United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 09-1229-cv

ROBERT L. SCHULZ

Plaintiff-Appellant,

– v. –

UNITED STATES FEDERAL RESERVE SYSTEM,
BEN S. BERNANKI, CHAIRMAN OF THE UNITED STATES FEDERAL RESERVE SYSTEM, UNITED STATES DEPARTMENT OF THE TREASURY, HENRY M. PAULSON JR., SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, AND UNITED STATES

Defendants-Appellees.

On Appeal From the United States District Court
For the Northern District of New York

BRIEF ON BEHALF OF APPELLEES

ISSUE PRESENTED

Did the district court properly grant defendants-appellees' motion to dismiss based upon plaintiff-appellant's lack of Article III standing?

JURISDICTIONAL STATEMENT

The district court lacked subject matter jurisdiction below. Pursuant to Title 28 U.S.C. § 1291, this Court has jurisdiction over plaintiff's appeal from the district court order granting defendants' motion to dismiss on that ground.

STATEMENT OF THE CASE

Plaintiff-appellant Robert L. Schulz ("Schulz") commenced a civil action, *Schulz v. United States Federal Reserve System et al.*, in the United States District Court for the Northern District of New York on September 18, 2008 ("the AIG case").[1] The defendants included several prominent federal officials and bodies.[2] The complaint alleged that Schulz pays taxes to the United States and to New York State (A.12, ¶4),[3] and that the defendants-appellees had agreed to an $85 billion bailout of "the troubled insurance company American International Group" ("AIG") (A.12, ¶ 10), which put taxpayer money at risk (A.13, ¶ 12). The complaint further alleged that the AIG agreement was *ultra vires* and unconstitutional (A.13, ¶ 15), and sought a permanent injunction barring defendants-appellees from giving or lending any public taxpayer monies to AIG (A.14, ¶ 14b). Schulz filed an emergency motion for a temporary restraining order in this civil action on the same date. (A.7, Entry No. 4; A.16-27).

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[1] N.D.N.Y. Docket No. 08-cv-991.

[2] *See* caption listing as defendants "United States Federal Reserve System, Ben S. Bernanki [sic], Chairman of the United States Federal Reserve System, United States Department of the Treasury, Henry M. Paulson, Jr., Secretary of the United States Department of the Treasury, and United States." A.11.

[3] "A" refers to the Appendix on Behalf of Appellant.

Schulz filed a second complaint, *Schulz v. United States Executive Department et al.*, on September 24, 2008 ("the $700 billion bailout case").[4] This complaint similarly named several prominent federal officials and bodies, and added several Congressional defendants.[5] Schulz again alleged that he pays taxes to the United States and to New York State (A.66, ¶ 4). Schulz also alleged that on September 20, 2008, the Executive Department submitted a proposed Act to Congress to authorize the Secretary of the Treasury to spend $700 billion of taxpayer money to purchase distressed mortgage-related assets from private parties (A.67, ¶ 13), and that this legislation would "socialize" the losses resulting from the bad investments of private entities (A.68, ¶ 18). As with his first complaint, Schulz sought an order declaring that any legislation implementing this action was without constitutional authority, null and void (A.69, ¶ 24). Schulz also filed papers seeking a preliminary injunction against the defendants in this civil action. (A. 71-87).

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[4] N.D.N.Y. Docket No. 08-cv-1011.

[5] This caption listed as defendants "United States Executive Department, George W. Bush, President of the United States, Henry M. Paulson, Jr., Secretary of the Treasury; United States Congress, Nancy Pelosi, Speaker of the House of Representatives, Harry Reid, Senate Majority Leader; United States Federal Reserve System, Ben S. Bernanke, Chairman of the Board of the United States Federal Reserve System." A. 65.

On September 26, 2008, the United States District Court for the Northern District of New York (Sharpe, D.J.) entered an order that consolidated Schulz's two civil actions and denied both of his applications for injunctive relief. (A.63). Schulz appealed from the district court's denial of injunctive relief on September 26, 2008.[6] On October 6, 2008, this Court denied Schulz's motion for temporary injunctive relief pending that appeal.

On February 24, 2009, the district court granted defendants' motion to dismiss Schulz's consolidated actions on the ground that Schulz lacked Article III standing. A.3. Judgment in favor of defendants was entered on that same date, and this appeal timely followed.

SUMMARY OF ARGUMENT

The district court properly dismissed Schulz's consolidated cases for lack of standing. Schulz essentially complained, as a citizen/taxpayer, that taxpayer money was being put at risk by the AIG agreement and that the $700 billion bailout was using public United States taxpayer funds to "socialize" various private entities' financial losses, all in violation of the Constitution. But the Supreme Court has consistently rejected standing where a plaintiff's alleged injury is based upon the "effect of allegedly illegal activity on public revenues, to which the taxpayer

[6] That appeal, Second Circuit Docket No. 08-4810-cv, remains pending at this time.

contributes." *Daimler Chrysler Corp. v. Cuno,* 547 U.S. 332, 344 (2006) (quoting *Commonwealth of Massachusetts v. Mellon, and Frothingham v. Same*, 262 U.S. 447, 488 (1923)). Nothing about Schulz's complaints suggested any basis for making an exception to the general rule that simply being a federal taxpayer does not confer standing to challenge how the federal government spends public monies.

There are additional bases for affirming the dismissal of Schulz's complaint against the Congressional defendants. Those claims essentially challenged House Speaker Pelosi, Senate Majority Leader Reid, and "the United States Congress" for their consideration and passage of the "$700 billion bailout" federal legislation. Such claims are clearly barred by the Speech or Debate Cause of the United States Constitution. U.S. Const. art I, § 6, cl. 1. Even if that were not so, the government has not waived sovereign immunity for such claims and, given the declaratory and injunctive relief Schulz sought, such a waiver was required.

Finally, because no cause of action exists to sue Congress or its Members for the performance, or non-performance, of legislative duties, Schulz's complaint failed to state a cognizable claim against the Congressional defendants.

STANDARD OF REVIEW

This Court reviews a district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for clear error as to any factual findings and *de novo* as to all legal conclusions. *Aurecchione v. Schoolman Transportation System, Inc.*, 426 F.3d 635, 638 (2d Cir. 2005); *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence. *Id.; see also Luckett v. Bure*, 290 F.3d 493, 497 (2d Cir. 2002). In resolving a 12(b)(1) motion, the allegations in the complaint are to be construed favorably to the pleader, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), but the district court may also refer to evidence outside the pleadings. *Makarova*, 201 F.3d at 113. A case has been properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court "lacks the statutory or constitutional power to adjudicate it." *Makarova*, 201 F.3d at 113.

ARGUMENT

Point I

The District Court Properly Dismissed Schulz's Consolidated Cases for Lack of Standing.

"[T]he question of standing is whether the particular litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Warth v.*

Seldin, 422 U.S. 490, 498 (1975)). Schulz lacked standing to maintain his actions under two modes of analysis employed by the Supreme Court: Article III standing and prudential standing. *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

A. There Was No Article III Standing.

"In every federal case, the party bringing the suit must establish standing to prosecute the action" under Article III of the Constitution. *Elk Grove*, 542 U.S. at 11. Article III standing "enforces the Constitution's case-or-controversy requirement." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also W.R. Huff Asset Management Co., v. Deloitte & Touche LLP*, 549 F.3d 100 (2d Cir. 2008). To establish Article III standing, a plaintiff must plead three elements: (1) injury in fact, (2) a causal connection between the injury and the challenged act, and (3) that the injury likely would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). These requirements make certain that any plaintiff has a sufficiently personal stake in the outcome of the suit so that the parties are adverse. *See Baker v. Carr*, 369 U.S. 186, 204 (1962).

Schulz's complaints failed to satisfy the "injury in fact" component of standing. A plaintiff must allege an injury that is "'(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'" *Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (quoting *Friends of the*

Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000)). Such an injury is one that "'affect[s] the plaintiff in a personal and individual way.'" *Altman v. Bedford Cent. School Dist.*, 245 F.3d 49, 69-70 (2d Cir. 2001) (quoting *Lujan*, 504 U.S. at 560). But the only injury Schulz alleged was that "taxpayer money" was being put "at risk," (A.13, ¶ 12) and that "public U.S. taxpayer funds" were to be use to "socialize" various private entities' financial losses (A.68, ¶ 18).

The Supreme Court has consistently rejected standing where a plaintiff's alleged injury is based upon the "effect of allegedly illegal activity on public revenues, to which the taxpayer contributes." *Daimler Chrysler Corp. v. Cuno*, 547 U.S. at 344 (quoting *Commonwealth of Massachusetts v. Mellon; Frothingham v. Same*, 262 U.S. at 488 (hereafter, "*Frothingham*"). As this Court has put it, "[t]he basic rule is that [federal] taxpayers do not have standing to challenge how the federal government spends tax revenue." *In re U.S. Catholic Conference (USCC)*, 885 F.2d 1020, 1027-28 (2d Cir. 1989), *citing Frothingham*, 262 U.S. at 488. [7] Any alleged injury to Schulz's interest in the federal budget – an interest which he shares with all members of the taxpaying public – is "not 'concrete and

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[7] Indeed, this Court has applied the basic rule in finding that Schulz lacked standing in several analogous cases in the past. *See Schulz v. Jennings*, 198 F. 3d 234 (2d Cir. 1999) (unpublished disposition), and additional cases cited therein.

particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally'" and, thus, one that does not create standing. *Daimler Chrysler*, 547 U.S. at 344 (2006) (quoting *Frothingham*, 262 U.S. at 488).

Schulz also failed to allege any facts demonstrating a causal nexus between 1) the loan to AIG and any injury to his alleged interests as a citizen/ taxpayer, or 2) the $700 billion bailout and any injury to his alleged interests as a citizen/ taxpayer. *See Lujan*, 504 U.S. at 560 (stating that the injury has to be "fairly traceable" to the challenged actions of the defendant). Schulz made no effort to demonstrate how the defendant-appellees' actions in assisting AIG or implementing the larger "bailout" had any specific injurious impact on the federal budget which his tax dollars help to maintain. But even if he were able to establish that those actions would negatively impact the federal budget, Schulz would nonetheless need to show that such an impact would, in turn, injure him as a taxpayer. Doing so would require speculation as to how members of the legislative or executive branches might respond to a revenue shortfall, would certainly be "conjectural or hypothetical," and thus would fail to meet the requirements for standing. *See Daimler Chrysler*, 547 U.S. at 344. Based on all of the above, the district court's conclusion, that Schulz's actions must be dismissed because he

lacked Article III standing in either the AIG case or the $700 billion bailout case, was correct and should be affirmed.

B. The Principle of Prudential Standing Also Required Dismissal.

Prudential standing embodies "judicially self-imposed limits on the exercise of federal jurisdiction."*Allen v. Wright*, 468 U.S. at 751. The principle of prudential standing includes "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12 (citing *Allen v. Wright*, 468 U.S. at 751). The Supreme Court has repeatedly "rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law,'" because "[s]uch claims amount to little more than attempts 'to employ a federal court in which to air . . . generalized grievances about the conduct of government.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 479 (1982) (internal citations omitted).

As alluded to above, the Supreme Court has been particularly wary of permitting lawsuits based on general "taxpayer" standing. The sole route toward establishing taxpayer standing requires "an individual [to] demonstrate that the challenged agency action is based on the Government's taxing and spending power, and, in addition, that the action is contrary to a specific constitutional

limitation on the exercise of that power." *Gosnell v. F.D.I.C.*, 938 F.2d 372, 375 (2d Cir. 1991) (citing *Valley Forge*, 454 U.S. at 478-79) ; *see also Flast v. Cohen*, 392 U.S. 83, 102-3 (1968) (creating exception to general rule against taxpayer standing for alleged violation of Taxing and Spending Clause of Art. I, § 8).[8] The Court has repeatedly found such standing only in the limited circumstance of challenges that involve Congressional appropriations implicating the Establishment Clause, and has refused to extend taxpayer standing to purported violations of other constitutional provisions. *See Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007) (taxpayer standing under *Flast*, even for Establishment Clause claim, must involve a direct Congressional appropriation, not Executive Branch spending discretion) (plurality opinion); *Daimler Chrysler*, 547 U.S. at 354 (Ginsburg, J., concurring) ("The *Flast* exception has not been extended to other areas"); *see also United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

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[8] The taxing and spending power was not implicated in the AIG case in any event. Federal Reserve Banks are separately capitalized by member banks within their districts (12 U.S.C. § 287), and Congress does not appropriate funds for their operations. *See Lewis v. United States*, 680 F.2d 1239, 1242 (9th Cir. 1982). The Federal Reserve Board's own expenditures are based on assessments on the Reserve Banks and, by statute, "shall not be construed to be government funds or appropriated moneys." 12 U.S.C. § 244. Because Federal Reserve Bank funds are not derived from taxes levied under the taxing and spending power of Article I, § 8 of the Constitution, the first prerequisite for showing taxpayer standing is absent.

Schulz did not allege any Congressional appropriation that violated the Establishment Clause and, thus, could not even arguably establish standing under the *Flast* exception. Moreover, his complaints demonstrated no other basis to overcome the judicial rule "barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12 (citing *Allen v. Wright*, 468 U.S. at 751). Thus, application of the principles of prudential standing also direct dismissal of Schulz's district court cases.

Point II

The District Court Lacked Jurisdiction Over Schulz's Claims Against the Congressional Defendants.

In light of its correct and fully dispositive determination that Schulz lacked Article III standing, the district court did not address the Congressional defendants' additional arguments in support of dismissal. A. 3. Nor does Schulz appear to address those arguments in his appellate brief. In an abundance of caution, however, and because this Court may affirm the district court "'on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely,'" *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007) (quoting *Cromwell Assocs. v. Oliver Cromwell Owners, Inc.*,

941 F.2d 107, 111 (2d Cir.1991)), appellees include a limited discussion of those additional grounds here.

A. Schulz's Claims Against The Congressional Defendants Were Barred by The Speech or Debate Clause.

Schulz's suit against the Congressional defendants (Speaker Pelosi, Majority Leader Reid, and the United States Congress) challenged their consideration or passage of legislation and is, therefore, squarely barred by the Speech or Debate Clause. *See* U.S. Const. art. I, § 6, cl. 1 (providing that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place"). The Clause affords Members of Congress an absolute immunity from damages, injunctions, and declaratory judgments for all conduct falling within the "sphere of legitimate legislative activity." *Eastland v United States Servicemen's Fund*, 421 U.S. 491, 501 (1975); *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973) (quoting *Gravel v. United States*, 408 U.S. 606, 624-25 (1972)); *see also Newdow v. United States Congress*, 328 F.3d 466, 484 (9th Cir. 2003) (dismissing Congress from challenge to Pledge of Allegiance statute, stating that under Speech and Debate Clause "the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation"), *rev'd on other grounds*, 542 U.S. 1 (2004). Consequently, the district court had no jurisdiction to entertain Schulz's complaints against the Congressional defendants.

B. Schulz's Claims Against The Congressional Defendants Were Barred by Sovereign Immunity.

Schulz's $700 billion bailout suit against Speaker Pelosi and Majority Leader Reid in their official capacities was equivalent to a suit against the government. Under the doctrine of sovereign immunity, of course, the government is immune from suit unless it consents to be sued. *See United States v. Sherwood*, 312 US. 584, 586 (1941). Since "the existence of consent is a prerequisite for jurisdiction," *Id.; see also United States v. Mitchell*, 463 U.S. 206, 212 (1983), and the government has not consented to be sued in these types of cases, there was no jurisdiction to maintain a suit against the Congressional defendants.[9] *See, e.g., Presidential Gardens Assocs. v. United States ex rel. Sec'y of Housing and Urban Dev.*, 175 F.3d 132, 139 (2d Cir.1999) ("In any suit in which the United States is a defendant, there must be a cause of action, subject matter jurisdiction, and a waiver of sovereign immunity."). Indeed, in light of the relief Schulz sought, the doctrine of sovereign immunity would bar his claims against Speaker Pelosi and Leader Reid "as individuals" as well. *See Keener v. Congress*, 467 F.2d 952, 953 (5th Cir.

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[9] Schulz's invocation of 28 U.S.C. §§ 1331 and 1343 alone does not satisfy the requirement for a waiver of sovereign immunity. For this reason, indeed, *both* of Schulz's claims were inadequate due to his failure to plead any waiver of sovereign immunity by any of the federal defendants. As to the non-Congressional defendants, Schulz might have relied upon 5 U.S.C. § 702, which allows suits against government agencies. For the Congressional defendants, however, there was simply no applicable waiver in existence.

1972); *cf. Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) ("[R]elief sought nominally against [a government] officer is in fact against the sovereign if the decree would operate against the latter").

C. Schulz's Complaint Failed To State A Claim Against The Congressional Defendants.

Federal courts have uniformly held that no cause of action exists to sue Congress or its Members for the performance, or nonperformance, of legislative duties. *See Richards v. Harper*, 864 F.2d 85, 88 (9th Cir. 1988) (affirming dismissal of action against Members of Congress because their failure to respond to constituent's request was "neither inappropriate nor actionable"); *Keener v. Congress*, 467 F.2d 952, 953 (5th Cir. 1972) (affirming dismissal of plaintiff's action to compel Congress to abandon gold standard); *Newell v. Brown*, 981 F.2d 880, 887 (6th Cir. 1992) (upholding dismissal of claim against Congressman arising out of service to a constituent stating that "[f]or the federal judiciary to subject members of Congress to liability for simply doing their jobs would be unthinkable"). Thus, Schulz's complaint failed to state a claim against the Congressional defendants for their legislative actions in passing the challenged "$700 billion bailout" legislation.

CONCLUSION

Based upon on all of the foregoing, the judgment of the district court should be affirmed.

Dated: June 4, 2009
Syracuse, N.Y.

Respectfully submitted,

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By:

/s/ Paula Ryan Conan
PAULA RYAN CONAN
Assistant United States Attorney

ANTI-VIRUS CERTIFICATION FORM
See Second Circuit Interim Local Rule
25(a)6 and 32(a)(1)(E)

CASE NAME: SHULTZ v. UNITED STATES FEDERAL RESERVE SYSTEM

DOCKET NUMBER: 09-1229-cv

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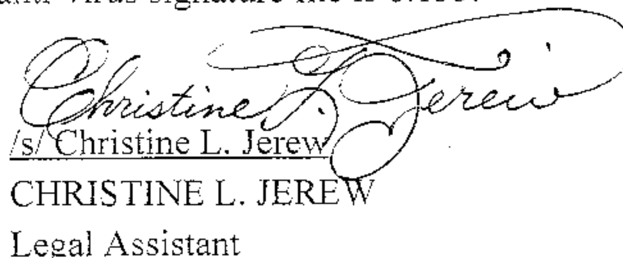


/s/ Christine L. Jerew
CHRISTINE L. JEREW
Legal Assistant

Date: June 4, 2009

CERTIFICATE OF SERVICE

ROBERT L. SHULTZ

v.

UNITED STATES FEDERAL
RESERVE SYSTEM

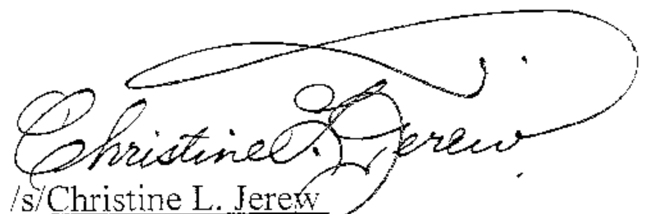
Docket No.
09-1229-cv

I Christine L. Jerew, hereby certify that I am an employee of the Office of the United States Attorney for the Northern District of New York and am a person of such age and discretion as to be competent to serve papers; and

That on June 4, 2009 I served a copy of a **Brief on Behalf of Appellees** on the pro se plaintiff-appellant at the following address, which is the last known address, by depositing said envelope and contents in the United States mail addressed to:

ADDRESSEE:

Mr. Robert L. Schulz
2458 Ridge Road
Queensbury, New York 12804



/s/Christine L. Jerew
CHRISTINE L. JEREW
Legal Assistant