No. **12-1350**

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

PETITIONER'S REPLY

Yoel Weisshaus
516 River Road 6
New Milford NJ, 07646
Tel: 201.357.2651
Fax: 201.625.6313
yoelweisshaus@yahoo.com

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Petitioner Yoel Weisshaus ("Weisshaus") demonstrated how the Second Circuit, via an ongoing conflict with the standard of review, committed prejudicial error that calls for reversal. In contrast, the Respondent Port Authority of New York and New Jersey ("Port Authority") July 12, 2013 brief fails to rebut Petitioner's arguments and misstates the relevant facts and law.

I. Any negative assumption on the *plausibility* of petitioner's complaint is utterly refuted by the Second Circuit's finding that Weisshaus pleaded "precisely the type of claim for which [42 U.S.C.] § 1983 provides a remedy," nevertheless preferred the conjecture of *minor restrictions* and *mere effect*.

There is no question whether Weisshaus stated a plausible claim for relief. First, the district court had judicial notice of its Memorandum Opinion and Order, entered in a related lawsuit by *Automobile Club of New York, Inc.* ("*AAA*")—a *prominent* organization, who filed suit 9 days after the present complaint. The *AAA* opinion clearly establishes *facial plausibility* when toll revenues are used for real estate such as the World Trade Center, a specific and indistinguishable factual allegation *Weisshaus* made 9-

days earlier in his complaint.[1] *See Automobile Club of New York, Inc. v. Port Authority of New York and New Jersey*, 842 F.Supp.2d 672, 681 (S.D.N.Y. 2012) Thus, *sua sponte* dismissal of this complaint was premature, especially before the issuance of a summons, without leave to amend, and without an adversarial response.[2] The Second Circuit also found that Weisshaus pleaded on the right to travel "precisely the type of claim for which [42 U.S.C.] § 1983 provides a remedy." *See* App. 7a. Moreover, the Second Circuit took judicial notice from a press release by the New York Governor's Office that "tolls were being used to fund the 9/11 museum." App. 40a at 23. Indeed, the Second Circuit remanded this case for further consideration under the

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[1] Facial plausibility is factual content "that allows the court to draw the reasonable inference" of defendant's liability for such misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) at 2(b).

[2] Although both *AAA* and *Weisshaus* challenge the same toll increase, there are differences. *AAA*'s *only* causation is the toll funding the World Trade Center. However, *Weisshaus*'s causation is the *amount* of the levy, which is the result of extraneous expenses on travel. Including, the classification of a $2 "penalty" for the payment of toll in cash, paying wages for airport employees from the toll revenues on bridges, and the levy to raise the Bayonne Bridge for post-PANAMAX ships. Such purposes that clearly exceed, to travelers paying the toll crossing the Hudson River, the fair approximation of facilities and the benefit conferred.

dormant Commerce Clause. App. 8a. Nevertheless, on the right to travel *Weisshaus* was still *sua sponte* dismissed before the issuance of a summons, without leave to amend, and before an adversarial response based on confusion with the standard of review, which is why certiorari should be granted.

II. The conjecture of *minor restrictions* and *mere effect* contradicts the validity of facial attacks on a State's action that *overbreadth* the right to travel.

Certiorari should be granted because the conjecture of *minor restrictions* and *mere effect* contradicts this Court's holding that: "recognized the validity of facial attacks alleging overbreadth… in relatively few settings" including the "right to travel." *See Sabri v. U.S.*, 541 U.S. 600, 609-10 (2004) also in *Chicago v. Morales*, 527 U.S. 41, 55 (1999). "[O]verbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand." *Sabri* Id. The Port Authority asserts, "[T]he toll only affects [Weisshaus] if he chooses to drive." Br. Opp. 11a. "We have held that the overbreadth doctrine, under which a party whose own activities are unprotected may challenge a

statute by showing that it substantially abridges" that right. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 505 (1981) fn11 Any conjecture of allowing *minor restrictions* and a *mere effect*, before the issuance of a summons thus contradicts the overbreadth principle where standing on issues of expression is not limited to lawfully driving a car.

A claim alleging an overbreadth on the right to travel is actionable regardless if there is a right to drive. "As a preliminary matter, it seems to us imprecise to describe the land carriage required by an intermodal transportation contract as 'incidental'." *Norfolk v. James*, 543 U.S. 14, 26 (2004) "For it is clear that the vagueness of this enactment makes a facial challenge appropriate" for travel related impacts. *Chicago v. Morales*, 527 U.S. 41, 55 (1999). The price is so excessive, that it practically chills impoverished itinerants from travel because the price exceeds twofold the local earnings and contains criminal penalties for a failure to pay. A code of the "criminal law that contains no *mens rea* requirement" and yet "infringes on constitutionally protected rights." *Chicago v. Morales*, 527 U.S. 41, 55-56 (1999). Especially where it is settled "[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." *Evansville Airport v. Delta Airlines,* 405 U.S. 707, 714 (1972). There is no promotion of travel by charging a price twofold the local earnings for purposes outside travel.

The Port Authority ignores addressing the principle question whether the *compelling justification* scrutiny can be replaced for the conjecture of *minor restrictions* and *mere effect* before the issuance of a summons. Instead, the Port Authority insists that Weisshaus's travel to New York City *must* be *deterred* for the PATH train because there is no right to sit in a car even if it is carpool, regardless of who the driver is.[3] However, this case is distinguished about the constitutionality of the pricing and the amount reasonableness. App. 8a. (Besides, the PATH is an illogical option to Weisshaus being by public transportation an additional two hours away from his residence, and was out of service for over four months after hurricane Sandy.)

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[3] Weisshaus, a New Jersey resident who survives by the minimum wage, relies on the river crossings to commute to New York City for work and family related affairs. Thus, the *amount* of the toll impedes the freedom to reside in New Jersey and commute to New York.

Neither does the Port Authority address in its brief why the *user fee* test does not apply for travel related claims. However, the Port Authority does concede that, "AAA challenged the same toll increase as Weisshaus." Br. Opp. 1 *n1. A clear consensus, that Weisshaus has a plausible claim for relief.

III. Certiorari should be granted consistent with this Court's unanimous decision in *Burnside v. Walters* No. 12-7892 (U.S., June 3, 2013).

The Court should grant certiorari because the issues of this case are coherent with, and a corollary to, the issues of *Burnside v. Walters* No. 12-7892 (U.S., June 3, 2013) on 28 U.S.C. § 1915(e)(2), asking whether:

> [T]he in forma pauperis statute, 28 U.S.C. § 1915(e)(2), prohibits indigent plaintiffs from amending their complaints?

The principle thesis raised in *Burnside* is the conflict of FRCP Rule 15(d) where leave to amend is freely given even on defective pleadings; in contrast under 28 U.S.C. § 1915(e)(2) there is no discretion for leave to amend. After certiorari for *Burnside*, the Court vacated judgment and remanded "for further consideration in

light of *LaFountain v. Harry*, No. 11-1496, 2013 WL 2221569 (CA6, May 22, 2013) at 9."

The principle issue here is the same, *Weisshaus* asks the Court:

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

Weisshaus's thesis focuses on the standard of review whether, when facing sua sponte dismissal, leave to amend is *discretionary* to cure deficiencies or *de novo* as a question of law. The question stems from the standard that on a dismissal, a plaintiff gets every favorable inference.

Moreover, there is no evidence that Congress abrogated where "a § 1915 dismissal is properly reviewed for an abuse of that discretion." *Denton v. Hernandez*, 504 U.S. 25, 26 (1992) Further, there is no evidence that Congress abrogated *Neitzke v. Williams*, 490 U.S. 319, 328-29 (1989), which distinguished § 1915 as cognizable from the plausibility of FRCP Rule

12(b)(6) and required deference before *sua sponte* dismissal.[4]

Unlike the Port Authority's phrasing that no conflict is present among the circuits, the Court explained the conflict that:

> "These courts explain that the PLRA not only imposed a new mandatory exhaustion requirement, but also departed in a fundamental way from the usual procedural ground rules by requiring judicial screening to filter out nonmeritorious claims: …and dismiss the complaint if it… fails to state a claim upon which relief may be granted or…."

Jones v. Bock, 549 U.S. 199, 213 (2007)

> "We think that the PLRA's screening requirement does not — explicitly or implicitly — justify deviating from the usual procedural practice...."

Id *214.

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[4] "Indeed, we recently reviewed the dismissal under Rule 12(b)(6) of a complaint based on 42 U.S.C. § 1983 and found by a 9-to-0 vote that it had, in fact, stated a cognizable claim — a powerful illustration that a finding of a failure to state a claim does not invariably mean that the claim is without arguable merit." *Neitzke v. Williams*, 490 U.S. 319, 329 (1989)

a. FRCP Rule 8 was satisfied; there was no reason for sua sponte dismissal without leave to amend.

Moreover, "Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiffs claim, not an exposition of his legal argument." *Skinner v. Switzer*, 562 U.S. ___, ___, 131 S.Ct. 1289 (2011). Unlike that Port Authority's final wording that Weisshaus's "legal theory was unsound," the Second Circuit recognized a *plausible* claim that "Weisshaus's challenge to the Port Authority's actions is that…, which is precisely the type of claim for which § 1983 provides a remedy." App. 7a. Likewise did the district court by recognizing plausibility on the merits in *Automobile Club of New York, Inc. v. Port Authority of New York and New Jersey*, 842 F.Supp.2d 672 (S.D.N.Y. 2012). Instead, the Second Circuit, before issuing a summons, went for an *exposition* of the complaint—whether Weisshaus should take the PATH train instead, or whether Weisshaus has a right to sit in a car or carpool. Such *exposition* surprises Rule 8 far beyond any standard of review ever set forth for screening a *pro se* complaint.

b. Even though *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997) has been overruled the conflict and confusion is still ongoing

Certiorari should be granted because the procedure in FRCP Rule 15(d) clearly provides that:

> "The court may permit supplementation even though the original pleading is defective in stating a claim or defense."

When "Congress meant to depart from the usual procedural requirements, it did so expressly." *Jones v. Bock*, 549 U.S. 199, 216 (2007) Here, Congress did not express departure from the usual Rule 15(d) procedure. However, the Second Circuit cited its own precedent of *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004) to deny leave to amend under the *de novo* standard of review, a case tracking *McGore* id *604.[5] Even though, the Sixth Circuit "overrule[d] *McGore"* as "flatly inconsistent with *Jones." See LaFountain v. Harry*, No. 11-1496, 2013 WL 2221569

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[5] *Shakur* cites *Liner v. Goord*, 196 F.3d 132, 134 (2nd Cir. 1999), which acknowledges that "We have not yet decided what standard of review applies to an appeal of a dismissal pursuant to Section 1915A." Instead, the Second Circuit relies on *McGore* for the standard of review. *See Liner*, Id.

(CA6, May 22, 2013) at 9. Nevertheless, the Second Circuit still employs *McGore* for the standard of review, to overrule FRCP Rule 15 including subsection (d). *See Hill v. Fischer*, 12-728-pr (2nd Cir. 5-13-2013) at 2-3, *Rudaj v. Treanor*, 12-280-cv (2nd Cir. 6-17-2013) at 3 *Jones v. Smith*, 12-401-pr (2nd Cir. 6-19-2013) at 6, employing a *de novo* review on a § 1915 dismissal without leave to amend.

c. It is timely to resolve the intercircuit's 16-year conflict with procedure, so a reviewing court will know which standard of review to apply.

In *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997) the Sixth Circuit was frustrated by the fact that, "The statute contains typographical errors," and that Congress ignored its "attempt to organize the chaos" and therefore decided "to engage in a comprehensive analysis of the statute." *Id* *603. Ordinarily, *de novo* applies to strict questions of law such as affirmative defenses, clear error for a finding of fact, and discretion when a court exercises its broad latitude of managing a case or managing its calendar. *Carco Group, Inc. v. Maconachy*, 11-4445-cv (2nd Cir. 5-21-2013) at 9, *Elgin v. Department of the Treasury*, 567 U. S. ___, 132 S.Ct. 2126 (U.S.

6-11-2012) at 13. Because there is no clarity, the Second Circuit as well other circuits apply a *de novo* review in managing its docket when screening complaints under § 1915, following *McGore*.

d. A circuit's frustration with *typographical errors* of a statute does not call for departing from this Court's precedents.

The Sixth Circuit provided no basis for departing from the *discretion* and changing the standard of review to *de novo*. The Sixth Circuit cited its own precedent of *Fraser v. Lintas: Campbell-Ewald*, 56 F.3d 722, 724 (6th Cir. 1995) and *U.S. v. Khalife*, 106 F.3d 1300, 1302 (6th Cir. 1997) even though these cases have nothing to do with 28 U.S.C. § 1915 or § 1915A. As a result, for over 16-years many circuits reduced *Denton v. Hernandez*, 504 U.S. 25, 26 (1992) and applied *McGore*. However, "[C]ourts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *See Jones v. Bock*, 549 U.S. 199, 212 (2007) simply put, Congressional intent to add a broader *discretion* for the lower courts in managing its docket, is no logical basis to depart from precedent for *de novo*.

e. The Court can easily resolve what caused the confusion on the standard of review.

The confusion for the circuits come 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, 894 (11th Cir. 2008)(Per Curiam) However, as the Court noted in *Jones*, "This statutory phrasing…. is boilerplate language. There are many instances in the Federal Code where similar language is used."[6] *See Jones v. Bock*, 549 U.S. 199, 220 (2007) (holding that boilerplate language does not create a new civil procedure.) A standard of review comes from relevant procedure, not just on the basis of interpreting the word *shall*. Therefore, certiorari should be granted to clarify the standard of review.

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[6] *See* 2 U.S.C. § 1405(b) using the boilerplate language of *fails to state a claim*. Also *see* 42 U.S.C. § 1997e (c)(1) and (2) describing such review as *may* instead of *shall* or *must*, and using the wording *if the court is satisfied,* further evidence that Congress intended *discretion* for § 1915(e)(B)(ii).

CONCLUSION

The petition for writ of certiorari should be granted and the summary order by the Second Circuit in *Weisshaus v. Port Authority of New York*, 497 Fed.Appx. 102 (2nd Cir. 9-20-2012) should be vacated and reversed and the Court should remand this case for further proceedings in light of *Burnside v. Walters* No. 12-7892 (US, June 3, 2013) and for the issuance of a summons.

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

Respectfully submitted,

Dated: July 21, 2013

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

Sworn and Subscribed,

LEOPOLD GROSS
NOTARY PUBLIC, State of New York
No. 02GR6274905
Qualified in Kings County
Commission Expires 01/14/ 2017