09-1910-cv

United States Court of Appeals for the Second Circuit

ROY DEN HOLLANDER, WILLIAM A. NOSAL,

Plaintiffs-Appellants,

v.

INSTITUTE FOR RESEARCH ON WOMEN & GENDER AT COLUMBIA UNIVERSITY, SCHOOL OF CONTINUING EDUCATION AT COLUMBIA UNIVERSITY, TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, ALSO KNOWN AS COLUMBIA UNIVERSITY, U.S. DEPARTMENT OF EDUCATION, RICHARD P. MILLS, IN HIS INDIVIDUAL CAPACITY, COMMISSIONER RICHARD P. MILLS, NEW YORK STATE COMMISSIONER OF THE DEPARTMENT OF EDUCATION, IN HIS OFFICIAL CAPACITY, MARGARET SPELLINGS, U.S. SECRETARY OF EDUCATION IN HER OFFICIAL CAPACITY, PRESIDENT JAMES C. ROSS, PRESIDENT OF THE NEW YORK STATE HIGHER EDUCATION SERVICES CORP., IN HIS OFFICIAL CAPACITY, JAMES C. ROSS, IN HIS INDIVIDUAL CAPACITY, CHANCELLOR ROBERT M. BENNETT, CHANCELLOR OF THE BOARD OF REGENTS, IN HIS OFFICIAL CAPACITY, ROBERT M BENNETT, IN HIS INDIVIDUAL CAPACITY, BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE, IN HIS OR HER OFFICIAL AND INDIVIDUAL CAPACITY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR STATE DEFENDANTS-APPELLEES

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for State Defendants-Appellees
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-6197

BARBARA D. UNDERWOOD
Solicitor General
PETER KARANJIA
Special Counsel to the Solicitor General
PATRICK J. WALSH
Assistant Solicitor General of Counsel

Dated: December 14, 2009

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (CONTINUED)

PAGE

TABLE OF AUTHORITIES

CASES PAGE

TABLE OF AUTHORITIES (CONTINUED)

CASES PAGE

TABLE OF AUTHORITIES (CONTINUED)

CASES **PAGE**

STATUTES

TABLE OF AUTHORITIES (CONTINUED)

REGULATIONS **PAGE**

PRELIMINARY STATEMENT

In this putative class action, plaintiff-appellant Roy Den Hollander, an alumnus of Columbia University, seeks an injunction barring Columbia from offering a Women's Studies Program, and enjoining federal and state funding of Columbia, on the theory that Women's Studies propagates "Feminism," which plaintiff characterizes as a "modern-day religion," in violation of the Establishment Clause of the Constitution.[1]

According to plaintiff, Women's Studies propagates the belief "that females are divine princesses and men the minions of Satan" (Joint Appendix ["JA."] 14). He seeks an order banishing the discipline from the curriculum or, in the alternative, requiring Columbia to introduce a formal program in "Men's Studies" (JA. 45-46). Plaintiff claims that such a program would train men "to recognize and handle the powers females often use to manipulate them, such as the male-paralyzing power of beauty, sexual power, verbal skills, victim power, and the male biological instinct to protect females at the price of harm to himself" (JA. 40).

---

[1] Plaintiff William A. Nosal appears to have withdrawn from this action, at least insofar as he purported to act as a class representative. *See* Pl. Br. at 1; see also n.6, *infra*.

Proceeding as a *pro se* attorney, plaintiff contends that the defendants have violated his constitutional rights and discriminated against him by supporting Women's Studies at Columbia. In addition to suing various entities associated with Columbia, together with the United States Department of Education, plaintiff has named as defendants the Board of Regents of the University of the State of New York ("Regents") and its Chancellor; the New York State Commissioner of the Department of Education; and the President of the New York State Higher Education Services Corporation (collectively, the "State defendants"). Plaintiff alleges that the State defendants have violated: 1) the Establishment Clause of the First Amendment "by aiding and advancing the modern-day religion of Feminism" at Columbia; and 2) the Equal Protection Clause of the Fourteenth Amendment, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, "by fostering, supporting and assisting the intentional discriminatory impact against men by Columbia's . . . Women's Studies program" (JA. 13).

In an April 30, 2009 Judgment and an accompanying April 23, 2009 Order, the United States District Court for the Southern District of New

York (Kaplan, J.) affirmed the report and recommendation of a magistrate judge, dismissing the suit for lack of standing. The court also dismissed the Establishment Clause claims on the alternative ground that "they are absurd and utterly without merit," noting that "[feminism] is no more a religion than physics, and at least the core of the complaint therefore is frivolous" (JA. 49).

The district court's dismissal should be affirmed because plaintiff lacks standing, as the court held. In addition, plaintiff's claims fail on the merits. "Feminism" is not a religion for Establishment Clause purposes, and even if it were, settled case law establishes that the State defendants' approval of degree programs and provision of financial aid to universities or students on neutral, secular terms does not violate the Establishment Clause. Finally, plaintiff's Equal Protection and Title IX claims fail, because he does not allege that the State defendants have engaged in any discriminatory conduct or policies. The State defendants do not determine the substance of any academic programs taught at Columbia, and while plaintiff may disagree with "feminism," as he understands it, he has not

alleged that any state action has deprived him of an opportunity available to women.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331. As we explain below, however, the district court lacked subject matter jurisdiction over this suit because plaintiff lacks standing to assert his claims. This Court has appellate jurisdiction under 28 U.S.C. § 1291, because this is an appeal from the district court's final judgment, entered on April 30, 2009. Plaintiff filed a notice of appeal on May 1, 2009 (JA. 61).

ISSUES PRESENTED FOR REVIEW

1. Does plaintiff have standing to bring this action where (a) he does not allege that he has ever taken a course in Women's Studies at Columbia, nor that he was prevented from enrolling in a such a course, and (b) he alleges no concrete and particularized harm stemming from Columbia's failure to offer a course in "Men's Studies"?

2. Is feminism a "religion" for Establishment Clause purposes and, if so, has the State acted with the purpose or effect of favoring the religion of feminism in its registration of educational programs and its provision of financial aid to educational institutions based on secular and neutral criteria?

3. Has plaintiff alleged sufficient facts to establish claims against the State defendants under the Equal Protection Clause and Title IX, where he identifies no state practice or policy that in any way discriminates on the basis of sex?

STATEMENT OF THE CASE

A. The Amended Complaint[2]

1. Plaintiff's Characterization of Feminism as a Religion, and His Allegations of Harm

Plaintiff Den Hollander ("plaintiff") claims that Columbia's program in Women's Studies harms him because it advocates feminism, which he equates with "the Nazification of universities in Germany during the

[2] The facts are taken from the Amended Complaint, and are assumed to be true, but only for purposes of this appeal.

1930s" (JA. 38). He alleges that "Feminist storm-troopers" are trained at Columbia to "propagandiz[e] the superiority of females," and that this training teaches women "to use tears, tantrums, fraud, threats of an unjust legal system, and sex to take advantage of men" (JA. 38, 43). Although plaintiff is unable to identify a single proponent of feminism who describes it as a "religion," he nonetheless characterizes it as one, because, in his view, it operates as a comprehensive, moral and ethical belief system, inculcates beliefs "based on teachings of certain prophet-like individuals, such as Betty Friedan," and reveres "a pantheon of idols, such as Mary Wollstonecraft" (JA. 13-15). Plaintiff also finds evidence of the religiosity of feminism in his allegation that it causes female followers to act against their self-interest by alienating men, "with the result that Feminists often wake up in the middle of the night crying because they are alone" (JA. 14).

Plaintiff contends that Columbia's propagation of this religion "demonizes men," like plaintiff himself, causing them to feel that they are "the inferior sex," and tramples their pride "under [its] boot-heel" (JA. 24-25). In addition, he claims that the Women's Studies program offers

special educational and networking opportunities to women, giving female students at Columbia "an exclusive opportunity over their male counterparts in the University and society" akin to a "a golf-like handicap in America" (JA. 34). Plaintiff does not allege, however, that he ever enrolled in courses in Women's Studies at Columbia, or was denied the opportunity to enroll in such courses as a result of his gender.

Plaintiff also alleges that he is harmed by the absence of a formal program in Men's Studies at Columbia (JA. 34-36, 39-43). He alleges that, as a Columbia alumnus, he would enroll in Men's Studies courses if they were available, both for general enlightenment and for use in the lawsuits he files to fight "for the rights of men" (JA. 39).[3] According to plaintiff, such courses would counter feminism, and would offer instruction on such diverse matters as the "connivance of domestic relations courts with Feminist groups to . . . throw fathers into the street like bags of garbage";

---

[3] This suit is not the only one. *See, e.g.*, *Hollander v. United States*, No. 08-6183cv, 2009 WL 4350252, at *1 (2d Cir. Dec. 3, 2009) (Unpublished Summary Order) (affirming dismissal of lawsuit challenging Violence Against Women Act); *Hollander v. Copacabana Nightclub*, 580 F. Supp. 2d 335 (S.D.N.Y. 2008) (dismissing action challenging "Ladies' Night" promotions by nightclubs); *see also* http://www.roydenhollander.com (plaintiff's website, describing litigation).

the theory that, among the elderly, "caretaker wives are most likely to abuse their older, sicker husbands"; and the notion that there is value in a man's contribution to the family through manual activities such as "raking the lawn" and "hanging paintings" (JA. 40-42).

2. Plaintiff's Claims Against the State Defendants

Based on his theory that feminism is a religion, plaintiff brings three claims against the State defendants, asserting that they have violated the Establishment Clause, and discriminated against him in violation of his constitutional rights to equal protection, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

Plaintiff claims that the Regents and the State Department of Education have illegally advanced the religion of feminism by registering and approving Women's Studies as a degree program at Columbia, and by providing Columbia with state aid, commonly known as "Bundy Aid," under New York Education Law § 6401 (JA. 17-20).[4] He also claims that

[4] Plaintiff initially named as defendants Robert M. Bennett, as Chancellor of the Regents, Richard P. Mills, as Commissioner of the State Department of Education, and James C. Ross, as President of the New York State Higher Education Services Corporation. Pursuant to

the State has violated (and continues to violate) the Establishment Clause because the New York State Higher Education Services Corporation ("HESC") provides loan guarantees, grants and scholarships to individual students, some of whom elect to attend Columbia, thereby passing these benefits into Columbia's coffers (JA. 21). He alleges that these programs, as well as the Regents' statewide plans and policies, in effect, "requir[e] Women's Studies programs in higher education in New York" (JA. 15), and thereby encourage a "sectarian religious view" in violation of the principle of neutrality under the Establishment Clause (Pl. Br. at 25).

Plaintiff's Equal Protection and Title IX allegations are based upon the premise that feminism and Women's Studies at Columbia discriminate against men, treating them "as the disposable sex . . . as though they were capitalists attending Moscow State University in the former Soviet Union" (JA. 23). Although plaintiff fails to identify any specific instances when he was deprived of an opportunity that was accorded to a female student or alumna of Columbia, he broadly alleges that women are favored at Columbia in terms of educational, career and networking opportunities,

---

F.R.A.P. § 43(c)(2), the successors of these officials have been automatically substituted as parties, as the corrected caption reflects.

and through the "instillation of pride and self-respect" conferred upon women by feminism (JA. 25, 33-36). According to plaintiff, by creating, approving and funding Women's Studies, the State is responsible for creating this inequitable treatment (JA. 25).

B. Statutory Background and the Role of the State Defendants

All institutions of higher education in New York State, whether public or private, are part of the University of the State of New York, and must comply with its rules and other applicable laws. *See* New York Education Law ("Educ. Law") § 214.

The Regents of the University of the State of New York were created in 1784 to "encourage and promote education, to visit and inspect [the University's] several institutions and departments, to distribute to or expand or administer for them such property and funds as the state may appropriate therefor or as the university may own or hold in trust or otherwise." *Id.* § 201. The Regents appoint a Commissioner of Education who is "charged with the general management and supervision of all public schools and all of the educational work of the state, including the

operations of The University of the State of New York." *Id.* § 101. While the Regents have broad power to "exercise legislative functions concerning the educational system of the state," they are prohibited from modifying "in any degree the freedom of the governing body of any seminary for the training of priests or clergyman to determine and regulate the entire course of religious, doctrinal or theological instruction to be given in such institution." *Id.* § 207. Thus, although the Regents have regulatory authority over explicitly religious educational institutions, they have no authority to judge the correctness of any religious teaching. *See Matter of Warder v. Bd. of Regents*, 53 N.Y.2d 186 (1981) (denial of charter to seminary upheld only when based on finding of secular, academic deficiencies)

One of the significant responsibilities delegated to the Regents is the power to "register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in this state." Educ. Law § 210. Pursuant to this authority, the Regents have established requirements for

undergraduate and graduate degrees. *See* 8 N.Y.C.R.R. § 3.47. The basic requirement is that "[n]o earned undergraduate or graduate degree shall be conferred unless the applicant has completed a program registered by the [State Department of Education]." *See id.* § 3.47(a)(1). The Regents have established standards governing eligibility of students to pursue undergraduate or graduate degrees, *see id.* § 3.47(a)(2), and general standards applicable to all registered undergraduate and graduate degrees, *see id.* § 3.47(c), (d). Currently, the Regents have registered 150 different degree programs that may be offered by qualifying institutions, including twenty in explicitly religious subjects, ranging from an S.M.B. degree for a Bachelor of Sacred Music, to an S.T.D. degree for a Doctor of Sacred Theology. *See id.* § 3.50 (listing registered degrees).

"[E]very curriculum creditable toward a degree offered by institutions of higher education" in New York State must be registered with the State Department of Education.[5] *See id.* § 52.1(a)(1). Acting

[5] While all courses offered must be "part of a registered curriculum," individual courses are not themselves registered. *See id.* § 52.1(f); *see also id.* § 52.2 (describing registration standards). The educational institution must describe courses offered in writing and state their subject matter and requirements. *See id.* § 52.2(c)(1).

under authority delegated by the Regents, the Commissioner has set standards for the registration of undergraduate and graduate curricula. *See id.* § 52.2. The Commissioner's standards address such objective criteria as: (1) financial resources and physical plant and equipment, *id.* § 52.2(a); (2) sufficiency of trained faculty, *id.* § 52.2(b); (3) minimal amounts of full-time equivalent study with available course selections, *id.* § 52.2(c); and (4) various other requirements concerning admission to programs of study and administration, *id.* § 52.2(d)-(f). "Registration or reregistration of a curriculum may be denied if the commissioner finds that curriculum, or any part thereof, not to be in compliance with statute or this Title." *Id.* § 52.2(l).

The Commissioner and the Regents can (and do) refuse to register proposed degree programs if they fail to meet these secular, religion-neutral academic criteria. *See Moore v. Bd. of Regents*, 44 N.Y.2d 593 (1978) (denying registration for Ph.D. programs in English and History at the State University of New York at Albany for insufficient faculty resources); *Matter of Warder*, 53 N.Y.2d at 186 (denying charter to seminary for secular academic deficiencies).

In addition to its authority to approve degree programs, the State Department of Education provides state aid, known as "Bundy Aid," to qualifying non-profit colleges and universities. *See* Educ. Law § 6401; *Excelsior College v. N.Y. State Educ. Dep't*, 306 A.D.2d 675, 676 (3d Dep't 2003). Such awards are granted without regard to academic program substance, instead being based upon the number and type of earned degrees awarded. *See* Educ. Law § 6401.

HESC is an educational corporation and an agency of the State of New York created to administer the State's financial aid programs and the Federal Family Education Loan Program ("FFELP"). *See* Educ. Law § 652(2)(a)-(c), 20 U.S.C. § 1071 *et seq.* HESC guarantees higher education loans made by private lenders under FFELP to New York State residents or to persons attending colleges or vocational schools in the State. *See* Educ. Law § 680(1)(b); 20 U.S.C. § 1085(j). HESC also administers programs providing direct grants of financial aid to students. *See* Educ. Law §§ 666-669 (general awards), 670-679 (performance-based awards). All of these grants and loans are made to individual students, who may use the proceeds to attend any eligible institution of higher

education and take any course of instruction approved for that institution. *See* Educ. Law § 661.

C. The Order Below

Upon motions to dismiss filed by all defendants, a magistrate judge (Fox, M.J.) issued a Report and Recommendation recommending that the complaint be dismissed for lack of standing (JA. 50-59). The Report explained that plaintiffs Den Hollander and Nosal had not alleged an "injury in fact," since they failed to allege that they had enrolled in Women's Studies courses at Columbia, thereby suffering direct injury from firsthand exposure to their content, nor had they alleged that they were discriminated against by being denied the opportunity to enroll in such courses (JA. 57-58). The magistrate judge found that, at most, the plaintiffs had alleged a "subjective" injury, rather than an "injury in fact," and that "exercising judicial authority over this case would 'convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders'" (JA. 58) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 473

(1982)). The magistrate further noted that to the extent the plaintiffs alleged an injury based on the absence of Men's Studies at Columbia, such injury is not "concrete and particularized," but rather, is "conjectural or hypothetical" (JA. 58) (citing *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 160 (2d Cir. 2003)).

The district court affirmed this dismissal for the same reasons, and, in the alternative, dismissed the claims on the merits. The court noted that "[t]he Establishment Clause claims . . . are absurd and utterly without merit," for "[f]eminism is no more a religion than physics, and at least the core of the complaint is therefore frivolous" (JA. 49). Den Hollander and Nosal filed a notice of appeal (JA. 60), but only Den Hollander has challenged the decision below in his brief on appeal.[6]

[6] Although Den Hollander's brief is submitted on behalf of "plaintiffs-appellants" (Br. at 61), it notes that "since the filing of this appeal, Mr. Nosal has withdrawn as a class representative" (*id.* at 1), and alleges standing only on behalf of Den Hollander himself (*see id.* at 24, 26-31). Thus, to the extent that Nosal is participating in this appeal in his capacity as a named plaintiff (but not a class representative), his claims have been abandoned.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint under Rules 12(b)(1) and 12(b)(6). *See Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997).

Where, as here, the defendants have moved to dismiss for lack of standing, the plaintiff bears the burden of demonstrating that the Court has subject matter jurisdiction over the suit. *See Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 175 (2d Cir. 2006). In considering a motion to dismiss for lack of subject matter under Fed. R. Civ. P. 12(b)(1), "federal courts need not accept as true contested jurisdictional allegations[;] [r]ather, a court may resolve disputed jurisdictional facts by referring to evidence outside the pleadings. *Jones v. Astrue*, 526 F. Supp. 2d 455, 458 (S.D.N.Y. 2007).

To avoid dismissal for failure to state a claim under Rule 12(b)(6), a complaint must "state a claim to relief that is *plausible on its face*." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("only a complaint that states a plausible claim for relief survives a motion to dismiss."). This

standard "demands more than unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949 (2009) (citing *Twombly*, 550 U.S. at 555).

SUMMARY OF ARGUMENT

The court below correctly held that plaintiff lacks standing to bring his claims. Plaintiff has alleged no actual or imminent injury, instead objecting to the values and ideas that he associates with feminism. He has not alleged that he ever enrolled in courses in Women's Studies at Columbia, or that he has been denied the opportunity to enroll in such courses. To the extent that plaintiff complains of harm stemming from what he characterizes as a pervasive culture of feminism at Columbia, his conclusory and implausible allegations are insufficient to withstand a motion to dismiss, and the amorphous harm he alleges does not satisfy the requirement that it be concrete and sufficiently particularized. Plaintiff's contention that he is harmed by the unavailability of Men's Studies at Columbia, because he might wish to enroll in such courses at some unspecified date in the future, similarly is the type of speculative injury

that does not confer standing. Finally, plaintiff has not alleged any facts establishing that he satisfies the narrow exception available for taxpayer standing.

Even if plaintiff had standing, his complaint fails on the merits. Feminism is not a religion for Establishment Clause purposes, and plaintiff does not identify any supporters of Women's Studies, or advocates of feminism, who would so characterize it. In any event, the State's approval and registration of degree programs, and provision of financial aid to Columbia and individual students based on neutral, secular criteria, does not violate the Establishment Clause.

Finally, plaintiff's equal protection and Title IX claims fail because he has not identified any state statute, regulation or policy that discriminates based on sex. He has also failed to identify any state action that even arguably discriminates against men. Plaintiff has not been denied or excluded from any opportunity available to women based on his sex.

ARGUMENT

POINT I

PLAINTIFF LACKS STANDING

The decision below should be affirmed on the threshold ground that plaintiff lacks standing to bring this action.[7]

A "case or controversy" under Article III of the United States Constitution is an essential prerequisite to the jurisdiction of the federal courts. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). "At an irreducible minimum," Article III requires that a plaintiff demonstrate (1) an actual or threatened injury, which is (2) fairly traceable to "'the putatively illegal conduct of the defendant,'" and (3) "'likely to be redressed by a favorable decision.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (citation omitted). This "injury-in-fact" must be "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004)

---

[7] To the extent that Nosal is still a party to this case, he has not challenged on appeal the correctness of the trial court's conclusion that he lacks standing. See note 6, *supra*.

("abstract injury is not enough; rather, 'the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical"'") (citation omitted). Courts refrain from exercising jurisdiction "which would convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Valley Forge Christian Coll.*, 454 U.S. at 473 (quotation marks omitted).

> Were the federal courts merely publically funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Article III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

Id.

Plaintiff's complaint alleges no actual or imminent injury, but rather, asserts precisely the type of "public grievances" — in this case, plaintiff's opposition to the ideas he associates with feminism and Women's Studies — that are insufficient to confer standing. While he complains that Women's Studies courses seek "to impose a unitary belief system of Feminist orthodoxy," which leads to sex-based stereotyping of males by depicting them as "the primary cause for most, if not all, the world's ills"

(JA. 22), plaintiff does not allege that he has ever taken a Women's Studies course at Columbia and thus has suffered any harm from being exposed to such instruction. Nor does he allege that he was prevented from enrolling in a Women's Studies course, or was otherwise denied an opportunity to express his objections to feminism. He asks the federal courts to ban Women's Studies, not because the program has caused him any cognizable injury, but because it offends his values and beliefs. But this type of abstract injury, seeking vindication of personal values in the forum of a federal court, does not confer Article III standing. *Valley Forge Christian Coll.*, 454 U.S. at 473.

Insofar as plaintiff recasts the harm he has suffered as resulting from a pervasive culture of feminism throughout Columbia (JA. 13-16, 44), such harm is equally diffuse and abstract, and no different from the harm that any male students at Columbia — or their innumerable predecessors, not to mention the multitude of other persons who "come into contact with" Columbia (Pl. Br. at 8) — would suffer under plaintiff's theory of the case.[8]

---

[8] Plaintiff's allegations of harm are particularly implausible given that much of this harm appears to have occurred well over a decade ago. *See* http://www.roydenhollander.com (attaching plaintiff's resume, which states that he attended Columbia from 1995-97); Pl. Br. at 26

Nor do conclusory allegations that plaintiff has been harmed by publications that Columbia circulates to its alumni (*see* Pl. Br. at 27) withstand a motion to dismiss, particularly where plaintiff's theory of harm is, on its face, wholly implausible. *See Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 570.

Plaintiff's theory that he is injured by the lack of a formal program in "Men's Studies" fares no better. Plaintiff claims that, as a Columbia alumus, he would enroll in continuing education courses in Men's Studies, if such a formal program existed. But it is unclear from his complaint how his status as an alumnus differentiates him from anyone else who might theoretically seek to participate in continuing education courses at Columbia. *See Lujan*, 504 U.S. at 560, 564 (requiring a "particularized" harm). Moreover, the possibility that he might one day take courses in a continuing education program at Columbia is exactly the type of speculative harm that does not satisfy standing requirements. *See id.* (allegation that plaintiffs might "some day" visit the habitat of endangered species did not constitute injury that would support standing to challenge

---

(recounting plaintiff's confrontations with "unwelcome and offensive Feminist orthodoxy" while he was a student at Columbia).

regulation). In short, Columbia's failure to offer a course that replicates plaintiff's personal values and beliefs creates no cognizable injury, and ignores the reality that students are exposed to non-feminist perspectives in numerous other courses at Columbia (*see* JA. 40-43) .

Plaintiff attempts to compensate for his failure to establish an injury-in-fact by relying on taxpayer standing. *See* Pl. Br. at 20-25. But, "[a]s a general matter, the interest of a . . . taxpayer in seeing Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 599 (2007). The Supreme Court has held that the exception to this general rule in the Establishment Clause context is "narrow," as plaintiff concedes (*see* Pl. Br. at 21), and requires a plaintiff to show (1) a logical link between his taxpayer status and the type of legislative enactment attacked, and (2) a nexus between that status and the nature of the alleged constitutional infringement. *Hein*, 551 U.S. at 602 (*citing Flast v. Cohen*, 392 U.S. 83 (1968)).[9] Specifically, the plaintiff must show "a measurable appropriation

[9] The exception to the general rule against taxpayer standing is in fact so narrow that, in *Hein*, Justice Kennedy's concurring opinion

or disbursement of [state] funds *occasioned solely by* the activities complained of." *See Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952) (emphasis added); *see also Altman v. Bedford Cent. School Dist.*, 245 F.3d 49, 74 (2d Cir. 2001) (plaintiff must show measurable loss of revenue resulting from challenged activities for taxpayer standing).

In this case, plaintiff has established no such link. As is explained below (see pp. 29-32, *infra*), the only funds implicated here are (1) those guaranteed by HESC and awarded to students to fund their educations at their chosen institutions, and (2) Bundy Aid, which is given to educational institutions based on the number of degrees awarded. Thus, plaintiff has shown no measurable appropriation of State funds "occasioned solely by," *Doremus*, 342 U.S. at 434, the existence of Women's Studies at Columbia. The disbursements complained of would be offered even if the Women's Studies program did not exist, and plaintiff has not alleged otherwise. Accordingly, his reliance on taxpayer standing is unavailing.

---

noted that the majority had essentially overruled *Flast v. Cohen*, the case that establishes the exception. *See Hein*, 551 U.S. at 628-32 (Kennedy, J., concurring).

POINT II

THE STATE DEFENDANTS HAVE NOT VIOLATED THE ESTABLISHMENT CLAUSE

Even if plaintiff had standing to raise his objections to feminism and Women's Studies in federal court, the State has not violated the Establishment Clause. "The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002). But, first, feminism is not a "religion" for Establishment Clause purposes. Second, even if feminism were a religion, the State's application of religion-neutral regulations to approve and register degree programs, award Bundy Aid, and provide grants and loan guarantees to students for educational purposes, does not have the purpose or effect of establishing such a religion.

A. Feminism is Not a Religion For Establishment Clause Purposes.

The Supreme Court has long held that the protections of the First Amendment apply to religion, and not secular belief systems. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous or admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief"). While this Court has applied a flexible and subjective approach, which focuses on the perspective of the believer, when defining religion in Free Exercise cases, *see, e.g., Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (focusing on the believer's inward attitudes toward her belief system in the Free Exercise context), it has adopted a narrower, objective approach when determining what constitutes a religion in Establishment Clause cases, *see U.S. v. Allen*, 760 F.2d 447, 450 (2d Cir. 1985) (adopting, for Establishment Clause purposes, "the conventional, majority view, rather than appellants' view, of what is religious and what is political").

In *Allen*, protesters who were opposed to nuclear weapons claimed that a religion of "nuclearism" exists, and that its adherents believe that "the bomb is the new source of salvation," and nuclear weapons are "sacred objects." *Id.* at 449. After staging a protest in which they vandalized a military B-52 bomber, the protesters were convicted under a statute criminalizing intentional damage to government property. They argued that the statute violated the Establishment Clause by having the purpose and primary effect of protecting nuclear weapons, and advancing the religion of "nuclearism." *Id.* at 450. This Court had little difficulty in rejecting the claim. Eschewing the protesters' broad, subjective definition of religion in favor of an objective approach, the Court emphasized that the protesters had asked it "to recognize as a 'religion' what that religion's alleged adherents have not identified as such." *Id.* Such an approach, the Court noted, would render all manner of humane government programs constitutionally suspect. *Id.* (citing L. Tribe, *American Constitutional Law* 827-28 (1978)).

Plaintiff's claims here present precisely the same problems; indeed, they would render constitutionally suspect innumerable academic

programs across the Nation. Like the protesters in *Allen*, plaintiff invites this Court to identify "feminism" as a religion for Establishment Clause purposes, based on his subjective — and highly idiosyncratic — perceptions of a school of thought to which he does not even subscribe. Plaintiff does not claim (and cannot plausibly claim) that any persons who identify themselves as feminists, or supporters of Women's Studies at Columbia, would describe feminism as a "religion." *Cf. id.*, 760 F.2d at 450 ("appellants ask us to recognize as a 'religion' what that religion's alleged adherents have not identified as such. . . . [T]he new religion's 'believers' would likely reject this interpretation of their beliefs and actions."). Feminism is no more a religion under the Establishment Clause than is "nuclearism," *see id.*, or "physics," *see* JA. 49.[10]

[10] Plaintiff suggests that the court below erred in failing to take evidence on whether feminism is a religion (Pl. Br. at 14), but overlooks that this Court rejected a similar argument in *Allen*, where the protesters "contend[ed] they should at least have had an evidentiary hearing on the issues of whether 'nuclearism' is a religion and whether the application of the property protection statute lends support to that religion in violation of the establishment clause." 760 F.2d at 499.

B. The State's Approval of Academic Programs and Provision of Aid to Columbia and Students on Purely Secular Grounds Does Not Violate the Establishment Clause.

Even if feminism were a religion under the Establishment Clause, none of the State's secular activities in registering academic programs, or providing students with financial aid violates the Establishment Clause. To survive an Establishment Clause challenge, government practices must (1) "have a secular legislative purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) not foster government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see also Altman*, 245 F.3d at 75.

In applying the first prong of *Lemon*, courts ask "whether the government's actual purpose is to endorse or disapprove of religion." *Id.* (citation omitted). Here, plaintiff has made no plausible and non-conclusory allegations that, in applying the statute and regulations governing the registration of academic programs and awards of aid to students and educational institutions, the State has acted with the purpose of favoring religion. To the contrary, the State engages in these activities without regard to religion, approving and disapproving both

secular and religious programs, and providing Bundy Aid and loan guarantees to individual students without regard to their religious affiliation (see pp. 13-14, *supra*).

Nor do any of these activities have the "effect"of advancing religion. Such a forbidden effect under *Lemon* occurs only when the government itself has advanced religion through its own activities or influence. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987). Because the State uses criteria that have nothing to do with religion when evaluating academic registration (see pp. 10-13, *supra*), and because innumerable programs and courses are approved under these secular and neutral criteria, the State does not advance feminism by approving Columbia's degree programs. Indeed, the State does not even review the substance of Columbia's Women's Studies program, or any other program for that matter. See pp. 12-13, *supra.*

Nor is there any improper effect of favoring religion under the case law addressing the government's provision of financial aid to sectarian institutions that teach explicitly religious subject matter. *See Mitchell v. Helms*, 530 U.S. 793, 808 (2000) (inquiring whether such funding defines

its recipients with respect to religion or results in religious indoctrination by the government); *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (same). Bundy Aid is distributed to any qualifying institution, based solely on the number and type of degree awarded. *See* Educ. Law § 6401(3). The religious affiliation of the institution is irrelevant. And because students themselves determine where to attend school, and what to study, the State plays no role in their "indoctrination" in feminism.

For the same reason, where the government provides financial aid on neutral terms to a citizens who, in turn, direct that aid to religious schools wholly as a result of their genuine and independent private choice, the Establishment Clause is not violated. *See Zelman*, 536 U.S. at 652. For this reason, HESC does not violate the Establishment Clause by administering programs providing financial aid to students, who then make their own independent choices regarding which schools to attend, and which courses to take.

Finally, there is no "danger of excessive entanglement" in religion where, as here, the State applies religion-neutral criteria in approving Columbia's degree programs. Similarly, because Bundy Aid is given to

any qualifying institution, and loan guarantees and grants are offered to any qualifying students, without regard to religion, no concerns about improper entanglement arise.

POINT III

THE STATE DEFENDANTS HAVE NOT DISCRIMINATED AGAINST PLAINTIFF BASED ON HIS SEX

Finally, plaintiff fails to state a claim under the Equal Protection Clause and Title IX on the theory that the State defendants have discriminated against men by providing financial support to Columbia and approving its academic programs.

With respect to Equal Protection, plaintiff identifies no government practice or policy that in any way discriminates on the basis of sex. All the statutes and regulations cited by plaintiff are neutral with regard to sex.[11] Likewise, the Amended Complaint identifies no action taken by any State defendant involving the discriminatory application of neutral policies.

[11] Although the plaintiff identifies a 1993 Regents policy statement, "Equity for Women in the 1990s," in his complaint, and other similar policy statements, none of these statements or plans make any reference to Women's Studies.

While plaintiff details the extent to which he feels personally aggrieved by feminism and Women's Studies, he does not identify any state action that singles out any person based on gender.

Plaintiff's Title IX claim is equally defective on its face. Title IX provides that no person shall, on account of sex, be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance . . . ." 20 U.S.C. § 1681(a). But plaintiff has not been excluded from, denied the benefit of, or subjected to discrimination in, a Women's Studies course. And nothing in the text of Title IX, or in any applicable case law, requires Columbia to offer a program of study that accords with his value system.

CONCLUSION

For all of the foregoing reasons, the judgment and decision below should be affirmed.

Dated: New York, New York
December 14, 2009

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Respondent

BY: _____
PATRICK J. WALSH
Assistant Solicitor General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-6197

BARBARA D. UNDERWOOD
Solicitor General

PETER KARANJIA
Special Counsel to the Solicitor General

PATRICK J. WALSH
Assistant Solicitor General
of Counsel

Reproduced on Recycled Paper

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, PATRICK J. WALSH, Assistant Solicitor General in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,448 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

PATRICK J. WALSH

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: Hollander v. Institute for Research on Women and Gender

DOCKET NUMBER: 09-1910-cv

I, (please print your name) Caitlin Campbell, certify that I have scanned for viruses the PDF version of the attached document that was submitted in this case as an email attachment to

- ☐ <agencycases@ca2.uscourts.gov>.
- ☐ <criminalcases@ca2.uscourts.gov>.
- ☑ <civilcases@ca2.uscourts.gov>.
- ☐ <newcases@ca2.uscourts.gov>.
- ☐ <prosecases@ca2.uscourts.gov>.

and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used VirusScan Enterprise 8.0.0

If you know, please print the version of revision and/or the anti-virus signature files _____

(Your Signature)_____

Date: 12/14/2009

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CAITLIN E. CAMPBELL, being duly sworn, deposes and says:

(1) I am over eighteen years of age and an employee in the office of Andrew M. Cuomo, Attorney General of the State of New York, attorney for State appellees herein.

(2) On the 14th day of December, 2009, I served the attached Brief in the following manner:

(i) two copies by overnight; and

(ii) one PDF copy via electronic mail.

(3) I served the above-referenced document upon the following named person:

Jean-David Barnea Esq.
United States Attorney`s Office
for the Southern District of New York
86 Chambers St.
New York, NY 10007
Jean_David.Barnea@usdoj.gov

Roy Den Hollander Esq.
Attorney at Law
545 East 14th Street
New York, NY 10009
RDHHH@yahoo.com

Robert D. Kaplan Esq.
Friedman Kaplan Seiler & Adelman LLP
1633 Broadway
New York, NY 10019
rkaplan@fklwa.com

_____
Caitlin E. Campbell

Sworn to before me this
14th day of December, 2009

_____
Assistant Solicitor General