09-1910-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Roy Den Hollander and William A. Nosal, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

--against--

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; U.S. Department of Education; Margaret Spellings, U.S. Secretary of Education in her official capacity; Board of Regents of the University of the State of New York, in his or her official and individual capacity; Chancellor of the Board of Regents, Robert M. Bennett, in his official and individual capacity; New York State Commissioner of the Department of Education, Richard P. Mills, in his official and individual capacity; and President of the New York State Higher Education Services Corp., James C. Ross, in his official and individual capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

(Counsel on inside)

Attorney for Defendants-Appellees

Board of Regents of the University of the State of New York, Chancellor Robert M. Bennet; New York State Dep't of Education, Commissioner Richard P. Mills; New York State Higher Education Service Corp., President James C. Ross,

Clement John Colucci, Esq.
Patrick Walsh, Esq.
New York State Department of Law
120 Broadway
New York, N.Y. 10271
(212) 416-8634

Attorneys for Defendants-Appellees

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,

Robert D. Kaplan Esq.
Friedman Kaplan Seiler & Adelman LLP
1633 Broadway
New York, N.Y. 10019
(212) 833-1104

Attorney for Defendants-Appellees

U.S. Department of Education, Secretary Margaret Spellings,

Jean-David Barnea Esq.
United States Attorney's Office
Southern District of New York
86 Chambers Street
New York, N.Y., 10007
(212) 637-2679

Attorney for Plaintiffs-Appellants

Roy Den Hollander and William Nosal, on behalf of themselves and all others similarly situated,

Roy Den Hollander, Esq.
Attorney at Law
545 East 14th Street, 10D
New York, N.Y. 10009
(917) 687-0652

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PRELIMINARY STATEMENT

This case is about the demise of the marketplace of ideas through the institution of a religious-type belief-system that results in the lack of equal treatment for men brought about by those in government and education who can only countenance one brand of thinking, one brand of belief, and one brand of speech—their own.

State and Federal officials and Columbia University have created a climate of intolerance that effectively bans beliefs, concepts, and facts inconsistent with Feminist dogma. The winds of a cult-like conformity blow through the abandoned marketplace of ideas when government and centers of learning believe they have discovered the one and only true doctrine. Believers benefit and are encouraged to speak while dissenters are silenced and denied opportunities for advancement.

In such a climate, the devotees of the Feminist faith audaciously declare themselves the true facilitators of education, when in reality they are fostering an Orwellian absurdity where authority proclaims all beliefs equal but theirs more equal than others. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960).[1]

[1] Politically-correct intolerance also led the attorneys for the State and Columbia to personally denigrate the Class Representative through selective and edited quotations from the Amended Complaint while engaging in hackneyed efforts to re-write the pleading so as to ignore its merits.

ARGUMENTS

1. The lower court's failures to follow the requirements of Rules 12(b)(1) & 12(b)(6) are reversible errors.

This is an appeal of the dismissal of all the claims pursuant to Fed. R. Civ. P. 12(b)(1). The lower court apparently also dismissed the Establishment Clause claims under Rule 12(b)(6). The dismissal under the two rules raises the question that if standing was lacking, then the lower court did not have jurisdiction to make a decision on the merits to dismiss for failure to state a claim. Regardless, under both rules the allegations in the Amended Complaint, which are considered true along with all reasonable inferences in support of them, are the focus of this Court's review—not the defendants' re-writing of the allegations, postulating inferences favorable to them or *ad hominem* attacks.

The Amended Complaint at ¶¶ 2-19, App. 13-16, alleges the basic facts that Feminism, as mandated and financed by the State and propagated by Columbia's Institute for Research on Women and Gender ("IRWG"), satisfies the criteria used by Federal courts to determine whether religion is involved. Since these basic fact allegations are presumed true, the resulting inference is that Feminism is a religion. The State, however, alleges that those basic factual allegations infer only the Class

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It is the same old strategy from the McCarthy era—edit an opponent's statements or take them out of context so as to misrepresent the record and paint him as a modern-day heretic against whom the government should rule because he does not subscribe to what is currently deemed appropriate. The Court is referred to the Amended Complaint so as not to mistakenly rely on the defendants interposing their own factual allegations before they have even filed answers.

Representative's personal "view[s]," "theor[ies]," "notion[s]," and "subjective—and highly idiosyncratic perceptions." (State Brf. p. 6-8, 29).[2] Such inferences favor the State, but at this stage, before any answer has been filed, the inferences should favor the Class Representative. Bldg. & Const. Trades Council Buffalo N.Y. & Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 144 (2d Cir. 2006)(Rule 12(b)(1))(citations omitted); Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009)(Rule 12(b)(6))(citation omitted).

The lower court based its dismissal of the Establishment Clause allegations for lack of standing, Rule 12(b)(1), and for failure to state a claim, Rule 12(b)(6), on finding that "Feminism is no more a religion than physics." (Order p. 2, App. 49). The lower court also added for Rule 12(b)(6) purposes, that the Establishment Clause claims were "absurd and utterly without merit." (Id.).

Rule 12(b)(1)

The lower court's standing decision on the Establishment Clause allegations should have been based solely on the only pleading in the case—the Amended Complaint.

> [I]n cases where the asserted basis for subject matter jurisdiction is also an element of the plaintiff's allegedly federal cause of action, [this Court] ask[s] only whether—on its face—the complaint is drawn so as to seek recovery under … the Constitution. If so, then [this

[2] Columbia, meanwhile, simplistically ignores any allegations inconvenient to its position by making the conclusory claim—eight times throughout its brief—that they are merely "rhetoric."

> Court] assume[s] or find[s] a sufficient basis for jurisdiction, and reserve[s] further scrutiny for an inquiry on the merits.

Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1189 (2d Cir. 1996). There were no summary judgment motions, no discovery and no trial below. No evidence was submitted to prove or disprove that Feminism meets the various criteria for a religion, yet the lower court made a finding of fact that Feminism was not a religion.

When there is a trial, the plaintiff must establish standing by evidence adduced at trial. Lewis v. Casey, 518 U.S. 343, 357-58 (1996)(citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). When there is a summary judgment motion, "the plaintiff can no longer rest on such mere allegations [in the complaint], but must set forth by affidavit or other evidence specific facts" as to his standing. Id. But when at the pleading stage, as here, a court is supposed to accept general allegations as embracing those specific facts that are necessary to support standing, id., accept as true all material allegations of the complaint, and construe the complaint in favor of the complaining party, Thompson v. County of Franklin, 15 F.3d 245, 249 (2d Cir. 1994)(citing Warth v. Seldin, 422 U.S. 490, 501 (1975)). The lower court did none.

The lower court simply ignored the procedural stage of the case and jumped ahead to make a finding of fact as though evidence had been submitted on whether Feminism is a religion. The lower court could have chosen to permit discovery of

facts demonstrating jurisdiction, Kamen v. American Tel. & Tel. Co.**,** 791 F.2d 1006, 1011 (2d Cir. 1986), or require the Class Representative to supplement the pleading by amendment or affidavit, or revisited the standing issue at the summary judgment or trial stage, Fair Hous. in Huntington Comm. v. Town of Huntington, 316 F.3d 357, 362 (2d Cir. 2003)(citation omitted), but it chose to reach a conclusion on a material fact issue without the submission of evidence. The lower court even failed to make an attempt at judicial notice.[3] And the State and USDOE could have moved for a more definite statement of fact, id., but they too chose to rely on an assumption to resolve a disputed fact.

USDOE argues that for standing purposes, the Amended Complaint's Establishment Clause claims can be summarily dismissed at the pleading stage for being "frivolous" in alleging that Feminism meets the criteria of a religion. (USDOE Brf. p. 19). This is a high burden for the defendant to meet. IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056 (2d Cir. 1993). USDOE devotes one footnote to it while the lower court provided no analysis at all—just a blanket declaration of "frivolous."

Standing exists where the right of a plaintiff to recover will be sustained if the Constitution is given one construction and will be defeated if given another.

[3] Even if the lower court believed the equivalence of Feminism and Physics as a proposition of general knowledge, such propositions are not necessarily indisputable in their application to the facts of a particular case. *See* Advisory Committee Note, Fed. R. Evid. 201, subdivision (b).

Bell v. Hood, 327 U.S. 678, 685 (1946). Here, the Class Representative wins with one constitutional construction of religion but loses under another; therefore, the allegations are not "wholly insubstantial and frivolous." Id. at 682-83.

Since the lower court found Feminism not a religion, it never reached the allegations that the State and USDOE's activities aided the Feminist religion at Columbia's IRWG.

Rule 12(b)(6)

To the extent that the lower court's decision includes a Rule 12(b)(6) dismissal on the merits of the Establishment Clause claims, it fails to comply with the Rule 12(b)(6) analysis set forth in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

Under Iqbal, the lower court should have identified the specific allegations of Feminism as a religion that were not entitled to the presumption of truth—those, if any, that merely cut and copy the elements of an Establishment Clause violation; that is, are conclusory. Id. at 1951. The lower court then should have considered whether the remaining allegations plausibly—not probably but more than possibly—suggested Feminism was a religion. Id. The lower court did neither, and neither does the State in claiming allegations of non-economic harm to the Class Representative from the alleged religion Feminism are conclusory. (State Brf. p. 23).

Since no judicial notice was taken and no evidence submitted on which the lower court made its decision that the Establishment Clause allegations failed to state a claim, the lower court must have relied on extrinsic evidence unknown to the Class Representative. When courts rely on matters extraneous to the complaint, the conversion requirement for Rule 12(b)(6) requires the plaintiff to have an opportunity to contest the extrinsic evidence. Global Network Communs., Inc. v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006)(district court committed reversible error when, in ruling that plaintiff failed to state a claim, it considered evidence outside the complaint). The purpose of the conversion requirement is to

> deter[] trial courts from engaging in fact-finding when ruling on a motion to dismiss and ensures that when a trial judge considers evidence dehors the complaint, a plaintiff will have an opportunity to contest ... relied-upon evidence by submitting material that controverts it. Id.

The Class Representative had no opportunity to contest the extrinsic evidence on which the lower court must have relied. The first notice he received that the lower court likely considered matters extraneous to the Amended Complaint was the ECF filing of the Order.

The Federal Rules of Civil Procedure either apply regardless of the popularity of a civil proceeding, or they do not. Fed. R. Civ. P. 1 & 2.

2. The Amended Complaint satisfies the standing requirements at the pleading stage for alleged Establishment Clause violations.

The injury requirement is the "linchpin" in Establishment Clause cases. Cooper v. United States Postal Serv., 577 F.3d 479, 489 (2d Cir. 2009). Injury for standing under the Establishment Clause comes in two forms: (1) where "a broad swath of litigants can demonstrate standing under Flast v. Cohen, 392 U.S. 83 (1968), which permits litigants to raise claims on the ground that their 'tax money is being extracted and spent in violation of specific constitutional protections,'" Cooper 577 F.3d 489 n. 9 (internal quotation Flast at 106), or (2) where non-economic injury comes from exposure to religious communications, id.

USDOE does not dispute that the Class Representative has standing to assert an Establishment Clause claim, USDOE Brf. p. 15, but the State does.

Taxpayer Standing

Under Flast, a taxpayer "asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause." Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007). The law may be challenged on its face or as applied. Bowen v. Kendrick, 487 U.S. 589, 598 (1988). "In several cases [the Supreme Court] … expressly recognized that an otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible." Id. at 601. This case does not challenge various

State and Federal statutes on their face but the use of appropriations under those statutes for the benefit of the Women's Studies Program at IRWG, which advances Feminism.

The State asserts that the Flast exception for taxpayer standing, which was followed in 2009 by this Court in Cooper 577 F.3d 479, and by the U.S. Supreme Court in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) and Bowen v. Kendrick, 487 U.S. 589 (1988), has actually been overruled by Justice Kennedy's concurring opinion in the 2007 case Hein. (State Brf. p. 24 n. 9). The plurality opinion in Hein, however, specifically states that it does not overrule Flast. Hein at 615. Justice Kennedy, who joined in the plurality opinion, also filed a concurring opinion stating that Flast "should be overruled," Hein at 637, but as of the filing of this Reply—it has not.

Failing to overrule Flast, the State misleading abbreviates and mis-applies the standing requirements used in Hein that are based on Flast. The complete requirements have two parts.

Part 1, the logical link between taxpayer status and the type of legislative enactment attacked requires that the expenditures at issue be made pursuant to an express legislative mandate and a specific legislative appropriation rather than general appropriations for day-to-day governmental operations. Hein at 603-05. The Class Representative's Brief at pp. 23-24 lists both the New York legislative

and Congressional laws that specifically appropriate and authorize the disbursement of funds to higher education. The Regents, N.Y. Education, and HESC carry out the legislature's scheme pursuant to the legislature's statutory mandate, as USDOE does with Congress' scheme, in providing funds for IRWG and its Women's Studies Program that propagates Feminism—an as applied violation of the Establishment Clause. *See* Lamont v. Woods, 948 F.2d 825, 830 (2d Cir. 1991)(injury asserted in amended complaint was the use of plaintiffs' federal tax dollars for appropriations and expenditures that allegedly violate the Establishment Clause).

Part 2, the nexus between taxpayer status and the constitutional infringement requires that the challenged legislative enactment exceeds specific constitutional limitations imposed upon the exercise of the taxing and spending power. Hein at 604. Since the Establishment Clause operates as a specific constitutional limitation upon the exercise of legislative taxing and spending power in aid of religion, expenditures of government funds to aid the religion of Feminism at IRWG satisfies part 2. *See* Lamont at 830.

The State relies on a quote from a case decided before Flast to invent a third standing requirement that the State's activities must involve "a measurable appropriation or disbursement of [state] funds occasioned solely by the activities complained of." (State Brf. pp. 24-25). The quote comes from Doremus v. Board

of Education, 342 U.S. 429, 434 (1952). The Doremus Court found no standing on the Establishment Clause claim concerning the reading of Bible passages in public schools because "[t]here [was] no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." Doremus at 433. Doremus made its statement about "a measurable appropriation or disbursement" based on Everson v. Bd. of Educ., 330 U.S. 1 (1947), which found no standing because the spending came from a general appropriation. So the quote really means that for standing, the spending cannot come from a general appropriation statute. Here, the funds benefiting Feminism come from specific appropriations and disbursements to higher education.

The State uses its invented third requirement to argue that the money now paid out, which aids IRWG's Feminist religion, would still be available if there was no IRWG Women's Studies Program. (State Brf. p. 25). The availability or offering of money to aid a religion is not the issue—it is the spending of money in aid of religion, and as the State admits, it helps finance Feminism.

The State also tries to invent a fourth requirement that the Class Representative "must show measurable loss of revenue" in order to have taxpayer standing. (State Brf. p. 25). The measurable loss of revenue applies to taxpayers

challenging municipal—not state or Federal—spending. Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 73 (2d Cir. 2001).

Non-economic Standing

The Second Circuit's leading case for non-economic Establishment Clause standing is Sullivan v. Syracuse Housing Authority, 962 F.2d 1101 (2d Cir. 1992), where the Court found a "spiritual First Amendment injury." Sullivan at 1108. In Sullivan, this Court found that (1) the operation of a religious after-school program in a community center deprived the plaintiff of his right to use and enjoy the center, (2) the plaintiff found the alleged establishment of religion offensive, and (3) the program brought religion into a place functionally similar to the plaintiff's home. Id. All of which satisfied the plaintiff having a "direct and personal stake in [the] controversy." Id.

This Court applied Sullivan in Cooper to find that the plaintiff (1) came into "direct contact with religious displays that were made a part of his experience in using the postal facility nearest his home," (2) such contact made him uncomfortable, and (3) to avoid contact, he would have to alter his behavior. Cooper, 577 F.3d at 491.

In this case, the Class Representative, as an alumnus and one who continues to take advantage of alumni rights and privileges, such as using the University libraries and attending events, (1) frequently comes into direct contact with

Feminism at Columbia, which interferes with his use and enjoyment of his alma mater; (2) he finds the communications of Feminist doctrine offensive and inappropriate; and (3) IRWG's Women's Studies Program, which propagates Feminism throughout the University community, has interjected this modern-day religion into an important section of the Class Representative's life, which even enters his home through mailings and the Internet, and which to avoid would require altering his behavior. (Class Rep. Brf. pp. 26-29).

The State and Columbia even admit that the Feminism propagated by IRWG "offends [the Class Representative's] values and beliefs," State Brf. p. 22, and the Class Representative "was exposed to feminist [ideology]" that was "uncomfortable" for him, Col. Brf. p. 14. Such are grounds for Establishment Clause standing in this Circuit.

The State tries to eliminate non-economic injury by calling it "abstract." (State Brf. p. 22). Yet interests and "values of an abstract nature or esoteric nature can provide the basis for standing," O'Hair v. White, 675 F.2d 680, 687 (5th Cir. 1982), such as the highly abstract rights to speech, association and equal protection, Wright, Fed. Prac. & Proc. Supp., § 3531.4, at pp. 954-55 (2008).

The State also attempts to add an additional requirement to Establishment Clause standing—the harm cannot be "diffuse."[4] (State Brf. p. 22). "Diffuse" means spread out or distributed, Webster's Third New International Dictionary (1993). Such a new requirement would have the effect of over-ruling this Court's decision in Cooper, 577 F.3d 479 (2d Cir. 2009), where large numbers of persons used a postal facility, since the harm from religious communications was spread among a large group. Furthermore, it would effectively eliminate standing in all class actions—not just Establishment Clause cases—because the requirement of non-diffuse harm could never apply to situations with too many parties for joinder. The aggregate injuries in a class action are spread out among many persons, which is why class actions exist. Under the State's new injury requirement, all those civil rights cases, such as Evers v. Dwyer, 358 U.S. 202 (1958), would have been dismissed for lack of standing because the harm was "diffuse[d]."[5]

Religion

The State wrongly asserts the Supreme Court has ruled that secular beliefs cannot function as a religion, State Brf. p. 27, for which it relies on Wis. v. Yoder, 406 U.S. 205, 215 (1972). Yoder did not make such a ruling because it could not

[4] The State misleadingly asserts the Class Representative's alleged harm is "no different from the harm that any male students" or their predecessors or others "come into contact with" at Columbia. (State Brf. p. 22-23). That is not what the Amended Complaint alleges. The harm is to that class of males who would take or would have taken a Men's Studies Program. (Amend. Compl. ¶ 196, App. 36-37).

[5] The State wrongly asserts "that much" of the alleged harm is irrelevant because it stems from 10 years ago. There is no statute of limitations on Establishment Clause violations.

have without overruling three U.S. Supreme Court cases finding that secular beliefs which impose a duty of conscience can function as a religion. Welsh v. U.S., 398 U.S. 333, 340 (1970)(which Yoder actually cites to); U.S. v. Seeger, 380 U.S. 163, 184-85 (1965), and Torasco v. Watkins, 367 U.S. 488, 495 n. 11 (1961). Even the ethical beliefs of an atheist who does not believe in an afterlife are considered religious. United States v. Bush, 509 F.2d 776 (7th Cir. 1975).[6]

Yoder stated religion is not merely a matter of personal preference, but is shared by an organized group, and intimately related to daily living. Yoder at 216. Yoder also cited to Justice Harlan's concurring opinion in Welsh that religion is more than devotion "to individual principles acquired on an individualized basis"; that it involves "shared beliefs by a recognizable and cohesive group." Welsh at 353. IRWG's Feminism is a well organized, far reaching belief system of widely accepted tenets that mandate daily activities in how to live, work and relate to others. (Amend. Compl. ¶¶ 5-15).

Unlike the State, USDOE recognizes "there is no bright line separating religious from secular belief systems." (USDOE Brf. p. 17). USDOE states "that religious beliefs are generally characterized by, [among other traits], 'ultimate ideas,' 'metaphysical beliefs,' 'moral or ethical system,' the 'accoutrements of

[6] The State relies on a Title VII case in its argument that it does not "aid" IRWG's Feminism. (State Brf. p. 31, Church of Jesus Christ of Latter-Day Saints v Amos, 483 U.S. 327 (1987)). The State, therefore, must accept Title VII's definition of religion under 29 CFR 1605.1, which "define[s] religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."

religion,' 'demonstrat[ing] any shared or comprehensive doctrine,' or 'display[ing] … structural characteristics or formal signs" similar to traditional religions. (USDOE Brf. P. 17-19, citing United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996); Alvarado v. City of San Jose, 94 F.3d 1223, 1230 (9th Cir. 1996)). Meyers includes under accoutrements: comprehensiveness of beliefs; founders, prophets, or teachers; important writings; keepers of knowledge; structure or organization; holidays; and propagation. The Amended Complaint alleges for IRWG's Feminism the characteristics cited in Meyers and Alvardo. (Amend. Compl. ¶¶ 5, 6, 11, 13, App. 13-15). So, by USDOE's own cited criteria, the Amended Complaint alleges the Feminism promoted and financed by the State and financed by USDOE satisfies the requirements of a religion.

The State circuitously argues that because N.Y. Education § 207 prohibits the State from regulating doctrinal instruction in seminaries, State Brf. p. 11, and because the regulations for approving curricula are "religion-neutral," State Brf. p. 13, the Feminist doctrine in IRWG's Women's Studies cannot be a religion because it is regulated by the State. That does not mean Feminism is not a religion. Governments often do things inconsistent with the written law, such as Watergate, Iran-Contra, Guatanamo, wire tapping citizens without court orders, or foisting the religion of Feminism in colleges. After all, the Establishment Clause

has been violated by governments before. *E.g.* McCreary County v. ACLU, 545 U.S. 844 (2005); Lee v. Weisman, 505 U.S. 577 (1992).

The State and USDOE claim that the definition for religion is "narrower" in Establishment Clause cases, State Brf. p 27; USDOE. Brf. p. 17, even though the courts have never ruled such. Alvarado v. City of San Jose, 94 F.3d 1223, 1230 n. 6 (9th Cir. 1996). USDOE cites to the criminal case U.S. v. Allen, 760 F.2d 447, 450-52 (2d Cir. 1985), for a narrower standard, but the Court did not rule on that issue—it held there was no aiding of religion involved. In addition, Third Circuit Judge Adams, in his concurring opinion in Malnak v. Yogi, 592 F.2d 197, 211-212 (3rd Cir. 1979), concluded it was difficult to justify a reading of religion as narrower for Establishment Clause purposes. Judge Adams referred to the logic of Justice Rutledge:

> 'Religion' appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.'

Everson v. Bd. of Educ., 330 U.S. 1, 32 (1947)(Rutledge, J., dissenting).

The State also strains to rely on the criminal case Allen to justify the lower court's circumventing of the rules of civil procedure, and foist the State's own inference favorable to it that "[f]eminism is no more a religion ... than is 'nuclearism' ... or 'physics." (State Brf. p. 29). That inference requires basic allegations in an answer the State has not yet filed. The Amended Complaint,

however, did what it was suppose to at the pleading stage—allege basic facts that satisfy the criteria for religion. (Amend. Compl. ¶¶ 4-15, App. 13-15).

The State turned to the Allen case after all the cases it and USDOE cited in the lower court for defining religion were decisions made after trial, hearings, or on summary judgment motions, and, therefore, had the benefit of an evidentiary record that does not exist here. Ironically, Allen actually has an evidentiary record, but the State failed to dig deeply enough to discover it.

The State mistakenly claims that the defendants in Allen were unable to submit evidence in the district court on whether "nuclearism," worship of nuclear arms, was a religion. (*See* State Brf. p. 29 n. 10). The defendants' motion to dismiss their criminal indictments actually included affidavit evidence and public documentary evidence. (Allen, Appellants' Joint Appendix pp. 5-26). Further, after the denial of their motion, the defendants submitted offers of proof to the district court supporting their religion defense. (Allen, Appellants' Joint Appendix pp. 27-42). No religion evidence was submitted in the district court in this civil case.

The State even tries to re-write the law for Establishment Clause purposes by requiring the Amended Complaint to identify "proponent[s] of feminism who describe it as a 'religion.'" (State Brf. pp. 6, 29). Free Exercise cases—not Establishment Clause cases—depend on the perspective of the believer. *See, e.g.,*

Thomas v. Review Board, 450 U.S. 707, 716 (1981). Unfortunately for the State, this is not a Free Exercise case.

Aiding Religion

In assuming Feminism is a religion, the State and USDOE wrongly argue their activities do not aid it.

IRWG's website bills IRWG as the "locus of interdisciplinary feminist scholarship and teaching at Columbia University," lists numerous Feminist activities, and displays a catalogue of Feminist teachings. (IRWG, http://www.columbia.edu/cu/irwag/index.html). IRWG is an institution in which the religion of Feminism is so pervasive that virtually all its functions admittedly serve the Feminist mission. The students, therefore, who earn degrees or graduate certificates at the institute are religious school students.

The "'three main evils against which the Establishment Clause was intended to afford protection [are] sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Cooper, 577 F.3d at 493 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)). To avoid these evils and not violate the Establishment Clause by providing direct aid to religious institutions or their students, government laws and activities must have (1) a secular purpose, (2) their primary effect must not advance religion, and (3) they must not excessively entangle the government with religion. Lemon at 612-13.

The State fails all three criteria, and USDOE fails the "effect" and "entanglement" requirements.[7]

Purpose and sponsorship

Lemon's "purpose" requirement aims at preventing government from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987). The Amended Complaint alleges that 37 years ago the State intentionally began to change higher education in accordance with Feminist doctrine through its active establishment, involvement, promotion, sponsoring, endorsement, enforcement, and approval of Feminist tenets, such as those fostered at IRWG. (Amend. Compl. ¶¶ 31-48, App. 17-19). The State's far-reaching plans and policies for advancing Feminism cannot realistically be considered neutral, as the State's Equity for Women in the 1990s, makes clear:

1. the elimination of evolutionary differences between the sexes in education and employment opportunities,
2. the educational community to take the lead in providing females access to a broad spectrum of career opportunities by promoting female friendly strategies for recruitment, selection, and advancement,

[7] USDOE's financing of Feminism at Columbia may have a secular purpose, but its effect, as measured by the reasonable person test, does not. Altman v. Bedford Sch. Dist., 245 F.3d 49, 75 (2d Cir. 2001). Assuming Feminism is a religion, then providing funds that accrue to its benefit is aiding it by any reasonable person's view.

3. affirmative action for females in recruitment and promotion in professional and managerial programs overseen by college affirmative action officers who provide reports to N.Y. Education Department,
4. research on current issues facing females be developed, supported, and promoted,
5. practices that advantage females with support, recruitment, and promotion be replicated while all others be eliminated with reports as to compliance provided N.Y. Education Department's Affirmative Action Officer,
6. colleges and universities to focus their support networks and create others to promote the hiring and placement of females,
7. particular care be taken with curriculum in both content and methods of instruction,
8. major revisions in curriculum and teaching are necessary,
9. changes in teaching strategies and cultural attitudes,
10. people's thought patterns be changed,
11. statewide compliance with affirmative action policies,
12. implementing change through education and appropriate action,
13. N.Y. Education to collect data necessary to carry out the Regents' action strategies,
14. college teachers to undergo training and their teaching regularly monitored and reinforced with Feminist tenets,
15. N.Y. Education to conduct academic reviews at colleges and universities to assure teaching practices comport with the Regents' Feminist objectives,
16. females be given extra assistance to obtain jobs in certain fields,
17. appropriate textbooks be used in all courses,
18. human resources personnel for colleges, universities, libraries, museums, and the Education Department be trained to execute the affirmative action policies so that parity in hiring between the sexes is reached as determined by affirmative action officers, and
19. those responsible to bring about the above changes are college faculty, administrators, staff members, students, deans, athletic directors, governing boards, and executive officers of all New York educational institutions, cultural institutions, N.Y. Education, employers, business, and industry in the State.

(http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/1d/35.pdf; Amend. Compl. ¶ 40, App. 18-19). There is no neutrality when government acts with the objective of favoring adherence to a religious doctrine. McCreary, 545 U.S. 844, 860.

Effect and financing

"The prohibition on establishment [also] covers ... financial aid for religious individuals and institutions…." McCreary at 875. Public funding may not be provided to an institution "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. 734, 743 (1973). The Supreme Court has repeatedly held invalid forms of financing for religious institutions and individuals. *E.g.* Levitt v. Comm. for Public Educ., 413 U.S. 472 (1973)(lump sum per student payment for administrative costs); Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)(reimbursement of parents for portion of tuition paid to religious institution); Tilton v. Richardson, 403 U.S. 672 (1971)(certain grants under Federal Higher Education Facilities Act violated the Establishment Clause when after 20 years Government could no longer assure the financed facilities were used for non-sectarian activities).

The State and USDOE partially finance the Feminism promoting Women's Studies Program at IRWG by providing funds directly to Columbia for the benefit of the institute and program. (Amend. Compl. ¶¶ 49, 61-62, App. 20-21). For example, the Amended Complaint at ¶ 61, App. 21, alleges, on information and belief, that USDOE provides research grants directly to IRWG for the furtherance of Feminism. Since this a motion on the pleadings, such allegations are accepted as true when the information is peculiarly within the knowledge of a defendant—the USDOE. Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986).

The State's "Bundy" aid, N.Y. Education Law § 6401, is paid directly to Columbia for the benefit of IRWG based on the number of degrees IRWG confers. The aid is not paid to a private party who then decides where the funds will go as in Zelman v. Simmons-Harris, 536 U.S. 639, 616-17 (2002)(did not involve direct aid to sectarian institution).

The State inaccurately asserts that Bundy aid is awarded without regard to the subject matter of IRWG's Women's Studies Program. (State Brf. p. 14). Before the aid is granted, the Program has to be approved by the State, N.Y. Educ. Law § 6401(2)(iii), which means reviewing the subject matter of courses and checking other aspects of the program, 8 N.Y.C.R.R. § 52.2.

Bundy funds are specifically prohibited from aiding or maintaining a sectarian institution, such as IRWG. Iona College v. Nyquist, 65 Misc. 2d 329, 333, 316 N.Y.S.2d 139 (Sup. Ct. Albany, 1970)(quoting the N.Y. Constitution, Art. IX, sec. 3:

> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance ... of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.).[8]

Since IRWG is the "locus" of Feminist instruction at Columbia, has a catalogue of Feminist activities that permeate it, and whatever secular teaching at IRWG may exist cannot be separate from the Feminist mission of the institute; the State is prohibited from providing Bundy aid for the degrees IRWG offers, and USDOE is prohibited from providing research grants to it. *Cf.* Roemer v. Bd. of Public Works, 426 U.S. 736, 755 (1976). Both, however, do such, which means they have the effect of aiding a religion. If there was a formal guarantee by Columbia that the funds were not used by IRWG to advance Feminism, and the Women's Studies Program only involved secular; that is, non-Feminist instruction, then IRWG would not have the effect of advancing a religion.

[8] The State argues that because students accept an offer of admission to IRWG, the State has nothing to do with aiding a religion in providing Bundy funds directly to a sectarian institution. (State Brf. p. 32). That is not what Iona College held.

As for student aid, it cannot indirectly finance religious education by relieving a sectarian institution of costs it would have otherwise borne in educating its students. Agostini v. Felton, 521 U.S. 203, 226 (1997)(citation omitted). State and USDOE student aid has the effect of advancing Feminism, since it is not given to students to use wherever they wish as in Zelman, 536 U.S. at 616-17. For example, HESC student "awards" are paid directly to Columbia or IRWG, 8 N.Y.C.R.R. § 2206.1, while other aid may be paid directly to Columbia, N.Y. Educ. Law § 665(3)(c)(i). Furthermore, all student aid requires both the students and IRWG to provide information to HESC under 8 N.Y.C.R.R. § 2205.1 for State aid and under 34 C.F.R. 668.11 & 668.31 *et al.* for Federal aid. The aid is predicated on information that the student is accepted to and pursuing or will be pursuing studies in the accredited program of Women's Studies at IRWG. 8 N.Y.C.R.R. §§ 2205.2-2205.3; 34 C.F.R. 668.31. When students attending a sectarian institute, such as IRWG, do not have a full free choice in directing aid elsewhere, then it supports religion, and it does not matter whether the aid literally or figuratively passes through the hands of the students. *Cf.* Mitchell v. Helms, 530 U.S. 793, 816 (2000).

Whether paid to IRWG, or Columbia's controller for IRWG's benefit, or students attending IRWG, State and USDOE funding advances Feminism and "carries with it the *imprimatur* of government endorsement," which are

Establishment Clause violations. *See* Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1005 (9th Cir. 2009).

Entanglement and involvement

The State inaccurately limits the involvement of the Regents, N.Y. Education, and HESC in the Women's Studies Program at IRWG. While admitting that curricula must be approved and registered, the State makes the specious claim that individual courses escape the State's approval and fall outside the registration process. (State Brf. pp. 12 & n. 5, 31). The State's Education Regulations define curriculum as

> Curriculum means a sequence of courses which together comprise a program of instruction, 8 N.Y.C.R.R. § 126.1(d)(emphasis added);
>
> Curriculum or program means the formal educational requirements necessary to qualify for certificates or degrees. A curriculum or program includes general education or specialized study in depth in a particular field, or both, 8 N.Y.C.R.R. § 50.1(i).

Under these definitions, the State cannot approve a curriculum for registration unless it approves the courses that are included in that curriculum. That is why the regulations require the "objectives of each curriculum and its courses shall be well defined in writing," and "[c]ourse description shall clearly state the subject matter and requirements of each course." 8 N.Y.C.R.R. § 52.2(c)(1). Since courses make up part of a curriculum, the State clearly reaches

into the content of Feminist instruction and other areas of IRWG to which it repeatedly gives its stamp of approval.

The State's effort to minimize its pervasive entanglement with the advancing of Feminist doctrine at IRWG led it to selectively delete, or euphemize, a number of educational program areas in Women's Studies that require examination and approval by the State under 8 N.Y.C.R.R. § 52.2. (State Brf. pp. 12-13, 31). For example the State fails to mention: (a)(2) adequate libraries and other instructional resources; (a)(3) equipment sufficient to support instruction, research, and student performance; (a)(4) libraries to support a curriculum; (b)(1) faculty that demonstrate by classroom performance, scholarship and other experience their competence to teach courses; (b)(3) a faculty to student ratio in each course sufficient to assure effective instruction; (b)(6) the teaching of each faculty member shall be evaluated; (b)(7) each faculty member shall have adequate time to prepare materials and perform teaching duties; (c)(2) courses will be offered in sufficient frequency; (c)(4) number of semester credits for each course is regulated; (c)(6)-(11) the number of semester hours necessary to earn various degrees is regulated; and (f)(2) whenever and wherever an institution offers courses as part of any registered curriculum, it shall provide adequate academic support services. The State's purpose for registering Women's Studies focuses on assuring the

effectiveness of instruction of students and alumni. In this case, it is the cultivating of Feminism as advanced by IRWG.

The State's promoting of Feminism in higher education has had the effect of involving the State to such a degree that it actually carries out reviews to assure teaching practices comport with the Regents' Feminist objectives and requires college affirmative action officers to tract for the State the implementation of Feminism in higher education. (Equity for Women in the 1990s, pp. 4, 7, 8-10; Amend. Compl. ¶ 40, App. 18-19). Such pervasive monitoring by public authorities and administrative cooperation between colleges and the State excessively entangles the State with the Feminist religion advanced at IRWG. *See* Agostini, 521 U.S. at 233.

The flip side of actively furthering Feminism, is the *de facto* prohibition of theories that are deemed antagonistic to it, which the State and USDOE have done by failing to set policies or provide aid for Men's Studies. Epperson v. State of Ark., 393 U.S. 97, 106-07 (1968). By aiding only Women's Studies, they use social pressure to enforce orthodoxy, which is just as impermissible as "more direct means," Lee v. Weisman, 505 U.S. 577, 594 (1992), and do nothing to protect the minority views of males, Santa Fe Ind. Sch. Dist. V. Doe, 530 U.S. 290, 304 (2000).

USDOE claims as significant that 20 U.S.C. § 1232a prevents the development of a national school board in the federal bureaucracy. (USDOE Brf. p. 10). Just because USDOE does not constitute a national school board along the lines of the N.Y. Regents does not mean its financial benefits to IRWG does not aid the alleged religion of Feminism. Among USDOE's primary roles are establishing policies on federal financial aid for education, distributing and monitoring those funds, ensuring equal access to education, and enforcing Title IX. (USDOE, http://www.ed.gov/about/landing.jhtml?src=gu; http://www.ed.gov /about/offices/ list/ocr/docs/tix_dis.html). USDOE's monitoring and enforcement duties mean it knows how its funds are put to use. In the case of IRWG, those funds further the propagation of Feminism in violation of the Establishment Clause. Zorach v. Clauson**,** 343 U.S. 306, 314 (1952).

Without the State's authorization, IRWG and the Feminism cultivated through its Women's Studies Program would not exist at Columbia because no credit toward an undergraduate degree, graduate certification, or a post-baccalaureate course could be offered. Without such accreditation, IRWG and its propagation of Feminism throughout the Columbia community would not benefit from USDOE and HESC funds. *See* 8 N.Y.C.R.R. § 2006.5.

CONCLUSION

"We are centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require the government to stay neutral on religious belief…." McCreary, 545 U.S. at 881.

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/S/

Roy Den Hollander, Esq.
Attorney for putative class and class representative
545 East 14 Street, 10D
New York, N.Y. 10009
(917) 687-0652
rdhhh @yahoo.com

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) by containing 6,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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