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United States Court of Appeals
Tenth Circuit

June 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANDREW U.D. STRAW,

Plaintiff - Appellant,

v.

STATE OF UTAH,

Defendant - Appellee.

No. 23-4036
(D.C. No. 2:22-CV-00023-TC)
(D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

Andrew U.D. Straw appeals the district court's dismissal of his in forma pauperis complaint alleging the Utah Supreme Court refused to allow him to file an amicus brief in a case pending before it, in violation of his First and Fourteenth Amendment rights. The district court dismissed the complaint on the basis that Mr. Straw lacked standing to bring his claim, noting also that Mr. Straw's claims were meritless. We conclude

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* After examining the briefs and appellate record, the panel has determined unanimously to honor the Appellant's request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

Mr. Straw did have standing, but we affirm the district court's dismissal because the complaint fails to state a claim on which relief may be granted.

I. BACKGROUND

According to Mr. Straw's Second Amended Complaint, he is an attorney who has been licensed in Indiana, Virginia, the U.S. Court of Appeals for the Fourth Circuit, and U.S. District Courts in Indiana, Illinois, and Wisconsin. Mr. Straw formerly worked for the Indiana Supreme Court, which he asserts abusively suspended his Indiana law license in 2017. Mr. Straw alleges the Eleventh Circuit Court of Appeals then denied him a license based on the Indiana suspension. Mr. Straw claims to have faced reciprocal suspension from federal courts and to have lost five state law licenses in what he terms "state supreme court takings." App. at 12.

In March 2021, Mr. Straw submitted an amicus brief in the Utah Supreme Court on behalf of another attorney, Doug Bernacchi, who had objected to Utah's imposition of reciprocal attorney discipline based on Indiana's suspension of Mr. Bernacchi's license. The Utah Supreme Court denied Mr. Straw's motion to permit his amicus brief. The Utah Supreme Court explained:

> [I]ndividuals and entities have no entitlement to file documents or pleadings in a case if they are not parties to that case; and Rule 25 of the [Utah] Rules of Appellate Procedure simply allows permissive participation by a non-party when the Court, in its sole discretion, determines that such participation will be beneficial to its review.

App. at 35. In June 2022, the Utah Supreme Court affirmed Mr. Bernacchi's one-year reciprocal suspension.

In January 2022—before the Utah Supreme Court resolved Mr. Bernacchi's appeal—Mr. Straw filed a federal complaint and then an amended complaint against the State of Utah claiming violation of his First and Fourteenth Amendment rights to free speech and to petition the government for redress of grievances via 42 U.S.C. § 1983 and 28 U.S.C. § 2201.[1] The court granted Mr. Straw's motion to proceed in forma pauperis, waiving the filing fee due to Mr. Straw's indigency. However, a magistrate judge determined Mr. Straw lacked standing and ordered him to file a second amended complaint,[2] which he did. Mr. Straw's Second Amended Complaint, filed in August 2022, is the operative complaint in this case. The Second Amended Complaint seeks damages of $1,000,000 and a declaration under 28 U.S.C. § 2201 that the First Amendment requires courts to accept properly filed amicus briefs.

In February 2023, the magistrate judge concluded Mr. Straw's Second Amended Complaint fails to show standing, reasoning:

> All of Mr. Straw's grievances amount to generalized claims of government misfeasance arising out of attorney disciplinary proceedings in Utah. Indeed, Mr. Straw acknowledges he "was not a party to the case and not an

[1] The complaint briefly nods to the Fifth Amendment but, on appeal, Mr. Straw characterizes his claim exclusively as a First and Fourteenth Amendment claim.

[2] There were significant, unexplained delays in screening Mr. Straw's first and second amended complaints under the in forma pauperis statute. Mr. Straw filed his First Amended Complaint in January 2022 , but the magistrate judge did not order him to amend his complaint until August 2022. In the interim, while Mr. Straw was under a court-ordered filing ban barring his various requests to allow service of process and address his claim, the Utah Supreme Court resolved Mr. Bernacchi's appeal. Mr. Straw quickly filed a Second Amended Complaint, but waited almost six more months for a Report and Recommendation from the magistrate judge and another month for a decision from the district court. These delays did not prejudice Mr. Straw because his claim is meritless.

> attorney for Mr. Bernacchi," but he claims standing as "a layperson in Utah who wanted to assist another layperson who was being violated with nonsensical attorney discipline processes." This abstract injury is precisely the type of undifferentiated and generalized grievance about the conduct of government that courts have declined to consider based on standing. Mr. Straw's generalized grievances against Utah attorney disciplinary proceedings . . . are insufficient to establish Article III standing as required for federal jurisdiction.

App. at 43–44 (internal quotation marks and citations omitted). The magistrate judge recommended dismissal. Over Mr. Straw's objection, in March 2023, the district court adopted the magistrate judge's Report and Recommendation and dismissed the complaint for lack of subject matter jurisdiction. The district court also noted that Mr. Straw's complaint was meritless because allowing amicus briefs is within the discretion of appellate courts.

Mr. Straw appealed to this court. He proceeds in forma pauperis under Federal Rule of Appellate Procedure 24(a)(3).

II. DISCUSSION

We first address the district court's jurisdiction, and our own, under Article III of the Constitution. We determine Mr. Straw had standing to sue, but dismissal was proper because Mr. Straw's Second Amended Complaint fails to state a claim on which relief may be granted.

A. Article III Subject Matter Jurisdiction

The district court adopted the magistrate judge's Report and Recommendation to dismiss Mr. Straw's complaint for lack of standing. We disagree that Mr. Straw lacked standing and, evaluating his complaint for mootness on our own impetus, we

conclude the complaint contains a still-live claim over which we may exercise jurisdiction.

Standing and mootness are questions of law reviewed de novo. *Brown v. Buhman*, 822 F.3d 1151, 1168 (10th Cir. 2016). Article III of the Constitution permits federal courts to decide only "Cases" or "Controversies." U.S. Const. art. III, § 2. This requires "a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). Although the primary concern is separation of powers, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013), the case-or-controversy requirement also protects judicial economy, ensuring "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 Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000). The doctrines of standing and mootness aim to ensure there is an Article III "case or controversy" before the court throughout the litigation.[3] *See id.* at 189 ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." (quoting *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 68 n.22 (1997))). "Standing concerns whether a plaintiff's action qualifies as a case or controversy when it is

[3] A third doctrine, ripeness, "aims to prevent courts from entangling themselves in abstract disagreements by avoiding premature adjudication." *Cellport Sys., Inc. v. Peiker Acustic GMBH & Co. KG,* 762 F.3d 1016, 1029 (10th Cir. 2014) (quotation marks omitted).

filed; mootness ensures it remains one at the time a court renders its decision." *Brown*, 822 F.3d at 1163.

The party invoking federal jurisdiction "bears the burden of establishing standing as of the time [it] brought th[e] lawsuit and maintaining it thereafter." *Carney*, 141 S. Ct. at 499 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "Failure to satisfy the requirements of either doctrine places a dispute outside the reach of the federal courts." *Brown*, 822 F.3d at 1164.

1. Standing

The doctrine of standing requires a litigant to "prove [(1)] he has suffered a concrete and particularized injury [(2)] that is fairly traceable to the challenged conduct, [(3)] and is likely to be redressed by a favorable judicial decision." *Carney*, 141 S. Ct. at 498 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013); *Lujan*, 504 U.S. at 560–61). "A party facing prospective [rather than suffering retrospective] injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Standing is evaluated as of the time a case is filed. *See Friends of the Earth*, 528 U.S. at 180; *Brown*, 822 F.3d at 1164. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan*, 504 U.S. at 561. Furthermore, "[b]ecause of the significance of First Amendment rights," the Supreme Court has endorsed a "'lessening of prudential limitations on standing'" in the First Amendment context. *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)).

Mr. Straw's allegations satisfy the requirements for standing. First, he asserts a concrete and particularized injury in the form of a violation of his constitutional rights to freedom of speech and to petition the government for redress of grievances. *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002) (explaining that First Amendment violation is a cognizable injury-in-fact). Second, the injury is traceable to the Utah Supreme Court's rejection of his amicus brief. Finally, the injury was redressable because, at the time the case was filed in January 2022, a declaratory judgment could have resulted in Mr. Straw being permitted to file his amicus brief in Mr. Bernacchi's appeal. *See S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152–53 (10th Cir. 2013) (explaining that, where an amended complaint supersedes an original complaint, standing is determined as of the time the first complaint was filed); *cf. Ward v. Utah*, 321 F.3d 1263, 1269–70 (10th Cir. 2003) (finding standing where declaratory judgment "would likely redress" plaintiff's alleged First Amendment injury). And Mr. Straw had standing to seek retrospective monetary relief for any actual damages he suffered from the alleged constitutional violation. *See PeTA*, 298 F.3d at 1202–03 (explaining that standing for retrospective relief is based on past injuries). Thus, dismissal for lack of standing was not warranted.[4]

[4] The district court's confusion on this issue likely arose from the Second Amended Complaint itself, which focuses as much on the harm of attorney discipline proceedings against Mr. Straw and Mr. Bernacchi as on the alleged First Amendment injury for which Mr. Straw seeks relief in this court: the Utah Supreme Court's refusal to accept Mr. Straw's amicus brief.

2. Mootness

Because the district court dismissed this case under the in forma pauperis statute prior to service of process, the State of Utah has not had occasion to argue mootness, and the district court did not address it. However, we have an independent duty to assure ourselves of our own jurisdiction. *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1274 (10th Cir. 2001).

Recall that the doctrine of mootness ensures a case or controversy exists throughout the proceedings. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71–72 (2013). "In the declaratory-judgment context, the mootness inquiry looks to whether the requested relief will actually alter the future conduct of the named parties." *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1114 (10th Cir. 2016). "[W]here a plaintiff seeks a declaratory judgment against his opponent, he must assert a claim for relief that, if granted, would affect the behavior of the particular parties listed in his complaint." *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011) (citing *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (per curiam) (explaining that a declaratory judgment "will constitute relief . . . if, and only if, it affects the behavior of the defendant toward the plaintiff")). Mr. Straw's request for a declaratory judgment is moot—and was moot when the district court ruled on it—because a declaration of a First Amendment right to file an amicus brief could not result in the Utah Supreme Court accepting Mr. Straw's amicus brief in Mr. Bernacchi's case, nor would it otherwise affect the State of Utah's exercise of its discretion with respect to Mr. Straw's amicus brief.

In contrast, Mr. Straw's request for monetary damages to compensate for the alleged past wrong is not moot. *See Lippoldt v. Cole*, 468 F.3d 1204, 1220 (10th Cir. 2006) (explaining that plaintiffs who show actual injury from a constitutional violation may recover damages under 42 U.S.C. § 1983); *Comm. for First Amend. v. Campbell*, 962 F.2d 1517, 1526–27 (10th Cir. 1992) (explaining mootness of claim for prospective relief did not moot claim for retrospective relief). In reaching this conclusion, we do not consider the underlying merits of Mr. Straw's claim. Rather, we assume Mr. Straw's damages claim is meritorious. *Cf. Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1092–93 (10th Cir. 2006) (en banc) ("For purposes of standing, we must assume the Plaintiffs' claim has legal validity."). We therefore ignore the fact that Mr. Straw does not plead any actual injury that would be compensable by monetary damages or explain how he arrived at the figure of $1,000,000. Accordingly, Mr. Straw's retrospective claim for the deprivation of his First Amendment right is not moot.

Thus, we proceed to evaluate whether dismissal of his claim was appropriate.

B. Dismissal under the In Forma Pauperis Statute

Mr. Straw contends (1) he has a valid constitutional claim under the First and Fourteenth Amendments and (2) the district court improperly dismissed his complaint at the screening stage.[5] We disagree. The district court correctly determined Mr. Straw fails

[5] We have liberally construed Mr. Straw's pro se filings, *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005), interpreting them generously despite Mr. Straw's training as an attorney.

to state a claim on which relief could be granted. As a result, the in forma pauperis statute required dismissal.

1. Failure to State a Claim

The district court correctly determined that Mr. Straw's complaint fails to state a claim upon which relief can be granted. The Utah Supreme Court's refusal to allow and consider his amicus brief did not violate his constitutional rights to freedom of speech and to petition the government for redress of grievances.

"We apply the same standard of review for dismissals under § 1915(e)(2)(B)(ii) that we employ for Federal Rule of Civil Procedure 12(b)(6) motions to dismiss for failure to state a claim." *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). Thus, we "look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Id.* at 1218.

"[T]he right of access to the courts is neither absolute nor unconditional." *Tripati v. Beaman*, 878 F.2d 351, 353 (10th Cir. 1989) (citation omitted) (rejecting First Amendment challenge to filing restrictions); *see also Smith v. Krieger*, 389 F. App'x 789, 799 (10th Cir 2010) (unpublished) (same). Even named parties to litigation, who have a constitutional right to petition the courts for redress of their grievances, may find their First Amendment rights "subordinated to other interests that arise in [a court] setting." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1073 (1991) (quotation marks omitted). When *non*-parties participate as amici curiae, they are not engaged in protected speech but permitted speech. The purpose of an amicus brief is to serve the court, so its acceptance is within the discretion of a court based

on its view of the brief's utility in helping to resolve the issues before it. *See N. Sec. Co. v. United States*, 191 U.S. 555, 555–56 (1903) (explaining a court may allow amicus briefs in the court's discretion); *N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1175–76 (10th Cir. 2021) (same); *Moffat Tunnel Improvement Dist. v. Denver & S.L. Ry. Co.*, 45 F.2d 715, 722 (10th Cir. 1930) (same).[6]

The discretion courts enjoy, and have historically enjoyed, in accepting or rejecting amicus briefs is incompatible with Mr. Straw's claim that the First Amendment required the Utah Supreme Court to accept his amicus brief. We do not foreclose the possibility that refusal of an amicus brief might, in some circumstances, violate a constitutional right, but Mr. Straw has alleged no such circumstances here. Thus, the Second Amended Complaint fails to state a claim on which relief may be granted.

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[6] The Seventh Circuit, which takes a particularly strong view of the courts' discretion to refuse amicus briefs, has explained the justification for accepting amicus briefs on a discretionary basis:

> The judges of this court will [] not grant rote permission to file such a brief . . . . The reasons for the policy are several: judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.

Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., in chambers).

2. Dismissal

Mr. Straw objects to the dismissal of his complaint at the screening stage. But the in forma pauperis statute requires courts to dismiss claims that are "frivolous or malicious," "fail[] to state a claim on which relief may be granted," or "seek[] monetary relief against a defendant who is immune." 28 U.SC. § 1915(e)(2)(B). As relevant here, a court must "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." *Id.* § 1915(e)(2)(B)(ii) (emphasis added). A district court properly dismisses an in forma pauperis complaint based on "an indisputably meritless legal theory." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).[7] Thus, the district court properly dismissed Mr. Straw's complaint under § 1915(e). Dismissal of Mr. Straw's declaratory judgment request was also proper because it was moot, as explained *supra*. *See Jordan*, 654 F.3d at 1023 (explaining that

[7] The Supreme Court has explained Congress's rationale in subjecting in forma pauperis complaints to dismissals at early stages of litigation: it discourages "the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *see also id.* at 326 (pointing to "the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints"); *cf. In re McDonald*, 489 U.S. 180, 184 (1989) (per curiam) ("[P]aupers filing *pro se* [complaints] are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court . . . requires some portion of the institution's limited resources. A part of [a court's] responsibility is to see that these resources are allocated in a way that promotes the interests of justice.").

when a case or controversy ceases to exist the court must dismiss for lack of subject matter jurisdiction).

III. CONCLUSION

We AFFIRM the dismissal.

Entered for the Court

Carolyn B. McHugh
Circuit Judge