U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
New York, New York 10007

April 1, 2011

BY HAND
Hon. Henry B. Pitman
United States Magistrate Judge
United States District Court
500 Pearl Street, Suite 750
New York, New York 10007

Re: *Den Hollander v. Members of the Board of Regents*, 10 Civ. 9277 (LTS) (HBP)

Dear Judge Pitman:

I write on behalf of the United States Department of Education and the Secretary of Education (collectively, "the Federal Defendants") to move to dismiss the complaint in the above-referenced action, which challenges federal financial assistance to Columbia University on the grounds that its Women's Studies program teaches the purported religion of "Feminism," in supposed violation of the First Amendment's Establishment Clause. I ask that the Court accept this letter brief in lieu of a formal motion to dismiss, and place this letter on the docket.[1]

This action must be dismissed on the grounds of collateral estoppel, because Plaintiff's standing to bring this very cause of action was previously determined by this Court and the Second Circuit, and cannot now be relitigated. On August 18, 2008, Plaintiff brought a nearly identical action against the Federal Defendants and others, claiming that federal assistance to Columbia University violated the Establishment Clause.[2] Magistrate Judge Fox issued a report and recommendation ("R&R") that recommended dismissing all of Plaintiff's claims for lack of standing, pointing out that Plaintiff is not a Columbia student nor has he never been exposed to the content of its Women's Studies courses. *See Hollander v. Inst. for Research on Women &*

[1]As this Court's Individual Practices require parties to exchange their motion papers among themselves in advance of filing them with the Court or providing courtesy copies to chambers, the undersigned provided this letter to the parties on February 11, 2011.

[2]The instant complaint is narrower than his first complaint in that it drops an equal-protection claim against the Federal Defendants, as well as claims against Columbia University.

Gender., No. 08 Civ. 7286 (LAK) (KNF), 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009). Ruling on Plaintiff's objection to the R&R in an unpublished order (a copy of which is attached hereto), Judge Kaplan agreed with Judge Fox's recommendation, and dismissed the action for lack of standing. The district court also ruled that "[t]he Establishment Clause claims are dismissed also on the alternative ground that they are absurd and utterly without merit."[3]

On appeal to the Second Circuit, Plaintiff claimed for the first time that he had "taxpayer standing" to assert his Establishment Clause claim, though his complaint did not plead this basis for standing. The Circuit thus dismissed his claims for lack of standing, specifically noting that Plaintiff has not "made out the requirements for taxpayer standing for his Establishment Clause claim." *Hollander v. Inst. for Research on Women & Gender*, 372 F. App'x 140, 142 (2d Cir. 2010). The Court of Appeals added that it "share[d] . . . the district court's grave doubts" about the underlying merits of the action. *Id.*

Plaintiff now attempts to replead his Establishment Clause claim, along with a lengthy enumeration of facts to support his taxpayer standing to bring such a claim. *See* Compl. ¶¶ 13-14, 72-77; *see also DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001) (explaining that in order to establish taxpayer standing to mount an Establishment Clause challenge, a plaintiff must identify "an expenditure made pursuant to statutory mandate, [and] establish[] a logical link between his status as a taxpayer and the type of legislative enactment attacked as well as a nexus between that status and the precise nature of the constitutional infringement alleged") (citations, quotation marks, brackets, and ellipsis omitted). But his new complaint pleads no new facts that were not known to Plaintiff at the time he brought his first complaint, and addresses no change in circumstances that would have not permitted him to make these allegations during his first action.

Plaintiff's complaint should be dismissed because it is barred by issue preclusion, as the issue of his standing to bring this very claim was previously decided against him. Courts confronted with similar claims — where plaintiffs attempt to relitigate issues in a second action after a previous court determination that they lacked standing to assert similar or identical claims — have dismissed them on grounds of issue preclusion. In a case bearing some similarities to the instant one, a plaintiff in the District of Columbia brought an Establishment Clause challenge to the use of the phrase "so help me God" during the 2005 Presidential inauguration, but the district court dismissed the action on the grounds that the plaintiff's prior lawsuit (involving the 2001 Presidential inauguration) had been dismissed for lack of standing by a district court in California, which had been affirmed by the Ninth Circuit. *See Newdow v. Bush*, 391 F. Supp. 2d 96, 99-101 (D.D.C. 2005). Similarly, the D.C. Circuit dismissed a challenge by a collegiate sports group to the Department of Education's policy interpretation on sex discrimination in sports programs because the same plaintiffs had brought a similar challenge a few years earlier,

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[3] I hereby attach a copy of the Federal Defendants' motion to dismiss Plaintiff's first complaint, which addresses the merits of his Establishment Clause claim, arguing that it should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

which had been dismissed for a lack of standing. *See Coll. Sports Council v. Dep't of Educ.*, 465 F.3d 20, 22-23 (D.C. Cir. 2006); *see also Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 898 n.10 (2d Cir. 1980) ("the issue of [certain plaintiffs'] standing . . . has been determined adversely to them in the state courts and that decision is binding upon us under principles of res judicata").

Furthermore, Plaintiff's complaint pleads no new facts that were not known to Plaintiff when he filed his previous complaint, and thus he is not entitled to file complaints upon complaints to cure jurisdictional defects he could have attempted to cure in the initial action. As the Seventh Circuit has explained, while it is true that dismissal for lack of standing is not a decision on the merits of the action, "that does not mean that dismissals for lack of jurisdiction have no preclusive effect at all[;] [a] dismissal for lack of jurisdiction [here, for lack of standing] precludes relitigation of the issue actually decided, namely the jurisdictional issue." *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000). In that case, a plaintiff, filed a second complaint which "inclu[ded] . . . some facts that [he] (mistakenly) believe[d] would establish his standing to seek injunctive and declaratory relief," relief which a prior case determined he did not have standing to seek. *Id.* at 317. This, the court held, was barred by issue preclusion, especially because "the factual allegations included in [the second complaint] did not represent a change in circumstances between [the first and second actions]. Instead, they were facts known when [the first action] was brought, but that were never included in the complaint." *Id.* at 318. It explained that this distinction was significant:

> [u]nder a system such as that established by the Federal Rules of Civil Procedure, which permits liberal amendment of pleadings, it does not make sense to allow a plaintiff to begin the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of from the beginning of the suit, until it finally satisfies the jurisdictional requirements.

Id. (internal quotation marks omitted).

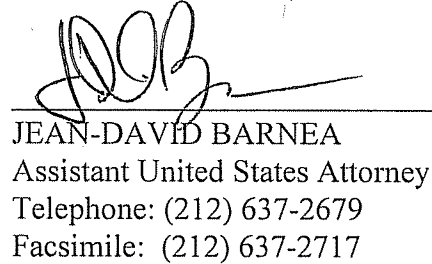
Here, Plaintiff's second action must be dismissed for the same reason. His first complaint was dismissed for lack of standing by this Court, a determination which was upheld by the Second Circuit. At no time during the pendency of the previous action did Plaintiff request leave from this Court to amend his complaint to add allegations relating to his taxpayer standing, notwithstanding that the facts he now pleads in support of his taxpayer standing were certainly known to him at the time of his prior complaint, *see* Compl. ¶ 13 (his status as "a New York State and federal taxpayer"); *id.* ¶ 75 (the statutory grant and loan programs administered by the Department of Education). Having thus forfeited the opportunity to do so, he cannot now create an end run around this Court's prior determination and relitigate the issue. His new action must thus be dismissed on grounds of issue preclusion. *See Coll. Sports Council*, 465 F.3d at 22-23; *Perry v. Sheahan*, 222 F.3d at 317-18; *Newdow*, 391 F. Supp. 2d at 99-101.

Should the Court deem that this issue ought to be presented in a formal motion or that the parties should also address the underlying merits of Plaintiff's constitutional claim against the

Federal Defendants, the Federal Defendants respectfully request the opportunity to do so. I thank the Court for its consideration of this matter.

Respectfully,

PREET BHARARA
United States Attorney



By: ______________________
JEAN-DAVID BARNEA
Assistant United States Attorney
Telephone: (212) 637-2679
Facsimile: (212) 637-2717

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cc: **BY EMAIL-PDF** (without enclosures)
Roy Den Hollander (*pro se*)
545 East 14th Street, 10D
New York, NY 10009

Clement J. Colucci (counsel for the New York State defendants)
Assistant Attorney General
New York State Department of Law
120 Broadway
New York, NY 10271