09-1910-cv

To Be Argued By:
JEAN-DAVID BARNEA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-1910-cv

ROY DEN HOLLANDER and WILLIAM A. NOSAL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—v.—

INSTITUTE FOR RESEARCH ON WOMEN & GENDER AT COLUMBIA UNIVERSITY; SCHOOL OF CONTINUING

(*Caption continued on inside cover*)

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

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

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EDUCATION AT COLUMBIA UNIVERSITY; TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; U.S. DEPARTMENT OF EDUCATION; ARNE DUNCAN, U.S. SECRETARY OF EDUCATION in his 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, MERRYL H. TISCH, in her official and individual capacity; NEW YORK STATE COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DAVID STEINER, in his official and individual capacity; ACTING PRESIDENT OF THE NEW YORK STATE HIGHER EDUCATION SERVICES CORP., ELSA MAGEE, in her official and individual capacity,

Defendants-Appellees.

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United States Court of Appeals

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ROY DEN HOLLANDER AND WILLIAM A. NOSAL,

Plaintiffs-Appellants,

—v.—

INSTITUTE FOR RESEARCH ON WOMEN & GENDER AT COLUMBIA UNIVERSITY, ET AL.,

Defendants-Appellees.

BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiffs-Appellants Roy Den Hollander and William A. Nosal ("Plaintiffs") appeal from a final judgment of the United States District Court for the Southern District of New York (Hon. Lewis A. Kaplan, J.), entered on April 30, 2009, dismissing their amended complaint against Defendants-Appellees the Institute for Research on Women & Gender at Columbia University (the "Institute"), the School of Continuing Education at Columbia University, and the Trustees of Columbia University in the City of New York (collectively, "Columbia"); the United States Department of Education (the "Department") and Arne

Duncan, United States Secretary of Education, in his official capacity* (together with the Department, the "Federal Defendants"); and the Chancellor of the Board of Regents Merryl H. Tisch, in her official capacity, Commissioner of the New York State Department of Education David M. Steiner, in his official and individual capacity, and Acting President of the New York State Higher Education Services Corporation Elsa Magee, in her official and individual capacity (collectively, the "State Defendants"). (JA 61).**

In their amended complaint, Plaintiffs asserted two claims against the Federal Defendants, both of which arose from the financial support Columbia receives from the Department: (1) that Columbia's Institute espouses a "religious" ideology in that its teachings are infused with the alleged religion of "Feminism," for which federal support supposedly violates the Establishment Clause of the First Amendment (JA 13-16); and (2) that Columbia discriminates on the basis of gender because its courses and campus activities "demonize[] men and exalt[] women" and because it does not have a "Men's Studies" department, such that federal support for the university supposedly violates constitutional equal protection principles (JA 21-28).

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* Secretary of Education Arne Duncan has been automatically substituted as a defendant-appellee pursuant to Fed. R. App. P. 43(c)(2).

** Citations to the Joint Appendix and the Brief of Plaintiffs-Appellees appear herein respectively as "JA __," and "Br. __," with the relevant page numbers inserted.

On April 15, 2009, Magistrate Judge Kevin Nathaniel Fox issued a report and recommendation ("report") recommending that these claims—as well as Plaintiffs' claims against the other defendants—be dismissed on the grounds that Plaintiffs lacked standing to assert them because they had not suffered a cognizable injury in fact. (JA 57-59). The district court subsequently adopted the report and dismissed Plaintiffs' claims based on their lack of standing. (JA 49). The court further found that Plaintiffs' First Amendment claim, premised as it is on their "central claim that feminism is a religion," is plainly "frivolous," because "[f]eminism is no more a religion than physics." (*Id.*).

This Court should affirm the district court's judgment. The district court correctly dismissed Plaintiffs' First Amendment claim because "feminism," as defined by Plaintiffs, is not a religion within the meaning of the First Amendment. Furthermore, this claim also fails because federal support for higher education does not discriminate between religious and nonreligious education at accredited institutions and thus does not run afoul of First Amendment proscriptions.

The district court also correctly dismissed Plaintiffs' equal protection claim. Plaintiffs, who are not current students at Columbia and thus have no exposure to Columbia's course offerings and campus activities, failed to allege that they had suffered any actual injury from those courses or activities, as opposed to a philosophical or generalized grievance, and therefore lack standing. In addition, the amended complaint failed to allege an equal protection claim because it did

not allege that the Federal Defendants provide financial support to higher education institutions such as Columbia and their students because of any allegedly adverse effect on men. This Court should thus affirm the district court's dismissal of all claims against the Federal Defendants.

Counterstatement of Jurisdiction

The district court lacked jurisdiction to consider Plaintiffs' equal protection claims against the Federal Defendants. *See* Point III.A, *infra*. On May 1, 2009, Plaintiffs timely filed a notice of appeal from the district court's judgment, entered on April 30, 2009, dismissing the amended complaint. Accordingly, this Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court properly dismissed Plaintiffs' First Amendment claim, which alleged that the Department's financial support to colleges and universities and their students advanced "feminism" as religion, because "feminism," as defined by Plaintiffs, is not a religion.

2. Whether the district court properly dismissed Plaintiffs' equal protection claim because Plaintiffs, who are not current students at Columbia, suffered no injury from Columbia's course offerings and campus activities and therefore did not have standing to raise such a claim.

Statement of Facts

A. Plaintiffs' Amended Complaint

In their amended complaint, filed on December 1, 2008, Plaintiffs, who are both Columbia alumni, assert two claims against the Federal Defendants.* Plaintiffs'

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* Plaintiff Roy Den Hollander has filed numerous lawsuits involving "litigat[ion] for men's rights." Br. at 7. *See Den Hollander v. Chertoff*, No. 08 Civ. 1521 (WHP), 2008 WL 5191103 (S.D.N.Y. Dec. 3, 2008), *aff'd sub nom. Den Hollander v. United States*, No. 08-6183-cv, 2009 WL 4350252 (2d Cir. Dec. 3, 2009) (rejecting challenge to allegedly gender-discriminatory provisions in the Violence Against Women Act); *Den Hollander v. Copacabana Nightclub*, 580 F. Supp. 2d 335 (S.D.N.Y. 2008), *on appeal*, No. 08-5547-cv (2d Cir.) (oral argument heard Aug. 24, 2009) (claiming that private nightclubs' "ladies' night" admission policies violate 42 U.S.C. § 1983); *see also Den Hollander v. Donovan*, No. 08 Civ. 4045 (FB) (LB) (E.D.N.Y. filed Oct. 3, 2008) (breach of copyright action against attorney representing defendants sued by Den Hollander in the *Copacabana* case). Den Hollander is also a prolific litigator regarding domestic and personal slights he claims to have suffered. *See, e.g.*, *Den Hollander v. Flash Dancers Topless Club*, 340 F. Supp. 2d 453 (S.D.N.Y. 2004), *aff'd*, 173 Fed. Appx. 15 (2d Cir. 2006), *cert. denied*, 549 U.S. 829 (2006) (civil RICO claim against Den Hollander's ex-wife and others); *Den Hollander v. Norton*, No. 113595/2008 (N.Y. Sup. Ct., N.Y. County) (discontinued by stipulation Aug. 21, 2009) (defamation action by Den Hollander against

first claim arises under the First Amendment's Establishment Clause, and is predicated on Plaintiffs' view that Columbia and the Institute, in their course offerings and campus activities, "propagate[] Feminism," which they assert is a "modern-day religion." (JA 13). According to Plaintiffs, the "religion" of "Feminism" is not "theistic in nature" but rather "stem[s] from moral, ethical or even malevolent tenets that are held with the strength of traditional religious convictions" (*id.*), including "historical revisionism, propagandizing, unanimity of thought labeled 'politically correct,' a pantheon of idols such as Mary Wollstonecraft, [and] *de facto* disciples and apostles." (JA 15; *see also* JA 13-14).

Plaintiffs further alleged that the Federal Defendants "provide[] grants, direct loans of federal funds, guarantees for loans from private lenders, and work-study programs," as well as student loans, to Columbia, the Institute, and their students. (JA 20-21). Plaintiffs contended that these forms of assistance violate the First Amendment's proscription against the Government "favor[ing]. . . or adopt[ing] programs or practices that aid any religion," *i.e.*, "feminism." (JA 16; *see also* JA 45).

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hosts of "Opie & Anthony" radio show); *Den Hollander v. Peter Cooper Vill./Stuyvesant Town Mgmt.*, No. 570631/06, 2007 WL 623797 (N.Y. App. Term Mar. 1, 2007) (defamation action against Den Hollander's landlord); *Den Hollander v. Fasano*, 825 N.Y.S.2d 474 (1st Dep't 2006) (noise nuisance action against Den Hollander's neighbor).

Plaintiffs' second claim arose under the equal protection component of the Fifth Amendment's Due Process Clause, and stems from Columbia's alleged "invidious discriminatory practices" against men (JA 28), which include its application of the "misandry doctrine of Feminism in order to impose a unitary belief system of Feminist orthodoxy that dictates the thoughts, speech, and conduct of members of the University and society-at-large" (JA 22). Plaintiffs claimed that Columbia's teachings "demonize[] men and exalt[] women" and are used "to justify discrimination against men based on collective guilt and old fashion [*sic*] stereotypes." (JA 24; *see also* JA 22 (men are "stereotype[d] . . . as the primary cause for most, if not all, the world's ills throughout history," while "[f]emales are credited with inherent goodness who are oppressed and colonized by men")). Plaintiffs further asserted that Columbia does not have a "Men's Studies" department, which purportedly deprives them of an educational opportunity on the basis of their sex. (JA 26; *see also* JA 38-39). According to the complaint, the Federal Defendants "knowingly aid[] [these] invidious discriminatory practices" by providing "financial funds" to Columbia "either directly or indirectly," which violates the "equal protection clause [*sic*] of the 5th Amendment." (JA 28; *see also* JA 46).*

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* The amended complaint also asserted that the Federal Defendants were indirectly responsible for the actions of the New York Board of Regents, one of the State Defendants, purportedly because the Department had "delegated" certain of its accreditation authority over institutions of higher education to the Regents. (JA 20). Plaintiffs withdrew this contention in the district

B. The United States Department of Education's Loan and Grant Programs

Pursuant to their authority under the Higher Education Act ("HEA"), as amended, 20 U.S.C. § 1001 *et seq.*, and other statutes, the Federal Defendants administer a variety of loan and grant programs that provide financial support to eligible colleges and universities, as well as direct or indirect financial assistance to students attending such institutions. Columbia is an eligible institution under the HEA and, as such, may participate in the programs authorized under that statute.

Programs under the HEA include: (a) student loan programs, such as the Federal Family Education Loan Program, 20 U.S.C. § 1071 *et seq.*, and the William D. Ford Federal Direct Loan Program, *id.* § 1087a *et seq.*; (b) campus-based programs, administered directly by individual schools' financial aid offices, such as Federal Perkins Loan programs, *id.* § 1087aa *et seq.*, and Federal Work-Study, 42 U.S.C. § 2751 *et seq.*; (c) grant programs, such as the Federal Pell Grant Program, 20 U.S.C. § 1070a *et seq.*; (d) fellowships for graduate studies, such as the Jacob K. Javits Fellowships, *id.* § 1134 *et seq.*; (e) field-specific grants, such as for international or foreign-language study under such programs as the Fulbright-Hays program, 22 U.S.C. § 2452, or teacher training under such programs as the TEACH Grant Program, 20 U.S.C. § 1070g *et seq.*; and

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court after the Federal Defendants demonstrated in their motion to dismiss that no such delegation had in fact occurred. (*Id.*; *see also* JA 8 (Docket Nos. 26, 27, 30)).

(f) aid for specific groups of students, including economically disadvantaged students under programs such as Student Support Services, *id.* § 1070a-14, and minority students under programs such as the Minority Science and Engineering Improvement Program, *id.* § 1067 *et seq.* (collectively referred to herein as "student-aid programs").

In addition, the Department provides assistance directly to colleges and universities to fund certain research, types of schools, fields of study, international study, and types of education. For example, the Department administers the Fund for the Improvement of Postsecondary Education, *id.* § 1138 *et seq.*, which finances university-sponsored research into higher-education reform and various international exchanges; projects to support educational opportunities for students with disabilities, *id.* § 1140 *et seq.*; funds for Historically Black Colleges and other schools targeted to minority students, *id.* § 1060 *et seq.*; projects to improve the education of students whose first language is not English, *id.* § 6861; and the Women's Educational Equity Program, *id.* § 7283 *et seq.*, which funds the implementation of gender-equity policies and research into issues of gender in education, *id.* § 7283b(b) (collectively referred to herein as "school grants").*

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* All of the student-loan and school grant programs are summarized in an annual guide published by the Department. *See* Office of Commc'ns & Outreach, U.S. Dep't of Educ., *Guide to U.S. Department of Education Programs* (2009), *available at* http://www.ed.gov/programs/gtep/gtep.pdf (visited Dec. 11, 2009).

Significantly, with respect to student-aid programs and school grants, the HEA precludes the Department from interfering with or exerting any influence over a school's curriculum or operations:

> No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system . . . .

20 U.S.C. § 1232a; *accord id.* § 3403(b).

C. Proceedings in the District Court

On January 9, 2009, all defendants moved to dismiss the amended complaint. The Federal Defendants sought to dismiss the First Amendment claim against them principally on the grounds that feminism is not a religion for First Amendment purposes, and that, in any event, the Government does not violate the Establishment Clause by providing aid to university students who then choose to use the funds to pursue a religious course of study. With respect to the equal protection claim, the Federal Defendants argued that Plaintiffs lacked standing to maintain such a claim, as their complaint did not identify a cognizable

injury in fact, but rather at most asserted a political or philosophical disagreement with Columbia's course offerings. The Federal Defendants also argued that the amended complaint did not state an equal protection claim because it did not allege sufficient facts upon which the district court could conclude that the Government had funded Columbia's Women's Studies program with the purpose of causing the alleged deleterious effects on male students.

On April 15, 2009, Magistrate Judge Kevin Nathaniel Fox issued his report recommending that the district court dismiss Plaintiffs' claims against all defendants, on the grounds that Plaintiffs lacked standing. (JA 50-59). The magistrate judge noted that "plaintiffs d[id] not allege they enrolled in a Women's Studies course(s) at Columbia that caused them to suffer a direct injury occasioned by firsthand exposure to the content of the Women's Studies course(s), or that they were discriminated against, by being denied the opportunity to participate in Columbia's Women's Studies program." (JA 58-59).

Judge Fox then concluded that "[a]t most, the 'injury' suffered by the plaintiffs, attributed by them to the existence of Columbia's Women's Studies program, is no more than a 'subjective chill,' and not an 'objective harm,' " and that "[s]uch an 'injury' is not an 'injury in fact.' " (JA 58 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972))). He further held that, with respect to Plaintiffs' claims "based upon the absence of a Men's Studies program at Columbia, their injury is not 'concrete and particularized'; rather, it is 'conjectural or hypothetical.' " (*Id.* (quoting *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 160 (2d Cir. 2003))).

Plaintiffs objected to the report. (JA 9). On April 23, 2009, the district court adopted the conclusions of the report and dismissed Plaintiffs' claims in their entirety based on their lack of standing. (JA 48-49). The court further considered the merits of Plaintiffs' First Amendment claim:

> [A]lthough the Magistrate Judge did not reach the merits, it bears noting that plaintiffs' central claim is that feminism is a religion and that alleged federal and state approval of or aid to Columbia's Institute for Research on Women & Gender therefore constitute a violation of the Establishment Clause of the First Amendment. Feminism is no more a religion than physics, and at least the core of the complaint is therefore frivolous.

(JA 49). The court thus dismissed "the Establishment Clause claim[] . . . also on the alternative ground that [it is] absurd and utterly without merit." (*Id.*).

The district court entered judgment dismissing the amended complaint on April 30, 2009. (JA 60). This appeal followed. (JA 61).

Summary of Argument

This Court should affirm the district court's dismissal of Plaintiffs' two claims against the Federal Defendants. The district court correctly dismissed the Establishment Clause claim because feminism is not a religion for purposes of the First Amendment. Courts, including this one, have dismissed similar claims of

invented or hypothesized religions dreamt up by plaintiffs seeking to influence public policy through constitutional litigation. *See* Point II.A, *infra*. Moreover, even if feminism were a religion, the district court's determination also can be upheld on the grounds that government provision of financial aid to students who then make individual choices to study religious subjects is permissible, and that Plaintiffs did not identify any specific Department school grant program that supports a religious program. *See* Point II.B, *infra*.

The district court also properly dismissed Plaintiffs' equal protection claim because Plaintiffs lacked standing to assert it. As alumni of Columbia, Plaintiffs have no current exposure to the university's courses and campus life, and they therefore have no more interest than any member of the general public who might have some disagreement with or opposition to such things. Plaintiffs therefore have experienced no cognizable injury in fact and lack standing to maintain this claim. *See* Point III.A, *infra*. In addition, the amended complaint plead no facts from which a court could conclude that the Federal Defendants provide financial support to Columbia for the very purpose of encouraging the supposedly anti-male campus atmosphere fostered by the Institute, as would be required to sustain an equal protection claim. *See* Point III.B, *infra*. Accordingly, the district court's order dismissing the amended complaint should be affirmed.

ARGUMENT

POINT I

STANDARDS OF REVIEW

This Court "review[s] *de novo* a district court's dismissal of a complaint for lack of standing, [pursuant to Federal Rule of Civil Procedure] 12(b)(1), and for failure to state a claim, [pursuant to Federal Rule of Civil Procedure] 12(b)(6)." *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). In conducting its review of both of these types of district court decisions, this Court "assume[s] all well-pleaded factual allegations to be true, and . . . construe[s] [the] complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in plaintiffs' favor." *Id.* (citation and internal quotation marks omitted).

Further, "[i]n accordance with the Supreme Court's decision [in] . . . *Twombly*, [this Court] appl[ies] a 'plausibility standard,' which is guided by '[t]wo working principles.' " *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly* 550 U.S. 544 (2007), and quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). "First, although 'a court must accept as true all of the allegations contained in a complaint,' that 'tenet' 'is inapplicable to legal conclusions,' and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.' " *Id.* at 72 (quoting *Iqbal*, 129 S. Ct. at 1949). " 'Second, only a complaint that states a plausible claim for relief survives a motion to dismiss,' and '[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific

task that requires the reviewing court to draw on its judicial experience and common sense.' " *Id.* (quoting *Iqbal*, 129 S. Ct. at 1950).

In addition, "[t]he party seeking judicial review bears the burden of alleging facts that demonstrate its standing." *Green Island Power Auth. v. FERC*, 577 F.3d 148, 159 (2d Cir. 2009) (internal quotation marks and brackets omitted).

POINT II

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' ESTABLISHMENT CLAUSE CLAIM AS FRIVOLOUS

The district court correctly held that Plaintiffs' amended complaint failed to state a claim under the Establishment Clause.* "The Establishment Clause of the First Amendment . . . prevents [the Government] from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002). The amended complaint does not allege that Congress enacted the Department programs at issue for a religious

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* On appeal, as in the district court, the Federal Defendants do not argue that Plaintiffs lack standing to assert their Establishment Clause claim, and do not seek to defend the district court's conclusion on that issue. *See Lamont v. Woods*, 948 F.2d 825, 829-30 (2d Cir. 1991) (discussing taxpayer standing doctrine in Establishment Clause claims).

"purpose."* "Thus, the [only] question . . . is whether [these] program[s] nonetheless ha[ve] the forbidden 'effect' of advancing or inhibiting religion." *Id.*

Plaintiffs suggest that the Department's provision of funding to Columbia, which proceeds both "directly to Columbia University and indirectly to the students who then pay over the funds to Columbia" (JA 16), had the effect of advancing feminism. However, as the district court correctly recognized, feminism is not a religion for the purposes of the First Amendment. Moreover, even assuming that feminism is a religion, Plaintiffs may not maintain their claim because: (1) the Department's student-aid programs do not "advance religion" for Establishment Clause purposes, but rather simply provide students with funds they may use to pursue any course of study at a participating institution, whether in a religious or non-religious field; and (2) Plaintiffs have not identified any Department program that encourages the teaching of feminism.

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* Even if they did, however, the relevant inquiry is whether the Government's intent, as determined from the perspective of a reasonable observer, is to "establish" the particular religion in question. *See Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir. 2001). Here, the amended complaint did not make any allegations that would support a reasonable inference that Congress enacted the Department's various programs to establish feminism as the religion of the land. Indeed, the amended complaint does not claim that Plaintiffs *themselves* believe that the intention behind those programs is to promote feminism. (*Cf.* JA 21).

A. "Feminism," as Defined by Plaintiffs, Is Not a Religion for Purposes of the Establishment Clause.

The district court correctly dismissed Plaintiffs' Establishment Clause claim as "frivolous" because "feminism," as defined by Plaintiffs, is not a religion. Although the complaint asserts that "[a] belief system need not be theistic in nature to be a religion but rather can stem from moral, ethical or even malevolent tenets that are held with the strength of traditional religious convictions" (JA 13), the Establishment Clause "does indeed distinguish between religious [philosophies] and secular [philosophies]," *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972)).

While there is no bright line separating religious from secular belief systems, courts have laid out relevant criteria for distinguishing between the two, including that religious beliefs are generally characterized by, *inter alia*, "ultimate ideas," "metaphysical beliefs," a "moral or ethical system," and the "accoutrements of religion." *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996); *see also Yoder*, 406 U.S. at 215-16 ("a 'religious' belief or practice entitled to constitutional protection" is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living"). Indeed, courts have specifically cautioned that defining "religion" too broadly for Establishment Clause purposes is problematic and "unworkable" because it would subject nearly any "governmental activit[y]" to potential "censure." *Alvarado v. City of San Jose*, 94 F.3d 1223,

1230 (9th Cir. 1996); *United States v. Allen*, 760 F.2d 447, 450-52 (2d Cir. 1985) (definition of religion is much narrower for Establishment Clause than for Free Exercise Clause).

Here, even accepting Plaintiffs' characterization of the nature of "Feminis[t]" beliefs (JA 15 ("historical revisionism, propagandizing, unanimity of thought labeled 'politically correct,' a pantheon of idols such as Mary Wollstonecraft, *de facto* disciples and apostles"); *see also* JA 13-14), the amended complaint does not establish that feminism is a religious belief, as opposed to a secular philosophy. This Court and others have, for example, rejected arguments that a public high school's Earth Day ceremony unconstitutionally promoted the "Gaia" religion, *see Altman*, 245 F.3d at 75-79; that a California city's statue of an Aztec serpent-god violated the Establishment Clause because some New Age spiritualists and Mormons ascribed religious significance to the ancient deity, *see Alvarado*, 94 F.3d at 1229-31; or even that a criminal law prohibiting destruction of government property (including nuclear facilities) established the religion of "nuclearism," *Allen*, 760 F.2d at 451.

Like the unsuccessful plaintiffs in these Establishment Clause cases, Plaintiffs' attempt to portray feminism as a religion collapses because feminism, as defined by Plaintiffs, may "invoke ultimate concerns, [but] fail[s] to demonstrate any shared or comprehensive doctrine or to display any of the structural characteristics or formal signs associated

with traditional religions." *Alvarado*, 94 F.3d at 1230.* Indeed, the district court correctly concluded that "[f]eminism is no more a religion than physics." (JA 49). The district court's judgment therefore should be affirmed.

B. The Federal Defendants' Assistance to Columbia and Its Students Does Not Violate the Establishment Clause.

Even if feminism were a religion for Establishment Clause purposes—which it is not—the First Amendment does not prohibit the Department from providing funds through its student-aid or school grant programs to students or schools.

As to the Department's student-aid programs, the First Amendment does not prohibit the Government from providing funds to students who then in turn choose to use the funds to pursue religious education. In the context of government funding for education, the Supreme Court has distinguished between "government programs that provide aid directly to religious schools,"

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* Plaintiffs' claim that the district court engaged in impermissible "fact-finding" in concluding that feminism was not a religion, Br. at 14, should be rejected. The district court found that Plaintiffs' claim about feminism was "frivolous" (JA 49), a determination that is properly made at the pleadings stage. *See Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1188 (2d Cir. 1996) (a court may dismiss a claim on a motion to dismiss " 'where such a claim is wholly insubstantial and frivolous' " (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946))).

and "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649.

"[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Id.* at 652. Thus, in *Zelman*, the Supreme Court approved a school-voucher program that gave parents a voucher worth a certain dollar amount per student, which could be used toward tuition costs at any local private school, whether religious or non-religious. *Id.* at 645-47; *see also Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (state vocational-assistance program for the blind constitutionally permitted a recipient to use funds to study at a religious college); *cf. Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 762-64, 786, 790 (1973) (finding that a New York law violated the Establishment Clause because it provided direct money grants and tax benefits to private religious schools in an amount "unrelated to the amount of money actually expended by any parent on tuition," and further offered parents tuition reimbursements that gave them "an incentive . . . to send their children to sectarian schools").

The Department's student-aid programs fall squarely on the permissible side of the *Zelman* rubric. These programs are available to nearly every student at an eligible college or university, public or private,

religious or non-religious, in the United States, *see generally* 20 U.S.C. § 1001 (providing eligibility criteria for participating colleges and universities), and provide funds that can be used by the students to pursue whatever course of study they choose to pursue. As Plaintiffs concede, "the type of government benefits provided for the instruction of Feminist doctrine are similar to those given Physics." Br. at 20. Thus, even if "feminism," as defined by Plaintiffs, were a religion, and a Columbia student who received funds through a student-aid program made an individual choice to enroll in a course in which "feminism" was taught, such a program would not violate the Establishment Clause. *See Zelman*, 536 U.S. at 652.

As to the Department's school grant programs, it is unclear if Plaintiffs are alleging that these programs directly fund Columbia's teaching of "feminism." (*See* JA 20 (alleging "[o]n information and belief" that Department programs "benefit the Women's Studies program and the furthering of Feminism at Columbia")). In any event, Plaintiffs' amended complaint failed to identify any federal program by which the Department allegedly encourages the teaching of "feminism," their would-be religion.

To the contrary, the Department's various school grant programs primarily fund educational research and programs that give educational opportunities to particular groups of students, and thus could not support any allegation that the Federal Defendants directly fund Columbia's teaching of Women's Studies and feminism. *See supra* at 8-9 (listing representative programs). The Court should therefore affirm the judgment of the district court.

POINT III

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' EQUAL PROTECTION CLAIM

A. The District Court Correctly Concluded that Plaintiffs Do Not Have Standing to Assert an Equal Protection Claim.

This Court should also hold that the district court correctly dismissed Plaintiffs' equal protection claim against the Federal Defendants. Plaintiffs contend that federal assistance to Columbia and the Institute in its teaching of Women's Studies and "feminism" violates the equal protection component of the Fifth Amendment's Due Process Clause because such support discriminates on the basis of gender. The district court correctly determined that Plaintiffs do not have standing to assert such a claim because their amended complaint points to no cognizable injury in fact.

"[T]he irreducible constitutional minimum of standing contains three elements: (1) there must be an injury in fact,—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Port Washington Teachers' Ass'n v. Bd. of Educ.*, 478 F.3d 494, 498 (2d Cir. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted).

Plaintiffs fail to allege a "concrete and particularized" injury that they have suffered at the hands of the Federal Defendants. Plaintiffs' allegations of harm have two components. First, they claim that the existence of the Institute and its teaching of feminism poisons Columbia's campus atmosphere by imbuing it with anti-male attitudes—while conceding that, as alumni, their only exposure to the campus atmosphere would occur were they to enroll in adult-education courses at Columbia's School of Continuing Education or decide to rematriculate. (JA 38-39). And, second, they lament the lack of "Men's Studies" courses at Columbia in which they might enroll, were such courses to be made available, again as continuing-education students or readmitted students. (JA 39).

However, neither of these supposed "harms" have caused Plaintiffs any constitutional injury because of Plaintiffs' status as *alumni* of Columbia. Plaintiffs have no current exposure to Columbia's courses and campus life, and the amended complaint does not allege that Plaintiffs have enrolled, or even taken any concrete steps to enroll in adult-education courses, which they concede are open to the general public (JA 38-39), or have applied for admission to a degree program, as any person can do. As this Court has explained, in order to have standing, "plaintiffs [must] be[] injured in a sufficiently personal way to distinguish themselves from other citizens who are generally aggrieved by a claimed constitutional violation." *Abortion Rights Mobilization Inc. v. Baker* (*In re U.S. Catholic Conference*), 885 F.2d 1020, 1024-25 (2d Cir. 1989) (dismissing suit by non-Catholic clergy who objected to the IRS's tax treatment of the Catholic Church).

Plaintiffs' failure to identify any actual injury they have suffered precludes them from establishing standing.*

Indeed, the very nature of Plaintiffs' objection appears to be philosophical or political. While it is clear that Plaintiffs would prefer if the student-aid programs were not available to Columbia students who choose to enroll in courses or degree programs at the Institute (JA 45-46), Plaintiffs are not directly affected by the Department's provision of such aid. Opposition to a government program for "philosophical and/or religious

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* Plaintiff Den Hollander further claims that his attendance at unspecified Columbia "events [and] activities" and his subscription to Columbia's alumni news magazine are sufficient to confer standing upon him. Br. at 27. But he does not allege facts specifically describing what transpired at these events, or what was printed in these publications that allegedly caused him injury. In addition, *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), cited by Plaintiffs, Br. at 25, is not to the contrary. In that case, a public school placed a portrait of Jesus in its hallway, where it could be seen by "any parent, employee or former student who uses the school facilities." 33 F.3d at 683. The *Washgesic* court concluded that any person who uses the school facilities is exposed to the portrait and could suffer a cognizable constitutional injury. *See id.* Here, by contrast, only current students are exposed to the content of courses at Columbia and most campus activities, and Plaintiffs have not alleged sufficient facts to establish that they actually participated in courses or particular campus activities open to alumni in which they suffered a specific, cognizable injury.

reasons [is a] generalized grievance, without any imminent tangible harm, [that] cannot confer standing." *Raiser v. United States*, 325 F.3d 1182, 1183 (10th Cir. 2002) (plaintiff's "status as a taxpayer who has religious objections to the death penalty does not confer standing"); *accord Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 435 (D.C. Cir. 2002) (*High Times* magazine lacked standing to challenge agency's refusal to decriminalize marijuana); *see also Minn. Fed. of Teachers v. Randall*, 891 F.2d 1354, 1358-59 (8th Cir. 1989) (teachers' union's opposition to law allowing students to take classes at religious colleges was based on "philosophical concerns" to program and thus the union lacked standing).

Moreover, the amended complaint does not credibly allege that any harms suffered by Plaintiffs, however remote, were caused by acts *of the Federal Defendants*. Indeed, none of the Department's programs can be used to "exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution," 20 U.S.C. § 1232a, and thus the content of the courses offered at Columbia are outside of the Department's control. Plaintiffs' unsupported accusation that the Department has "fail[ed] to set policies and provide aid for men's studies," Br. at 26, ignores this statutory prohibition. Plaintiffs thus lack standing to assert an equal protection claim based on the Department's student aid programs or school grants. Accordingly, this Court should affirm the district court's determination that Plaintiffs lacked standing to maintain their equal protection claim.

B. The Department's Programs Do Not Violate Constitutional Equal Protection Principles Because Plaintiffs Did Not Allege Purposeful Government Discrimination.

Plaintiffs' amended complaint also fails to state an equal protection claim against the Federal Defendants because Plaintiffs did not allege that the Federal Defendants engaged in purposeful discrimination. It is well established that the Fifth Amendment's Due Process Clause contains an "equal protection component" that forbids the Government from discriminating on the basis of sex. *Heckler v. Mathews*, 465 U.S. 728, 730-31 (1984).* "When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is . . . appropriate. The first question is whether the statutory classification is . . . indeed neutral in the sense that it is not gender-based. If the classification itself, covert [or] overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the

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* The " 'approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment,' " *Collier v. Barnhart*, 473 F.3d 444, 448 (2d Cir. 2007) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)), and thus cases applying either of these constitutional provisions are relied upon herein.

Constitution." *Collier*, 473 F.3d at 448 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979)).

As to this second inquiry, a plaintiff must establish that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part *because of* not merely *in spite of* its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (emphasis added); *see also Grimes ex rel. Grimes v. Sobol*, 832 F. Supp. 704, 708 (S.D.N.Y. 1993) ("[i]n alleging a claim . . . based on a constitutional violation, the '[d]iscriminatory purpose' with which a defendant must have acted 'implies more than intent as volition or intent as awareness of the consequences' " (quoting *Feeney*, 442 U.S. at 279)), *aff'd*, 37 F.3d 857 (2d Cir. 1994).

Here, the statutes enacting the student-aid programs contain no classifications potentially relating to gender, nor does the complaint allege any such classification. As to whether these statutes reflect alleged "purposeful" sex-based discrimination, Plaintiffs allege that the Department provides "student aid to colleges and universities, including Columbia . . . , that [offer courses in] Women's Studies" (JA 27); that this aid "advanc[es] the disparate treatment of males and the harmful impact of [Women's Studies] programs" (*id.*); that this aid contributes to societal differences in the treatment of men and women (JA 27-28); and that this aid "directly result[s] in disparate treatment of men at Columbia" (JA 28). They conclude that the Department "knowingly assist[s] the prejudicial dissimilar treatment of men" through the provision of such aid. (JA 28).

These allegations fall far short of those needed to establish purposeful, sex-based discrimination. In particular, even assuming that the Department's administration of its various programs has an adverse effect on men—which it clearly does not—the amended complaint does not allege that the Department administers its programs specifically "*because of* . . . [their] adverse effects" on men. *Feeney*, 442 U.S. at 279 (emphasis added). That is, Plaintiffs have failed to make "specific allegations of fact necessary to sustain the claim" that the Department's programs were enacted and administered in this way "*because* of, not merely *in spite* of, [their] allegedly detrimental effects on [men]." *Grimes*, 832 F. Supp. at 708 (emphases in original).

Moreover, it would be impossible for Plaintiffs to plausibly allege such purposeful discrimination. As explained above, Congress has specifically prohibited the Department from exercising any supervision or control over the content of courses offered at participating institutions of higher education, through the student-aid or other programs, 20 U.S.C. § 1232a, and thus the Federal Defendants' administration of these programs must be without regard to the courses of study offered or chosen by an eligible student at any given college.

In *Grimes*, the court rejected an analogous equal protection claim to the one Plaintiffs attempted to assert here. In that case, a group of African-American students in New York City public schools charged that the public school curriculum "distorts and demeans the role of African Americans and excludes the existence, contributions, and participation of African Americans

in the various aspects of world and American culture." *Id.* at 706 (internal quotation marks omitted). Although the school authorities had "implemented a Holocaust Curriculum and an Italian Heritage Curriculum, but did not adopt a special curriculum to focus on issues of particular importance to African Americans," the district court found that the "Plaintiffs had failed to come forward with the specific allegations of fact necessary to sustain the claim that a discriminatory *purpose* was a motivating factor in any actions taken by defendants—that is, that the curriculum was adopted *because* of, not merely *in spite* of, its allegedly detrimental effects on African American students." *Id.* at 708 (emphases in original).

Here, Plaintiffs' claims against the Federal Defendants are infinitely more remote. They do not allege that the Federal Defendants played any role in creating the curriculum about which Plaintiffs are concerned, and the curriculum in question is not part of a mandatory public school offering, but rather comprises elective university courses. The amended complaint seeks relief from the Federal Defendants merely on the theory that they provide funds by which students can defray part of the cost of attending eligible institutions of higher education, and at which the students may choose any available course of study. Because Plaintiffs do not thus allege sufficient facts to support an inference of intentional discrimination based on gender, this Court can also affirm the district court's dismissal of Plaintiffs' equal protection claim on this ground. *See Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006) (court of appeals is "free to affirm a decision on any grounds supported in the record").

CONCLUSION

The district court's judgment should be affirmed.

Dated: New York, New York
December 14, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6750 words in this brief.

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ANTI-VIRUS CERTIFICATION

Case Name: Hollander v. Instit. for Research on Women

Docket Number: 09-1910-cv

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **prosecases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 12/14/2009) and found to be VIRUS FREE.

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BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

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December 14, 2009

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Case Name: Hollander v. Institute for Research

Docket/Case No. 09-1910-c