No. 22-5092

IN THE

Supreme Court of the United States

JAMES ERIC MOORE,

Petitioner,

v.

JASON KOENIGSFELD, *et al.*,

Respondents.

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

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) If a non-prisoner Plaintiff proceeding *in forma pauperis* files a complaint that fails to satisfy Rule 12(b)(6), does 28 U.S.C. § 1915(e)(2)(B)(ii) empower the District Court to *sua sponte* dismiss the claims, without prejudice, prior to service of process?

(2) Did the District Court err by dismissing a claim, without prejudice, asserting a violation of 12 U.S.C. § 4002, the Expedited Funds Availability Act, where the Complaint did not allege facts showing Plaintiff deposited a check drawn upon the United States Treasury?

(3) Did the District Court err by dismissing a claim, without prejudice, asserting a violation of 42 U.S.C. § 1981, where Plaintiff failed to allege any facts supporting the conclusory allegation that Defendants acted with racially discriminatory intent?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent Collins Community Credit Union states that no publicly held corporation owns 10% or more of Collins Community Credit Union stock and there are no parents, subsidiaries, and/or affiliates of Collins Community Credit Union that have issued shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Rules

Other Authorities

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eighth Circuit is unreported. The order of the Court of Appeals denying Motion for Rehearing is unreported. The order of the United States District Court for the Northern District of Iowa is unreported. The order of the District Court denying Motion to Reconsider is unreported.

JURISDICTION

The Court of Appeals entered judgment on April 11, 2022. The Petition for a Writ of Certiorari was filed on July 5, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case concerns the proceeds of a $20,833 Paycheck Protection Program ("PPP") loan and the three business days that it spent in a personal checking account at Collins Community Credit Union ("Collins").

Plaintiff/Petitioner James Moore's ("Moore") case relies on his allegation that Collins and its employee, Jason Koenigsfeld ("Koenigsfeld"), acted improperly when they failed to immediately authorize a $15,000.00, lump sum, cash withdrawal of a PPP loan—a loan that the Federal Government had facilitated to "help businesses keep their workforce employed during the COVID-19 crisis"[1]—from his personal, non-business account.

[1] U.S. Small Business Administration Information on Paycheck Protection Program, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program (visited October 11, 2022).

In his initial Complaint, Moore requested damages of $11,000,000.00. Moore later moved to amend his Complaint to add additional damages. The District Court dismissed the Complaint, without prejudice, for failure to state a claim. The Eighth Circuit summarily affirmed. Moore has asked this Court to intervene. This Court should deny the Petition for Certiorari.

A. Factual Background

On Friday, April 16, 2021, Moore's personal checking account at Collins, which held $5.69, received an Automated Clearing House transfer ("ACH") in the amount of $20,833.00 from Customers Bank. (Complaint p. 5, DC Dkt. 1-1 (filed May 13, 2021) (hereinafter "Compl.").[2]) The ACH indicated the funds were for a PPP forgivable loan. The day of the deposit, Moore attempted to withdraw $15,000.00 in cash from his account and was unsuccessful. (Compl. p. 5.)

Moore returned to Collins on Monday, April 19, 2021. (Compl. p. 5.) During this visit, Moore emphasized that he had urgent bills to pay and showed Collins staff his personal utility bills and a 3-day notice of eviction from his residential landlord. (Compl. p. 5.) When he was unsuccessful at withdrawing the PPP funds in cash, Moore applied for a personal loan, the purpose of which Moore stated was "Personal Expenses." (Compl. p. 5.) On the loan application, Moore did not indicate he currently or previously owned any business.

[2] All citations to "DC Dkt." refer to the docket of proceedings in the District Court below, No. 1:21-cv-00052-CJW-KEM (N.D. Iowa).

On Tuesday, April 20, 2021, Moore returned to Collins twice, and again attempted to withdraw the PPP funds in cash. (Compl. p. 5.) During his second visit that day, Collins informed Moore that they would continue to work with him to verify the PPP funds, but alternatively, they could reverse the ACH and send the PPP funds back to Customers Bank. (Compl. p. 6.) Moore then asked Collins to transfer the PPP funds to an account at Wells Fargo. (Compl. p. 6.) Collins declined this request, so Moore had Collins reverse the ACH and sent the PPP funds back to Customers Bank on April 20, 2021. (Compl. p. 6.) This suit followed.

B. Procedural History

On May 13, 2021, Moore filed a *pro se* Complaint and Motion for Leave to Proceed *in forma pauperis*. Moore's complaint alleged (1) violations of 42 U.S.C. § 1981 for discrimination and retaliation, (2) violations of Moore's Fourth Amendment rights due to the "seizure" of his $20,833.00 PPP loan, (3) embezzlement under 28 U.S.C. Chapter 31, and (4) violation of 12 U.S.C. § 4002 (the Expedited Funds Availability Act or "EFAA"). (Compl. pp. 5–9.) The Complaint sought "compensatory damages in the amount of $1,000,000.00 dollars for loss of business opportunities and severe emotional pain and suffering and humiliation" as well as $10,000,000.00 in punitive damages. (Compl. p. 9.) Moore subsequently filed a Motion to Amend Complaint in which he added additional damages stemming from Customers Bank's subsequent refusal to disburse the PPP loan funds after further review of Moore's loan application. (Amended Complaint p. 1, DC Dkt. 2 (filed May 21, 2021).)

On October 12, 2021, the District Court granted the *in forma pauperis* Motion, *sua sponte* denied the Complaint without prejudice, and denied the Motion to Amend as moot. (Oct. 12, 2021 Order, DC Dkt. 4.) The District Court determined Moore's Complaint failed to state a claim on which relief could be granted under Fed. R. Civ. P. 12(b)(6) and dismissed the Complaint, without prejudice, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). *Id*. On October 21, 2021, Moore filed a Motion to Reconsider. (DC Dkt. 7.) On October 26, 2021, Moore filed a Supplement to the Motion to Reconsider. (DC Dkt. 8.) On November 4, 2021, the District Court denied Moore's Motion to Reconsider. (Nov. 4, 2021 Order, DC Dkt. 9.)

Moore filed a Notice of Appeal on November 24, 2021. (Notice of Appeal, DC Dkt. 11.) In his appeal, Moore raised four "issues for review":

> (1) The district court erred in holding the complaint does not sufficiently set forth a prima facie case for intentional discrimination in violation of Title 42 U.S.C. 1981 . . . .
> . . .
> (2) The district court erred in finding plaintiff did not allege facts in the complaint to show defendants retaliated against plaintiff in violation of Title 42 U.S.C. 1981.
> . . .
> (3) The district court erred in finding plaintiff did not allege facts in the complaint, to prove defendants violated Title 12 U.S.C. 4002(a)(1)(B).
> . . .
> (4) The district court erred in deciding the case acting as defense counsel for the defendant's [sic], by giving defenses never alleged by defendant' [sic] to the plaintiff or the court, because the court never required a response and defended the defendant's adverse actions against plaintiff himself, even though plaintiff stated the defendant's [sic] never gave any explanations for their adverse conduct against plaintiff.

(Notice of Appeal pp. 2–4, 8th Cir. Case No. 21-3736 (docketed Nov. 30, 2021).)

On December 10, 2021, Moore filed a Motion to Supplement the Record. Moore specifically "ask[ed] the eighth circuit court of appeal [sic] to allow supplement of the appeal, to add these due process violations on appeal for review." (Motion to Supplement the Record p. 1, 8th Cir. Case No. 21-3736 (filed Dec. 10, 2021).) This Motion to Supplement was the first time Moore raised the applicability of 28 U.S.C. § 1915(e)(2)(B)(ii). In this Motion, Moore specifically argued the following:

> Appellant states the district court dismissal of the complaint pursuant to title 28 U.S.C. 1915(e)(2)(B)(ii), for failure to state a claim upon which relief may be granted prior to service upon appellees and responsive pleading violated appellants due process rights . . . district courts are not authorized to sua sponte dismiss a complaint for failure to state a claim to which relief may be granted pursuant to 28 U.S.C. 1915(e)(2)(B)(ii), prior to service upon defendants, which include responsive pleading.

Id at 3–4. On March 1, 2022, the Eighth Circuit summarily affirmed the District Court's dismissal and denied Moore's Motion to Supplement the Record. The panel disposed of all appellate filings with the following Judgment:

> **The motion to supplement the record is denied**. This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

(*Moore v. Koenigsfeld*, No. 21-3736, Judgment, (8th Cir. Mar. 1, 2022) (*per curiam*) (emphasis added) (quoting the Judgment in its entirety).)

On March 14, 2022, Moore filed a Petition for Rehearing En Banc and also for Rehearing by the Panel. (Petition for Rehearing p. 1, 8th Cir. Case No. 21-3736 (filed Mar. 14, 2022).) On April 11, 2022, the Eighth Circuit denied the Petition for Rehearing. (Order, 8th Cir. Case No. 21-3736 (Apr. 11, 2022).)

This Petition for Certiorari followed.

REASONS FOR DENYING THE PETITION

In this case, all of the traditional certiorari criteria point toward denial. First, the case presents numerous vehicle problems. In particular, the record is unclear and undeveloped, and Moore did not preserve error concerning the Court's pre-service dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Second—vehicle problems notwithstanding—there is neither circuit split for this Court to resolve, nor any important issue of federal law that requires resolution by this Court. Third, this is not the rare case that lacks a circuit split, but nonetheless presents an error below that is in need of correction; the Eighth Circuit's *per curiam*, summary dismissal of Moore's appeal was plainly correct.

I. The Case Is a Problematic Vehicle for Appellate Review.

a. Moore Did Not Preserve Error Regarding Pre-Service Dismissal Under 28 U.S.C. § 1915.

Moore did not preserve error concerning whether 28 U.S.C. § 1915(e)(2)(B)(ii) allows the District Court to dismiss his Complaint, *sua sponte*, prior to service of process. In its Order dismissing the Complaint, the District Court noted that Moore proceeded *in forma pauperis*, and that, as a result, 28 U.S.C. § 1915(e)(2)(B)(ii) empowered the Court to dismiss the complaint—*sua sponte*—prior to service of process. 28 U.S.C. § 1915, entitled "Proceedings in forma pauperis", states, in part:

> (e) . . .
>
> (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—
>
> (B) the action or appeal—
>
> . . .

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

28 U.S.C. § 1915(e)(2)(B)(ii).

In the Petition for Certiorari, Moore takes issue with the District Court's position that 28 U.S.C. § 1915(e)(2)(B)(ii) allows for dismissal of any *in forma pauperis* complaint prior to service of process. But Moore did not preserve error on this issue at the Eighth Circuit. Moore's filed his appeal with the Eighth Circuit on November 30, 2021. In his appeal, Moore did not dispute the District Court's authority to dismiss his case *sua sponte*, prior to service of process. In fact, Moore did not mention 28 U.S.C. § 1915(e)(2)(B)(ii) at all. The closest Moore came to this issue is in his fourth issue for appeal, where he argued the following: "The district court erred in deciding the case acting as defense counsel for the defendant's [sic], by giving defenses never alleged by defendant' [sic] to the plaintiff or the court, because the court never required a response . . . ." (Notice of Appeal p. 3, 8th Cir. Case No. 21-3736 (docketed Nov. 30, 2021).) Although Moore mentions that "the court never required a response," this is a mere recitation of the procedural history—not an argument that 28 U.S.C. § 1915(e)(2)(B)(ii) does not apply to him. Even under the charitable standard for interpretation of *pro se* filings, Moore did not preserve the 28 U.S.C. § 1915(e)(2)(B)(ii) issue in his Eighth Circuit appeal.

On December 10, 2021, Moore filed a Motion to Supplement the Record that *did* raise the 28 U.S.C. § 1915(e)(2)(B)(ii) issue. In this Motion, Moore "ask[ed] the eighth circuit court of appeal [sic] to allow supplement of the appeal" and specifically raised the following dispute:

> Appellant states the district court dismissal of the complaint pursuant to title 28 U.S.C. 1915(e)(2)(B)(ii), for failure to state a claim upon which relief may be granted prior to service upon appellees and responsive pleading violated appellants due process rights . . . district courts are not authorized to sua sponte dismiss a complaint for failure to state a claim to which relief may be granted pursuant to 28 U.S.C. 1915(e)(2)(B)(ii), prior to service upon defendants, which include responsive pleading.

(Motion to Supplement the Record pp. 3–4, 8th Cir. Case No. 21-3736 (filed Dec. 10, 2021).) But the Eighth Circuit denied this Motion to Supplement the Record. *Moore v. Koenigsfeld*, No. 21-3736, Judgment, (8th Cir. Mar. 1, 2022) (per curiam). Thus, the arguments contained in Moore's December 10, 2021 Motion are not part of the appellate record, and Moore's argument that 28 U.S.C. § 1915(e)(2)(B)(ii) did not permit the District Court to dismiss his complaint was not preserved for review by this Court. *See Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (this Court is "a court of final review and not first view," and it does not "[o]rdinarily . . . . decide in the first instance issues not decided below") (internal quotation marks omitted).

b. The Record is Unclear and Undeveloped.

The Petition for Certiorari raises numerous issues that have not been fully addressed by the courts below, primarily because Moore failed to raise them. The Eighth Circuit summarily resolved a multi-issue appeal with a one-paragraph, summary disposition issued pursuant to Eighth Circuit Rule 47A(a). *Moore v. Koenigsfeld*, No. 21-3736, Judgment, (8th Cir. Mar. 1, 2022) (per curiam). Thus, some issues in the Petition for Certiorari remain wholly unaddressed by any court below, including the District Court's application of 28 U.S.C. § 1915(e)(2)(B)(ii) and what Moore characterizes as the District Court's use of the *McDonnell Douglas*

framework. Furthermore, because the Complaint was dismissed *sua sponte*, and prior to service of process, this Response to the Petition for Certiorari is the Respondents' first filing in this matter. As a result, the record lacks any inclusion or consideration of the facts Collins and Koenigsfeld possess.

II. There is No Circuit Split at Issue in this Case.

a. There is Not a Circuit Split Concerning Pre-Service Dismissal Under 28 U.S.C. § 1915(e)(2)(B)(ii).

The District Court held that 28 U.S.C. § 1915(e)(2)(B)(ii) allows for the dismissal of Moore's Complaint for failure to state a claim, *sua sponte*, prior to service of process, because the Complaint was filed *in forma pauperis*. (Oct. 12, 2021 Order, DC Dkt. 4.) Moore argues that the Eighth Circuit's affirmance of the District Court created a split with the Second, Fifth, Sixth, Seventh, and Ninth Circuits. (Petition for Certiorari ("Pet.") p. 6) (citing *Lewis v. New York*, 547 F.2d 4 (2nd Cir. 1976); *Tyler v. Mmes Pasqua Toloso*, 748 F.2d 283, 287 (5th Cir. 1981); *Tingler v. Marshal*, 716 F.2d 1109, 1111 (6th Cir. 1983); *Nichols v. Schubert*, 499 F.2d 946, 947 (7th Cir. 1974); *Franklin v. Oregon*, 662 F.2d 1337, 1340 (9th Cir. 1981)).[3]

In truth, there is no circuit split. The cases cited by Moore from the Second, Fifth, Sixth, Seventh, and Ninth Circuits do not concern 28 U.S.C. § 1915(e)(2)(B)(ii)

[3] In a related argument, Moore asserts that the lower rulings run afoul of Fed. R. Civ. P. 4(a) under *Nichols*, 499 F.2d at 947 and *Franklin,* 662 F.2d at 1340; in both of which the Clerk of Court refused to issue a summons to Plaintiff. (*See* Pet. p. 6.) Rule 4(a) is not implicated here, as Moore obtained a summons upon filing his Complaint.

because these cases predate the current version of the statute.[4] Instead, the cases cited by Moore stand for the modest proposition that prior to § 1915(e), Fed. R. Civ. P. 8 generally required service of process prior to dismissal of a complaint. *See Lewis*, 547 F.2d at 6 (2nd Cir. 1976) (pre-§ 1915 case stating pre-service dismissal disfavored); *Tyler*, 748 F.2d at 287 (5th Cir. 1984) (pre-§ 1915(e) case declining to address whether pre-service dismissal appropriate); *Tingler*, 716 F.2d at 1112 (6th Cir. 1983) (pre-§ 1915(e) case outlining procedure courts must follow in order to dismiss a claim *sua sponte*) (statutory supersedence recognized by *Coleman v. Tollefson*, 733 F.3d 175, 177 (6th Cir. 2013) ("the [1996 revision of § 1915] generally overruled the set of procedures outlined in *Tingler*")); *Nichols*, 499 F.2d at 947 (7th Cir. 1974) (holding improper for clerk to withhold summons under 4(a)); *Franklin*, 662 F.2d at 1340 (9th Cir. 1981) (same). The instant District Court ruling does not disagree; nor do the Eighth Circuit cases cited by Moore. *See, e.g., Porter v. Fox*, 99 F.3d 271, 273–74 (8th Cir. 1996) (reversing District Court's *sua sponte* dismissal of a non-*in forma pauperis* [i.e., fee paid] complaint in which responsive pleadings were on file—such that 28 U.S.C. § 1915 was not applicable).

[4] 28 U.S.C. § 1915 was enacted in 1979 and included the following provision regarding dismissal: "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." Law of Oct. 10, 1979, 28 U.S.C. § 1915(d) (repealed Apr. 26, 1996, 110 Stat. 1321-73 to 1321-75). The statute was substantially amended in 1996 to include the present subsection (e) which provides for dismissal at any time if the court determines the complaint fails to state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii) (eff. April 26, 1996).

The issue in the present case is whether the *exception* to the general principle disfavoring pre-service dismissal—which is carved out in 28 U.S.C. § 1915(e)(2)(B)(ii)—is properly applied to Moore. The District Court held that the answer is yes: 28 U.S.C. § 1915(e)(2)(B)(ii) empowers dismissal *sua sponte*, prior to service, of an *in forma pauperis* complaint. Every Court of Appeals agrees. *Mazzaglia v. State*, 229 F.3d 1133, at *1 (1st Cir. 2000) (*per curiam*) (unpublished) (First Circuit clarifying that 28 U.S.C. § 1915 empowers district courts to *sua sponte* dismiss any *in forma pauperis* complaint that fails to state a claim—regardless of whether the complaint was filed by a prisoner or non-prisoners); *Cieszkowska v. Gray Line N.Y.*, 295 F.3d 204, 205–06 (2d Cir. 2002) (*per curiam*) (Second Circuit affirming dismissal of case brought by non-prisoner for failure to state a claim pursuant to § 1915(e)(2)); *Fake v. City of Philadelphia*, 704 F. App'x 214, 216 (3d Cir. 2017) (unpublished), *cert. denied*, 138 S. Ct. 754 (2018) (Third Circuit affirming "the District Court's *sua sponte* dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)" in case involving *in forma pauperis* complaint brought by non-prisoner); *Michau v. Charleston County, S.C.*, 434 F.3d 725, 728 (4th Cir. 2006), *cert. denied*, 126 S. Ct. 2936 (2006) (Fourth Circuit affirming dismissal and holding 28 U.S.C. § 1915(e) applies to all *in forma pauperis* complaints); *Newsome v. E.E.O.C.*, 301 F.3d 227, 231 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 660 (2002), *rehearing denied*, 123 S. Ct. 1013 (2003) (Fifth Circuit affirming dismissal of non-prisoner *in forma pauperis* complaint under § 1915(e)(2)(b)(ii)); *Asberry v. Bisig*, 70 F. App'x 247, 249 (6th Cir. 2003) (unreported) (Sixth Circuit affirming District Court's dismissal of non-

prisoner *in forma pauperis* complaint for failure to state a claim pursuant to § 1915(e)(2)); *Kaminski v. Elite Staffing, Inc.*, 23 F.4th 774, 776 (7th Cir. 2022) (Seventh Circuit affirming the *sua sponte* dismissal—with prejudice—for failure to state a claim, pursuant to 28 U.S.C. § 1915(e), where a non-prisoner brought an *in forma pauperis* complaint alleging discrimination); *Carter v. Schafer*, 273 F. App'x 581, 582 (8th Cir. 2008) (unpublished) ("[C]ontrary to plaintiffs' arguments on appeal, the provisions of 28 U.S.C. § 1915(e) apply to all persons proceeding IFP and are not limited to prisoner suits, and the provisions allow dismissal without service. *See* 28 U.S.C. § 1915."); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*) ("It is also clear that section 1915(e) not only permits but requires a district court to dismiss an *in forma pauperis* complaint that fails to state a claim."); *Tucker v. United States Ct. of Appeals for Tenth Cir.*, 815 F. App'x 292, 293 (10th Cir. 2020) (unreported) (Tenth Circuit affirming *sua sponte*, pre-service dismissal of *in forma pauperis* complaint by non-prisoner, and noting "because Tucker proceeds *in forma pauperis* under 28 U.S.C. § 1915(a)(1), his complaints are subject to that statute's screening requirement"); *Jones v. Nat'l Lab. Rels. Bd.*, 675 F. App'x 923, 925–26 (11th Cir. 2017) (unreported) (Eleventh Circuit affirming pre-service dismissal of *in forma pauperis* complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)); *Christian v. United States*, 856 F. App'x 326, 327 (D.C. Cir. 2021) (unpublished) (D.C. Circuit affirming dismissal of non-prisoner *in forma pauperis* complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)).

Only one decision cited by Moore disagrees with the instant District Court ruling—and it is from another District Court within the Eighth Circuit: *Johnson v. Bloomington Police Dept.*, 193 F. Supp. 3d 1020, 1023 (D. Minn. 2016). But *Johnson* is a clear outlier within the Eighth Circuit. *See, e.g., Keys v. Does*, 217 F. Supp. 3d 1006, 1007–08 (E.D. Ark. 2016) (stating *Johnson's* "argument overlooks the history and structure of the statute" and holding § 1915(e) applies to all *in forma pauperis* proceedings); *Stebbins v. Hannah*, No. 15-cv-00436, 2015 WL 5996295, at *1 n.1 (E.D. Ark. Sept. 1, 2015) (holding non-prisoner complaint subject to screening under § 1915(e)(e)(B)) (citing *Bey v. Superior Protection, Inc.*, No. 4:08CV004191 JLH, 2009 WL 1058054, at *2 (E.D. Ark. Apr. 20, 2009) ("Although many of the provisions in § 1915 specifically refer to and apply only to prison inmates, the language in § 1915(e)(2) does not distinguish between prisoner and non-prisoner complaints.")); *Zessin v. Neb. Health & Human Servs.*, No. 07-cv-247, 2007 WL 2406967, at *1–2 (D. Neb. Aug. 20, 2007) ("it is clear that 28 U.S.C. § 1915(e)(2)(B) authorizes dismissal of complaints filed *in forma pauperis* without regard to whether the plaintiff is a prisoner").

In fact, *Johnson* was recently rebuked within its own district. *See Baylor v. Gildea*, No. 20-CV-1811, 2020 WL 7224243, at *1 (D. Minn. Dec. 8, 2020). In *Baylor,* the Court took care to explain that *Johnson* had misinterpreted *Porter*:

> In support of his position, Baylor cites *Johnson v. Bloomington Police*, 193 F. Supp. 3d 1020 (D. Minn. 2016), in which the district court declined to accept an R&R that recommended dismissal of a case brought by a pro se, non-prisoner litigant under § 1915(e)(2)(B)(ii). In *Johnson*, the court explained that a district court, except as authorized by the statute, generally lacks the authority to dismiss a case *sua sponte*

> before service of process unless a complaint is frivolous . . . . The court also relied heavily on a footnote in *Porter* . . . . But *Porter* did not concern the propriety of dismissing a case brought by a non-prisoner litigant under § 1915(e)(2)(B)(ii) . . . . Section 1915 plainly was not at issue in *Porter* and the language in the court's footnote relied upon in *Johnson* therefore does not have precedential value.

Baylor, 2020 WL 7224243, at *1. The *Baylor* court then explained that other Eighth Circuit law clearly supported the application of § 1915(e)(2)(B)(ii) to Baylor—who was situated similarly to Moore:

> It appears that Eighth Circuit has not directly addressed the question of whether § 1915(e)(2)(B)(ii) authorizes dismissal of a case brought by a non-prisoner litigant seeking in forma pauperis status for failure to state a claim. However, the Eighth Circuit has regularly affirmed the dismissal of claims brought by such plaintiffs under this provision. *See, e.g., Jones v. Manor Care Health Servs*., 788 F. App'x 1039, 1039–40 (8th Cir. 2019) (per curiam); *Rickmyer v. ABM Sec. Servs., Inc*., 668 F. App'x 685, 686 (8th Cir. 2016) (per curiam); *Graddy v. U.S. Dep't of Homeland Sec*., 515 F. App'x 625 (8th Cir. 2013) (per curiam); *Briggs v. Wheeling Mach. Prod. Co*., 499 F. App'x 634 (8th Cir. 2013) (per curiam); *Pomerenke v. Bird*, 491 F. App'x 778, 779–80 (8th Cir. 2012) (per curiam).

Baylor, 2020 WL 7224243, at *1. Even if *Johnson* were good law in the District of Minnesota, a split between two District Courts within a Circuit is not a split that requires intervention and resolution by this Court. *See* S. Ct. Rule 10(a).

Moreover, the Plaintiff in *Baylor* later sought a petition for writ of mandamus from this Court, in which the question presented was whether District Court was permitted to dismiss "a non-prisoner, indigent, *pro se* litigant . . . Section 1983 claim . . . pursuant to 28 U.S.C. § 1915(e)(2)(b)." *In re Christopher Gary Baylor*, Docket No. 20-1052, Emergency Petition for Writ of Mandamus, 2021 WL 371403 at *i (2021). This Court denied that petition. *In re Baylor*, 141 S. Ct. 2507 (2021).

In fact, this Court has recently denied at least one other petition for certiorari in which a question presented involved applicability of § 1915 to non-prisoner Plaintiff, pre-service, pursuant to 28 U.S.C. § 1915. *Veena Sharma v. Santander Bank*, 2020 WL 8269660 (1st Cir. Feb. 24, 2021), *cert. denied*, 141 S. Ct. 1735 (2021); s*ee also Veena Sharma v. Santander Bank*, Docket No. 20-980, Brief in Opposition to Certiorari, 2021 WL 781219 at *i (February 24, 2021).

Certain recent certiorari petitioners have not raised the 28 U.S.C. § 1915 issue at all—even though it was squarely preserved—presumably because the law on this issue is settled. *See Evans v. Georgia Regional Hospital*, Docket No. 17-370, Petition for a Writ of Certiorari, 2017 WL 4022788 at *i, 5 (September 7, 2017), *cert. denied*, 138 S. Ct. 557 (2017) (District Court *sua sponte* dismissed non-prisoner *in forma pauperis* civil complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Plaintiff appealed, and eventually pursued certiorari, but did not raise the § 1915 issue as a question presented in the petition for certiorari that was filed by Pamela S. Karlan, Jeffrey L. Fisher, and the Stanford Supreme Court Litigation Clinic).

b. There is Not a Circuit Split Regarding What Facts Must be Alleged to State a Claim Pursuant to 12 U.S.C. § 4002.

The District Court held that Moore had failed to state a claim upon which relief could be granted under 12 U.S.C. § 4002. Moore argues that the Eighth Circuit's affirmance of the District Court created a split with the Ninth Circuit and incongruity with this Court. (Pet. p. 7) (citing *Little Donkey Enterprises Washington Inc. v. U.S. Bank Corp.*, 136 F. Appx. 91, 92 (9th Cir. 2005) (unpublished); *Beffa v. Bank of West*, 152 F.3d 1174, 1176 (9th Cir. 1998); *Bank One Chicago, N.A. v.*

Midwest Bank & Trust Co., 516 U.S. 264 (1996)). However, there is no Circuit or Supreme Court disagreement for the Court to address.

The "EFAA establishes specific time periods during which banks must make deposited funds available to their customers for check writing and cash withdrawals." *Lynch v. Bank of Am., N.A.*, 493 F. Supp. 2d 265, 267 (D.R.I. 2007) (citing 12 U.S.C. § 4001 et seq.). The time period in which a bank must make funds available depends on the type of deposit. *See* 12 U.S.C. § 4002(a)–(e). Specifically, § 4002(a)(2)(A) applies to checks drawn on the United States Treasury.

The District Court addressed Moore's § 4002 claims in its ruling on Moore's Motion to Reconsider. The District Court determined Moore's claim failed because he had not alleged facts showing the PPP loan was a government check for the purpose of § 4002(a)(2)(A). (Nov. 4, 2021 Order, DC Dkt. 9, pp. 3–4.) The Eighth Circuit summarily affirmed the dismissal of Moore's Complaint. (*Moore v. Koenigsfeld*, No. 21-3736, Judgment, (8th Cir. Mar. 1, 2022) (per curiam).)

The cases cited by Moore and the rulings in this case align. *See Little Donkey Enterprises Washington Inc. v. U.S. Bank Corp.*, 136 F. App'x. 91, 92 (9th Cir. 2005) (unpublished) (holding plaintiff required to provide evidence as to (1) type of deposit covered by EFAA and (2) time period bank held funds, and affirming bank's nonliability under EFAA for freezing account for suspicious activity); *Beffa v. Bank of West*, 152 F.3d 1174, 1176 (9th Cir. 1998) (addressing whether equitable tolling extended statute of limitations under EFAA and affirming dismissal of EFAA claim

as untimely); *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (holding banks can maintain claims against other banks under EFAA).

The District Court correctly found Moore's claim under § 4002(a)(2) failed because he had not pleaded the PPP funds were a government check (nor could he have, since the funds were an ACH from a financial institution). There is no disagreement in the case law regarding whether a government check is a necessary component of a claim under § 4002(a)(2) (*see Little Donkey*, 136 F. App'x at 92) and therefore the Eighth Circuit's ruling summarily affirming the District Court is not at odds with the Ninth Circuit's general recitation of the elements of a § 4002 claim from *Little Donkey* or the other cases cited by Moore.

c. There is Not a Circuit Split Regarding What Facts Must be Alleged to State a Discrimination or Retaliation Claim Pursuant to 42 U.S.C. § 1981.

The District Court determined that Moore failed to state a claim upon which relief could be granted under 42 U.S.C. § 1981—for either discrimination or retaliation. (Oct. 12, 2021 Order, DC Dkt. 4, pp. 4–6.) Moore argues that the Eighth Circuit's affirmance of the District Court violates Fed. R. Civ. P. 8(a)(2) and is inconsistent with this Court's decision in *Swierkiewicz v. Sorena N.A.*, 534 U.S. 506 (2002) and creates a circuit split with the Seventh Circuit's decision in *Bennett v. Schmidt*, 153 F.3d 516 (7th Cir. 1998). (Pet. pp. 9–12.) Moore asserts the District Court held Moore's Complaint to the *McDonnell Douglas* framework, which is in excess of 8(a)'s short, plain statement standard. (*Id.*)

In truth, there is no circuit split or disagreement with the Supreme Court on this issue, nor does this case create one. Contrary to Moore's assertion, the District

Court did not apply *McDonnell Douglas*'s burden shifting evidentiary framework to his claims. Neither the District Court nor the Eighth Circuit cite to *McDonnell Douglas*. Rather, the District Court correctly recited the elements of a § 1981 claim and the applicable pleadings standard. (*See* Oct. 12, 2021 Order, DC Dkt. 4, pp. 4–6.) The cases identified by Moore do not call into question the District Court's decision. In *Swierkiewicz v. Sorena N.A.*, this Court struck down the Second Circuit's heightened pleadings standard for employment discrimination claims. 534 U.S. at 512. *Bennett v. Schmidt*, the other case identified by Moore, is a Seventh Circuit decision which predates *Iqbal* and *Twombly*. 153 F.3d 516. Moreover, to the extent there was any ambiguity on the pleading requirements for a § 1981 claim, this Court recently issued an opinion on the matter in *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020) (holding a plaintiff suing for racial discrimination under 42 U.S.C. § 1981 must plead facts plausibly showing that race was the but-for cause of challenged action).

In light of the clarity among courts, this Court has recently denied numerous petitions for certiorari in cases involving the elements required for discrimination and retaliation cases brought under 42 U.S.C. § 1981. In particular, this Court has denied numerous petitions since addressing the § 1981 pleading requirements in *Comcast*. *See, e.g., Lemon v. Myers Bigel, P.A.*, 985 F.3d 392 (4th Cir. 2021), *cert. denied* 142 S. Ct. 225 (2021) (Denying cert where one question presented was whether the Fourth Circuit "erred in dismissing Petitioner's claim under 42 U.S.C. § 1981 for failure to plead 'but-for' causation." *Lemon v. Myers Bigel, P.A.*, Petition

for Certiorari, 2021 WL 3081220 at *i.). In the current term this Court has already denied certiorari in one such case. *Takieh v. Banner Health*, 2022 WL 474170 (9th Cir. Feb. 16, 2022), *cert. denied* --- S. Ct. ----, 2022 WL 4652174 (Oct. 3, 2022).

III. The *Per Curiam*, Summary Affirmance by the Eighth Circuit Was Proper.

This is not the rare case that lacks a circuit split, but nonetheless presents an error below that is in need of correction. The Eighth Circuit's *per curiam*, summary dismissal of Moore's appeal was plainly correct.

a. Pre-Service Dismissal, *Sua Sponte*, Was Proper.

i. Moore Did Not Timely Appeal on the Grounds that 28 U.S.C. § 1915(e)(2)(B)(ii) Does Not Apply to Him.

As discussed above, Moore did not allege that 28 U.S.C. § 1915(e)(2)(B)(ii) does not apply to him until he filed his Motion to Supplement the Record on Appeal. The Eighth Circuit denied this Motion to Supplement, and thus did not reach the question of whether 28 U.S.C. § 1915(e)(2)(B)(ii) applies to Moore. Instead, the Eighth Circuit was faced with Moore's assertion that "the district court erred in deciding the case acting as defense counsel for the defendant's [sic]." The Eighth Circuit's rejection of this appeal and affirmance of the District Court's dismissal was proper.

ii. 28 U.S.C. § 1915(e)(2)(B)(ii) Applies to Moore.

Even if the Eighth Circuit had reached the specific question of whether 28 U.S.C. § 1915(e)(2)(B)(ii) applied to Moore, the summary affirmance would have been proper.

Fed. R. Civ. P. 8 generally requires service of process prior to dismissal of a Complaint. But 28 U.S.C. § 1915(e)(2)(B)(ii) carves out an exception: a district court has broader latitude to dismiss complaints filed *in forma pauperis*. This exception preserves judicial economy by empowering district courts to dismiss *in forma pauperis* complaints *sua sponte*, prior to service of process, if they fail to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). This *in forma pauperis* exception is particularly critical in the district that heard the instant case—the Northern District of Iowa has only two federal judges, and faces one of the highest case volumes, per judge, in the country. *See* U.S. District Courts – Combined Civil and Criminal Federal Court Management Statistics During the 12-Month Periods Ending June 30, 2017 Through 2022, https://www.uscourts.gov/sites/default/files/fcms_na_distprofile0630.2022_0.pdf (visited Oct. 11, 2022).

This *in forma pauperis* exception applies to Plaintiff. This Code section concerns "Proceedings in forma pauperis." 28 U.S.C. § 1915. The relevant subsection states the following: "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 . . . the action or appeal . . . **fails to state a claim** on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added). Moore does not dispute that he proceeded *in forma pauperis*. The District Court held that Moore's complaint "fails to demonstrate a plausible claim for relief." (Oct. 12, 2021 Order, DC Dkt. 4, p. 7) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Thus, Eighth Circuit

properly affirmed the District Court's application of 28 U.S.C. § 1915(e)(2)(B)(ii) to Moore.

b. Moore Did Not State a Claim Upon Which Relief Can Be Granted Pursuant to 12 U.S.C. § 4002.

There was no error below concerning 12 U.S.C. § 4002, the Expedited Funds Availability Act. Moore's Complaint did not point to a specific provision of § 4002 that Collins violated. Accordingly, the District Court reviewed Moore's allegations under § 4002(a)(2)(A). Section 4002(a)(2)(A) provides that a bank must make checks drawn on the Treasury of the United States available on the next business day. 12 U.S.C. § 4002(a)(2)(A). The District Court determined Moore failed to allege the PPP funds were a government check which would qualify under the statute and determined he failed to state a claim. *See Little Donkey*, 136 F. App'x at 92 (requiring plaintiff plead both the type of deposit and hold period to state a claim under the EFAA, and holding "[M]erely placing a hold on or freezing funds in an account after the deposits have been made available is not a violation of the [EFAA Act].") The District Court did not err.

Moore repeatedly refers to his deposit as a "direct deposit" from Customers Bank for a PPP loan. (*See, e.g.*, Compl. pp. 5, 7, 8; Pet. pp. 3, 4, 9.) At no point in his Complaint did Moore plead that the deposit was a check made on the United States Treasury. Therefore, the District Court was correct in dismissing Moore's claim without prejudice.

To the extent the District Court erred in how it construed Moore's use of the term "direct deposit," the error was harmless. Moore's Complaint uses the

misnomer "direct deposit" throughout, however, his Motion to Amend Complaint attaches documents which correctly identify the transfer as an ACH, rendering § 4002(a)(1)(A) entirely inapplicable. (Amended Complaint p. 3, DC Dkt. 2 (filed May 21, 2021).) Therefore, any error by the District Court in interpreting Moore's use of the term "Direct Deposit" in favor of Collins was harmless.

c. Moore Did Not State a Claim Upon Which Relief Can Be Granted Pursuant to 42 U.S.C. § 1981.

There was no error below concerning the District Court's dismissal of Moore's 42 U.S.C. § 1981 claim. Section 1981 provides that all persons "shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981.

Moore argues the District Court erred in determining his Complaint failed to sufficiently state a claim for relief because he pleaded that he is African American and he can conceive no other reason for Collins or Koenigsfeld's actions other than racial discrimination. (Pet. pp. 3, 14.) He asserts the District Court incorrectly applied the *McDonnell Douglas* framework to his Complaint. (Pet. pp. 10–14.)

A plaintiff does not need to establish a *prima facie* case of discrimination under the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002). The complaint, however, must comport with the pleading requirements of Fed. R. Civ P. 8, as interpreted by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Under Rule 8(a)(2), a

complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Fed. R. Civ. P 12(b)(6) provides for the dismissal of an action where a complaint fails "to state a claim upon which relief can be granted." The notice pleading rules are "not meant to impose a great burden on a plaintiff." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). Although "detailed factual allegations" are not necessary to withstand Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "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." *Id.* (citing *Twombly*, 550 U.S. at 556). The Court need not accept as true "a legal conclusion couched as a factual allegation," nor an inference unsupported by the facts set forth in the complaint. *Id.* (quoting *Twombly*, 550 U.S. at 555).

"[T]o determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end." *Comcast*, 140 S. Ct. at 1014. "To establish a claim under § 1981, a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute". *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993); *see also Felder v. United States Tennis Ass'n*, 27 F.4th 834, 848 (2d Cir.

2022). To plead discriminatory intent, a plaintiff asserting race discrimination under Section 1981 must plausibly allege that "race was a but-for cause of [his] injury." *Comcast*, 140 S. Ct. at 1014. Section 1981 applies only to "purposeful discrimination". *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). Therefore, a plaintiff "must allege facts supporting [a defendant's] intent to discriminate against him on the basis of his race." *Sherman v. Town of Chester*, 752 F.3d 554, 567 (2d Cir. 2014); *see also Haynes v. Indiana Univ.*, 902 F.3d 724, 733 (7th Cir. 2018) (holding implicit bias claim failed because unintentional discrimination not recognized under § 1981).

Courts consistently dismiss claims which fail to allege facts supporting the conclusion that defendants acted with a discriminatory purpose. *See Jordan v. Staffing Plus, Inc.*, 315 F. Supp. 3d 844, 847 (E.D. Pa. 2018) (dismissing claim where "Plaintiff relies solely on his own bare assertion that 'they would not have done that if I was a pale skinned or Caucasi[an].' Courts have repeatedly held that such bare assertions of subjective belief are insufficient to establish an inference of discrimination.") (citing *Groeber v. Friedman & Schuman, P.C.*, 555 F. App'x 133, 135 (3d Cir. 2014) (unpublished) (plaintiff's "subjective believe that race played a role in these employment decisions, however, is not sufficient to establish an inference of discrimination")); *Henley v. Turner Broad. Sys., Inc.*, 267 F. Supp. 3d 1341, 1354 (N.D. Ga. 2017) (dismissing 1981 claim where "allegations are 'consistent' with intentional race discrimination, and may support a 'suspicion' or 'possibility' of misconduct, [but] they do not raise 'a reasonable expectation that

discovery would reveal evidence that these Defendants acted with racially-discriminatory animus.'" (quoting *Twombly*, 550 U.S. at 555; *Ford v. Strange*, 580 F. App'x 701, 713 (11th Cir. 2014) (unpublished))); *Fouche v. St. Charles Hosp.*, 64 F. Supp. 3d 452, 457 (E.D.N.Y. 2014) ("Here, by contrast, the Plaintiff's bald assertions of discrimination—unsupported by any meaningful comments, actions, or examples of similarly—situated persons outside of the Plaintiff's protected class being treated differently—are insufficient to survive a motion to dismiss."); *Middlebrooks v. Godwin Corp*, 722 F. Supp. 2d 82, 88 (D.D.C. 2010) (dismissing § 1981 claim where "only suggestion that plaintiff's race or color played any role in her interactions with [defendants] are plaintiff's conclusory statements that she was 'terminated . . . based on [her] race' and 'color'" and "none of the factual allegations in plaintiff's complaint suggest a racially discriminatory motive for defendants' treatment of plaintiff"), *aff'd*, 424 F. App'x. 10 (D.C. Cir. 2011) (unpublished), *cert. denied* 132 S. Ct. 846 (2011) (citing *Bray v. RHT, Inc.*, 748 F. Supp. 3, 5 (D.D.C. 1990) ("plaintiff cannot merely invoke his race in the course of a claim's narrative and automatically be entitled to pursue relief"), *aff'd sub nom*. *Bray v. Hebble*, 976 F.2d 45 (D.C. Cir. 1992)); *Fantini v. Salem State Coll.*, 557 F.3d 22, 34 (1st Cir. 2009) (dismissing § 1981 claims where plaintiff did not plead facts supporting conclusion that adverse actions were on account of her race).

The District Court determined Moore had adequately alleged the first and third element of a § 1981 claim. (Oct. 12, 2021 Order, DC Dkt. 4.) However, the District Court determined Moore failed to allege any facts supporting his conclusory

assertion that Collins or Koenigsfeld acted with intent to discriminate against him on the basis of race. (*Id.*) The District Court, and the Eighth Circuit in summarily affirming the dismissal, did not err in this determination.

The Complaint is devoid of any facts supporting the assertion that Collins or Koenigsfeld engaged in racial discrimination. Moore pleaded that a) he is an African American man, b) he was unable to withdraw $15,000 in cash, c) Koenigsfeld commented that he did not believe Moore was doing anything wrong, and d) that Moore believes "the internet constantly shows pictures of black people who commit fraud pertaining to the paycheck protection program loans but do not show pictures of white people who commit the same type of fraud". (Compl. p. 5.) Based on these allegations—none of which indicate Collins or Koenigsfeld acted with the intent to discriminate against Moore—the District Court correctly refused to assume racial animus. *See Mekuria v. Bank of America*, 883 F. Supp. 2d 10, 15 (D.D.C. 2011) ("At the end of the day, Plaintiff's case boils down to an argument that because he was mistreated and because he is black, there must be some connection between the two. Such supposition is not enough.") The facts asserted in the Complaint no better support a claim based on any other physical attribute, such as gender or age. Moore alleged his own beliefs, rather than any actions by Collins or Koenigsfeld. This is insufficient to "nudge" a claim from "conceivable to plausible." *Twombly*, 550 U.S. at 570.

Moore's retaliation claim under § 1981 is no different. Section 1981 "prohibits not only racial discrimination but also retaliation against those who oppose it."

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 355 (2013). Moore claims Collins and Koenigsfeld retaliated against him based on his race by reversing the ACH and sending the PPP funds back to Customers Bank. (Pet. pp. 15–17.) As correctly identified by the District Court, Moore's own Complaint alleges that he instructed Collins to reverse the ACH. (*See* Compl. p. 6.) Moreover, Moore sets forth no facts supporting the conclusion that Collins reversed the ACH based on Moore's race. Without setting forth facts supporting the claim that Moore was discriminated against on the basis of his race, his retaliation claim under § 1981 fails.

CONCLUSION

Moore seeks damages in excess of $11,000,000.00 because Collins and Koenigsfeld failed to authorize a $15,000.00, lump sum, cash withdrawal of a PPP loan and then complied with his request to send the PPP funds back to the originating bank. The District Court dismissed the Complaint, without prejudice, for failure to state a claim. The Eighth Circuit summarily affirmed. This Court should deny the Petition.

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