Appendix A

19-722-cv
Kerven v. United States

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 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of February, two thousand twenty.

PRESENT: JOHN M. WALKER, JR.,
DENNY CHIN,
STEVEN J. MENASHI,
Circuit Judges.

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JAMES M. KERVEN,
Plaintiff-Appellant,

-v- 19-722-cv

UNITED STATES OF AMERICA,
Defendant-Appellee.

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FOR PLAINTIFF-APPELLANT: James M. Kerven, *pro se*, Syracuse, New York.

FOR DEFENDANT-APPELLEE: Richard E. Zuckerman, Principal Deputy Assistant Attorney General, Michael J. Haungs, Kathleen E. Lyon, Attorneys, Tax Division, Department of Justice, Washington, DC.

Appeal from a judgment of the United States District Court for the Northern District of New York (D'Agostino, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiff-appellant James Kerven, *pro se,* appeals from a judgment entered June 10, 2019 dismissing his complaint against defendant-appellee United States of America for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The complaint alleged that the Tax Cuts and Jobs Act of 2017, Public Law 115-97 (the "Act"), was unconstitutional and violated Kerven's due process rights. The district court dismissed the complaint for lack of subject matter jurisdiction, reasoning that Kerven lacked standing because he did not allege a concrete, particularized injury. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* a district court's determination that a plaintiff lacked standing to sue. *Rajamin v. Deutsche Bank Nat'l Tr. Co.*, 757 F.3d 79, 84-85 (2d Cir. 2014). To have standing, a plaintiff must show that (1) he has an injury-in-fact, (2) there is a causal connection between the injury and conduct of which he complains, and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). An injury-in-fact requires a concrete injury to

create a sufficient personal stake in the litigation. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Hypothetical injuries are generally not sufficient to meet the requirement. *Id.* And "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Kerven cannot show an injury-in-fact. He alleged that he had standing based on his status as a taxpayer, as a representative of American taxpayers, and as a person who engages in commerce in the United States. The fact, however, that a plaintiff is a taxpayer is generally not sufficient to establish standing because the alleged injury -- *i.e.*, an effect on taxes -- is too abstract. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007); *Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. N.Y. State Teachers Ret. Sys.*, 60 F.3d 106, 110 (2d Cir. 1995). There is a narrow exception to this rule with respect to taxpayers challenging laws under the Establishment Clause, *see Flast v. Cohen*, 392 U.S. 83, 88 (1968), but the Supreme Court has not expanded this exception to other constitutional provisions, *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 139 (2011). The exception is therefore not applicable here. Accordingly, Kerven's status as a taxpayer alone is not sufficient to establish a concrete, particularized injury.

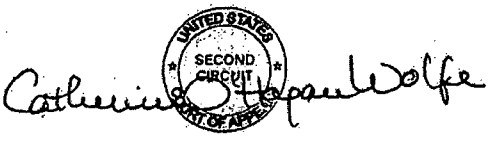
Kerven argues that he was injured by the "debt shenanigans" created by the Act. Appellant's Br. at 13. Specifically, he contends, he became a "debt holder" because the Government did not pay its debt, his taxes were not lowered, and the Act

"purposefully increased" the federal budget deficit. Appellants' Br. at 13. He also argues that his injury was concrete because the tax cuts affected the budget deficit, and his injury was not a generalized grievance because it was "specifically applicable" to everyone. Appellant's Br. at 32. These arguments do not establish standing. Even assuming that the federal budget would increase and that his taxes would not be lowered as a result of the Act, Kerven has not sufficiently alleged a concrete or particularized injury. *See Bd. of Educ. of Mt. Sinai Union Free Sch. Dist.*, 60 F.3d at 110 (effect of government action on future taxation too remote to create an injury); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345-46 (2006) (plaintiffs had no standing to challenge tax credit scheme where injury asserted was depletion of state budget and disproportionate tax burden). Further, Kerven's argument that the injury he asserts was applicable to everyone undermines his position that he suffered a particularized injury. *See Warth*, 422 U.S. at 499.

* * *

We have considered Kerven's remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JAMES M. KERVEN,

Plaintiff,

vs. **5:18-CV-742 (MAD/ATB)**

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES: **OF COUNSEL:**

JAMES M. KERVEN
Plaintiff *pro se*

U.S. DEPARTMENT OF JUSTICE - TAX DIVISION **JAMES YU, ESQ.**
P.O. Box 55
Ben Franklin Station
Washington, D.C. 20044
Attorney for Defendant

Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On June 25, 2018, Plaintiff commenced this action *pro se* against the United States of America, challenging the constitutionality of the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (the "TCJA").[1] *See* Dkt. No. 1 at 1. Plaintiff alleges that the TCJA violates the Fourteenth Amendment because it creates "gross inequality" in taxation. *See id.* at 4. Specifically, the Complaint brings two claims: (1) "'grossly unequal' treatment and lack of any reasonable attempt to adjust the burden with a fair and reasonable degree of equality with regard

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[1] Plaintiff incorrectly named the "Government of the United States" as Defendant. The Court directs the Clerk of the Court to amend the case caption as indicated above.

to the 'repatriation' section of [the TCJA]" and (2) that the "U.S. 1.5 trillion dollar loan facilitating the underpayment of taxes for current taxpayers . . . is an absurd violation of any intent to distribute the burden with any reasonable degree of equality." *See id.* at 2. Additionally, the Complaint criticizes the current tax policy, quotes various public figures, and attaches annotated newspaper articles about the TCJA. *See id.* at 3-96.

On October 23, 2018, Defendant moved to dismiss the Complaint pursuant to 12(b)(1) for lack of subject-matter jurisdiction. *See* Dkt. No. 22. Plaintiff has not filed an opposition, and the Motion to Dismiss is presently before the Court.

II. DISCUSSION

A. Legal Standard

"Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,' which restrict the authority of federal courts to resolving the legal rights of litigants in actual controversies." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (internal quotation omitted) (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982)). "As an incident to the elaboration of this bedrock requirement, a plaintiff seeking to maintain an action in federal court is "always required" to have standing. *Valley Forge Christian College*, 454 U.S. at 471; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Thus, standing is "the threshold question in every federal case, determining the power of the court to entertain the suit." *Kiryas Joel Alliance v. Vill. of Kiryas Joel*, 495 Fed. Appx. 183, 188 (2d Cir. 2012).

"To demonstrate standing, a plaintiff must have 'alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'" *Salazar v. Buono*, 559 U.S. 700, 711 (2010) (quoting *Horne v. Flores*, 557 U.S. 433, 445 (2009)) (emphasis

omitted). As the Supreme Court established in *Lujan*, "the irreducible constitutional minimum of standing contains three elements":

> First, the plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560 (internal citations and quotation marks omitted). The "[s]tanding doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000); *see also Genesis Healthcare*, 569 U.S. at 71 ("This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved"). In accordance with this precept, a plaintiff must establish standing for each claim and form of relief sought. *See Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010).

"[W]here a complaint is dismissed for lack of Article III standing, the dismissal must be without prejudice, rather than with prejudice." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 54-55 (2d Cir. 2016); *see also Hernandez v. Conriv Realty Associates*, 182 F.3d 121, 123 (2d Cir. 1999) (holding that a federal court cannot dismiss a case with prejudice where there is no Article III standing). This is because "[s]uch a dismissal is one for lack of subject matter jurisdiction, and without jurisdiction, the district court lacks the power to adjudicate the merits of the case." *See*

id. (citing *Davis v. Federal Election Commission*, 554 U.S. 724, 732-33 (2008); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998)) (other citations omitted).

"[I]n a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.'" *Govan v. Campbell*, 289 F. Supp. 2d 289, 295 (N.D.N.Y. 2007) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)) (other citations omitted). The Second Circuit has opined that the court is obligated to "'make reasonable allowances to protect *pro se* litigants'" from inadvertently forfeiting legal rights merely because they lack a legal education. *Id.* (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)).

B. Application

Defendant brings a facial challenge to Plaintiff's standing based on the allegations in the Complaint. Thus, for purposes of this motion, the Court must accept as true all material factual allegations in the Complaint and draw all reasonable inferences in favor of Plaintiff. *See Carter*, 822 F.3d at 56 (holding that "[w]hen the Rule 12(b)(1) motion is facial, *i.e.*, based solely on the allegations of the complaint or the complaint and exhibits attached to it . . . [t]he task of the district court is to determine whether the Pleading 'allege[s] facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue'").

In the present case, the Court does not have subject matter jurisdiction because Plaintiff does not have standing to sue. Plaintiff argues that he has standing "as an individual taxpayer and . . . representative of the majority of American taxpayers injured by the [TCJA]." *See* Dkt. No. 1 at 1; *see also id.* at 2 (alleging standing based on Plaintiff's status as "a current and future taxpayer"); *id.* at 4 (alleging standing because Plaintiff pays "personal taxes and business taxes generated through his commerce"). However, as Defendant points out, Plaintiff has not alleged a particularized or imminent injury. *See* Dkt. No. 22-1 at 4. Instead, Plaintiff makes broad

statements about the unfairness of the TCJA, without ever stating how he has been harmed. *See, e.g.*, Dkt. No. 1 at 2 (alleging "grossly unequal" treatment from the "repatriation" section of the TCJA); *id.* at 5 (alleging that "[w]e believe these deferred foreign income corporations and their repatriation activity are in breach of any rational fairness in tax law"). Even reviewing the Complaint under the more lenient standard afforded to *pro se* litigants, Plaintiff does not have "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction." *Salazar*, 559 U.S. at 711 (citation omitted).

Plaintiff's concern seems to be with the fiscal policy of the current administration. *See, e.g.*, Dkt. No. 1 at 2 ("Already running deficits with revenues running 20% short of spending, the 115th congress and the Trump Administration have borrowed the equivalent of two years of current deficits to lower taxes for current selected taxpayers making the short fall 25%. THIS IS NOT AND NEVER WAS A SPECULATIVE CLAIM"); *id.* at 7 ("[T]he 115th congress and the Trump Administration have initiated tax cuts that burden future taxpayers with a 1.5 trillion dollar loan to underwrite a reduction in taxes for current tax payers"). The Court may only adjudicate "actual and concrete disputes, the resolutions of which have direct consequences on the parties involved." *See Genesis Healthcare*, 569 U.S. at 71. Since Plaintiff has not alleged an actual and concrete dispute, he has not met the irreducible constitutional minimum of standing. *Lujan*, 504 U.S. at 560. Accordingly, the Court must dismiss the Complaint without prejudice for lack of subject matter jurisdiction.[2]

[2] Because Plaintiff lacks Article III standing, the Court does not have subject matter jurisdiction and will not address Defendant's other arguments. *See* Dkt. No. 22-1 at 2 (arguing that the Court should dismiss the case for three reasons: lack of standing, the tax exemption bar to the Declaratory Judgment Act, and because the case involves a nonjusticiable political question).

III. CONCLUSION

After careful review of the record, the Motion to Dismiss, and the applicable law, the Court hereby

ORDERS that Defendant's Motion to Dismiss (Dkt. No. 22) is **GRANTED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Defendant's favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: February 12, 2019
Albany, New York

Mae A. D'Agostino
U.S. District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

JAMES M. KERVEN,
Plaintiff,

vs.

5:18-CV-742 (MAD/ATB)

UNITED STATES OF AMERICA,
Defendant.

500 / #505

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (Dkt. No. 22) is **GRANTED**; and the Court further **ORDERS** that the Clerk of the Court shall enter judgment in Defendant's favor and close this case, all of the above pursuant to the Memorandum-Decision and Order of the Honorable Judge Mae A. D'Agostino, dated the 12th day of February, 2019.

DATED: February 12, 2019

John Domurad
Clerk of Court

s/Britney Norton
Britney Norton
Deputy Clerk

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Appendix C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of May, two thousand twenty.

James M. Kerven,

Plaintiff - Appellant,

v.

United States of America,

Defendant - Appellee.

ORDER

Docket No: 19-722

Appellant, James M. Kerven, filed a petition for panel rehearing, or, in the alternative, for rehearing *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