferred of local practice, conflicts with this Court's law.

Here, the *price* is so excessive to the benefit conferred that it directly burdens (and practical-

ly restricts) the itineration of poor people between the states, by exceeding the benefit ferred twofold with their reasonable income. Such a levy cannot pass the rational review basis, let alone common sense, considering the toll is set to be $15 by 2015, exceeding twofold the minimum wage of $7.25, the local practice for the States of New York and New Jersey. Nevertheless, the Second Circuit effectively conflicts where "The Court generally applies the rule in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 that even nondiscriminatory burdens on commerce may be struck down on a showing that they clearly outweigh the benefits of a state or local practice." *Dept. Revenue of Kentucky v. Davis*, 553 U.S. 328, 330 (2008) at (d)

The Second Circuit flouts the economic factors of *income* to determine whether there is excessiveness to the benefit conferred. Here the Second Circuit misjudges "that the district court properly dismissed Weisshaus's claims based on his constitutional right to travel insofar as it analyzed his claims" (App. 7a) as "Nondiscriminatory state-created burdens placed on travel…. do not constitute a violation of the right to travel, as they place only a negligible burden on commerce." App. 20a.

Nevertheless, "[R]ecent decisions have rejected the approach to the Commerce Clause taken in the earlier cases that focused primarily on the character of the privilege rather than the practical consequences of the tax." *See American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 267 (1987) ¶4, a case where this Court held that a state levy could be scrutinized on "its practical effect… when the tax is applied to an activity with a substantial nexus with the taxing State." *Id* at 295. The Second Circuit disregards the local wage, a clear economic factor, legalizes a toll that exceeds the benefit conferred on income as a *negligible burden* or *minimal impact*. Notwithstanding that, "A flat tax may not be upheld merely because the particular formula by which its charges are reckoned extends the same nominal privilege to interstate commerce that it extends to in-state activities." *Id* 267 ¶4.

e. The Second Circuit is in direct conflict with *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir. 1991)

The Second Circuit's original source for *minor restriction* is in *Cramer v. Skinner*, where the Fifth Circuit applied the three-prong test of *Attorney General of N.Y.*, 476 U.S. 898 to evaluate if deterrence, impedance, and/or classification

impact travel. *See Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991) at 46. There the Fifth Circuit held, *except where* the three-prong test strikes the implication, minor restrictions of inconveniences "can be upheld only if the government has a compelling justification." *Id.* Despite the wording in *Cramer* using the three-prong test and requiring a *compelling justification* to justify the minor restriction, the Second Circuit spins the Fifth Circuit precedent to disregard that even with the three-prong test and compelling justification, *minor restrictions* are permissible, thereby conflicting with *Cramer v. Skinner*.

f. Before this case, *compelling justification* was precedent in the Second Circuit even for minor restrictions, thereby abrogating *Attorney General of N.Y.* 476 U.S. 898 (1986).

Since the Second Circuit's decision in this case established *minor restrictions* and a *mere effect* precedent, the Second Circuit no longer applies the *compelling justification* requirement of *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992), and *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) to an infringement on the constitution. *See Selevan v. New York Thruway Au-*

thority, 11-5370-cv (2nd Cir. 3-27-2013) at 7-8, a more recent opinion where the Second Circuit legalizes an infringement on travel by invoking *minor restrictions* and a *mere effect.*

Unlike in *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 140-1 (2d Cir. 2010) the issue was whether the Port Authority Police had a *compelling justification* of public safety, in an isolated incident, to withhold a person from boarding a plane for carrying a concealed weapon without a license. Similarly in *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 54 (2nd Cir. 2007), the question was whether a special permit to board boats at its ferry terminal was a *compelling justification* for the Town of East Hampton to deal with the traffic volumes that "during summers are currently at or near capacity." *id* at 43. The same is true for *Soto-Lopez v. N.Y.C. Civil Serv. Comm'n*, 755 F.2d 266, 278-9 (2d Cir. 1985) where the Second Circuit recognized the three prong test and *compelling justification* to evaluate the right to travel. Here, by contrast, the expense on travel to rebuild the World Trade Center and the penalties, as well as the toll amount that exceeds twofold the local wage is a daily infringement, not an isolated incident, and has no *compelling justification*. The Second Circuit provided no reasoning on petition

for *rehearing* for such an unfathomable theory of *minor restrictions* and *mere effect*.

g. According to the Ninth Circuit, the Second Circuit incorrectly applies *Miller v. Reed* for travel.

The Second Circuit misuses *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) for the right to travel, which is a supposed source for the *minor restrictions* theory in *Town of Southold*, 477 F.3d 38. However, the Ninth Circuit itself explained that these cases are wholly unrelated. *See Dittman v. California*, 191 F.3d 1020, 1030 (9th Cir. 1999) that in *Miller*, the inquiry was whether the "primary objective of California Vehicle Code § 1653.5" violated "the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." *Dittman*, at 1030. However, "Miller d[id] not allege that the primary objective of California Vehicle Code § 1653.5 is to impede interstate travel" and there was no review of whether its "licensing treats interstate travelers differently from intrastate travelers." *Miller*, at 1205 applies elements of the *user fee test* for evaluation. Therefore, the Second Circuit misuses *Miller v. Reed* for a travel evaluation.

h. The contradiction between the Second Circuit and this Court on the right to travel demonstrates confusion on how to review *ex parte* the *facial plausibility* in accordance with *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Since the decisions in *Ashcroft* and *Twombly*, the lower "courts have struggled to apply the new pleading standard consistently." *See Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). "The primary source of confusion has been the meaning of the term 'plausibility'." *Id.* Under the procedure for failure to state a claim, pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6), "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) at 2(b).

The Second Circuit acknowledged *facial plausibility* that Weisshaus pleaded "precisely the type of claim for which [42 U.S.C.] § 1983 provides a remedy." See App. 7a. However, the circuit crossed the line to adjudge its *probability* by weighing the facts as a *minor restriction* and

mere effect. This is even more apparent where the same or similar facts by AAA survived the *plausibility* test. Likewise in determining *plausibility,* a "claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Ashcroft* at 663-4. Here, the panel *sua sponte* took judicial notice of *plausibility* from a press release by the New York Governor's Office stating that toll revenues were used to build the 9/11 museum. App. 40a.

In particular, the Second Circuit reads, "*pro se* complaints with 'special solicitude,' and interpret[s] them to raise the 'strongest arguments that they *suggest*'." App. 6a. The "special solicitude" standard spells great concern regarding its *probability*. Instead of assessing the *plausibility* of the right to travel claim, the Second Circuit focuses too much on whether the claim is probable by utilizing 28 U.S.C. § 1915(e)(2)(B). Here, the Second Circuit pre-threshold review is harmful to the plaintiff by weighing the facts for its *probability* as *minor restrictions* and a *mere effect*, therefore depriving the plaintiff of a justiciable case. Certiorari would resolve the differential interpretation on *ex parte* review—assessing *pro se* claims for its *probability*.

II. The questions presented are in urgent need of resolution, and this case is an excellent vehicle for addressing it, because the "precedent is unsettled on the standard of review for a district court's decision to dismiss a complaint under § 1915(e)(2)." *See Kersh v. Richardson*, 466 Fed. Appx. 718, 719 (10th Cir. 2012).

In 1996, "Congress enacted the Prison Litigation Reform Act of 1995 (PLRA)" *Jones v. Bock,* 549 U.S. 199, 202 (2007), which amended the in forma pauperis act. Nevertheless, since *Denton v. Hernandez*, 504 U.S. 25 (1992) this Court did not address the standard of review for intake screenings under 28 U.S.C. § 1915 prior to an adversarial response. In *Denton* the Court held that "a § 1915 dismissal is properly reviewed for an abuse of that discretion." *Denton* at 26 (2). Sixteen years later, "The circuits are [still] split on this issue and some have disagreed with this interpretation of § 1915(e)(2)" *Lopez v. Smith*, 203 F.3d 1122, 1140 (9th Cir. 2000)(en banc) at n4 leaving common law with no uniformity as the Second Circuit explained:

> Some circuits presume that they may continue to review such dismissals for an abuse of discretion. See *Norton v.*

> *Dimazana*, 122 F.3d 286, 291 (5th Cir. 1997); *McWilliams v. Colorado*, 121 F.3d 573, 574-75 (10th Cir. 1997). But see *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997) (dismissal under § 1915(e)(2)(B) reviewed de novo).

See Livingston v. Adirondack Beverage Company, 141 F.3d 434, 437 (2nd Cir. 1998) at (A) describing the conflicts. Also see *Brown v. Johnson*, 387 F.3d 1344, 1348-9 (11th Cir. 2004) further describing the conflict on whether there is leave to amend.

The Second Circuit reviews *de novo* failure to state a claim under § 1915(e)(2) as the court may act so *sua sponte* for failure to state a claim, and reviews *de novo* whether to leave amending the complaint. *Livingston*, 141 F.3d at 437. In contrast, the Ninth Circuit holds "that a district court retains its discretion over the terms of a dismissal for failure to state a claim, including whether to make the dismissal with or without leave to amend." *Lopez v. Smith*, 203 F.3d 1122, 1124 (9th Cir. 2000)(en banc) However, the Sixth Circuit completely disagrees with all circuits and rigidly applies as law "Under the Prison Litigation Act, courts have no discretion in permitting a plaintiff to amend a complaint to avoid a sua sponte dismissal." *McGore v. Wrigglesworth*, 114

F.3d 601, 612 (6th Cir. 1997), *Baxter v. Rose*, 305 F.3d 486, 488 (6th Cir. 2002), and *Agramonte v. Shartle*, 491 Fed. Appx. 557, 560 (6th Cir. 2012). Moreover, the Third Circuit explained that courts lack "any authority to the contrary either in statutory text or legislative history" to dismiss without notice or afford to amend the complaint. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 113-14 (3d Cir. 2002)

The civil procedure "rules provide a judge with liberal discretion to permit a plaintiff to amend a complaint" *Summers v. Earth Island Institute*, 555 U.S. 488, 509 (2009)(Ginsburg dissent). The circuits that review *de novo* whether to give leave for an *in forma pauperis* to amend, flout FRCP Rule 15 where the precedent to amend is *discretion*, notwithstanding that a "Pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers'." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

i. The circuits' discord causes prejudicial disregard for the Federal Rules of Civil Procedure guidelines on Rule 12(b)(6) when acting *sua sponte* under § 1915(e)(2).

According to several circuits including the Second, the review requires *instant* dismissal on the intake of an in forma pauperis complaint, even without giving an opportunity for the plaintiff to affirm or to cure the *plausibility* of the complaint. *See Petway v. New York City Transit Authority*, 450 Fed. Appx. 66, 67 (2nd Cir. 2011) and *McGore v. Wigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997).

The confusion for the circuits comes from "the language in dismissals under 28 U.S.C. § 1915(e)(2)(B)(ii) which 'tracks' the language in Fed.R.Civ.P. 12(b)(6)" of "fails to state a claim on which relief may be granted" *Hindman v. Healy*, 278 Fed. Appx. 893 (11th Cir. 2008) Nevertheless, nowhere is it evident from Congress's intent or the language in 28 U.S.C. § 1915(e)(2) that mandatory dismissal for failure to state a claim requires depriving an indigent of the Federal Rules of Civil Procedure, such as amending the complaint, where there is any indication of a claim.

Moreover, as noted "It is also consonant with Congress'[s] goal in enacting the *in forma pauperis* statute of assuring equality of consideration for all litigants." *Neitzke v. Williams*, 490 U.S. 319 (1989) "To conflate these standards would deny indigent plaintiffs the practical protections of Rule 12(b)(6)—notice of a pending motion to dismiss and an opportunity to amend the complaint before the motion is ruled on—which are not provided when complaints are dismissed *sua sponte." Id* Indeed, congressional intent in 28 U.S.C. § 1915(d), is that "The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." Notwithstanding congressional intent—because of the circuits' unsettled precedent—indigent plaintiffs are prohibited from validating their complaints in the district court; then the barely developed record on which a district court relies, dictates on appeal without room for the benefit of doubt. As a result, not the same Rules of Civil Procedure as available to regular litigants in assessing *plausibility* and not the same duties are followed, and not the same remedies are available to an in forma pauperis as required by statute § 1915(d). Thereby, certiorari can

bring resolution to the failure to state a claim conflict between Rule 12(b)(6) and 28 U.S.C. § 1915(d) stemming from subsection (e)(2)(B).

The obvious conflict and lack of clear direction deprives indigent plaintiffs from validating their complaints, or from submitting evidence to their support. Whereas the district court and the Second Circuit deprived Weisshaus of an opportunity to amend the complaint, to avoid prejudicial dismissal for the right to travel and the other legal theories. If in *Denton* and other circuits, there is "leave to amend if it appears that the allegations could be remedied through more specific pleading" then Weisshaus should have not been deprived *here* of the right to amend his complaint.

j. Consequently, the circuits' current harsh construal of review for a complaint under 28 U.S.C. § 1915 invalidates whatever rights §§ 1653 and 1654 confer and protects.

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts," 28 U.S.C. § 1653; however, not if the litigant is a *pauperis*, according to the unfortunate interpretation of some circuits. Those circuits that hold § 1915(e)(2) require mandatory dismis-

sal without offering an opportunity to cure, have turned the statute into a jurisdictional limitation against a pauperis; given that the circuits bar an indigent with a federal claim from having a day in court of competent jurisdiction.

Likewise, the lack of clarity on the standard of review for scrutiny under Section 1915 causes a conflicting result with 28 U.S.C. § 1654, which is "providing that 'parties may plead and conduct their own cases personally or by counsel'." *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202 (1993) also *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 521-2 (2007). Depriving *sua sponte* an *in forma pauperis* plaintiff from prosecuting his/hers case by staying his action pending an action represented by counsel because the complaint is not written *perfectly* deserving a harsh review, or depriving validating an otherwise plausible claim, contradicts § 1654 the right "to prosecute his claim to judgment" *Washington-Southern Nav. Co.,* 263 U.S. 629, 635.

What goes on in the circuits is apparent, as reflected in the foresight of Justice Marshall *In Re Demos*, 500 U.S. 16, 19 (1991) (Marshall, Blackmun, Stevens dissenting). "[T]he Court moves ever closer to the day when it leaves an

indigent litigant with a meritorious claim out in the cold." *Id*. "And with each barrier that it places in the way of indigent litigants, and with each instance in which it castigates… the Court can only reinforce in the hears and minds of our society's less fortunate members the unsettling message that their pleas are not welcome here." *Id*. Whereas, the unsettling message of inequality available to an i*n forma pauperis* deprived Weisshaus from submitting any evidence that would have sufficed the causes of action and stayed his action because his *pleas are not welcome here.* As the differential treatment FOR *Weisshaus* between *AAA* shows that Weisshaus a *pauperis* and filed earlier must yield to *AAA,* which is a prominent organization. This is even truer, where the Rules of Civil Procedure provide alternative mechanisms for staying an action, such as to consolidate the related actions.

This unexplainable discrepancy for a pauperis extends to all levels, even when seeking to submit evidence pursuant to 28 U.S.C. § 1653 to cure why the complaint should have not been dismissed sua sponte.[2] Notwithstanding, "this

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[2] Materials submitted to Court of Appeals after district court had dismissed complaint for failure to state claim, although not part of official record and having no

court is compelled, as all courts are, to receive evidence dehors the record affecting their proceeding in a case before them on error or appeal." *Dakota County v. Glidden*, 113 U.S. 222, 225 (1885) also *Global Aerospace, Inc. v. Hartford Fire Ins. Co.*, 354 Fed. Appx. 501, 503 (2d Cir. 2009). Since some circuits precedent is to treat an *in forma pauperis* more strictly than members of the bar facing dismissal, the Second Circuit struck those supplemental evidence that would have supported the *plausibility* as to why the district court should have not *sua sponte* dismissed the complaint with prejudice.

The current-unfortunate reality is, when a plaintiff by counsel faces FRCP 12(b)(6) dismissal for failure to state a claim, the plaintiff gets an opportunity to defend, amend, affirm, and validate the *plausibility* of the complaint by submitting evidence, even if such evidence was not part of the complaint. However, if the plaintiff is a poor person who is qualified for *in forma pauperis*, and is a layperson who is not so familiar

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standing as evidence, "were usable to show how the accident might have happened," in effort to show that the complaint should not have been dismissed on its face, provided that material was not inconsistent with allegations of complaint. *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 914-5 (7th Cir. 1985) Fed. R. App. P. 10.

with the legal writing and all requisites of a complaint, then he or she has no right to amend under 28 U.S.C. § 1653, even at the appellate level, to support why the district court has jurisdiction.

k. The confusion on the standard of review created a Second Circuit procedure rerouting an *in forma pauperis* for appeal before entering the district court.

Although the concerned toll increase in *Automobile Club of New York, Inc. v. Port Authority of New York & New Jersey*, No. 11-CV-6746 (S.D.N.Y. filed Sept. 27, 2011) were indistinguishable from *Weisshaus v. Port Authority, et al.*, No. 11-CV-6616 (S.D.N.Y. filed Sept. 19, 2011), where both suits alleged the toll increase to fund real estate like the World Trade Center is unjust and unreasonable, the district court dismissed *Weisshaus* sua sponte before an adversarial response. Notwithstanding, *Weisshaus* filed 9-days before *AAA*, and *AAA* survived a motion to dismiss; *Weisshaus* was rerouted to the Court of Appeals for the Second Circuit before remanding to the district court. App. 28a

The same occurs in many pauperis cases, where the requisite is to spend an extra year in

litigation, by rerouting through the Court of Appeals before proceeding in the district court. *See Gardner v. McArdle*, 461 Fed. Appx. 64 (2d Cir. 2012), *Robles v. Evans*, 480 Fed. Appx. 86 (2d Cir. 2012), and *Hathaway v. Holder*, 491 Fed. Appx. 207 (2d Cir. 2012) (summary orders).

In particular, Congress enacted the PLRA to conserve judicial resources by mandate of "early judicial screening of prisoner complaints" *Jones v. Bock*, 549 U.S. 199, 202 (2007). However, the foregoing 2012 Second Circuit cases of *Gardner, Robles*, *Hathaway*, and *Weisshaus* present that without clear guidance from this Court, the PLRA fails because it reroutes the plaintiffs first to the circuit level before the district court. The rerouting process has already been noted for its failures in a number of Second Circuit decisions that "Untimely dismissal may prove wasteful of the court's limited resources rather than expeditious, for it often leads to a shuttling of the lawsuit between the district and appellate courts." *See Abbas v. Dixon*, 480 F.3d 636, 640 (2007) stating, "[W]e believe it is bad practice for a district court to dismiss without affording a plaintiff the opportunity to be heard in opposition." *Id*

Simply put, the circuits interpretation of the word "shall" in 28 U.S.C. § 1915(e)(2) means *must* with a mandatory-spontaneous dismissal, is telling the plaintiff "go for an appeal before entering the district court." The idea of construing a *pro se*—who is far less skilled in legal writing than attorneys—and asking the appellant-plaintiff to write appellate briefs and spend an extra year in litigation by rerouting for an appeal before entering the district court is certainly beyond congressional intent. In each of these, four remanded cases—and there are many more such cases, the indigent plaintiff had to spend unnecessary money and resources to facilitate an appeal. If not for counsel representing *Gardner, Robles*, and *Hathaway*, their appeals would have failed as they occur with other pauperis. Such precedent discounts the goal of the PLRA and confirms Justice Marshall's concerns, that "All men and women are entitled to their day in Court only if they have the *means* and the *money*." *In Re Amendment to Rule 39*, 500 U.S. 13, 15 (1991)(emphasis in original)

III. Many circuits reading of 28 § 1915(e)(2), misapplies the word *shall* as mandatory, by disregarding "if the court determines," where *if* guides such determination with discretion.

Taking the clear language of § 1915(e)(2) "the court shall dismiss the case at any time if the court determines…" we see a different context than many circuits apply. [T]he language of § 1915(e)(2) is not mandatory and, "Though screening might be a good practice and more efficient, we find that nothing in this language *requires* an assigned magistrate judge to screen a case for merit... the language of § 1915(e)(2) does not impose a duty to screen or review before service of summons." *Buchheit v. Green*, 705 F.3d 1157, 1160 (10th Cir. 2012) Simply put, the statute does not require a *sua sponte* determination without giving a fair opportunity for the pauperis to validate, perfect, or amend the complaint. Indeed, the language is explicit, *if the court determines*, where the *determination* is *if,* as guided by discretion and caution.

Equally, the circuits misjudge on the word *shall*, because it is evident nowhere that *shall*

means *must*.[3] "An Act of Congress ought not [to] be construed to violate the Constitution if any other possible construction remains available." *Rowland v. California Men's Colony*, 506 U.S. 194, 211 (1993).

The language *determines if* is best described by Professor Bryan A. Garner in Garner's Modern American Usage. "*[D]etermine if* has historically been used almost as often as *determine whether*—even reputable writers—today

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[3] The word *shall* has several meanings including *may*. Black's Law Dictionary 2d Ed:

> SHALL. As used in statutes and similar instruments this word is generally imperative or mandatory; but it may be construed as merely permissive or directory, (as equivalent to 'may.') to carry out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense. Also, "[a]s against the government, 'shall' is to be construed as 'may,' unless a contrary intention is manifest." *Wheeler v. Chicago*, 24 ILL 105, 107-8; *People v. Chicago Sanitary Dist.*, 184 ILL. 597, 605 (1900); *See Madison v. Daley* (C.C.) 58 Fed. 751, 753 (1893) *Cairo & F. R. Co. v. Hecht*, 95 U.S. 168, 170 (1877) at 3.

Black's 2d. 1081 (1910) (internal citations were corrected); *See* also Black's Law Dictionary 6th Ed, 1335 (1990)

the *whether* form is considered better because *if* erroneously suggests a conditional as opposed to a neutral hypothetical." (Garner 246, 3d 2009) On point, the statute places the word *if* before *determines*, which suggests that such determination is not mandatory as *sua sponte*, but rather guides a court under a neutral process with caution of reviewing for the pauperis an opportunity to overcome the deficiencies of the complaint. Indeed, a court can make a *determination* only with an established record.

The words *if* and *determines* are used almost frequently in case law, to describe the issue or application of a particular test. Its frequent use, of *if determines,* suggests the neutral format as opposed to the negative application. "There is thus no reason to suppose that the normal pleading rules have to be altered to facilitate judicial screening of complaints..." *Jones v. Bock*, 549 U.S. 199, 214 (2007)

In other cases, this Court asked, "How can the Court determine if a regulation is appropriately tailored without considering its impact?" *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S.Ct. 3020, 3127 (2010)(Breyer dissenting) "And how can the Court determine if there are less restrictive alternatives without considering

what will happen if those alternatives are implemented?" *Id.* In general, "we will look to statutory text to determine purpose, because the purpose of an enactment is embedded in its words, even though it is not always pedantically expressed in words." *Rowland v. California Men's Colony*, 506 U.S. 194, 211 (1993) at n12. As we see in case law, *if determines* is neutral as opposed to rigid, and courts ought to look for the less restrictive meaning.

Simply put, the intent of Congress with the PLRA is to ease the courts by screening the claims coming from the prisons. However, the PLRA does not create a new civil procedure or call for depriving an indigent from the neutral judicial process. There "is strong evidence that the usual practice should be followed." *See Jones v. Bock*, 549 U.S. 199, 212 (2007) As a result, of the Supreme Court not defining the words "if the court determines," the circuits have yet to define them, instead some interpret the *shall* religiously to the most rigid standard possible. "But nothing in the statute requires us to read the language in a way that would deprive the district courts of their traditional discretion to grant leave to amend." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)(en banc) In addition, the PLRA specifically deals only with prisoners, and

not civilians. *See* H.R. 3019, 104th Congress. There is no evidence in the text of the PLRA that Congress intended to treat indigent litigants like prisoners. Indeed, subsection 1915(a) distinguishes in forma pauperis for *civilians* from prisoners in subsection (b). "[A]nd there can be no doubt that general legal principles necessarily inform judicial determinations as to what remedies are available to civil plaintiffs" *Sossamon v. Texas*, 563 U.S. ___, ___, 131 S.Ct. 1651, 1666 (2011)(Sotomayer dissent) at n3 citing *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 421 (2009). Therefore, I ask this Court to bring a resolution for the PLRA under the civil procedure, whether the standard of review requires a *plausibility* review and leave to amend.

CONCLUSION

The petition for writ of certiorari should be granted.

I declare the foregoing is true and correct to the best of my knowledge.

Respectfully submitted,

Dated: May 8, 2013

Yoel Weisshaus,
516 River Road 6
New Milford, NJ 07646
Tel: 917.335.1933
Fax: 201.625.6313

Sworn and Subscribed,

Affirmed before me, on this,
the 8th day of May, 2013

ABRAHAM J. HESCHEL
NOTARY PUBLIC, State of New York
No. 01HE6076299
Qualified in Kings County
Commission Expires June 19, 2014

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 26, 2013

Mr. Yoel Weisshaus
516 River Road 6
New Milford, NJ 07646

Re: Yoel Weisshaus
v. Port Authority of New York and New Jersey, et al.
Application No. 12A923

Dear Mr. Weisshaus:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on March 26, 2013 extended the time to and including June 7, 2013.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/
Erik Fossum
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Yoel Weisshaus
516 River Road 6
New Milford, NJ 07646

Clerk
United States Court of Appeal for the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

11-4934
Weisshaus v. Port Auth. of N.Y. & N.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of September, two thousand twelve.

11-4934-cv

PRESENT:

ROSEMARY S. POOLER,
BARRINGTON D. PARKER,
RICHARD C. WESLEY,

Circuit Judges.

Yoel Weisshaus,

Plaintiff-Appellant,

v.

Port Authority of New York and New Jersey, et al.,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:

Yoel Weisshaus, *pro se*, New Milford, New Jersey.

FOR APPELLEES:

Kathleen Gill Miller, the Port Authority of New York and New Jersey, *for* Defendant-Appellee Port Authority of New York and New Jersey.

No appearance for Defendants-Appellees State of New York, New York State Assembly, New York State Senate, State of New Jersey,

New Jersey State Legislator, New Jersey State General Assembly, New Jersey State Senate, John Does 1-20, Jane Does 1-20.

Appeal from a judgment of the United States District Court for the Southern District of New York, (Batts, J.), and its subsequent order denying reconsideration (Preska, C.J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED IN PART**, and the case is **REMANDED** to the district court for further proceedings.

Appellant Yoel Weisshaus, proceeding *pro se*, appeals the district court's judgment *sua sponte* dismissing his civil rights complaint, to the extent it dismissed his claims against the Port Authority of New York and New Jersey ("Port Authority") for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). He also appeals the district court's subsequent order denying his construed Federal Rule of Civil Procedure 60(b) motion for reconsideration. The Port Authority moves to strike certain exhibits from the appendix to Weisshaus's appellate brief, and the portions of the brief that cite to those exhibits. We assume the parties' familiarity with the underly-

ing facts, the procedural history of the case, and the issues on appeal.

We review *de novo* a dismissal made pursuant to 28 U.S.C. § 1915(e)(2)(B). *See Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While *pro se* complaints must contain sufficient factual allegations to meet the plausibility standard, we read *pro se* complaints with "special solicitude," and interpret them to raise the "strongest arguments that they *suggest*." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (per curiam) (citations omitted).

I. Constitutional Claims

As an initial matter, we conclude that the district court did not err in construing Weisshaus's constitutional claims as having been as-

serted pursuant to 42 U.S.C. § 1983. Section 1983 provides a remedy where a plaintiff alleges that the defendant, acting under the color of state law, deprived him of a federal right. *See Ahlers v. Rabinowitz*, 684 F.3d 53, 60-61 (2d Cir. 2012). In this case, with respect to his constitutional claims, Weisshaus's challenge to the Port Authority's actions is that, while exercising its state law authority to regulate toll rates, the Port Authority violated his federal constitutional rights, which is precisely the type of claim for which § 1983 provides a remedy.

As a general matter, "[t]he right to travel is implicated in three circumstances: (1) when a law or action deters such travel; (2) when impeding travel is its primary objective; and (3) when a law uses any classification which serves to penalize the exercise of that right." *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 140 (2d Cir. 2010). However, "travelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right." *Id.* at 140-41 (internal quotation marks and citation omitted); *see also Soto-Lopez v. N.Y.C. Civil Serv. Comm'n*, 755 F.2d 266, 278 (2d Cir. 1985) ("Merely having an effect on travel is not sufficient to raise an issue of constitutional dimension.").

We conclude that the district court properly dismissed Weisshaus's claims based on his constitutional right to travel insofar as it analyzed his claims under the above standard, and thus affirm the district court's dismissal of his constitutional claims to the extent that they were brought as a challenge to the Port Authority's imposition of tolls, regardless of amount. However, we conclude that the district court erred in failing to consider whether Weisshaus had adequately pleaded a constitutional challenge to the reasonableness of the amount of the tolls under the dormant Commerce Clause, and, accordingly, we remand the case to the district court to determine in the first instance whether Weisshaus has adequately pleaded such a claim or should be granted leave to amend the claim.

On remand, the district court should analyze the adequacy of Weisshaus's pleadings with respect to a dormant Commerce Clause claim by applying the standard the Supreme Court set out in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), for analyzing the reasonableness of fees charged for use of state-provided facilities. See *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 98 (2d Cir. 2009) (concluding that the appropriate test for analyzing the constitutionality and reasonableness of highway tolls under the dormant Commerce Clause was that set out

in *Northwest Airlines*). Under *Northwest Airlines*, a fee is reasonable if it "(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Nw. Airlines*, 510 U.S. at 369. In the alternative, the district court may, in its discretion, consider staying the action pending a decision in *Automobile Club of New York, Inc. v. Port Authority of New York & New Jersey*, No. 11-CV-6746 (S.D.N.Y. filed Sept. 27, 2011) (order denying preliminary injunction published at 842 F. Supp. 2d 672 (S.D.N.Y. 2012)). We express no opinion as to the merits of a dormant Commerce Clause claim, and leave it to the district court to determine the best way to address the issue on remand. In all other respects, the district court's dismissal of Weisshaus's constitutional claims is affirmed.

II. Robinson-Patman and State Law Claims

We also affirm the district court's dismissal of Weisshaus's claims brought under the Robinson-Patman Act, 15 U.S.C. § 13, as well as his state law unjust enrichment claim. In order to state a claim under the Robinson-Patman Act, a plaintiff must adequately plead the existence of an antitrust injury, *see E&L Consulting, Ltd. v.*

Doman Indus. Ltd., 472 F.3d 23, 32-33 (2d Cir. 2006), and here, there is nothing to suggest that any antitrust-related issue is implicated by the allegations in Weisshaus's complaint. As for Weisshaus's state law unjust enrichment claim, although the district court did not specifically address the issue, we conclude that the claim was properly dismissed because the district court would have lacked jurisdiction over the claim. *See Leecan v. Lopes*, 893 F.2d 1434, 1439 (2d Cir. 1990) ("[W]e are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied."). Pursuant to the statutes waiving the Port Authority's statutory sovereign immunity, an individual wishing to bring a state law claim against the Port Authority must file a notice of claim sixty days *prior* to commencing suit, *see* N.Y. Unconsol. Laws § 7107 (McKinney); N.J. Stat. Ann. § 32:1-163, and Weisshaus conceded in his district court filings that he had failed to do so. Compliance with the sixty-day notice requirement is jurisdictional in nature, *see Caceres v. Port Auth. of New York & New Jersey*, 631 F.3d 620, 624-25 (2d Cir. 2011), and, thus, Weisshaus's failure to serve the notice of claim before filing suit deprived the district court of jurisdiction over any state law claims. Accordingly, we affirm the district court's dismissal of

Weisshaus's Robinson-Patman and state law unjust enrichment claims.

Although Weisshaus also argues the merits of a number of claims that he did not assert in the district court, we decline to address those claims, as they are not properly before the Court. *See United States v. Lauersen*, 648 F.3d 115, 115 (2d Cir. 2011). We also decline to address any claims Weisshaus raised for the first time in his Rule 60(b) motion, as the district court properly declined to address the merits of those claims. *Cf. Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) ("It is well-settled that Rule 59 [governing motions to alter or amend a judgment] is not a vehicle for . . . presenting the case under new theories . . . or otherwise taking a second bite at the apple[.]" (internal quotation marks omitted)).

III. Conclusion

Given our decision to remand the case to the district court, we find it unnecessary to address the issue of whether the district court erred in construing Weisshaus's post-judgment submission as a Rule 60(b) motion and denying the construed motion. We have considered Weisshaus's remaining arguments and find them to be without merit. Accordingly, the district court's judg-

ment is **AFFIRMED IN PART**, and the case is **REMANDED** to the district court for further proceedings consistent with this decision. It is further **ORDERED** that the Port Authority's motion to strike is **GRANTED**, as we generally do not consider on appeal materials that were not part of the record before the district court, *see IBM v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975), and do not find that extraordinary circumstances warranting the review of such materials exist in the instant case.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

[Stamp]

United States
Court of Appeals
Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of January, two thousand thirteen.

Docket No: 11-4934

Yoel Weisshaus,

Plaintiff-Appellant,

v.

Port Authority of New York and New Jersey, State of New York, New York State Assembly, New York State Senate, State of New Jersey, New Jersey State Legislator, New Jersey State General Assembly, New Jersey State Senate, John Does 1 through 20, Jane Does 1 through 20,

Defendants-Appellees.

Appellant Yoel Weisshaus filed a petition for panel rehearing, or, in the alternative, for re-

hearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

[Stamp]

United States
Court of Appeals
Second Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER OF DISMISSAL

11-civ-6616 (LAP)

Yoel Weisshaus,

Plaintiff,

v.

Port Authority of New York and New Jersey, et al.,

Defendants.

DEBORAH A. BATTS, Acting Chief United States District Judge:

Plaintiff filed this Complaint *pro se* challenging toll increases on bridges and tunnels between New York and New Jersey. Plaintiff is granted leave to proceed *in forma pauperis*. For the following reasons, the Complaint is dismissed.

STANDARD OF REVIEW

The Court has the authority to dismiss *sua sponte* an *in forma pauperis* complaint at any time pursuant to 28 U.S.C. § 1915(e)(2)(B). The Court must dismiss an *in forma pauperis* complaint that states a claim that is frivolous or malicious, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); see *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1988). While the law authorizes dismissal on any of these grounds, district courts "remain obligated to construe *prose* complaints liberally." *Harris v. Mills,* 572 F.3d 66, 72 (2d Cir. 2009). Thus, *pro se* complaints should be read with "special solicitude" and should be interpreted to raise the "strongest [claims] that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471,474-75 (2d Cir. 2006) (citations omitted).

BACKGROUND

Plaintiff challenges recent toll increases on bridges and tunnels connecting New York and New Jersey as being "discriminately targeted to restrict his rights and freedoms." Plaintiff, a student living at "poverty level," has been unem-

ployed since 2009 and needs to travel to seek employment and visit with family. According to Plaintiff, there is limited public transportation available where he resides in New Jersey. On days that Plaintiff cannot afford the toll, he tells the toll plaza clerk that he has no money and he is given "permission... to pursue his way." Nevertheless, Plaintiff is "penalized by the Port Authority with excessive fines for the sole reason of being poor and not being able to afford [the] toll." Attached to the Complaint are notices of violations charging Plaintiff a $50 penalty. Plaintiff refers to the Port Authority as a "debt collector" and alleges that he and his grandmother have been harassed and intimidated over the debts. Plaintiff alleges violations of his rights pursuant to the First, Fifth and Fourteenth Amendments to the United States Constitution and that Defendants violated the Robinson-Patman Act, 15 U.S.C. §13(f). Named, as Defendants are the Port Authority of New York and New Jersey, the State of New York, the New York State Assembly, the New York State Senate, the State of New Jersey, a New Jersey State Legislator, the New Jersey State General Assembly, the New Jersey State Senate and "1-20 John Does and 1-20 Jane Does."

DISCUSSION

The Court liberally construes the Complaint as alleging constitutional violations pursuant to 42 U.S.C. § 1983. Section 1983 allows an individual to bring suit against persons who, acting under color of state law, have caused him to be "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws of the United States." 42 U.S.C. §1983; *West v. Atkins*, 487 U.S. 42, 48 (1988). Affording the Complaint the liberal reading to which it is entitled, the Court nevertheless finds that Plaintiff has failed to state a valid claim.

Sovereign Immunity

Plaintiffs' claims against New York, New Jersey and its legislators and legislatures must be dismissed. The Eleventh Amendment bars from federal court all suits by private parties against a state unless the state consents to such a suit or Congress has expressly abrogated its immunity. See *Board of Trustees v. Garrett*, 531 U.S. 356, 363-64 (2001); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-100 (1984). This immunity extends to state legislatures and legislators. See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Almonte v. City of Long Beach*, 4 78 F .3d 1 00, 106 (2d. Cir. 2007). Because neither the states nor their legislators and

legislatures have consented to be sued in federal court under 42 U.S.C. § 1983, and Congress has not expressly abrogated the state's immunity, see *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 40 (2d Cir. 1977), Plaintiffs claims against these Defendants are barred by the Eleventh Amendment.

Constitutional Claims

The Port Authority is a bi-state entity created by compact between the States of New York and New Jersey. See H*ess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994); *Langhorne v. Port Authority of New York and New Jersey*, 03 Civ. 4610, 2005 WL 3018265 at *1 (S.D.N.Y. Nov. 10, 2005). As authorized by the courts and legislature, the Port Authority collects tolls at its bridges and tunnels to finance the cost of its operations. See *Saunders v. Port Authority of New York*, 02 Civ. 9768, 2004 WL 1077964, at *1 (S.D.N.Y. May 13, 2004) (quoting *Wallach v. Brezenoff*, 930 F.2d 1070, 1072 (3d Cir. 1991)).

The right to travel is a fundamental right of United States citizenship that is protected from abridgement by the states, *Saenz v. Roe*, 526 U.S. 489, 500-01 (1999), however, the states have the power to regulate the use of motor vehicles on their highways. See, *Kane v. New Jersey*, 242

U.S. 160 (1916). Non-discriminatory state-created burdens placed on travel—such as gasoline taxes, licensing requirements and tolls—do not constitute a violation of the right to travel, as they place only a negligible burden on commerce. See *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999); *Kansas v. United States*, 16 F.3d 436, 442 (D.C. Cir. 1994); *Wallach*, 930 F.2d at 1072 (rejecting claims that toll increases infringed the constitutional right to travel, violated the Commerce Clause or were excessive in relation to costs). Moreover, there is no fundamental right to drive a motor vehicle. See *Duncan v. Cone*, 00 Civ. 5705, 2000 WL 1828089, at *2 (6th Cir. Dec.7, 2000) ("While a fundamental right to travel exists, there is no fundamental right to drive a motor vehicle.") (citing *Miller*, 176 F.3d at 1205-06)). Plaintiff's assertion that toll increases are infringing his constitutional rights fail to state a § 1983 claim.

Robinson-Patman Act

Plaintiff fails to state a claim under the Robinson-Patman Act, which makes it unlawful for anyone engaged in commerce:

> [t]o discriminate in price between different purchasers of commodities of like grade and quality, where ... the effect of such discrimination may be to substantially lessen com-

> petition ... with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a)(1997). Section 2(f) of the Robinson-Patman Act makes it unlawful for purchasers "knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f). "Liability under§ 2(f) is derivative in nature-a buyer may be held liable under§ 2(f) only if his seller could be held liable under§ 2(a)." *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133, 137 (S.D.N.Y. 2000) (citing *Great Atl. & Pac. Tea Co. v. Federal Trade Comm'n*, 440 U.S. 69, 77 (1979)). Plaintiff does not allege any discrimination in pricing, and the statue has no apparent applicability to the facts presented in Plaintiff's Complaint.

CONCLUSION

The Clerk of Court is directed to assign this case to Chief Judge Loretta A. Preska. The Complaint, filed *in forma pauperis* under 28 U.S.C. § 1915(a), is dismissed for failure to state a claim on which relief may be granted and on immunity grounds. See 28 U.S.C. §§ 1915(e)(2)(B)(ii), (iii).

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. See *Coppedge v. United States*, 369 U.S. 438,444-45 (1962).

SO ORDERED:

/s/ *Deborah A. Batts*

DEBORAH A. BATTS
Acting Chief United States District Judge

Dated: October 24, 2011
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIVIL JUDGMENT

11-civ-6616 (LAP)

Yoel Weisshaus,

Plaintiff,

v.

Port Authority of New York and New Jersey, et al.,

Defendants.

Pursuant to the order issued October 24, 2011 by the Honorable Deborah A. Batts, Acting Chief United States District Judge, dismissing the Complaint, it is,

ORDERED, ADJUDGED AND DECREED: That the Complaint be and is dismissed. See 28 U.S.C. § 1915(e)(2)(B)(ii). The

Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal.

/s/ *Deborah A. Batts*

DEBORAH A. BATTS
Acting Chief United States District Judge

Dated: October 24, 2011
New York, New York

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER

11-civ-6616 (LAP)

Yoel Weisshaus,

Plaintiff,

v.

Port Authority of New York and New Jersey, et al.,

Defendants.

LORETTA A. PRESKA, Chief United States District Judge:

On October 24, 2011, the Court dismissed this action *sua sponte* for failure to state a claim upon which relief may be granted. Plaintiff has now filed a motion for reconsideration alleging, *inter alia,* that the Court did not "mention" 42

U.S.C. § 1983 in its Order and that the Port Authority is not immune from suit under the Eleventh Amendment. In addition, Plaintiff argues, for the first time, that the EZ Pass program is discriminatory. The Court construes the filing as a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b). Fed. R. Civ. P. 60(b) provides that a party may seek relief from a district court's order or judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is not longer equitable; or (6) any other reason justifying relief.

Fed. R. Civ. P. 60(b).

Despite granting Plaintiffs motion the liberal interpretation that it is due, he has failed to al-

lege that any of the circumstances listed in the first five clauses of Fed. R. Civ. P. 60(b) have taken place. Nothing in Plaintiffs submission warrants reconsideration of the Court's initial determination that he failed to state a denial of access to the court claim or any other claim over which this Court has jurisdiction. Contrary to Plaintiffs arguments, in the Order of Dismissal the Court (1) construed Plaintiffs Complaint as having been filed pursuant to § 1983; (2) dismissed his claims against the states, its legislators and legislatures on Eleventh Amendment immunity grounds and (3) dismissed his claims against the Port Authority because he did not allege a violation of his federal or constitutional rights. Because Plaintiff did not challenge EZ Pass in his Complaint the Court need not consider that claim now. EZ Pass has, however, survived constitutional challenge before. See *Saunders v. Port Authority of New York*, 02 Civ. 9768, 2004 WL 1077964 (S.D.N.Y. May 14, 2004). Thus, any relief Plaintiff seeks under any of the first five clauses of Fed. R. Civ. P. 60(b) is denied.

To the extent, Plaintiff seeks relief under Fed. R. Civ. P. 60(b)(6), Plaintiffs motion is also denied. With respect to motions brought under Fed. R. Civ. P. 60(b)(6), the movant must first demonstrate that, but for the one-year time limi-

tation, he could not have sought relief under the first five grounds of Rule 60(b). See *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009). In addition, the movant must show that the motion was filed within a "reasonable time" and that "'extraordinary circumstances' [exist] to warrant relief." *Old Republic Ins. Co. v. Pac. Fin. Servs. of America, Inc.*, 301 F.3d 54, 59 (2d Cir. 2002) (12§: curiam) (quoting *Rodriguez v. Mitchell*, 252 F.3d 191, 201 (2d Cir. 2001)). Plaintiff has failed to allege facts demonstrating that extraordinary circumstances exist to warrant relief under Fed. R. Civ. P. 60(b)(6). See *Ackermann v. United States*, 340 U.S. 193, 199-202 (1950).

CONCLUSION

Accordingly, Plaintiffs motion for reconsideration is DENIED. No further filings will be accepted in this case except those directed to the United States Court of Appeals for the Second Circuit.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. See *Coppedge v. United States*, 369 U.S. 438,444-45 (1962).

SO ORDERED:

/s/ *Loretta A. Preska*

LORETTA A. PRESKA
Chief United States District Judge

Dated: Dec 08, 2011
New York, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

YOEL WEISSHAUS,

Appellant,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Appellees.

September 11, 2012
10:00 a.m.
U.S. Courthouse
500 Pearl Street

Before:

HON. BARRINGTON D. PARKER

HON. ROSEMARY S. POOLER

HON. RICHARD C. WESLEY

Case: 11-4934-cv

PIROZZI & HILLMAN
212-213-5858

APPEARANCES:

YOEL WEISSHAUS, appellant
516 River Road 6
New Milford, NJ 07646

BY: YOEL WEISSHAUS

THE PORT AUTHORITY OF NEW YORK
and NEW JERSEY, appellee
225 Park Avenue South
13th Floor
New York, NY 10003

BY: KATHLEEN GILL MILLER

MR. WEISSHAUS: May it please the Court, my name is Yoel Weisshaus. I'm the appellant. I would like to reserve two minutes for rebuttal.

The review on this appeal is that there is a colorable claim that is present. In this case, by increasing toll prices, the Port Authority did not provide conspicuous public notice of the board-held meetings or public hearings on increasing the tolls, besides, newspaper notice failed to outline in tabular form the price change and its impact on budget -- and budgetary impact.

The facts of the tolls are the tolls exceed the fair approximation of facilities by funding the World Trade Center and raising the Bayonne Bridge. Legislator approval is mandatory before designating toll revenues for new debt.

Second, we have here that the tolls exceed the benefit conferred. Since 2001, in less than 10 years, the tolls rose over 300 percent when inflation did not rise as high.

JUDGE WESLEY: Did they have a right, Mr. Weisshaus, to charge -- to in-

clude in their charge an amount of money for the replacement of capital over a period of time?

MR. WEISSHAUS: The thing is that it depends what -- what it is.

JUDGE WESLEY: Well, you would agree with me that the bridges and the tunnels operated by the Port Authority will need maintenance and/or --

MR. WEISSHAUS: Yes.

JUDGE WESLEY: -- replacement, some point?

MR. WEISSHAUS: Yes, yes. But --

JUDGE WESLEY: So it's not -- it's not just what their cost was.

MR. WEISSHAUS: Right.

JUDGE WESLEY: It's their -- so it's more than just their actual current cost. It's projected cost that they want to look at. Is that --

MR. WEISSHAUS: The main thing of my focus in this case is the amount.

JUDGE WESLEY: Okay.

MR. WEISSHAUS: Okay? When challenging the amount, I look at all factors. I look at what's involved in increasing the toll prices based on the facilities. If they're going to say, "Oh, we need money for this, we need money for that," well, I take a look at the Bayonne Bridge, it hasn't been painted in years but meanwhile, the toll has kept going up. For what has the toll been raised?

JUDGE POOLER: Are you arguing that the tolls are not reasonably related to the cost?

MR. WEISSHAUS: It's not consistent -- it's not consistent with what they charge. In other words, they're saying that we need the money for this and this and this, and apparently, the prices are very high, but the cost for it didn't rise as much. So --

JUDGE WESLEY: Yeah, but -- I'm

sorry. Go ahead and finish your answer. I apologize.

MR. WEISSHAUS: So what I'm trying to point out to this court is that there's a colorable claim present.

So if we go on the standards of review based on de novo or abuse of discretion or clear error, there -- there is a colorable claim present and the district court made an error to dismiss the complaint without giving an opportunity to amend the complaint, to amend the appropriate facts, and to cure the deficiencies from the complaint. So --

JUDGE WESLEY: I'm sorry. But the -- and really, your focus is not on the two prongs. It's not the -- not the dormant commerce clause because it doesn't discriminate against interstate commerce. Everybody pays the same toll.

MR. WEISSHAUS: Not -- not --

JUDGE WESLEY: Let me ask you this: If in discovery -- say we agree with you and we send it back -- if in discovery,

it's determined that no tolls are being used to fund the World Trade Center, does that then -- does your claim fail?

MR. WEISSHAUS: Not necessarily, because there's a $2 penalty for -- for the payment of cash, which comes back to the point that it does discriminate the interstate commerce. For what reason is there a $2 penalty of cash?

The Supreme Court has held in a variety of cases, [that] the penalty on the right to travel violates interstate commerce.

JUDGE WESLEY: That's a penalty that's imposed on anyone. You can get an E-Z Pass. You don't have to live in New York or New Jersey to get an E-Z Pass.

MR. WEISSHAUS: Well, the E-Z Pass is --

JUDGE WESLEY: My E-Z Pass works in Massachusetts quite nicely.

MR. WEISSHAUS: Right. Well, I know E-Z Pass works nicely. But for people

of the lower income like me, who cannot afford to have E-Z Pass and then at the month -- end of the month get a huge bill, for us to be subjected to a $2 penalty for payment in cash, that's -- that's --

JUDGE WESLEY: Okay. So your answer is "no," that you still -- in your view, you'd still have a claim even if there's no money going to any -- anything with regard or -- with the regard to the World Trade Center?

MR. WEISSHAUS: Correct.

JUDGE WESLEY: Okay.

JUDGE POOLER: All right, Mr. Weisshaus. You reserved two minutes for rebuttal.

MR. WEISSHAUS: Thank you very much.

JUDGE WESLEY: Thank you.

JUDGE POOLER: Thank you. And from the Port Authority.

MS. MILLER: May it please the Court, my name is Kathleen Miller. I'm an attorney for the Port Authority of New York and New Jersey and I would like to thank this court for allowing us to submit a brief in this case.

As you know, the Port Authority was never served with a summons and complaint in this action. Plaintiff chose to serve his summons and complaint on the press, and we learned about this action in the New York Post.

JUDGE POOLER: What's the status of the AAA case?

MS. MILLER: The status of the AAA case is that it's currently in discovery under the supervision of Judge Pitman. And there, it's --

JUDGE POOLER: They're making some of the same claims, aren't they?

MS. MILLER: The AAA case and the reason we are here is the AAA case made claims that the plaintiff never made.

The plaintiff in this case had a complaint which is clearly outlined in paragraph 6 that he was seeking injunctive relief and declaratory judgment to roll back these tolls because they discriminated against him, as he's claimed to be a poor person -- a poor person who, I might add, is able to afford his own court reporter.

But that was the gist of his complaint. He never made a claim under the Highway Act, 33 U.S.C. § 508, that the tolls are not just and reasonable within that context that -- excuse me, or the dormant commerce clause, which requires that there be a fair approximation of the benefits conferred. Those are not his arguments. He never mentioned the commerce clause. He never mentioned the Highway Act.

There were several references, conclusory allegations that the tolls were raised in connection with the World Trade Center. That was the extent of his claim, that they were not just and reasonable under either of those two statutes.

JUDGE POOLER: I think he's re-

ferred today within it and we're required, as you know, to read his complaint for any claim that they might raise, that they might conceivably be raised. Isn't that correct?

MS. MILLER: That's correct, Your Honor. But he didn't raise -- under Twombly, he didn't raise that claim, not even conceivably.

JUDGE WESLEY: Well, he just said that he thought that the money was being used for buildings at the World Trade Center. And as to whether that's true or not is a matter to be resolved fairly quickly after an appearance and a short amount of discovery.

MS. MILLER: That's a conclusory allegation. He has no facts to support that.

JUDGE WESLEY: How's he supposed to know that? I mean, I saw the governor's press release this morning. Apparently, tolls were being used to fund the 9/11 museum. I mean, the -- did you see the governor's press release this morning?

MS. MILLER: I haven't seen the press release this morning, Your Honor. But one of --

JUDGE WESLEY: Well, New York Post --

MS. MILLER: If the AAA -- I'm sorry.

JUDGE WESLEY: No. So I mean, he made that allegation.

Look, we see unsolved things all the time and he made that allegation. There is the litigation, the AAA litigation, which is on this and there is a -- AAA's claims are that unsolved -- that, you know, the proportionate use, the fair approximate use, and the value received are out of the way.

MS. MILLER: AAA is very distinct. AAA has alleged facts in support of their complaint.

JUDGE WESLEY: Who had this case, Preska? Chief Judge Preska?

MS. MILLER: This was originally

dismissed by --

JUDGE POOLER: Judge Batts.

JUDGE WESLEY: Judge Batts.

MS. MILLER: I'm sorry. I have the -- it was originally dismissed by Judge Batts and the decision was reviewed by Judge Preska under Rule 60 and she concurred --

JUDGE WESLEY: Okay.

MS. MILLER: -- that this complaint, even under the most liberal reading, failed to state a claim. But I would urge this court to consider that AAA has made the claim under the Highway Act and AAA has made the claim under the dormant commerce clause; and they more ably represent than plaintiff would, the owners and drivers of motor vehicles, and they're better qualified to pursue that litigation, and there's no -- it serves no purpose to have the Southern District have two claims, one of them coming in after the other, following the other identically.

JUDGE WESLEY: Well, we certainly could address, could we not, those aspects of the claims that were raised?

If we disagreed, we could address those aspects of the claims that -- sound and equal protection or right to travel claims.

MS. MILLER: Well, the right to travel claim here is basically that -- that comes down to driving a car.

JUDGE WESLEY: No. What I -- my question was that -- my question was: We certainly could address those aspects of this complaint and decide whether we would affirm the dismissal of those, as opposed to the need for recreating, perhaps, a potential dormant commerce clause?

MS. MILLER: Yes, yes. I certainly -- I agree with that. And just to briefly address those: I think this Court, in Southold versus the Town of East Hampton, says that it's a non-discriminatory burden to be placed on travel through, you know, financial limitations on that travel, such as tolls. And the tolls here don't discriminate

between people of different states. The toll is the same whether you're a New Jersey resident or a New York resident.

It's the crux of plaintiff's complaint here that it discriminates against him because he's poor, and that he can't afford to pay the toll. And the relief that he sought in his complaint was to set aside the tolls for that reason and to be relieved of his indebtedness for not having paid the toll when he drove across the bridge and, therefore, have been billed for them.

But, basically, there are other courts, and I think the Monarch decision out of the Ninth Circuit, this Court's decision in the Town of Southold, strongly suggest there's no constitutional right to drive a car. And that's really the crux of plaintiff's complaint, that he wants to be able to drive his car, as opposed to taking the Path train. There are other means of transportation available to him.

But the Sixth Circuit, the Ninth Circuit, and I think to a large extent, this circuit in the Town of Southold case, have held that there isn't a constitutional right

of an individual to have a particular mode of transportation or to be free from an burden that the state may wish to place upon it.

And the other part of the -- plaintiff's complaint was the Robinson-Patman claim, which was correctly dismissed by Judge Batts. That would reflect a commodity, but I don't know of any case that's held that paying tolls -- that using a road is a commodity. And also, there's no evidence of discriminatory pricing.

The price -- the discounts for E-Z Pass are the same, and I might add, plaintiff did not raise an E-Z Pass complaint claim below any more than he raised the just and reasonable Highway Act claim below. These are claims the plaintiff has raised for the first time on appeal.

And, finally, he seeks to have some sort of state law for unjust enrichment, which Judge Batts did not address. But I don't think she needs to if she finds there's no constitutional violation or any violation of the Robinson-Patman Act, she doesn't need to address the state law. That falls on

its own.

Thank you very much. No further questions.

JUDGE POOLER: Mr. Weisshaus, you reserved two minutes for rebuttal.

MR. WEISSHAUS: Thank you. Of the 88 paragraphs in the complaint, there's not a single mention of the word "drive." This -- there's nothing in the complaint that implies we are talking here about a right-to-drive claim. What I'm talking here is about the right to travel.

And the important part is -- between AAA and the World Trade Center and a number of cases, and it's common law in the legal community, a cause of action is based upon the facts; whatever the facts are, that's what creates the cause of action. Then you can utilize certain laws, certain statutes in order to -- to advance the -- the cause of action.

In this case, the fact that the -- that I allege in the complaint that the tolls are being used for the World Trade Center

and, the same thing, it was acknowledged by the District Court, that AAA alleged, is indistinguishable; they're two of the same facts. Whether I choose to use this particular statute or this particular statute, it's irrelevant because there's a number of statutes within the Port Authority compact that prohibits using the money for anything outside the legislator authorization.

The priority of assessing a sua sponte dismissal prior to the service on a defendant if there is a colorable claim. The District Court, before they -- they dismiss -- they grant or deny, apprise the application, they review it; and then if they grant it, they may issue a summons or may dismiss it.

The point is if there is a colorable claim, then the District Court has to provide at least one opportunity to amend the complaint to cure the deficiencies.

In this case, the District Court did not rule out any ability that amending the complaint would not cure the deficiencies. The fact that AAA was able to advance a similar claim was indistinguishable. In

fact, whether -- the statute is not important for them to follow. The point here is that the facts are colorable.

And this is where I stand at. Whether we assume this case under de novo or abuse of discretion or of clear error, there's -- the holdings of this case, for example, in three separate 2012 decrees, this Court held in Gardner and Robles and Hathaway that the District Court has to provide an opportunity, at least once, for a pauperis to amend a complaint before dismissing it.

With that, I conclude. Thank you very much.

(Record closed)

28 U.S.C. § 1915 - Proceedings in Forma Pauperis

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

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

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

(b) (1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of —

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

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

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from t he prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

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

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

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

authorized by the Director of the Administrative Office of the United States Courts.

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

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

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

(A) the allegation of poverty is untrue; or

(B) the action or appeal —

(i) is frivolous or malicious;

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

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

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

party, the same shall be taxed in favor of the United States.

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

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

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

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

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of,

convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

(June 25, 1948, ch. 646, 62 Stat. 954; May 24, 1949, ch. 139, Sec. 98, 63 Stat. 104; Oct. 31, 1951, ch. 655, Sec. 51(b), (c), 65 Stat. 727; Pub.L. 86-320, Sept. 21, 1959, 73 Stat. 590; Pub.L. 96-82, Sec. 6, Oct. 10, 1979, 93 Stat. 645; Pub.L. 101-650, title III, Sec. 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 104-134, title I, Sec. 101[(a)] [title VIII, Sec. 804(a), (c) to (e)], Apr. 26, 1996, 110 Stat. 1321, 1321-73 to 1321-75; renumbered title I Pub.L. 104-140, Sec. 1(a), May 2, 1996, 110 Stat. 1327.)

HISTORICAL AND REVISION NOTES 1948 ACT

Based on title 28, U.S.C., 1940 ed., Sec. 9a(c)(e), 832, 833, 834, 835, and 836 (July 20, 1892, ch. 209, Sec. 1-5, 27 Stat. 252; June 25, 1910, ch. 435, 36 Stat. 866; Mar. 3, 1911, ch. 231, Sec. 5a, as added Jan. 20, 1944, ch. 3, Sec. 1, 58 Stat. 5; June 27, 1922, ch. 246, 42 Stat. 666; Jan. 31, 1928, ch. 14, Sec. 1, 45 Stat. 54).

Section consolidates a part of section 9a(c)(e) with sections 832-836 of title 28, U.S.C., 1940 ed.

For distribution of other provisions of section 9a of title 28, U.S.C., 1940 ed., see Distribution Table.

Section 832 of title 28, U.S.C., 1940 ed., was completely rewritten, and constitutes subsections (a) and (b).

Words "and willful false swearing in any affidavit provided for in this section or section 832 of this title, shall be punishable as perjury as in other cases," in section 833 of title 28, U.S.C., 1940 ed., were omitted as covered by the general perjury statute, title 18, U.S.C., 1940 ed., Sec. 231 (H.R. 1600, 80th Cong., sec. 1621).

A proviso in section 836 of title 28, U.S.C., 1940 ed., that the United States should not be liable for costs was deleted as covered by section 2412 of this title.

The provision in section 9a(e) of title 28, U.S.C., 1940 ed., respecting stenographic transcripts furnished on appeals in civil cases is extended by subsection (b) of the revised section to include criminal cases. Obviously it would be inconsistent to furnish the same to a poor person in a civil case involving money only and to deny it in a criminal proceeding where life and liberty are in jeopardy.

The provision of section 832 of title 28, U.S.C., 1940 ed., for payment when authorized by the Attorney General was revised to substitute the Director of the Administrative Office of the United States Courts who now disburses such items.

Changes in phraseology were made.

1949 ACT

This amendment clarifies the meaning of subsection (b) of section 1915 of title 28, U.S.C., and supplies, in subsection (e) of section 1915, an inadvertent omission to make possible the recovery of public funds expended in printing the record for persons successfully suing in forma pauperis.

AMENDMENTS

1996 — Subsec. (a). Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(a)(1)], designated first paragraph as par. (1), substituted "Subject to subsection (b), any" for "Any", struck out "and costs" after "of fees", substituted "submits an affidavit that includes a statement of all assets such prisoner possesses" for "makes affidavit", substituted "such fees" for "such costs", substituted "the person" for "he" in two places,

added par. (2), and designated last paragraph as par. (3).

Subsec. (b). Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(a)(3)], added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(a)(2), (4)], redesignated subsec. (b) as (c) and substituted "subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b)" for "subsection (a) of this section". Former subsec. (c) redesignated (d).

Subsec. (d). Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(a)(2)], redesignated subsec. (c) as (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(a)(5)], amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows: "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(a)(2)], redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsec. (f). Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(a)(2), (c)], redesignated subsec. (e) as (f), designated existing provisions as par. (1) and substituted "proceedings" for "cases", and added par. (2).

Subsec. (g). Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(d)], added subsec. (g).

Subsec. (h). Pub.L. 104-134, Sec. 101[(a)] [title VIII, Sec. 804(e)], added subsec. (h).

1979 — Subsec. (b). Pub.L. 96-82 substituted "Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title" and "Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts" for "In any

civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts".

1959 — Subsec. (a). Pub.L. 86-320 substituted "person" for "citizen".

1951 — Subsec. (b). Act Oct. 31, 1951, struck out "furnishing a stenographic transcript and" after "expense of".

Subsec. (e). Act Oct. 31, 1951, inserted provision that the United States shall not be liable for any of the costs incurred.

1949 — Subsec. (b). Act May 24, 1949, Sec. 98(a), inserted "such printing is" between "if" and "required".

Subsec. (e). Act May 24, 1949, Sec. 98(b), inserted "or printed record" after "stenographic transcript".

CHANGE OF NAME

"United States magistrate judge" substituted for "United States magistrate" in subsec. (c) pursuant to section 321 of Pub.L. 101- 650, set out as a note under section 631 of this title.