
In The
Supreme Court of the United States



In re ROY DEN HOLLANDER
Petitioner, on behalf of himself and all others similarly situated.

On Petition for Writ of Mandamus or Prohibition to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF MANDAMUS
OR PROHIBITION

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QUESTIONS PRESENTED

Men's rights attorney, petitioner Roy Den Hollander ("Den Hollander"), brought four class action lawsuits challenging discrimination against men by the federal and state governments. The Court of Appeals for the Second Circuit used Summary Orders in three of the four cases to quickly rid the federal courts of men who believed that "in times of repression, when interests with powerful spokes[persons] generate symbolic pogroms against nonconformists, the federal judiciary . . . has special responsibilities to prevent an erosion of the individual's constitutional rights." *Younger v. Harris*, 401 U.S. 37, 58 (1971)(Douglas, J. dissenting).

The latest Summary Order threatens Den Hollander with sanctions if he represents two men or anyone who dares bring a new action challenging federal and New York State enforcement of the belief system Feminism in higher education—a belief system that has all the earmarks of religion as that term has been used by the U.S. Supreme Court and various courts of appeals.

1. Should the Court of Appeals for the Second Circuit rescind its threat that when attorney Den Hollander again involves himself in a case alleging that Feminism is a religion, he will be sanctioned under Fed. R. Civ. P. 11, which may include a fine, suspension from the practice of law, or disbarment?

2. Should the Court of Appeals for the Second Circuit refrain from abusing its power by relying on the historically discredited authoritarian

prerogative of arbitrary rule in dismissing men's rights cases through Summary Orders?

3. When the rights of men are violated by government giving preferential treatment to women, should the federal courts of these United States, such as those of the Second Circuit, be compelled to protect the constitutional rights and liberties of the minority—men, by making decisions in accordance with the U.S. Constitution instead of the invidiously discriminatory, anti-male belief system Feminism?

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**PETITION FOR A WRIT OF MANDAMUS OR
PROHIBITION**

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit (App. 1a) is not published but is available at *Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, 2013 U.S. App. LEXIS 7368 (2d Cir. April 10, 2013).¹

The Second Circuit affirmed the October 31, 2011 order of the United States District Court for the Southern District of New York (App. 44a), which is not published but is available at *Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, 2011 U.S. Dist. LEXIS 125593, (S.D.N.Y. October 31, 2011).

The Second Circuit also affirmed the district court's memorandum order of May 21, 2012, which incorporated certain sections of defendants' memoranda of law. The memorandum order is not published and not available on Lexis or Westlaw but is printed along with the incorporated sections in the Appendix at 52a.

JURISDICTION

The Second Circuit entered judgment on April 10, 2013. This Court has jurisdiction under 28 U.S.C.

¹ The petitioner's last name consists of two words, "Den Hollander," since he is of Dutch ancestry. Petitioner has repeatedly tried to correct opposing attorneys, judges, and the courts to use both words instead of just "Hollander"—sometimes with success, often times not. In this petition, the petitioner uses his correct surname.

§ 1651(a). The issuance of a writ of mandamus or prohibition to an inferior court is an exercise of appellate jurisdiction. *In re Winn*, 213 U.S. 458, 465-466 (1909).

The district court had jurisdiction under 28 U.S.C. § 1331, and the Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the U.S. Constitution: The Government shall not abridge “the right of the people . . . to petition the Government for a redress of grievances.”

STATEMENT OF THE CASE

Petitioner Den Hollander attempted with four lawsuits to find justice for the rights of men in the federal judiciary but failed because the courts have become ideologically corrupted by ruling in accordance with the invidiously discriminatory belief system Feminism rather than the Constitution.

Each case challenged the deprivation of the rights of men by government giving preferential treatment to females.

Most recently in two companion cases, Den Hollander alleged that the Board of Regents of New York State and the United States Department of Education violated the Establishment Clause of the First Amendment by aiding the modern-day religion Feminism in colleges in New York.

The Court of Appeals for the Second Circuit avoided ruling on the substantive issue of whether Feminism satisfied the standards for a religion as

established by the Supreme Court and various courts of appeals.²

In the first case, the Second Circuit relied on the hyper-technical pleading standards of the early 19th century to rule through Summary Order that because Den Hollander had failed to include the words “I am a taxpayer,” he did not have standing to bring the case. *Den Hollander v. I.R.W.G. at Columbia Univ.*, App. 138a, 372 Fed. Appx. 140, 142 (2d Cir. 2010), 2010 U.S. App. LEXIS 7902 *3 (April 16, 2010)). The Second Circuit never decided the other Establishment Clause standing issue of non-economic injury. In addition, during oral argument Judge Straub resorted to insulting the petitioner, by sarcastically remarking “Are you a lawyer, are you?” and “But [Den Hollander] here alleges ad nauseam the involvement of the state” App. 153a, 156a, Transcription Oral Argument.

In the second case, the Court of Appeals used the doctrine of “issue preclusion” to avoid a decision on the merits even though there were two new plaintiffs not involved in the first case who tried to join the proceeding but were barred. *Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, App. 5a-7a, 2013 U.S. App. LEXIS 7368 (2d Cir. April 10, 2013). It was that Summary

² Cases that established standards for determining whether a belief system is a religion are *Welsh v. U.S.*, 398 U.S. 333, 339-340 (1970); *U.S. v. Seeger*, 380 U.S. 163, 176, 186 (1965); *Torasco v. Watkins*, 367 U.S. 488, 495 n. 11 (1961); *Malnak v. Yogi*, 592 F.2d 197, 211-212 (3rd Cir. 1979)(Adams, J., concurring); *U.S. v. Bush*, 509 F.2d 776, 780, 782-783 (7th Cir. 1975); and *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227-1229 (9th Cir. 1996).

Order which threatened Den Hollander with sanctions:

One additional point deserves mention. By presenting a court with a pleading, an attorney certifies, *inter alia*, that (1) the pleading ‘is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation’; (2) ‘the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law’; and (3) ‘the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.’ Fed. R. Civ. P. 11(b). Hollander is an attorney. Before again invoking his *feminism-as-religion thesis* in support of an Establishment Clause claim, we expect him to consider carefully whether his conduct passes muster under Rule 11.

(*Id.* at *6-7, App. 7a-8a)(emphasis added)(the legal errors with that Summary Order are addressed in a current petition to this Court for a writ of certiorari).

The third Summary Order from the Second Circuit came in a case challenging secrecy provisions enacted under the Violence Against Women’s Act

(“VAWA”), 8 U.S.C. § 1367(a)(b) & (c). *Den Hollander, Moffett, Cardozo, Brannon v. United States of America, et al.*, App. 159a, 2009 U.S. App. LEXIS 26248. The Department of Homeland Security’s immigration divisions use proceedings kept secret from Americans to make findings of fact that an American has committed “battery,” “extreme cruelty” or an “overall pattern of violence” against an alien spouse or lover. Even if the American learns of the proceedings, he is barred from submitting evidence on his behalf and is barred from accessing and challenging the findings that are forever kept in the government’s record on him.

The secret proceedings are used against a disproportionate number of American males—around 85%, which makes it an equal protection violation in the application of the law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886)(laws might not have invidiously discriminatory classifications written in words, but they may be applied in such a way as to create such classifications).

The Second Circuit dismissed the case for lack of injury by resting its decision on the following Kafkaian logic: Since the fact-findings are kept secret from the American, any allegation of harm stemming from those secret fact-findings that the American makes is “speculative.” The plaintiffs, including Den Hollander, could not find out what the federal government did behind closed doors concerning them because they were locked out. Therefore, they could not specifically say what took place or how those fact-findings were used against them and to whom disseminated. The law allows the government to provide those fact-findings to certain Feminist

organizations, potential government employers, and virtually every law enforcement agency in the world. The Second Circuit ruled the plaintiffs' allegations speculative even though it was the government's secrecy that was being challenged which allowed the Court to rule the allegations speculative. A Catch 22 by any other name.

In the VAWA case, the Second Circuit's subservience to society's preoccupation with punishing males for any perceived or imagined slight to females, alien or citizen, caused it to ignore the wisdom of one of the better Supreme Court Justices: secrecy "provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected. Appearances in the dark are apt to look different in the light of day." *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951)(Frankfurter J., concurring).

While the Second Circuit did not eliminate the fourth men's rights case with its arbitrary decision making prerogative of a Summary Order, it did create a distinction without a difference to again crush the rights of men. In what the media dubbed the "Ladies Nights" case, public accommodation nightclubs charged males more for admission. *Den Hollander v. Copacabana Nightclub, et al.*, App. 164a, 2010 U.S. App. LEXIS 18229. The Second Circuit ruled that "state action" existed only at the point where an alcoholic drink is handed over to a customer, but not when the customer enters the nightclub to reach the bar to obtain the drink. It was the classic "distinction without a difference."

The Second Circuit found the “distinction” necessary in order not to overrule a 1970 case that found state action when a bar discriminated against two ladies. *Seidenberg v. McSorleys’ Old Ale House, Inc.*, 317 F. Supp. 593 (1970). The Court of Appeals wrongly claimed that those two ladies were refused alcoholic drinks, so state action was involved. However, the files of that case do not refer to any refusal to serve alcoholic drinks—it could have been cokes for all the Court knew. So the Second Circuit simply invented a fact to reach the decision required by its anti-male Feminist ideology because now males were being discriminated against—which is acceptable. The Court also ignored that controlling alcohol has always been a public function: “[W]hen private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations.” *Evans v. Newton*, 382 U.S. 296, 299 (1966).

In these four case, not once, not even close to once, did any federal court ever reach the fundamental question in each case: Is it fair under the U.S. Constitution to give women favorable treatment at the expense of the rights of men? The cases were not about enforcing more rights for men but defending the rights they have in the face of an onslaught by the totalitarian belief system Feminism. As Professor Howard Zinn insightfully observed, “[I]t is possible to have an atmosphere of totalitarianism in a society which has many of the attributes of democracy.” Howard Zinn, *Disobedience*

and Democracy: Nine Fallacies on Law and Order at 120, Random House/Vintage Books (1968).

The Second Circuit used one or another of the many methods that bureaucrats endowed with governmental power use, or more accurately abuse, in order to further their personal beliefs or demonstrate subservient allegiance to those they fear. Every case was thrown out of court at the very first instance, regardless of what the blindfolded lady in the courthouse allegedly represents.

REASONS FOR GRANTING THE PETITION

The injustice of the current case is that the Court of Appeals for the Second Circuit has not only again demonstrated a pattern of giving short shrift to the rights of men, but is now escalating its opposition to men's rights by resorting to the threat of sanctions. Its aim is clear—stop an attorney from not only bringing a similar case but essentially any case opposing the preferential treatment of the majority—women, by the government. The sword of Damocles³ not only hangs over attorney Den Hollander's head but the economic livelihood of any attorney and the rights of any *pro se* party who dares to advocate for the rights of men deprived by a government enforcing the dictates of what has become the equivalent of an American religion—Feminism.

The U.S. Supreme Court is the only court with the supervisory authority that can put a stop to such an abuse of power by the Second Circuit and assure that the Supreme Court's eventual jurisdiction over

³ Cicero, *Tusculan Disputations*, V. 61–2.

this brand of civil rights cases is not frustrated by the Second Circuit's unconstitutional conduct. The Supreme Court has previously invoked 28 U.S.C. § 1651(a) to issue a writ in aid of its jurisdiction involving lawsuits over which the Court would have statutory review jurisdiction at a later stage. *E. g.*, *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945); *Ex parte Peru*, 318 U.S. 578, 586 (1943); *Ex parte United States*, 287 U.S. 241, 248-249 (1932); *McClellan v. Carland*, 217 U.S. 268, 280 (1910).

Without the aid of a writ of mandamus or prohibition, "history shows that people have a way of not being willing to bear oppressive grievances without protest. Such protests, when bottomed upon facts, lead almost inevitably to an irresistible popular demand for either a redress of those grievances or a change in the Government." *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 167 (1961) (Black, J., dissenting).

I. The Second Circuit's threat of sanctions chills both Den Hollander's and other men's rights advocates' First Amendment rights to petition their government for a redress of grievances.

The First Amendment to the federal constitution prohibits not only Congress but the Judiciary from abridging "the right of the people . . . to petition the Government for a redress of grievances."

The Court of Appeals for the Second Circuit has in effect issued a permanent injunction against a men's rights attorney that forever bans him from representing anyone—for a fee or *pro bono*, or providing advice, or participating in any manner in a case raising the issue of whether Feminism is a religion under Supreme Court or various federal courts standards.

The Supreme Court and other federal courts have taken the time, energy, and effort to decide whether beliefs in “goodness,” Aztec mythology, transcendental meditation, or even atheism are religions under the First Amendment.⁴ But when it comes to Feminism, which impacts a lot more people than those beliefs, no court dares to decide whether it is a religion other than by way of a *dictum* decree made without evidence or discovery by a district court judge. *Den Hollander v. I.R.W.G. at Columbia Univ.*, 2009 U.S. Dist. LEXIS 131582 *4-5 (S.D.N.Y. April 23, 2009).⁵

While the Second Circuit's threat focuses on one advocate for men's rights and one issue, the threat coupled with its prior dismissive disregard for the deprivation of men's rights sends a perfectly clear message to attorneys and parties alike—do not bother us with such cases and if you persist, we will

⁴ *U.S. v. Seeger*, 380 U.S. 163, 166 (1965); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1225 (9th Cir. 1996); *Malnak v. Yogi*, 592 F.2d 197, 198 (3rd Cir. 1979); *U.S. v. Bush*, 509 F.2d 776, 780 (7th Cir. 1975).

⁵ “Feminism is no more a religion than physics” Judge Lewis A. Kaplan.

punish you.⁶ The Second Circuit has in effect loaded a gun and aimed it at anyone thinking about petitioning the courts to put a stop to any governmental invidious discrimination against men that benefits the exalted sacrosanct majority—females.

As the eminent Chief Judge Jack B. Weinstein advised:

Some litigations should be, if not encouraged, at least not discouraged. Of particular importance are cases brought against government officials and government agencies. Such suits are often the only effective channel for keeping within bounds official arrogance and lawlessness. At the very least, they publicize grievances and thus permit the ventilation of private outrage that the First Amendment's right to petition protects. They serve the public policy of avoiding violence by providing a peaceful forum. They may provide the basis for legislative and executive ameliorative action even when the courts lack power to act.

⁶ For attorneys, the court can fine, refer for suspension or disbarment, have arrested, require representation of any indigent—whether citizen or not, demand an apology to Feminists, require posting a bond in future cases, require copying by hand sections of legal treatises, put an attorney into re-education, and demand he obtain court permission to bring future men's rights cases.

Eastway Constr. Corp. v. City of New York, 637 F.Supp. 558, 575 (E.D.N.Y. 1986)(Weinstein, C.J.), modified 821 F.2d 121 (2d Cir. 1987), *certiorari denied* 484 U.S. 918.

In this democracy, there has been a deliberate policy choice to make our nation's courts more accessible to people who feel aggrieved, particularly in certain areas such as civil rights. Wright, Miller & Kane, *5A Fed. Prac. & Proc. Civ.* § 1331 at 3 (3d ed.). The reasons are simple: (1) "Individual liberty is the first concern of every man for without it, life is not worth living." Clarence Darrow. And (2) "Freedom is never more than one generation away from extinction. We didn't pass it to our children in the bloodstream. It must be fought for, protected, and handed on for them to do the same." Ronald Reagan. The way to do that is through the courts:

The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [*Marbury v. Madison*, 5 U.S. 137, 1803 WL 893 (1803)] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our

Federal Government in the final analysis rests.

United States v. Richardson, 418 U.S. 166, 192 (1974)(Powell, J., concurring). The Second Circuit, however, has erected a road block to the meaningful judicial review of the deprivation of men's rights that it intends to enforce with sanctions.

While the drafters of Rule 11 specifically intended to provide a means for deterring frivolous litigation, they also intended to avoid the unwanted side effect of undermining the vindication of any substantive right, including civil rights. Wright, Miller & Kane, *5A Fed. Prac. & Proc. Civ.* § 1332 at 4 (3d ed.). The Second Circuit's decisions eliminate that intent and confirm Professor Georgene Vairo's warning of too many cases being dismissed or litigated with little regard to the merits, Vairo, *Report to the Advisory Committee on Amended Rule 11* (September, 1987), at least concerning the civil rights of men opposing the preferential treatment of females.

Rule 11 "requires that members of the bar avoid haphazard, superficial research" improperly motivated and their pleadings have evidentiary support. *International Shipping Company v. Hydra Offshore, Inc.*, 875 F.2d 388 (2d. Cir. 1989); Fed. R. Civ. P. 11(b)(3). The allegation of "feminism-as-religion" resulted from weeks of research, discussion, and review of the writings of experts on that belief system, all of which are clearly reflected in the proposed amended complaint that the district court and Second Circuit barred. App. 73a-83a. For evidentiary support, the complaint refers to and

quotes from policy statements by the Regents of New York State that illustrate their faithful devotion to the preferential treatment of females in higher education at a time when in America the supermajority of college and graduate degrees are awarded to females.⁷ In particular, the Regents *Equity for Women in the 1990s, Regents Policy and Action Plan* (1993). App. 106a. As for motivation, fighting for one's rights is never improper.

This case did not ask for extension, modification, or reversal of existing law but simply for the application of existing law to whether Feminism is a religion. Applying the standards used by the Supreme Court, various courts of appeals,⁸ the Equal Employment Opportunity Commission in Title VII employment cases, 29 C.F.R. §1605.1, and *Altman v. Bedford Cent. School Dist.*, 45 F.Supp.2d 368, 378, (S.D.N.Y. 1999), *rev'd on other grounds*, 245 F.3d 49 (2d Cir. 2001), *cert denied*, 534 U.S. 827, clearly indicate Feminism is a religion. App. 73a-75a. But that is an adjudicatory endeavor never performed by a federal court in this case or the prior one because the first case was disposed of on the hyper-technical requirements of the early 19th century—pleading must contain the words “I am a

⁷ In 2010, Females earned 60% associate's, 57% bachelor's, 60% master's and 52% doctor's degrees. U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 2012*.

⁸ *Welsh v. U.S.*, 398 U.S. 333, 339-340 (1970); *U.S. v. Seeger*, 380 U.S. 163, 176, 186 (1965); *Torasco v. Watkins*, 367 U.S. 488, 495 n. 11 (1961); *Malnak v. Yogi*, 592 F.2d 197, 211-212 (3rd Cir. 1979)(Adams, J., concurring); *U.S. v. Bush*, 509 F.2d 776, 780, 782-783 (7th Cir. 1975); and *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227-1229 (9th Cir. 1996).

taxpayer,” and this case by Clintonian linguistics—“new plaintiffs are not new evidence.” So whether the thesis of “feminism-as-religion” is a losing or winning one has never been determined, and, thanks to one of the most prestigious courts in the land, will most likely not be determined until some future generation when society no longer considers men inferior to women.

For now, however, the barring of a men’s rights attorney from representing new plaintiffs in a new action is no different than a Jim Crow court in the 1800s threatening the attorney for the New Orleans Comité des Citoyens with sanctions for bringing another *Plessy v. Ferguson*, 163 U.S. 537 (1896), suit with a different plaintiff on the same issue—separate but equal. And no different than at the end of every year sanctioning the American Civil Liberties Union for bringing another action with new plaintiffs against Christmas displays.

The Second Circuit has done what sanctions are not intended to do—impede creative advocacy and “discourage attorneys from advocating positions which, though today perceived as absurd, may become tomorrow’s law.” *Larez v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994).

II. The Second Circuit relied on the once discredited doctrine of arbitrary rule by using “Summary Orders” to dispose of three out of four men’s rights cases.

Nearly 800 hundred years after the *Magna Carta* initiated a historical change of eliminating arbitrary rule by those who hold government

authority for life,⁹ the judges of the Second Circuit reverted to the ways of King John of England by using “Summary Orders” to exercise their power against those they view as dissidents and troublesome minorities.

The Second Circuit’s Local Rule 32.1.1(b) states that “[r]ulings by summary order do not have precedential effect.” The lack of precedential effect allows the judges of the Court of Appeals to rule in accordance with their personal wishes without the same invented law or inconsistent analyses being used against those they favor in future cases. Summary Orders also reduce the likelihood of Supreme Court review because by their definition they only affect the parties standing before the court—those individuals are bound by the judges’ decisions but nobody else. To government, it is an acceptable injustice despite the words of Ghandi that “an injustice to one is an injustice to all.”

Summary Orders allow Second Circuit judges to replace the “rule of law” for the “rule of the person.” When a subject petitions the powerful elite of the Second Circuit, the judges can either spend their time, energy, and effort in applying the law of the land to resolve the dispute or invoke Local Rule 32.1.1 to circumvent the supremacy of the law and rule in accordance with their own will. It is an

⁹ Lord Denning described the *Magna Carta* as “the greatest constitutional document of all time—the foundation of the freedom of the individual against the arbitrary authority of the despot.” Danziger & Gillingham, *1215: The Year of Magna Carta*, p. 278, paperback ed. 2004.

authoritarian prerogative that supposedly ended in the medieval ages.

In three of the four men's rights cases, judges of the Second Circuit relied on the divine right of their life long tenure and Summary Orders to rule in accordance with their adherence to the establishment's de facto ideology of Feminism.¹⁰

In this case, *Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, App. 1a, 2013 U.S. App. LEXIS 7368 (2d Cir. April 10, 2013), the Second Circuit ignored the traditional legal definition for "evidence." Evidence is "[a]ny species of proof presented . . . through the medium of witnesses [which commonsensically includes parties] . . . for the purpose of inducing belief in the minds of the [judges] as to their contentions." *American Jurisprudence*, Evidence § 1. The Second Circuit simply ignored that new plaintiffs with different fact situations meant new evidence and ruled against amending the complaint, which would have prevented summary judgment based on collateral estoppel. In addition, just the presence of two new plaintiffs not involved in the prior case would infer that the ultimate fact of collateral estoppel would not apply.

In the precursor case, *Den Hollander v. I.R.W.G. at Columbia Univ.*, App. 134a, 372 Fed. Appx. 140, 142 (2d Cir. 2010), 2010 U.S. App. LEXIS

¹⁰ The Establishment today is a Feminist Establishment—a unitary belief system held by enough influential persons so that it dominates over other beliefs in this society, such as the principles of the Declaration of Independence and the Bill of Rights.

7902 (April 16, 2010), the Second Circuit stepped back in time to the common law pleading standards of the early 1800s to rely on those hyper-technical rules and ignore modern-day notice pleading under Rule 8(a). The Court used a Summary Order to dismiss for lack of Establishment Clause standing because the complaint did not contain words that Den Hollander was a “taxpayer.” In its rush to throw out the case, the Second Circuit refused to take judicial notice of Den Hollander’s taxpayer status, even though the U.S. Attorney admitted such, App. 150a-151a, and refused to remand the case to the district court for discovery on that issue. Discovery that would have simply required the reproduction of Den Hollander’s tax return.

The Second Circuit’s third use of Summary Orders came in the case challenging a secrecy provision that allows Homeland Security to make a fact-finding that an American man committed “battery,” “extreme cruelty” or an “overall pattern of violence” against an alien spouse or lover. The Second Circuit told the four men petitioning for justice that because the provision kept secret from them (but not others such as law enforcement agencies, government employers, and certain Feminist nonprofits) what happened and was happening to their reputations, they could not detail any specific injuries, so there were no injuries. Once again early 19th century pleading standards that this time ignored the reason for discovery under the modern rules of procedure—to disclose information solely in the hands of an adversary.

In effect, America’s Feminist Establishment, which wrote the provision, told these particular men

that the destruction of their reputations and careers and hardships in finding gainful employment left them no legal recourse because government secrecy prevented them from detailing the exact steps that led to such harm.

Summary Orders allow the Second Circuit to do what Justice Stevens once warned against: “[O]ccasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.” J. Cole & E. Bucklo, *A life Well Lived: An Interview With Justice John Paul Stevens*, 32 *Litigation* 8, 67 (Spring 2006). The over use of Summary Orders, especially in men’s rights cases, is contrary to the rule of law. “It is more proper that law should govern than any one of the citizens . . . if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.” Aristotle, *Politics* 3.16.

III. The Second Circuit Court of Appeals is failing to protect the constitutional rights of the minority—men because when government violates their rights by giving females preferential treatment, the Second Circuit ignores the Constitution and decides in accordance with the belief system Feminism.

“Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind. Rather, our Constitution was fashioned to perpetuate liberty

and justice. . . .” *Turner v. United States*, 396 U.S. 398, 426 (1970)(Black, J., dissenting).

Writs of mandamus or prohibition are “an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.” *Virginia v. Rives*, 100 U.S. 313, 323 (1880)(Strong, J.).

In the four men’s rights cases, the Second Circuit has acted beyond its authority by deciding in accordance with the current popular ideology Feminism even though it is the imperative duty of the courts to support the Constitution and decide “under laws supposed already to exist.” *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908)(Holmes, J.). “[The] constitution is, in fact, and must be regarded by the judges, as a fundamental law.” Alexander Hamilton, *Federalist Paper No. 78*. Supplanting it with the tenets of Feminism is an act beyond a court’s authority and its duty to obey the rule of law—not the rule of the “politically correct.”

The Second Circuit has replaced the fundamental thesis of the Bill of Rights—fairness. “[A]n underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual.” *Regents of University of California v. Bakke*, 438 U.S. 265, 319 n.53 (1978). The Second Circuit, as shown by the four men’s rights cases, has decided to marginalize men while exalting females, which is the primary objective of Feminism. The Court is not standing as a Sir Gawain vigilant protector of women against barbarian, colonizing men but rather as an enforcer of a concept relied on by Justice Henry Brown, “if one [group] be inferior to

the other socially, the constitution of the United States cannot put them upon the same plane.” *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

Today in America, it is men who are deemed inferior under Feminism, so the Second Circuit has held that:

- It is fair to charge men more for admission to public accommodation nightclubs than females even though the clubs are pervasively regulated by a state liquor authority and serve a function traditionally reserved to state governments. *Den Hollander v. Copacabana Nightclub*, 624 F.3d 30, 2010 U.S. App. LEXIS 18229 (September 1, 2010)(*per curiam*).
- It is fair for the federal government to make findings of fact that a man committed “battery,” “extreme cruelty” or an “overall pattern of violence” against an alien spouse or lover when the man is barred from submitting evidence that he did not do it. *Den Hollander v. United States of America*, 354 Fed. Appx. 592, 2009 U.S. App. LEXIS 26248, (December 3, 2009)(summary order).
- It is fair that colleges with all-male sports teams be required to have all-female teams, but not fair for colleges with Women’s Studies Programs be required to have Men’s Studies Programs even when men make up a

minority of the students on campus. *Den Hollander v. Institute for Research on Women & Gender at Columbia Univ.*, 372 Fed. Appx. 140, 2010 U.S. App. LEXIS 7902 (April 16, 2010)(summary order).

- It is fair that New York State has re-made higher education in accordance with Feminist dogma by requiring that all the activities of colleges be conducted in a female friendly fashion to meet the needs of females while ignoring the needs of males—the group most at risk of not graduating or finding productive work. *Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, 2013 U.S. App. LEXIS 7368 (April 10, 2013)(summary order).

These men’s rights cases were not about winning more rights for men but enforcing those rights that already are supposed to exist. There is no conflict among the rights of men and the rights of females unless one group is repeatedly favored over the other because that requires the violation of the other’s rights. The current state of the law in the Second Circuit is that females are favored over males.

The men’s rights cases simply advocated the principle expressed by Justice Harlan in his lone dissent in *Plessy v. Ferguson*, 163 U.S. at 559, although as applied to sex rather than color: “[I]n view of the Constitution, in the eye of the law, there

is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is [sex]-blind, and neither knows nor tolerates classes among citizens.”

Nice words, but for men fighting the deprivation of their rights in the Second Circuit Court of Appeals—just words.

Acting as a legislature, the Second Circuit has decided to send a message to future litigants of men’s rights cases not to petition that Court for a redress of grievances because they will fare no better than Den Hollander under the Law of Feminism.

CONCLUSION

“In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury [and insults]. A [judiciary], whose character is thus marked by every act which may define a Tyran[ny]¹¹, is unfit to be the [arbitrator] of a free people.” *The Declaration of Independence*.

The Second Circuit has so exceeded its authority as to warrant issuance of a writ of mandamus or prohibition. This petition is the only remedy available—other than that previously advocated by Professor Howard Zinn during the Vietnam War, “Civil disobedience is the organized

¹¹ “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” James Madison, *Federalist Paper* No. 47. The dominance of the belief system Feminism has created a tyranny in America by controlling the decision makings of all branches of government.

expression of revolt against existing evils The deliberate violation of law for a vital social purpose. It becomes not only justifiable but necessary when [] fundamental human right[s] [are] at stake, and when legal channels are inadequate for securing [those] right[s].” Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order* at 119, Random House/Vintage Books (1968).

The petitioner requests that a writ of mandamus or prohibition from the Supreme Court to the Court of Appeals for the Second Circuit require that court to (1) withdraw its threat of Rule 11 sanctions against attorney Den Hollander, (2) curtail the use of summary orders in men’s rights cases, and (3) ensure for all the “American people the promise of equal justice under law,” rather than favoring a particular group because of its current political and social influence.

The petitioner also requests such other and further relief and process as this Court may deem just and proper.

Dated: June 24, 2013

Respectfully submitted

Roy Den Hollander

Counsel of Record

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UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of April, two thousand thirteen.

Present: BARRINGTON D. PARKER,
 SUSAN L. CARNEY,
 Circuit Judges,
 JED S. RAKOFF,
 District Judge.*

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

ROY DEN HOLLANDER, on behalf of himself and
all others similarly situated,

Plaintiff-Appellant,

v.

MEMBERS OF THE BOARD OF REGENTS OF
THE UNIVERSITY OF THE STATE OF NEW
YORK, in their official capacities, in their individual
capacities, MERRYL H. TISCH, Chancellor of the
Board of Regents; in her official capacity, Chancellor
of the Board of Regents; in her individual capacity,
DAVID M. STEINER, New York State
Commissioner of the Department of Education; in
his official capacity, New York State Commissioner
of the Department of Education; in his individual
capacity, ELSA MAGEE, Acting President of the
New York State Higher Education Services Corp.; in
his official capacity, Acting President of the New
York State Higher Education Services Corp.; in his
individual capacity, UNITED STATES
DEPARTMENT OF EDUCATION, ARNE
DUNCAN, United States Secretary of Education; in
his official capacity,

Defendants-Appellees.

Appearing for Plaintiff-Appellant: ROY DEN HOLLANDER,
Law Office of Roy D.
Hollander, New York, NY.

Appearing for New York State Defendants-Appellees: LESLIE B. DUBECK,
Assistant Solicitor General
(Barbara D. Underwood,
solicitor General, Steven
C. Wu, Special Counsel to
the Solicitor General,
Laura R. Johnson,
Assistant Solicitor
General, on the brief), for
Eric T. Schneiderman,
Attorney General of the
State of New York.

Appearing for Federal Defendants: SARAH J. NORTH (Jean-
David Barnea, Sarah
S.Normand, on the brief),
Assistant United States
Attorneys, for Preet
Bharara, United States
Attorney for the Southern
District of New York.

Appeal from the United States District Court for
the Southern District of New York (Laura Taylor
Swain, Judge). ON CONSIDERATION WHEREOF,
it is hereby ORDERED, ADJUDGED, and
DECREED that the judgment of the District Court
be and it hereby is AFFIRMED.

Plaintiff-Appellant Roy Den Hollander appeals

from an October 31, 2011 judgment of the District Court (Swain, J.) dismissing his complaint, and a May 21, 2012 order of the District Court denying his motion to vacate the judgment and amend his complaint. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal, to which we refer only as necessary to explain our decision.

In December 2010, Hollander brought this putative class action against several New York State education officials (the "State Defendants"), as well as the United States Department of Education and the United States Secretary of Education (the "Federal Defendants"). Hollander claims that the State and Federal Defendants violate the Establishment Clause of the United States Constitution by providing public funding to Columbia University, which maintains an Institute for Research on Women's and Gender Studies and a Women's Studies program. According to Hollander, feminism is a "modern-day religion," Compl. ¶ 1, and by providing public funding to Columbia, the Defendants unconstitutionally "promote and favor the religion Feminism while inhibiting other contradictory viewpoints," id. § VI. Hollander, who seeks declaratory and injunctive relief, contends that he has standing to bring his Establishment Clause claim both as a New York State and federal taxpayer, id. ¶¶ 72-78, and as a Columbia alumnus whose "direct contact with the offensive religion" of feminism, id. ¶ 80, makes him "very uncomfortable" and interferes with his "use and enjoyment of Columbia as [a] member[] of the Columbia community," id. ¶ 79.

Several years ago, we affirmed the dismissal of a nearly identical suit – also brought by Hollander – for lack of standing. Hollander v. Institute for Research on Women & Gender at Columbia Univ., 372 F. App'x 140 (2d Cir. 2010) (“Hollander I”) (summary order). In Hollander I, as here, Hollander claimed that “the existence of Columbia University’s Women’s Studies Program” promoted “feminism as a religion,” and that federal and state funding of Columbia therefore violated the Establishment Clause. Id. at 141. We concluded that Hollander’s “claims of harm amount[ed] to the kind of speculative harm for which courts cannot confer standing,” id., and that Hollander had failed to “ma[ke] out the requirements for taxpayer standing for his Establishment Clause claim,” id. at 142.

In the present case, the District Court granted summary judgment to the Defendants after concluding that “collateral estoppel precludes this action because [Hollander] previously litigated the issue of his standing to bring such a claim.” Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y., No. 10 Civ. 9277, 2011 WL 5222912, at *1 (S.D.N.Y. Oct. 31, 2011) (adopting Report and Recommendation of Magistrate Judge Pitman). For substantially the reasons stated in Judge Pitman’s thorough Report and Recommendation, as adopted by the District Court, we agree that summary judgment was correctly entered. Hollander’s standing to assert an Establishment Clause claim based on the Defendants’ provision of public funding to Columbia was fully litigated and decided in Hollander I. He is therefore barred from relitigating the standing issue

in the present action. See, e.g., Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890, 896 n.10 (2d Cir. 1980); see also Coll. Sports Council v. Dep't of Educ., 465 F.3d 20, 22-23 (D.C. Cir. 2006) (per curiam); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4402 (2d ed. 2012). “[I]t 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 [he] finally satisfies the jurisdictional requirements [for standing].” Perry v. Sheahan, 222 F.3d 309, 318 (7th Cir. 2000) (internal quotation marks omitted). Accordingly, we affirm the District Court’s judgment dismissing Hollander’s complaint.

We also affirm the District Court’s order denying Hollander’s motion to vacate the judgment and amend his complaint. “A party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b).” Williams v. Citigroup Inc., 659 F.3d 208, 213 (2d Cir. 2011) (per curiam) (internal quotation marks and brackets omitted). Hollander’s motion to vacate arose under Rule 59(e). A court may grant a Rule 59(e) motion only if the movant satisfies the heavy burden of demonstrating “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” Virgin Atl. Airways, Ltd. v. Nat’l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks omitted); see also Munafo v. Metro. Transp. Auth., 381 F.3d 99, 105 (2d Cir. 2004). Hollander contends

that vacatur was warranted here because, after the District Court entered judgment against him, he discovered two new potential plaintiffs who allegedly have standing to challenge the Defendants' funding decisions. But new plaintiffs are not "new evidence," and Hollander's discovery of additional individuals willing to press Establishment Clause claims against the Defendants does not satisfy the requirements of Rule 59(e). See United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 392 (2d Cir. 2001). Nor has Hollander shown that the denial of his Rule 59(e) motion works a "manifest injustice" against the recently discovered plaintiffs. Nothing in the District Court's order purports to preclude those individuals from bringing suit in their own names. We therefore discern no abuse of discretion in the District Court's denial of Hollander's motion to vacate the judgment and amend his complaint. Schwartz v. Liberty Mut. Ins. Co., 539 F.3d 135, 150 (2d Cir. 2008).

One additional point deserves mention. By presenting a court with a pleading, an attorney certifies, inter alia, that (1) the pleading "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"; (2) "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"; and (3) "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b). Hollander is an attorney. Before again invoking his

feminism-as-religion thesis in support of an Establishment Clause claim, we expect him to consider carefully whether his conduct passes muster under Rule 11.

We have considered Hollander's remaining arguments and find them to be unavailing. Accordingly, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

-----X

ROY DEN HOLLANDER, on behalf of himself and
all others similarly situated,

Plaintiff,

-against-

MEMBERS OF THE BOARD OF REGENTS OF
THE UNIVERSITY OF THE STATE OF NEW
YORK, in their official and individual capacities;
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 M.
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; U.S.
DEPARTMENT OF EDUCATION, and U.S.
SECRETARY OF EDUCATION, ARNE DUNCAN,
in his official capacity,

Defendants.

-----X

10 Civ. 9277 (LTS)(HBP)

REPORT AND RECOMMENDATION

PITMAN, United States Magistrate Judge:

TO THE HONORABLE LAURA TAYLOR
SWAIN, United States District Judge,

I. Introduction

Plaintiff Roy Den Hollander commenced this putative class action pro se against defendants pursuant to the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 ("Section 1983"), alleging violations of the Establishment Clause of the First Amendment ("the Establishment Clause"). Hollander, a Columbia University ("Columbia") Business School graduate, seeks declaratory and injunctive relief against defendants for their alleged roles in the establishment of "the modern-day religion Feminism" at Columbia and its Institute for Research on Women and Gender ("IRWG"). By notice of motion dated January 14, 2011, defendants Members of the Board of Regents of the University of the State of New York, Chancellor of the Board of Regents Merryl H. Tisch, New York State Commissioner of the Department of Education David M. Steiner and Acting President of the New York State Higher Education Services Corp. Elsa Magee (collectively, the "State Defendants"), move to dismiss Hollander's complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure (Docket Item 7). By letter motion dated April 1, 2011, defendants U.S. Department of Education and U.S. Secretary of Education Arne Duncan (collectively, the "Federal Defendants") move to dismiss on the grounds of collateral

estoppel. By Order dated June 3, 2011, I announced my intention to convert the motions to motions for summary judgment pursuant to Fed.R.Civ.P. 12(d) (Docket Item 17). For the reasons set forth below, I respectfully recommend that defendants' motions for summary judgment be granted.

II. Facts

A. Parties

Plaintiff Hollander is an alumnus of the Columbia Business School and a New York State and federal taxpayer (Com-plaint, dated December 10, 2010 (Docket Item 1) ("Compl."), at ¶ 13). The putative class consists of Columbia "alumni, students and employees who are New York State and federal taxpayers that find the inculcation and manifestations of Feminism at Columbia offensive" (Compl. at ¶ 14).

Defendants Members of the Board of Regents of the University of the State of New York ("the Board of Regents") compose the body that, inter alia, regulates state educational institutions, administers funds allocated by the state to the institutions and appoints the Commissioner of the Department of Education. N.Y. Educ. L. §§ 101, 201. Defendant Merryl H. Tisch is the Chancellor of the Board of Regents. Members of the Board of Regents, <http://www.regents.nysed.gov/members/bios/tisch.html> (last visited June 13, 2011). Defendant David M. Steiner was the Commissioner of the New York State Department of Education at the time the complaint was filed.¹

¹ On June 15, 2011, Steiner was succeeded by Dr. John B. King,

Defendant Elsa Magee is the acting president of the New York State Higher Education Services Corporation, a body that administers New York State financial aid and supports the administration of federal financial aid. N.Y. Educ. L. § 652(2); HESC Directory -- Executive Management and Office of the President, http://www.hesc.com/content.nsf/CA/HESC_Directory_Executive_Management_and_Office_of_the_President (last visited June 13, 2011). Defendant United States Department of Education, inter alia, provides financial aid to institutions of higher education. 20 U.S.C. §§ 1070(a)(5), 3402(6). Defendant Arne Duncan is the United States Secretary of Education and supervises the Department of Education. 20 U.S.C. § 3411; Arne Duncan, U.S. Secretary of Education -- Biography, <http://www2.ed.gov/news/staff/bios/duncan.html> (last visited June 13, 2011).

B. The Underlying Action

On or about August 18, 2008, Hollander commenced an action (the "Underlying Action," Docket No. 08 Civ. 7286) against the same defendants who are in this action, or their predecessors.² He claimed that defendants violated

Jr. Board of Regents Elects John King Commissioner of Education, <http://www.oms.nysed.gov/press/BORElectsJohn-KingCOE.html> (last visited June 13, 2011).

² In the Underlying Action, the defendants were the Board of Regents of the University of the State of New York, Chancellor of the Board of Regents Robert M. Bennett, New York State Commissioner of the Department of Education Richard P. Mills, President of the New York State Higher Education Services Corp. James C. Ross, the U.S. Department of Education and U.S. Secretary of Education Margaret Spellings.

the Establishment Clause "by aiding the establishment of the religion Feminism" through Columbia's Women's Studies program. Hollander also asserted claims for violations of the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, and New York Civil Rights Law § 40-c for their fostering, aiding or carrying out intentional discrimination against men through the Women's Studies program (First Amended Class Action Complaint in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286, filed December 1, 2008 ("Underlying Action Compl.") (Docket Item 17), at ¶ 1).

With respect to the Establishment Clause claim, the complaint in the Underlying Action alleged that

The establishment clause forbids government action that benefits a religion. 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

Bennett, Mills, Ross and Spellings have since been succeeded by Tisch, Steiner, Magee and Duncan, respectively. In the Underlying Action, Hollander also sued the IRWG, the School of Continuing Education at Columbia and the Trustees of Columbia, but they are not parties to this action.

Following the commencement of the Underlying Action, William A. Nosal was added as a class representative. However, he later withdrew. See Hollander v. Inst. for Research on Women & Gender at Columbia Univ., 372 F. App'x 140, 2010 WL 1508269 at *1 n.1 (2d Cir. Apr. 16, 2010) (unpublished).

with the strength of traditional religious convictions. Gods or goddesses are not needed for a religion.

(Underlying Action Compl. at ¶ 4). The complaint in the Underlying Action alleged that the feminism taught at Columbia and its IRWG constituted a religion because, inter alia, it promoted theories with respect to the natural order of males and females, combined strains of feminist research "into a comprehensive belief system that has spread throughout Columbia into the society as a whole" and mandated a lifestyle (Underlying Action Compl. at ¶ 5). The complaint in the Underlying Action further alleged that the IRWG administrators and teachers were akin to "priestesses" because of their teachings, and that the IRWG "exalt[ed] certain Feminists to apostle-like status," treated certain days like feminism holidays and promoted feminism through the Women's Studies program (Underlying Action Compl. at ¶ 6).

Specifically, the complaint in the Underlying Action alleged that the Women's Studies program

(1) 'instructs, trains, supports, furthers, cultivates and advocates strategies, and tactics for demeaning and abridging the rights of men'; (2) advocates 'that the civil rights of males be diminished or eliminated'; and (3) 'stereotype[s] males as the primary cause for most, if not all, the world's ills throughout history,' while crediting females 'with inherent goodness.'

(Report and Recommendation in Hollander v. Inst. for Research on Women & Gender at Columbia

University, 08 Civ. 7286, filed April 15, 2009 ("Report and Recommendation") (Docket Item 33), at 4, quoting Underlying Action Compl. at ¶¶ 75-77).

While the plaintiffs did not allege that they enrolled or attempted to enroll in any Women's Studies courses, the complaint in the Underlying Action alleged that the few males who did participate in the Women's Studies program were discriminated against in various ways (Underlying Action Compl. at ¶ 87). The plaintiffs alleged that no Men's Studies program existed, but they intended to enroll in such a program as soon as it was offered (Underlying Action Compl. at ¶¶ 223-25). They stated that the promotion of the Women's Studies program effectively denied class members the opportunity to take Men's Studies courses (Underlying Action Compl. at ¶ 210).

By motions filed on January 9, 2009, all defendants moved to dismiss the Underlying Action Complaint on various grounds, including lack of standing (Docket Items 21, 23 and 25 in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286). On April 15, 2009, the Honorable Kevin Nathaniel Fox, United States Magistrate Judge, issued a Report and Recommendation that recommended a dismissal of all claims for lack of standing (Docket Item 33 in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286). Judge Fox concluded that the plaintiffs lacked standing because their alleged injury, "which is purportedly based upon the content of, or the discriminatory impact flowing from, the Women's Studies program at Columbia, is not an 'injury in fact'" since plaintiffs

were neither enrolled in the program nor denied an opportunity to enroll (Report and Recommendation at 8-9). Judge Fox also concluded that any alleged injury stemming from the absence of a Men's Studies program was not concrete and particularized (Report and Recommendation at 9). By Order dated April 23, 2009, the Honorable Lewis A. Kaplan, United States District Judge, adopted the Report and Recommendation and dismissed the action for lack of standing (Docket Item 36 in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286). Judge Kaplan also dismissed the Establishment Clause claims "on the alternative ground that they are absurd and utterly without merit" (Order at 2).

On May 1, 2009, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit (Docket Item 38). They argued on appeal that they had standing to sue as taxpayers. Brief of Plaintiffs-Appellants, Hollander v. Inst. for Research on Women & Gender at Columbia University, No. 09-1910-cv, 2009 WL 8105887 at *2, *20-*24 (2d Cir. Aug. 25, 2009). At oral argument, Hollander conceded that he did not make an express assertion of taxpayer standing for his Establishment Clause claims in the complaint in the Underlying Action (Transcription of Oral Argument, annexed as Ex. E to Declaration of Roy Den Hollander in Support of Opposition to Motions to Dismiss, dated March 8, 2011 ("Hollander Decl.") (Docket Item 15), at 2). However, he argued that an inference should have been drawn that he was also asserting New York State and federal taxpayer standing as a basis of standing (Transcription of Oral Argument at 2).

Hollander also conceded that, in filing his objections to Judge Fox's Report and Recommendation, he did not ask for leave to amend the complaint with respect to standing in the event the court ruled against him (Transcription of Oral Argument at 9-10). However, he did request a remand from the Second Circuit so he could amend his complaint to assert taxpayer standing (Transcription of Oral Argument at 2).

By Summary Order dated April 16, 2010, the Second Circuit affirmed the dismissal of the Underlying Action for lack of standing. Hollander v. Inst. for Research on Women & Gender at Columbia Univ., *supra*, 372 F. App'x 140, 2010 WL 1508269 at *1. Specifically, the Court of Appeals held that "plaintiff's claims of harm amount to the kind of speculative harm for which courts cannot confer standing," adding, "[n]or has plaintiff made out the requirements for taxpayer standing for his Establishment Clause claim." Hollander v. Inst. for Research on Women & Gender at Columbia Univ., *supra*, 372 F. App'x 140, 2010 WL 1508269 at *1 (citations omitted).

C. The Present Action

On December 13, 2010, Hollander commenced the present action, seeking declaratory and injunctive relief for violations of the Establishment Clause (Compl.). His allegations with respect to his Establishment Clause claims are similar to those in the Underlying Action (compare Underlying Action Compl. at ¶¶5-6, with Compl. at ¶¶ 50, 53). In this action, however, Hollander expressly alleges that he has standing as a federal and New York State

taxpayer (Compl. at ¶¶ 6, 13; Hollander Decl. at ¶7).³ In summary, Hollander alleges taxpayer standing for an economic injury caused by defendants' expenditure of government funds to Columbia's Women's Studies program (Compl. at ¶¶ 72-78). He also alleges, as a non-economic injury, that members of the putative class feel that the "inculcation, manifestation, and exposure of Feminism at Columbia is offensive . . . and makes its members very uncomfortable" (Compl. at ¶ 79).

By notice of motion dated January 14, 2011, the State Defendants move to dismiss Hollander's complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) (Docket Item 7). In support of their motion, the State Defendants argue that: (1) the action should be dismissed on res judicata grounds; and (2) "Feminism" is not a religion and the defendants' actions do not tend to establish religion (Memorandum of Law in Support of the State Defendants' Motion to Dismiss, dated January 14, 2011 (State Defs.' Mem.) (Docket Item 9), at I). By letter motion dated April 1, 2011, the Federal Defendants move to dismiss on the grounds of collateral estoppel. In support of their motion, the Federal Defendants argue that Hollander's standing to bring this action was previously determined and cannot be relitigated, and that Hollander pleads no facts with respect to taxpayer standing that were not

³ In a supplemental submission, Hollander attached what he describes as 1099 tax forms from 2010 and 2011. Actually, these documents appear to be pay stubs that detail New York State and federal tax withholdings (Hollander Decl. at ¶ 7 and Ex. F).

known to him at the time of the first action (Letter from Jean-David Barnea to undersigned, dated April 1, 2011, at 2).

In opposition, Hollander makes the following arguments: (1) because the Underlying Action was dismissed for lack of standing, the judgment was not on the merits and, thus, claim preclusion does not apply; (2) issue preclusion does not apply because the Underlying Action was dismissed for failure to allege a jurisdictional fact, while the current action alleges that fact; (3) the plausibility pleading standard applies to both Fed.R.Civ.P. 12(b)(1) and 12(b)(6); (4) the complaint plausibly alleges that the class representative satisfies both the taxpayer and non-economic standing requirements, and (5) the complaint plausibly alleges Feminism is a religion and that the State Defendants and U.S. Department of Education aid it in violation of the Establishment Clause (Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Complaint, dated March 8, 2011 ("Pl.'s Mem.") (Docket Item 11)).

By Order dated June 3, 2011, I announced my intention to convert the motions to a motion for summary judgment pursuant to Fed.R.Civ.P. 12(d) and directed the parties to submit additional materials, if they wished to do so, no later than June 30, 2011 (Docket Item 17). On June 20, 2011, I received a letter from the Federal Defendants requesting that their motion to dismiss not be converted to a motion for summary judgment (Letter from Jean-David Barnea to undersigned, dated June 20, 2011, at 2). On June 23, 2011, I received a letter from the State Defendants that "concur[red] with,

and adopt[ed], the views expressed" in the Federal Defendants's letter (Letter from Clement J. Colucci to undersigned, dated June 24, 2011, at 1). Because I conclude that the motions should be granted, defendants are not prejudiced by the conversion, and I decline their request to reconsider. Moreover, Hollander did not object to the conversion in his subsequent submission, which I received on June 27, 2011 and which consisted of a Statement of Material Facts, Declaration, Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and a proposed Second Amended Complaint.

III. Analysis

A. Summary Judgment Standard

The standards applicable to a motion for summary judgment are well-settled and require only brief review.

Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). This form of relief is appropriate when, after discovery, the party . . . against whom summary judgment is sought has not shown that evidence of an essential element of her case -- one on which she has the burden of proof -- exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This form of remedy is inappropriate when the issue to be resolved is both genuine and related to a disputed material fact. An alleged factual dispute regarding immaterial or minor

facts between the parties will not defeat an otherwise properly supported motion for summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990). Moreover, the existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must "demonstrate more than some metaphysical doubt as to the material facts," and come forward with "specific facts showing that there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993). If the non-movant fails to meet this burden, summary judgment will be granted against it.

Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004); accord Binder & Binder PC v. Barnhart, 481 F.3d 141, 148 (2d Cir. 2007); Jeffreys v. City of N.Y., 426 F.3d 549, 553-54 (2d Cir. 2005); Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223-24 (2d Cir. 1994); see also McPherson v. N.Y.C. Dep't of Educ., 457 F.3d 211, 215 n.4 (2d Cir. 2006) ("[S]peculation alone is insufficient to defeat a motion for summary judgment.").

"In determining whether a genuine issue of

material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant Stated more succinctly, '[t]he evidence of the non-movant is to be believed.'" Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 253-54 (2d Cir. 2002), quoting Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 255; accord Jeffreys v. City of New York, supra, 426 F.3d at 553 ("Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment.") (citation and internal quotations omitted); see also Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 142 (2d Cir. 2004); Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003).

"Material facts are those which 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Coppola v. Bear Stearns & Co., 499 F.3d 144, 148 (2d Cir. 2007), quoting Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 248; accord McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007). "[I]n ruling on a motion for summary judgment, a judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-movant] on the evidence presented[.]" Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 788 (2d Cir. 2007), quoting Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 298 (2d Cir. 1996).

B. Constitutional Standing Requirements

The Constitutional standing requirements have been comprehensively set forth by the Honorable Kenneth M. Karas, United States District Judge, in Access 4 All, Inc. v. Trump Int'l Hotel and Tower Condo., 458 F. Supp. 2d 160, 167 (S.D.N.Y. 2006):

Standing is an essential and unchanging component of the case-or-controversy requirement of Article III. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). There are three well-settled constitutional standing requirements: (1) injury in fact, which must be (a) concrete and particularized, and (b) actual or imminent; (2) a causal connection between the injury and the defendant's conduct; and (3) the injury must be likely to be redressed by a favorable decision. See Field Day, LLC v. County of Suffolk, 463 F.3d 167, 175 (2d Cir. 2006) (citing Lujan, 504 U.S. at 560, 112 S.Ct. 2130). A plaintiff's standing is evaluated at the time the complaint is filed. See Robidoux v. Celani, 987 F.2d 931, 938 (2d Cir. 1993). As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing standing. See Field Day, 463 F.3d 167, 176. To defeat a motion for summary judgment, Plaintiffs "must set forth by affidavit or other evidence specific facts which for purposes of the summary judgment motion will be taken to be true." Lewis v. Casey, 518 U.S. 343, 358, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (citing Lujan, 504 U.S. at 561, 112 S.Ct. 2130). Each

element must be proven with the "manner and degree of evidence required" at the given stage of litigation. See Bldg. & Constr. Trades Council v. Downtown Dev., Inc., 448 F.3d 138, 144 (2d Cir. 2006).

A plaintiff cannot base standing merely on his status as a taxpayer unless there are "special circumstances." Ariz. Christian Sch. Tuition Org. v. Winn, ____ U.S. ___, 131 S. Ct. 1436, 1442 (2011). The United States Supreme Court "has rejected the general proposition that an individual who has paid taxes has a 'continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution.'" Ariz. Christian Sch. Tuition Org. v. Winn, *supra*, 131 S. Ct. at 1442, quoting Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 599 (2007) (plurality opinion).

In Flast v. Cohen, 392 U.S. 83 (1968), the Supreme Court carved out a "narrow exception" to the rule against taxpayer standing. Ariz. Christian Sch. Tuition Org. v. Winn, *supra*, 131 S. Ct. at 1445, quoting Bowen v. Kendrick, 487 U.S. 589, 618 (1988). Under Flast v. Cohen, *supra*, a taxpayer will have standing when two conditions are met. "The first condition is that there must be a 'logical link' between the plaintiff's taxpayer status 'and the type of legislative enactment attacked.'" Ariz. Christian Sch. Tuition Org. v. Winn, *supra*, 131 S. Ct. at 1445, quoting Flast v. Cohen, *supra*, 392 U.S. at 102. The other condition "is that there must be 'a nexus' between the plaintiff's taxpayer status and 'the precise nature of the constitutional infringement alleged.'" Ariz. Christian Sch. Tuition Org. v. Winn,

supra, 131 S. Ct. at 1445, quoting Flast v. Cohen, supra, 392 U.S. at 102. A plaintiff's allegation of taxpayer standing based on "an abstract injury shared by the public" will not suffice, as "a concrete injury" is required. Bd. of Educ. v. N.Y. State Teachers Ret. Sys., 60 F.3d 106, 110 (2d Cir. 1995) (citations omitted); see also Woods v. Empire Health Choice, Inc., 574 F.3d 92, 96 (2d Cir. 2009) ("Standing has been rejected in [taxpayer standing] cases because the alleged injury is . . . a grievance the taxpayer suffers in some indefinite way in common with people generally." (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006) (internal quotation marks omitted))).

C. Res Judicata and Collateral Estoppel

The common law doctrines of res judicata and collateral estoppel are "related but distinct [and] operate to prevent parties from contesting matters that they have had a full and fair opportunity to litigate, thereby conserving judicial resources and protecting parties from the expense and vexation of multiple lawsuits." Marvel Characters, Inc. v. Simon, 310 F.3d 280, 286 (2d Cir. 2002). Federal law determines the preclusive effect of a federal judgment. PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896 n.1 (2d Cir. 1983).

"Res judicata [or claim preclusion]⁴ precludes parties from litigating issues 'that were or could

⁴ Some more modern authorities refer to the doctrines of res judicata and collateral estoppel by the more descriptive terms of claim preclusion and issue preclusion, respectively. See Allen v. McCurry, 449 U.S. 90, 94 n.5 (1980).

have been raised' in a prior proceeding." Perez v. Danbury Hosp., 347 F.3d 419, 426 (2d Cir. 2003), quoting Monahan v. N.Y.C. Dep't of Corr., 214 F.3d 275, 284-85 (2d Cir. 2000); accord Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998). "To prove that a claim is precluded under this doctrine, 'a party must show that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.'" Pike v. Freeman, 266 F.3d 78, 91 (2d Cir. 2001), quoting Monahan v. N.Y.C. Dep't of Corr., *supra*, 214 F.3d at 284-85; see also Allen v. McCurry, *supra*, 449 U.S. at 94; Burgos v. Hopkins, 14 F.3d 787, 789 (2d Cir. 1994); Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343, 345-46 (2d Cir. 1995); Henik v. Labranche, 433 F. Supp. 2d 372, 378 (S.D.N.Y. 2006) (Sweet, D.J.); Word v. Croce, 230 F. Supp. 2d 504, 508-09 (S.D.N.Y. 2002)(Swain, D.J.).

"Collateral estoppel, or issue preclusion, prevents parties or their privies from relitigating in a subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding." Marvel Characters, Inc. v. Simon, *supra*, 310 F.3d at 288; see Boguslavsky v. Kaplan, 159 F.3d 715, 719-20 (2d Cir. 1998); see also Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948) ("Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel."). To assert a defense of collateral estoppel successfully, a party must establish four elements: "(1) the identical issue was raised in a previous proceeding;

(2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." Ball v. A.O. Smith Corp., 451 F.3d 66, 69 (2d Cir. 2006), quoting Purdy v. Zeldes, 337 F.3d 253, 258 & n.5 (2d Cir. 2003); accord Uzdavines v. Weeks Marine, Inc., 418 F.3d 138, 146 (2d Cir. 2005); Marvel Characters, Inc. v. Simon, *supra*, 310 F.3d at 288-89. However, collateral estoppel will not be applied where it would lead to an unfair result. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979) (application of collateral estoppel may be unfair where prior litigations have yielded inconsistent results); Bear, Stearns & Co. v. 1109850 Ontario, Inc., 409 F.3d 87, 91 (2d Cir. 2005) (same).

The granting of a motion to dismiss on substantive grounds is considered a judgment on the merits. See Overview Books, LLC v. United States, 755 F. Supp. 2d 409, 415-16 (E.D.N.Y. Dec. 13, 2010), quoting Ramirez v. Brooklyn Aids Task Force, 175 F.R.D. 423, 426 (E.D.N.Y. 1997) ("It is well-established that '[f]or *res judicata* purposes, a Rule 12(b)(6) dismissal is deemed to be a judgment on the merits."). However, the preclusive effect of a dismissal for lack of standing is not as clear in the Second Circuit.

A dismissal for lack of standing "is a dismissal for lack of subject matter jurisdiction." St. Pierre v. Dyer, 208 F.3d 394, 400 (2d Cir. 2000) (citations omitted). Courts in the Second Circuit have held that "a dismissal for lack of subject matter jurisdiction is not an adjudication of the merits, and hence has no

res judicata effect." St. Pierre v. Dyer, *supra*, 208 F.3d at 400; Thompson v. Cnty. of Franklin, 15 F.3d 245, 253 (2d Cir. 1994), *citing* Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976); Fiero v. Fin. Indus. Regulatory Auth., Inc., 606 F. Supp. 2d 500, 510 (S.D.N.Y. 2009) (Marrero, D.J.). However, courts in this Circuit have also held that determinations of standing and other jurisdictional issues do give rise to binding res judicata consequences. Mrazek v. Suffolk Cnty. Bd. of Elections, 630 F.2d 890, 896 n.10 (2d Cir. 1980) ("We note only that the issue of [plaintiffs'] standing, by all accounts, has been determined adversely to them in the state courts and that decision is binding upon us under principles of res judicata" (citation omitted); Ripperger v. A.C. Allyn & Co., 113 F.2d 332, 333-34 (2d Cir. 1940) ("The appellant concedes, as he necessarily must on the authorities, that a decision in favor of jurisdiction is res judicata and invulnerable to collateral attack" (citations omitted)); Barclay's Ice Cream Co., Ltd. v. Local No. 757 of Ice Cream Drivers and Emp'rs Union, 79 Civ. 1611 (RWS), 1979 WL 1710 at *2 (S.D.N.Y. Sept. 7, 1979) (Sweet, D.J.) ("[A] finding of lack of subject matter jurisdiction is res judicata as to that particular issue in subsequent actions between the parties."); Loucke v. United States, 21 F.R.D. 305, 309-10 (S.D.N.Y. 1957) (Herlands, D.J.) ("[A] decision on the issue of jurisdiction or venue is res judicata with respect to those issues.").

While these authorities appear to be conflicting, the ambiguous use of the term "res judicata" may be one reason for the apparently

inconsistent holdings.

[T]he term 'res judicata' has historically been used interchangeably to mean either res judicata (also known as claim preclusion) or collateral estoppel (also known as issue preclusion), see Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) (noting the older practice of using res judicata to describe both res judicata and collateral estoppel, and noting a more recent tendency to apply the label of res judicata only to matters of claim preclusion)

Wells Fargo Bank, N.A. v. Diamond Point Plaza Ltd. P'ship, 971 A.2d 360, 365 (Md. Ct. Spec. App. 2009). In any event, the weight of authority outside of this Circuit holds that a dismissal for lack of standing collaterally estops subsequent suits which present the precise standing issue that was actually determined. Brereton v. Bountiful City Corp., 434 F.3d 1213, 1218-19 (10th Cir. 2006); Ammex, Inc. v. United States, 384 F.3d 1368, 1372 (Fed. Cir. 2004); In re V & M Mgmt., Inc., 321 F.3d 6, 8-9 (1st Cir. 2003); Harley v. Minn. Mining & Mfg. Co., 284 F.3d 901, 909 (8th Cir. 2002); Hooker v. Federal Election Comm'n, 21 F. App'x 402, 405-06 (6th Cir. 2001) (*per curiam*); Dresser v. Backus, 229 F.3d 1142, 2000 WL 1086852 at *1 (4th Cir. Aug. 4, 2000) (unpublished) (*per curiam*); Perry v. Sheahan, 222 F.3d 309, 317-18 (7th Cir. 2000); Cutler v. Hayes, 818 F.2d 879, 889 (D.C. Cir. 1987). See also People of Bikini, ex rel. Kili/Bikini/Ejit Local Gov. Council v. United States, 77 Fed. Cl. 744, 776 (Fed. Cl. 2007) ("Dismissal of a suit for want of federal subject-matter jurisdiction,

for example, should not bar an action on the same claim in a court that does have subject matter jurisdiction, but ordinarily should preclude relitigation of the same issue of subject-matter jurisdiction in a second federal suit on the same claim." (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4402 at 20 (2d ed. 2007) (emphasis added)).

"It is clear that a dismissal for want of jurisdiction does not preclude a second action where subsequent events cure the jurisdictional deficiency in the first suit." Bui v. IBP, Inc., 205 F. Supp. 2d 1181, 1188 (D. Kan. 2002), citing Costello v. United States, 365 U.S. 265, 284-88 (1961); Perry v. Sheahan, supra, 222 F.3d at 318; Dozier v. Ford Motor Co., 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, Cir. J.). However, a number of Circuits have held that, following a dismissal for lack of standing, a plaintiff is collaterally estopped from relitigating the standing issue with facts that were available to him at the time of the first action. In re V & M Mgmt., Inc., supra, 321 F.3d at 8-9 (affirming bankruptcy court's dismissal of claims of fraud, professional malpractice and breach of fiduciary duty on issue preclusion grounds and holding that an appellant's "allegations could have been raised in the prior bankruptcy proceedings where [his] standing was adjudicated"); Dresser v. Backus, supra, 2000 WL 1086852 at *1 (rejecting appellant's contention that a prior action presented "different issues than the case at bar" where the prior action addressed his standing to bring state law tort claims and the case at bar only raised the issue of his

standing to pursue RICO claims, concluding that the two actions "clearly involve common factual issues"); Perry v. Sheahan, supra, 222 F.3d at 317-18 (dismissing Section 1983 action).⁵ See also Hooker v. Federal Election Comm'n, 21 F. App'x at 405-06 ("In sum, issue preclusion applies in the present case, because the plaintiff is attempting to reassert the same claim with unchanged facts supporting his standing. Federal courts have used preclusion to bar litigants who had been found to lack standing in a prior suit from reasserting the same claim in a

⁵ Other Circuits have held that a party is collaterally estopped from relitigating other jurisdictional issues with facts that were available at the time of the first action. Citizens Elecs. Co. v. OSRAM GmBH, 225 F. App'x 890, 893 (Fed. Cir. 2007) ("[A] plaintiff cannot relitigate a jurisdictional dismissal [for failure to plead an actual controversy] by relying upon those facts that existed at the time of the first dismissal" (citations omitted)); Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agric., 378 F.3d 1132, 1137 (10th Cir. 2004) (affirming dismissal on issue preclusion grounds following prior action's dismissal on the grounds that claim was not ripe and holding that "[w]e do not think that these additional factual allegations should preclude the operation of res judicata when these facts were available to [the plaintiff] at the time it filed its complaint in [the prior litigation]," quoting Magnus Elecs., Inc. v. La Republica Argentina, 830 F.2d 1396, 1401 (7th Cir. 1987); Dozier v. Ford Motor Co., *supra*, 702 F.2d at 1192 & n.4 (affirming dismissal on res judicata grounds following prior suit's dismissal for inadequate amount-in-controversy and concluding that "proper application of res judicata should require some demonstration that the plaintiff is relying upon a new fact or occurrence, and not merely relying upon those that existed at the time of the first dismissal."). See also DaCosta v. United States, No. 09-558 T, 2010 WL 537572 at *5-*6 (Fed. Cl. Feb. 16, 2010) ("[T]he newly alleged facts must have arisen after the court's dismissal of the first complaint." (citation omitted)).

subsequent suit if the facts presented by the litigants to support standing had not changed." (citations omitted)).

In Perry v. Sheahan, *supra*, 222 F.3d at 317-18, the Seventh Circuit affirmed the dismissal of a Section 1983 action on the grounds of issue preclusion where a prior action had been dismissed for lack of standing. There, the plaintiff "conceded at oral argument that the factual allegations included in Perry II did not represent a change in circumstances between Perry I and Perry II. Instead, they were facts known when Perry I was brought, but that were never included in the complaint." Perry v. Sheahan, *supra*, 222 F.3d at 318.

The Court stressed that

[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.

Perry v. Sheahan, *supra*, 222 F.3d at 318, quoting Magnus Elecs., Inc. v. La Republica Argentina, *supra*, 830 F.2d at 1401.

D. Application of the Foregoing Principles to the Present Case

Judged by the standards set forth above, I conclude that summary judgment should be granted dismissing Hollander's claims for lack of subject

matter jurisdiction. I need not address the dubious merits of his claims, because I conclude – based on the weight of authority discussed above – that his action is barred on the grounds of collateral estoppel. The Underlying Action was dismissed for lack of standing (see Report and Recommendation in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286 (Docket Item 33); Order in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286 (Docket Item 36); Hollander v. Inst. for Research on Women & Gender at Columbia Univ., supra, 372 F. App'x 140, 2010 WL 1508269 at *1), an issue that Hollander attempts to relitigate here.

As discussed in Section III.C., defendants must establish collateral estoppel through a four-part test, showing that "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." Ball v. A.O. Smith Corp., supra, 451 F.3d at 69, quoting Purdy v. Zeldes, supra, 337 F.3d at 258 & n.5.

Hollander's Establishment Clause claims are identical to those raised in the Underlying Action, with one distinction: in his complaint here, Hollander has expressly alleged his standing as a taxpayer as an alternative basis for standing. However, when Hollander appealed the Underlying Action to the Second Circuit, he raised the issue of taxpayer standing. At oral argument, the Second Circuit discussed this issue at length with Hollander

and defendants. Although Hollander conceded there that he never expressly alleged taxpayer standing in the complaint in the Underlying Action, he argued that this basis of standing should have been implied. The Court of Appeals rejected Hollander's assertion of taxpayer standing, holding that Hollander had not "made out the requirements for taxpayer standing for his Establishment Clause claim." Hollander v. Inst. for Research on Women & Gender at Columbia Univ., supra, 372 F. App'x 140, 2010 WL 1508269 at *1. The foregoing demonstrates that the issue of taxpayer standing was raised previously and was actually litigated and decided. Hollander had a full and fair opportunity to litigate the taxpayer standing issue, and the resolution of this issue was necessary to a valid and final judgment on the issue of standing. Although not technically "on the merits," the Second Circuit's judgment has preclusive effect with respect to the specific issue of standing. Mrazek v. Suffolk Cnty. Bd. of Elections, supra, 630 F.2d at 896 n.10 (citation omitted). See also Brereton v. Bountiful City Corp., supra, 434 F.3d at 1218-19; Ammex, Inc. v. United States, supra, 384 F.3d at 1372; In re V & M Mgmt., Inc., supra, 321 F.3d at 8-9; Harley v. Minn. Mining & Mfg. Co., supra, 284 F.3d at 909; Hooker v. Federal Election Comm'n, supra, 21 F. App'x at 405-06; Dresser v. Backus, supra, 229 F.3d 1142, 2000 WL 1086852 at *1; Perry v. Sheahan, supra, 222 F.3d at 317-18; Cutler v. Hayes, supra, 818 F.2d at 889.

Hollander's pleading of facts that were previously available at the time of the Underlying Action does not defeat collateral estoppel. Hollander puts forth no evidence that his taxpayer standing is

a new development that has occurred subsequent to the dismissal of the Underlying Action. On the contrary, he claimed during his appeal of the Underlying Action that he had taxpayer standing, and he is merely claiming to allege a jurisdictional fact here that he omitted from his prior complaint (Pl.'s Mem. at 7). As the weight of authority shows, a plaintiff is collaterally estopped from relitigating the standing issue with facts that were available to him at the time of the first action. In re V & M Mgmt., Inc., supra, 321 F.3d at 8-9; Dresser v. Backus, supra, 2000 WL 1086852 at *1; Perry v. Sheahan, supra, 222 F.3d at 317-18.

Hollander's subsequent submission of pay stubs from 2010 and 2011, which indicate New York State and federal tax withholdings, does not change the foregoing analysis. Hollander submitted this evidence in his declaration in opposition to the motions to dismiss, after he filed his complaint. In the Second Circuit, a plaintiff's standing is evaluated "at the time the complaint was filed." Robidoux v. Celani, supra, 987 F.2d at 938. Even if I were to ignore this rule, Hollander asserted that he was a New York State and federal taxpayer at the time of the first action, as already discussed above. Therefore, these subsequent pay stubs do not constitute a "change in circumstances" with respect to Hollander's taxpayer standing. Perry v. Sheahan, supra, 222 F.3d at 318. Hollander is not alleging that he only became a New York State or federal taxpayer following the dismissal of the Underlying Action. He could have pleaded similar facts at the time of the first complaint, albeit with pay stubs from previous years.

Hollander argues that a "failure to allege a jurisdictional fact will not prevent a subsequent action in which the jurisdictional fact is alleged" (Pl.'s Mem. at 6 (citation omitted)). But the cases he cites in support of his position do not change the foregoing analysis (see Pl.'s Mem. at 5-6). He cites Smith v. McNeal, 109 U.S. 426, 431 (1883), for the proposition that a failure to allege a jurisdictional prerequisite is no bar where the defect was cured in a subsequent pleading. However, in Dozier v. Ford Motor Co., *supra*, 702 F.2d at 1192-93, the D.C. Circuit concluded that Smith v. McNeal, *supra*, and similar cases that suggested that "any 'defect in pleading' may be remedied" should be regarded as "superseded, expressing a rule that made sense only in a system where liberal amendment of pleading was not permitted." The Court of Appeals further noted that Smith v. McNeal had "not been cited by the Supreme Court in the century since its issuance." Dozier v. Ford Motor Co., *supra*, 702 F.2d at 1193. This analysis is consistent with the holdings from other Circuits, already discussed above, limiting relitigation of jurisdictional defects to situations where new facts arise subsequent to a prior action's dismissal.

Next, Hollander cites Ripperger v. A.C. Allyn & Co., *supra*, 113 F.2d at 333-34, for the proposition that failure to allege a jurisdictional fact will not prevent a subsequent action in which the jurisdictional fact is alleged. I conclude the holding in this case actually undercuts his position. As already noted above, the Second Circuit stated in Ripperger v. A.C. Allyn & Co., *supra*, 113 F.2d at 333 "that a decision in favor of jurisdiction is res judicata

and invulnerable to collateral attack" (citations omitted). While the Second Circuit cites Smith v. McNeal, supra, in Ripperger, it distinguishes the case. Ripperger involved an action against two out-of-state corporations for conspiracy to use corporate assets for private profit, and a prior action had been dismissed for improper venue. In the second action, the plaintiff appealed a district court dismissal on the grounds of res judicata. 113 F.2d at 332-33. In the second action, the plaintiff alleged that the corporations had designated agents for service of process in New York, a fact that existed prior to the dismissal of the first action. 113 F.2d at 333. The Second Circuit held that because the designation of the agents "antedated the first suit," there was "no change in the facts upon which the venue privilege depends." 113 F.2d at 334. The Court of Appeals concluded that the legal effect of the designation of agents "was a question necessarily involved in the controversy presented by the motions to dismiss the first complaint" and that appellant could have proved the fact of the designations by affidavit at that time. 113 F.2d at 334. Thus, the prior dismissal for improper venue was "a conclusive determination of that issue between the parties." 113 F.2d at 334. This holding is entirely consistent with the aforementioned cases that hold that jurisdictional defects can only be cured with new facts that post-date the prior action's dismissal. Therefore, I conclude that this holding actually supports defendants' position.

Next, Hollander cites a footnote in York v. Guaranty Tr. Co. of N.Y., 143 F.2d 503, 519 n.21 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99

(1945), which states:

As appears from *Ripperger v. A. C. Allyn & Co.*, 2 Cir., 113 F.2d 332, and *Smith v. McNeal*, 100 U.S. 426, 3 S.Ct. 319, 27 L.Ed. 986, a prior decision dismissing a suit on the mere pleadings for lack of jurisdiction is not a bar to a second suit alleging sufficient jurisdictional facts which existed when the first suit was pending but which were not therein alleged. Cf. *Wiggins Ferry Co. v. Ohio & M.R. Co.*, 142 U.S. 396, 410, 2 S.Ct. 188, 35 L.Ed. 1055; *Sylvan Beach v. Koch*, 8 Cir., 140 F.2d 852, 860; *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 6 Cir., 121 F. 313, 318.

I conclude that this footnote is not controlling authority, but rather dicta. "Dictum generally refers to an observation which appears in the opinion of a court which was unnecessary to the disposition of the case before it." *Hormel Foods Corp. v. Jim Henson Productions, Inc.*, 73 F.3d 497, 508 (2d Cir. 1996) (citations and internal quotation marks omitted). "Dicta of course have no precedential value." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 17 (2003) (citation omitted). The footnote qualifies as an observation which was unnecessary to the disposition of that case. The United States Supreme Court, before reversing *York v. Guaranty Tr. Co. of N.Y.*, *supra*, on other grounds, stated that the Second Circuit's holding was that "in a suit brought on the equity side of a federal district court[,] that court is not required to apply the State statute of limitations that would govern like suits in the courts of a State where the federal court is sitting even though the exclusive basis of federal jurisdiction is

diversity of citizenship." Guaranty Tr. Co. of N.Y. v. York, *supra*, 326 U.S. at 101.

Additionally, I have not found any subsequent case citing the footnote in York. Moreover, as already discussed, the cases relied upon in the York footnote are of questionable help to Hollander. The Ripperger appellant was unable to avoid *res judicata* because his only purportedly new allegation with respect to venue "antedated the first suit." Ripperger v. A.C. Allyn & Co., *supra*, 113 F.2d at 334. And at least one Circuit regards Smith v. McNeal, *supra*, as superceded. See Dozier v. Ford Motor Co., *supra*, 702 F.2d at 1192-93.

Finally, the overwhelming majority of Circuits that have addressed this issue since York have concluded that a plaintiff is collaterally estopped from relitigating a jurisdictional defect -- including standing -- with facts that were available to him at the time of the first action. Citizens Elecs. Co. v. OSRAM GmBH, *supra*, 225 F. App'x at 893; Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agric., *supra*, 378 F.3d at 1137; In re V & M Mgmt., Inc., *supra*, 321 F.3d at 8-9; Dresser v. Backus, *supra*, 229 F.3d 1142, 2000 WL 1086852 at *1; Perry v. Sheahan, *supra*, 222 F.3d at 317-18; Dozier v. Ford Motor Co., *supra*, 702 F.2d at 1192 & n.4.⁶ For these reasons, I

⁶ It appears that only one Circuit has held that a jurisdictional defect may be cured by restating facts which existed prior to dismissal of the initial case. In Mann v. Merrill Lynch, Pierce, Fenner & Smith, 488 F.2d 75, 76 (5th Cir. 1973) (*per curiam*), the district court dismissed a complaint "alleging wrongs sounding in contract" for failure to properly allege diversity jurisdiction. The Fifth Circuit held that this dismissal did not preclude a new suit where allegations of diversity jurisdiction

decline to adopt the reasoning from this footnote. Thus, Hollander's taxpayer standing argument fails.

In addition to his taxpayer standing argument, Hollander also alleges non-economic standing – which he previously alleged in the Underlying Action Complaint. This ground for standing was previously litigated and decided in the Underlying Action by Judge Kaplan, who adopted Judge Fox's Report and Recommendation and dismissed for lack of standing. Judge Fox held that there was no "injury in fact" since the plaintiffs there were neither enrolled in the Women's Studies program nor denied an opportunity to enroll, and he also held that any alleged injury stemming from the absence of a Men's Studies program was not concrete and particularized (Report and Recommendation at 8-9). The Second Circuit affirmed the dismissal "for substantially the reasons stated in Judge Fox's thorough Report and Recommendation as adopted by

were properly pled, as the original suit was dismissed "basically because requisite jurisdictional allegations were missing." Mann v. Merrill Lynch, Pierce, Fenner & Smith, supra, 488 F.2d at 76. Two Circuits have subsequently examined the holding in Mann and declined to adopt its reasoning. Dozier v. Ford Motor Co., supra, 702 F.2d at 1193 n.7 (concluding that the requirement of a showing that facts occurred subsequent to the original dismissal in order to cure a jurisdictional defect "makes more sense"); Magnus Elecs., Inc. v. La Republica Argentina, supra, 830 F.2d at 1401 (comparing Dozier and Mann and concluding that "Dozier [was] the better reasoned result"). See also 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4436 at 159 n.18 (2d ed. 2007) ("The treatment of the problem in the Mann case is not so thorough that it can be relied upon as the final word.").

the district court." Hollander v. Inst. for Research on Women & Gender at Columbia Univ., *supra*, 372 F. App'x 140, 2010 WL 1508269 at *1. Hollander had a full and fair opportunity to litigate the non-economic standing issue, and the resolution of this issue was also necessary to a valid and final judgment on the issue of standing. As already discussed, a judgment on the issue of standing has preclusive effect with respect to that issue.

Therefore, I conclude that plaintiff's lack of standing is established by the judgment in the Underlying Action and that the doctrine of collateral estoppel precludes plaintiff from relitigating the issue here. Because I reach this conclusion, I need not address the other arguments Hollander raised in his opposition memo with respect to the plausibility standard of pleading. There are no genuine issues of material fact, and defendants are entitled to summary judgment as a matter of law.

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that defendants' motions for summary judgment be granted.

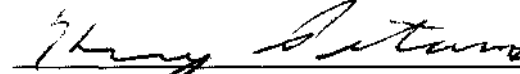
V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also Fed. R. Civ. P. 6(a). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Laura Taylor Swain, United States

District Judge, 500 Pearl Street, Room 755 and to the Chambers of the undersigned 5 00 Pearl Street, Room 750 New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Swain. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.** Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson/ 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55,57-59 (2d Cir. 1988); McCarthy v. Manson,714 F.2d 234, 237-38 (2d Cir. 1983) (per curiam).

Dated: New York, New York
July 1, 2011

Respectfully submitted/



HENRY PITTMAN
United States Magistrate Judge

Copies transmitted to:
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43a

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UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

-----X

ROY DEN HOLLANDER,

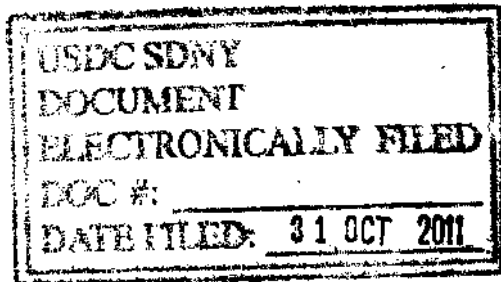
Plaintiff,

-v-

MEMBERS OF THE BOARD OF REGENTS OF
THE UNIVERSITY OF THE STATE OF NEW
YORK , in their official and individual capacities, et
al.

Defendants.

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No . 10 Civ. 9277 (LTS)(HBP)

ORDER

Plaintiff Roy Den Hollander ("Plaintiff"), a
Columbia University (the "University") alumnus,
seeks declaratory and injunctive relief against the
Members of the Board of Regents of the State of New

York, Chancellor of the Board of Regents Merry] H. Tisch, New York State Commissioner of the Department of Education David M. Steiner, Acting President of the New York State Higher Education Services Corporation Elsa Magee, and United States Secretary of Education Arne Duncan, in their official and individual capacities, and the United States Department of Education (collectively, "Defendants"). Plaintiff asserts that it is unconstitutional for Defendants to provide the University with public funding because the University's Women's Studies program promotes a religion of feminism in violation of the Establishment Clause of the First Amendment.

Plaintiff commenced a similar action against Defendants (or their predecessors) and the University in 2008 alleging, among other things, that Defendants violated the Establishment Clause "by aiding the establishment of the religion Feminism" by funding the University's Women's Studies Program. Den Hollander v. Inst. for Research on Women & Gender at Columbia Univ. ("Den Hollander I"), No. 08 Civ. 7286 (S.D.N.Y. filed Dec. 1, 2008). The District Court dismissed Den Hollander I for lack of standing, and the Second Circuit affirmed the dismissal. Order, Den Hollander I, No. 08 Civ. 7286 (S.D.N.Y. Apr. 24, 2009), ECF No. 36, *aff'd*, 372 Fed. Appx. 140 (2d Cir. 2010).) In Den Hollander I the issue of Plaintiffs standing thus was litigated at the District Court level and on appeal. See, e.g., Report and Recommendation, Den Hollander I, 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009), adopted by, Order, No. 08 Civ. 7286 (S.D.N.Y. Apr. 24, 2009), ECF No. 36, *aff'd*, 372 Fed. Appx.

140(2d Cir. 2010).

Defendants moved to dismiss Plaintiff's Complaint in this case. Magistrate Judge Harry B. Pitman, to whom the matter was referred for a Report and Recommendation, converted Defendants' motions to dismiss into a motion for summary judgment in accordance with Federal Rule of Civil Procedure 12(d). (Order, June 3, 2011, ECF No. 17; see also Fed. R. Civ. P. 12(d).) On July 1, 2011, Judge Pitman issued a Report and Recommendation ("Report") recommending that summary judgment be granted in favor of Defendants on the ground that collateral estoppel precludes this action because Plaintiff previously litigated the issue of his standing to bring such a claim. (Report, July 1, 2011, ECF No. 24.) Plaintiff filed timely objections. Familiarity with the Report and Den Hollander I is assumed.

In reviewing the Report, the Court "may accept reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. 636(b)(1)(C) (West 2006 & Supp. 2011). The Court is required to make a de novo determination as to the aspects of the Report to which specific objections are made. United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997). When a party makes only conclusory or general objections, or simply reiterates original arguments, the Court reviews the Report only for clear error. See Camardo v. Gen. Motors Hourly-Rate Emp. Pension Plan, 806 F. Supp. 380, 382 (W.D.N.Y. 1 992) (court need not consider objections which are frivolous, conclusory, or general, and which constitute a rehashing of the same arguments and positions taken in original pleadings); Schoolfield v. Dep't of Corr., No. 91 Civ.

1691, 1994 WL 119740, at *2 (S.D.N.Y. Apr. 6, 1994) (objections stating that magistrate judge's decisions are wrong and unjust and which restate facts upon which complaint was grounded are conclusory and do not form specific basis for not adopting report and recommendation). Objections to a Report must be specific and clearly aimed at particular findings in the magistrate judge's proposal, such that no party be allowed a "second bite at the apple" by simply re-litigating a prior argument. Camardo, 806 F. Supp. at 381-82 .

Plaintiff raises five objections to the Report. He asserts that the Report: (1) is flawed by reliance on "factual inaccuracies"; (2) that Judge Pitman's failure to address *res judicata* was improper; (3) that Judge Pitman erred in holding that collateral estoppel bars Plaintiff from asserting taxpayer standing in relation to his Establishment Clause claim because the issue of standing was resolved against Plaintiff in Den Hollander I; (4) that Plaintiff's "non- economic" standing argument is not barred by collateral estoppel and that Judge Pitman's contrary conclusion is marred by reliance on "false facts"; and (5) that Judge Pitman "inappropriately relies on cases outside the Second Circuit to override the authority of the Second Circuit and U.S. Supreme Court preceden[ts] on the issue of collateral estoppel." (Obj., July 11, 2011, ECF No. 25.)

The Court has reviewed de novo the aspects of the Report to which Plaintiff's objections are non-conclusory and not simply reiterations of arguments previously directed to Judge Pitman. The Court has reviewed the remainder of the Report for clear error.

Plaintiffs first objection, that Judge Pitman relied on factual inaccuracies in the Report, is unsupported by the record. Plaintiffs second objection, that Judge Pitman did not rule whether res judicata applies, is unavailing. When one issue is dispositive of a matter, there is no need for the Court to address alternate grounds for disposition. See, e.g., Stachelberg v. Ponce, 128 U.S. 686, 691 (U.S. 1888) ("This conclusion is sufficient to dispose of the case, and renders it unnecessary to consider other grounds upon which, it is insisted, the decree below should be sustained."). Here, the Report unambiguously recommends dismissal of the entire Complaint on the ground of collateral estoppel, making a ruling on res judicata unnecessary. (See Report 37, July 1, 2011, ECF No. 24.)

Plaintiffs third and fourth objections, that collateral estoppel does not apply because taxpayer standing and non-economic standing were not previously litigated, are similarly without merit. Collateral estoppel bars relitigation of an issue when: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) resolution of the issue was necessary to support a valid and final judgment on the merits of the issue. Ba ll v. A.O. Smith Corp., 451 F.3d 66, 69-70 (2d Cir. 2006). This Court has previously applied collateral estoppel to the issue of standing. See Fulani v. Bentsen, 862 F. Supp. 1140 (S .D.N.Y. 1994).

Plaintiff describes the instant case as "a continuation of [his previous] men's rights case."

(Obj. ¶ 6 July 11, 2011, ECF No. 25.) Plaintiff 's standing to bring an Establishment Clause claim based on government funding of the University, including the Women's Studies program, was litigated in Den Hollander I. See, e.g., Report and Recommendation, Den Hollander I, 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009), adopted by, Order, No. 08 Civ. 7286 (S.D.N.Y. Apr. 24, 2009), ECF No. 36, aff'd, 372 Fed. App'x 140 (2d Cir. 2010). Both the District Court and the Second Circuit necessarily decided the issue of Plaintiff's standing in Den Hollander I. See Order, Den Hollander I, 08 Civ. 7286 (S.D.N.Y. Apr. 24, 2009), ECF No. 36, aff'd, 372 Fed. App'x 140 (2d Cir. 2010)). The issue of Plaintiff's standing to litigate his Establishment Clause and related claims regarding the University's Women's Studies program was decided against him in Den Hollander I. Plaintiff's attempt to litigate alternate grounds for standing in this lawsuit is improper and unavailing. As the Second Circuit has stated, "[t]he principal virtue of collateral estoppel is self-evident: it promotes judicial economy by reducing the burdens associated with revisiting an issue already decided." Securities Exch. Comm'n v. Monarch Funding Corp., 192 F.2d 295, 303 (2d Cir. 1999) (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986)). Additionally, "when the claims in two separate actions between the same parties are the same or are closely related[. . .] it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy." United States v. Stauffer Chem. Co., 464 U.S. 165,

171 (1984) (quoting Restatement (Second) of Judgments 28, comment b (1982)); Fulani, 862 F. Supp. at 1151. In sum, "a dismissal for lack of subject matter retains *some* preclusive effect [and] bars those matters that have been actually litigated - typically, the specific jurisdictional issue(s) that mandated the initial dismissal." Lowe v. United States, 79 Fed. Cl. 218, 229 (original emphasis) (citing Parklane Hosiery, 439 U.S. at 326 n.5 ("the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action")). Thus, collateral estoppel bars Plaintiff's attempt re-litigate his standing to bring an Establishment Clause claim based on government funding of the University.


Finally, Plaintiff misreads the case law when he objects that the Report relies on non-binding decisions "to override the Second Circuit and the U.S. Supreme Court" by applying collateral estoppel to his claim. The authorities upon which Plaintiff relies are inapposite to the standing question at issue here. The Court has thoroughly reviewed and considered de novo the relevant aspects of the Report and concurs in Judge Pitman's conclusions regarding the scope and application of the collateral estoppel doctrine.

The Court has reviewed the remaining aspects of the Report and finds Judge Pitman's analysis free of clear error. The Court adopts the Report in its entirety, and, for the reasons stated therein and for the foregoing reasons, summary judgment is granted in favor of Defendants. The Clerk of the Court is respectfully requested to enter judgment accordingly and to close this case.

51a

This Order resolves docket entry no. 7.
SO ORDERED.

Dated: New York, New York
October 31, 2011


LAURA TAYLOR SWAIN
United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

-----X

ROY DEN HOLLANDER,

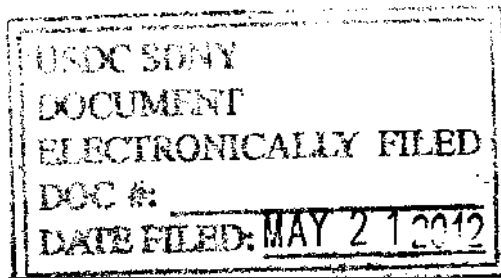
Plaintiff,

-v-

MEMBERS of the BOARD of REGENTS of the
UNIVERSITY of the STATE of NEW YORK, in
their official and individual capacities, et al.,

Defendants.

-----X



No. 10 Civ. 9277 (LTS)(HBP)

MEMORANDUM ORDER

On August 18, 2008, Plaintiff Roy Den Hollander ("Plaintiff" or "Den Hollander") commenced an action in this district ("Den Hollander I"), asserting that he was a New York State resident and an alumnus of Columbia University, but that he was deterred from attending

continuing education courses at Columbia because he would be exposed to "Feminist dogma" from the university. See Den Hollander v. Institute of Research on Women and Gender at Columbia University, et al., 08 Civ. 7286 (LAK). He additionally contended that Columbia University's Institute for Research on Women and Gender Studies promotes the "Religion of Feminism," in violation of the Establishment Clause.

On April 15, 2009, Magistrate Judge Kevin Nathaniel Fox issued a Report and Recommendation recommending dismissal of Den Hollander I for lack of standing. See Den Hollander I, 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009). On April 24, 2009, District Judge Lewis Kaplan adopted the Report and Recommendation and, on April 16, 2010, the United States Court of Appeals for the Second Circuit affirmed Judge Kaplan's decision, based entirely on Plaintiffs failure to establish standing.

Plaintiff subsequently filed the present action ("Den Hollander II"), which was referred to Magistrate Judge Henry Pitman for general pre-trial management. Defendants moved to dismiss the complaint, and Judge Pitman converted those motions to summary judgment motions. Judge Pitman ultimately issued a Report and Recommendation recommending that summary judgment be granted on the ground that collateral estoppel precluded Plaintiff from re-litigating the question of standing. After considering the Report and Recommendation and Plaintiffs objections, this Court adopted the Report and Recommendation in its entirety on October 31, 2011 and entered

judgment closing the case that same day.

Now before the Court is Plaintiff's motion to vacate the October 31, 2011, judgment and to amend his complaint , principally by adding two new plaintiffs who assert that they have taxpayer standing. The Court has considered carefully all the parties' submissions and, for substantially the reasons set forth in pages 5-8 of the State Defendants' Opposition Memorandum of Law and pages 1-2 of the Federal Defendants' opposition letter, Plaintiffs motion is denied.

SO ORDERED.

Dated: New York, New York
May 21, 2012

/S/
LAURA TAYLOR SWAIN
United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF NEW YORK

-----X
ROY DEN HOLLANDER,

Plaintiff,

-against-

MEMBERS OF THE BOARD OF REGENTS OF
THE UNIVERSITY OF THE STATE OF NEW
YORK, in their official and individual capacities,
et al.,

Defendants.

-----X
10 Civ. 9277 (LTS) (HBP)
ORIGINAL FILED BY E.C.F.

**STATE DEFENDANTS' MEMORANDUM OF
LAW IN OPPOSITION TO PLAINTIFF'S
MOTIONS TO VACATE JUDGMENT AND
AMEND THE COMPLAINT**

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Attorney for State Defendants
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CLEMENT J. COLUCCI
Assistant Attorney General
Of Counsel

D. The Proposed Amendment

By motion filed on November 21, 2011, plaintiff moves to vacate the October 31, 2011 judgment and to amend the complaint, mainly for the purpose of adding two additional plaintiffs, who assert their potential standing as taxpayers and on other grounds. (PAC, ¶¶ 67-97) The proposed amended complaint also makes some factual allegations concerning the proposed new defendants themselves and their grievances³, see PAC, ¶¶ 1, 5-7, 13-15, 43-44, 47, 49-50, 88-96, 125, 132-54, 158-63, 166-68, but, as plaintiff rightly asserts, these new factual allegations make no significant change in the theory of the case or the underlying legal issues. (Pltf. Mem., p. 5)

ARGUMENT

POINT I

THERE ARE NO GROUNDS TO VACATE THIS COURT'S ORDER

Plaintiff correctly states that a party seeking to file an amended complaint after judgment has been entered must first have the judgment vacated or set

³ One proposed new defendant, Michael Schmitt, has complaints about the women's studies program at his *alma mater*, Hofstra University, that largely parallel Mr. Den Hollander's about Columbia's program. See PAC, ¶¶ 1, 5-7, 13-14, 43-44, 47, 49-50, 88-96, 125, 132-54, 158-63, 166-68. The other proposed new defendant, Michael Leventhal, is identified as a taxpayer and an alumnus of Hunter College of The City University of New York, but does not make any further allegations concerning him or the nature of his grievance, if any. (PAC, ¶15)

aside pursuant to FRCP 59(e) or 60(b).⁴ See Pltf. Mem., p. 3, citing cases. But having stated the correct rule, plaintiff then fails to so much as mention any grounds to vacate or set aside the judgment, *id.*, pp. 3-8, and "[u]nless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint." *National Petrochemical Co. of Iran v. MIT Stolt Sheaf*: 930 F.2d 240, 245 (2d Cir. 1991). Because there is no such basis, this Court should not entertain the proposed amendment.

"Applications to alter or amend judgments under Federal Rule of Civil Procedure 59(e) or for reconsideration under Local Rule 6.3 are evaluated under the same exacting standard." *Antomarchi v. Consolidated Edison Co. of New York, Inc.*, 03 Civ. 7735 (LTS), 2011 WL 253640 at* 1 (S.D.N.Y. Jan. 19, 2011), *citing Williams v. New York City Dept. of Corrections*, 219 F.R.D. 78, 83 (S.D.N.Y. 2003). The movant "bears the heavy burden of demonstrating that there has been an intervening change of controlling law, that new evidence has become available, or that there is a need to correct a clear error or manifest injustice." *Id.*, *citing Virgin Airways v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992).

⁴ Because plaintiff has filed his motion within 28 days of the entry of judgment, it is properly considered a motion to alter or amend under FRCP 59(e) rather than a motion for relief from judgment or order under FRCP 60(b). See 12A C. Wright, *et al.*, *Federal Practice and Procedure. Civil*, § 1489 (3d ed. 2010). The difference, however, is of no practical consequence in this case. Compare Fed. R. App. Pro. 4(a)(4)(A)(iv) and (vi) (effects of respective motions on time to file appeal).

Although plaintiff does not explain on what theory he thinks the judgment ought to be vacated--the preliminary step to any amendment-- analysis of the proceedings so far, and the proposed amendment, will show that none of the reasons for alteration or amendment of judgments applies here.

Den Hollander I determined that plaintiff lacked standing to pursue this Establishment Clause claim. *Den Hollander v. Institute for Research on Women & Gender at Columbia University. etal.* . 09-1910-cv, 372 Fed. App'x 140 (2d Cir. 2010). This Court has determined that this same named plaintiff-- Roy Den Hollander-- was barred from re-litigating his standing and precluded from pursuing this claim even on the basis of a better-articulated theory of standing that, if valid, would have been available to him in *Den Hollander I*. (*Den Hollander II* Docket Document 29) The most important amendment plaintiff wishes to make is to add two new named plaintiffs who, if the allegations of the proposed amended complaint are to be believed, can successfully assert taxpayer standing. (PAC, ¶¶ 13, 15, 67-78) But the apparently newly-discovered existence of these potential plaintiffs does not constitute one of the recognized reasons for vacating or amending a judgment.

Plaintiff does not contend that there has been some intervening change in the law. And new plaintiffs, even newly-discovered plaintiffs, are not newly-discovered *evidence*. The addition of these new plaintiffs would not cure plaintiffs *own* lack of standing to pursue these claims, and, therefore, would not be grounds to alter the original decision. *See U.S. v. Internat'l Bhd. Of*

Teamsters, 247 F.3d 370, 392 (2d Cir. 2001) (newly-discovered evidence must be of the sort that would probably have changed the result). Although plaintiff obviously disagrees with this Court's October 31, 2011 decision, he does not assert clear error. Finally, plaintiff does not identify any manifest injustice. As he admits, the proposed new plaintiffs are perfectly free to bring their own lawsuit in their own names, and, if successful, obtain injunctive and declaratory relief that would benefit not only them, but plaintiff and all others similarly situated. (Pltf. Mem., p. 6) The proposed new plaintiffs can, if they choose, avail themselves of Mr. Den Hollander's advice or direction in the prosecution of their own lawsuit.

In short, plaintiff has failed to show any reason to alter or amend the judgment. Because an alteration or amendment of the judgment is a prerequisite for a post-judgment motion to amend, the proposed amendment fails at the threshold and should be denied.

POINT II

PLAINTIFF LACKS STANDING TO SEEK AMENDMENT

Plaintiff has twice been adjudicated as lacking standing to pursue this case. *See Den Hollander v. Institute for Research on Women & Gender at Columbia University. et al.*, 09-1910-cv, 372 Fed. App'x 140 (2d Cir. 2010) (*Den Hollander I*); *Den Hollander II*, Docket Document 29. Lacking standing to pursue the case at all, plaintiff necessarily lacks standing to seek amendment, even to add other parties who might have

standing, and this Court lacks jurisdiction to entertain the motion. *See Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278, 1282-83 (5th Cir. 1981) ("Since there was no plaintiff before the court with a valid cause of action, there was no proper party available to amend the complaint. . . . Since Summit had no standing to assert a claim, it was without power to amend the complaint so as to initiate a new lawsuit with new plaintiffs and a new cause of action."); *Zangara v. Travelers Indemnity Co. of America*, 05 CV 731, 2006 WL 825231 at *3 (N.D. Ohio Mar. 30, 2006) ("Zangara's lack of standing precludes him from amending the complaint to substitute new plaintiffs and join a new defendant. More precisely, his lack of standing divests this Court of subject matter jurisdiction necessary to even consider such a motion."); *Turner v. First Wisconsin Mortgage Trust*, 454 F. Supp. 899, 913 (E.D. Wis. 1978) ("a plaintiff who cannot maintain her own complaint has no right to amend it pursuant to Rule 15 of the Federal Rules of Civil Procedure to bring in other parties who will thereafter remain as parties when the complaint is dismissed as to the original plaintiff"); *Schwartz v. The Olympic, Inc.*, 74 F. Supp. 800, 801 (D. Del. 1947) ("Plaintiff also seeks to amend his complaint to bring in other parties plaintiff. If he cannot maintain his own complaint, he has no right to amend it.")

POINT III

AMENDMENT SHOULD BE DENIED AS
FUTILE BECAUSE "FEMINISM" IS NOT A
RELIGION AND THE STATE DEFENDANTS'
ACTIVITIES DO NOT TEND TO ESTABLISH
RELIGION

Leave to amend should be denied when the proposed amendment would be futile. *Lucente v. IBM Corp.*, 310 F.3d 243,258 (2d Cir. 2002); *Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001). A proposed amendment is futile when it would not withstand a motion to dismiss under Rule 12(b)(6). See *Lucente*, 310 F.3d at 258; *Dougherty v. North Hempstead Board of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002).

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U.S. Department of Justice

*United States Attorney
Southern District of
New York*

*86 Chambers
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New York, New
York 10007.*

December 5, 2011

BY FACSIMILE (212) 805-0426
Hon. Laura Taylor
Swain United States
District Judge United
States District Court
500 Pearl Street, Suite
755 New York, New
York 10007

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

Dear Judge Swain:

I write on behalf of the United States Department of Education and the Secretary of Education (collectively, "the Federal Defendants") to oppose plaintiff Roy Den Hollander's motion to vacate the judgment and amend the complaint [Docket No. 34]. The Federal Defendants respectfully request that the Court accept this letter in lieu of a formal opposition to plaintiff's motion, and enter this letter on the docket.

This is plaintiff's now-third attempt to craft a complaint that survives the pleadings stage, and it is no more successful than his previous attempts. As the Court will recall, Plaintiff believes that federal (and state) funding provided for students at Columbia University violates the First Amendment's Establishment Clause because the university has a women's studies department, which teaches about feminism, and feminism – in plaintiff's singular view – is a religion. In Plaintiff's first action ("*Hollander I*"), the district court dismissed this action on the grounds that Plaintiff lacked standing to prosecute it, and because it was frivolous. *See Hollander v. Inst. for Research on Women & Gender.*, No. 08 Civ. 7286 (LAK) (KNF), 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009) (report and recommendation), *approved by Order* (LAK) (S.D.N.Y. Apr. 24, 2009) (unpublished).¹ The Second Circuit upheld the district court's decision on standing alone, and thus did not reach the frivolousness issue, though the Circuit indicated that it shared the district court's skepticism on the merits of Plaintiff's bizarre theory. *Hollander v. Inst. for Research on Women & Gender.*, 372 F. App'x 140, 142 (2d Cir. 2010).

Plaintiff then filed the second, instant action ("*Hollander II*"), which added further allegations regarding his standing. This Court held, however, that the determination of his standing in the earlier

¹ A copy of Judge Kaplan's unpublished order was previously provided to this Court in connection with the Government's briefing of its motion to dismiss. An additional copy can be provided to the Court upon request.

case was *res judicata* and could not be relitigated upon new allegations in a second action. *See* [Docket No. 24] (report and recommendation), *approved by* 2011 WL 5222912 (S.D.N.Y. Oct. 31, 2011). Judgment was entered dismissing this second action on October 31, 2011. [Docket No. 30].

Plaintiff now seeks to vacate the judgment, pursuant to Federal Rules of Civil Procedure 59 and 60, so that he can have a third crack at this complaint, by adding two additional plaintiffs. This request should be rejected for several reasons. Plaintiffs request does not satisfy the strict requirements for reopening a judgment, which are based on the important interest in finality. Even if Plaintiffs request were timely, his proposed complaint cannot be accepted because his claims plainly would not survive a motion to dismiss, because the addition of new plaintiffs does nothing to affect Plaintiffs own standing to bring this action nor does it cure the frivolous nature of the allegations themselves.

As Plaintiff notes, "[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b)." *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011) (internal quotation marks and brackets omitted). "[C]onsiderations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of judgment. . . . [I]n view of the provision in [Federal Rule of Civil Procedure] 15(a) that leave to amend [a complaint] shall be freely given when justice so requires, it might be appropriate in a proper case to take into

account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment." *Id.* (citations and internal quotation marks omitted). Thus, a determination of whether to permit Plaintiff to vacate the judgment requires an examination of how the Court would consider a timely motion to amend his complaint. Here, such a motion, as discussed below, would be doomed.

As numerous courts have held, "Rule 15 does not permit a plaintiff [to] amend[] its complaint to substitute a new plaintiff in order to cure the lack of subject matter jurisdiction." *United States ex rel. Fed. Recovery Servs., Inc. v. Crescent City E.M.S., Inc.*, 72 F.3d 447,453 (5th Cir. 1995); *accord Wright v. Dougherty County*, 358 F.3d 1352, 1356 (11th Cir. 2004) ("Where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action." (internal quotation marks omitted)); *In re Enron Corp. Secs., Derivative & ERISA Litig.*, Nos. H-01-3624, H-04-4520, 2011 WL 5967239, 12 n.19 (S.D. Tex. Nov. 29, 2011) ("The general rule is that a plaintiff who lacks standing may not amend a complaint to substitute a new plaintiff to cure a lack of jurisdiction because a plaintiff may not create jurisdiction by amendment where none exists."); *Zangara v. Travelers Indem. Co. of Am.*, No. 1:05CV731, 2006 WL 825231, at *3 (N.D. Ohio Mar. 30, 2006) (citing *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002)) ("[Plaintiffs] lack of standing precludes him from amending the complaint to substitute new plaintiffs and join a new defendant.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
Roy Den Hollander, Lt. Col. (Ret.) Michael G.
Leventhal, and Michael P. Schmitt, Esq.,

Plaintiffs,

-against-

Members of the Board of Regents of the University of
the State of New York, in their official and
individual capacities; Chancellor of the Board of
Regents, Merryl H. Tisch, in her official and
individual capacity; New York State Commissioner
of the Department of Education, John B. King Jr., 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; U.S. Department of Education; and U.S.
Secretary of Education, Arne Duncan, in his official
capacity;

Defendants.

-----X

Docket No. 10 CV 9277 (LTS)(HBP)(ECF)

**ESTABLISHMENT CLAUSE AMENDED
COMPLAINT**

Jury Demand

I. Introduction

1. This action seeks declaratory and injunctive relief against the New York State defendants, pursuant to the 14th Amendment and 42 U.S.C. § 1983, and the United States defendants for their ongoing violation of the Establishment Clause of the First Amendment to the U.S. Constitution by aiding the modern-day religion Feminism in public and private higher educational institutions in New York State, such as Columbia University (“Columbia”) and its Institute for Research on Women and Gender Studies (“IRWG”) and Hofstra University (“Hofstra”) and its Women’s Studies program.

2. The Chancellor and Members of New York State’s Board of Regents (“Regents”) and the Commissioner and the New York State Department of Education (“SED”) require that higher education institutions, such as Columbia and Hofstra, adhere to the religious doctrine of Feminism.

3. Funds appropriated and mandated by the New York State Legislature are used by the Regents and SED to carry out their educational policy of inculcating Feminism into New York’s higher educational.

4. The Secretary and the U.S. Department of Education (USDOE) violate the Establishment Clause by providing funds to the Regents and SED that are used to enforce the State’s Feminist requirements, such as those stated in *Equity for Women in the 1990s, Regents Policy and Action Plan, Background Paper* (1993)(the document contains two papers separately cited as *Equity for Women, Regents Policy and Action Plan* and *Equity for*

Women, Background Paper).

5. The Regents and SED expend non-student aid, in particular “Bundy” funds under N.Y. Educ. Law § 6401 in support of the inculcation of Feminism by Columbia’s IRWG and Hofstra’s Women’s Studies program. The funds are appropriated by the New York State Legislature and mandated for higher education.

6. USDOE expends public funds on non-student aid in the form of awards, contracts, and research grants that directly or indirectly support the inculcation of Feminism at Columbia’s IRWG and Hofstra’s Women’s Studies program. The funds are appropriated by the U.S. Congress and mandated for higher education.

7. Columbia’s IRWG and Hofstra’s Women Studies program avowed purposes are to bring the doctrine of Feminism to the colleges’ students and the members of their communities.

II. Jurisdiction and Venue

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action raises federal questions under the First and 14th Amendments to the U.S. Constitution.

9. This Court has personal jurisdiction over the defendants in accordance with Fed. R. Civ. P. 4(e)(2)(C), 4(i)(2), 4(j)(2)(B) and New York C.P.L.R. § 307(1) & (2)(2).

10. This Court has venue under 28 U.S.C. 1391(b)(2), (e)(2) & (3)

III. Parties

11. Plaintiff Roy Den Hollander is a resident of New York County, N.Y., a citizen of the United States, a New York State and federal taxpayer, a member of the Columbia Community as an alumnus of the Columbia University Business School, and an attorney admitted to practice before this Court.

12. Den Hollander uses the facilities and services he is entitled to as an alumnus of Columbia and is directly affected by the New York State defendants requiring Columbia to comply with Feminist precepts and by the State defendants and USDOE using tax dollars to directly or indirectly support the propagation of the Feminist doctrine at IRWG.

13. Plaintiff Michael P. Schmitt is a resident of Port Washington, New York, a citizen of the United States, a New York State and federal taxpayer, a member of the Hofstra Community as an alumnus of the Hofstra Law School, and an attorney admitted to practice in New York State.

14. Schmitt uses the facilities and services he is entitled to as an alumnus of Hofstra Law School and is directly affected by the New York State defendants requiring Hofstra to comply with Feminist precepts and by the State defendants and USDOE using tax dollars to directly or indirectly support the propagation of the Feminist doctrine at Hofstra's Women's Studies program.

15. Lieutenant Colonel (Retired) Michael G. Leventhal is a resident of Brooklyn, New York, a citizen of the United States who served his country in the military, a New York State and federal

taxpayer and graduate of the City University of New York Hunter College.

16. The Regents are responsible within New York State for the supervision of educational activities, chartering and controlling higher educational institutions, and presiding over the University of the State of New York and New York's Department of Education, which contains within it the Higher Education Services Corporation ("HESC"). N.Y. Educ. Law §§ 101, 207, 214, 215, 216, 219, 226(4) & 652; NYSED/Board of Regents, <http://www.regents.nysed.gov/>.

17. The University of the State of New York is America's most comprehensive and unified educational system, which encompasses all the institutions, both public and private, offering education in the State. NYSED/Board of Regents, <http://www.regents.nysed.gov/>.

18. The University of the State of New York's mission is to provide educational programs and related services to the residents of the State. N.Y. Educ. Law § 201.

19. The Regents exercise legislative functions concerning the higher educational system in New York State, determine higher education policies, and establish the rules for carrying those policies into effect throughout the higher educational institutions of the State. N.Y. Educ. Law § 207.

20. Columbia and Hofstra are part of the University of the State of New York.

21. Through the Regents' power to suspend the charters of higher educational institutions, N.Y.

Educ. Law §§ 210 & 215, and its power to register degree granting educational programs and curricula, Regents Rule § 13.1, which includes the courses and all of a school's facilities, 8 N.Y.C.R.R. §§ 3.47(a), 50.1(i), 52.1, 52.2, 126.1(d), the Regents control what is taught in colleges and universities in the State, the environment in which it is taught, and limit which educational programs receive accreditation, and, therefore, non-student State and federal funding.

22. Every four years the Regents develop or update their master plan for higher education in New York called the Statewide Plan for Higher Education and review the plan's implementation by higher educational institutions. N.Y. Educ. Law § 237.

23. In formulating the plan for higher education, the Regents take into consideration the master plan of the Commission on Independent Colleges and Universities of New York, which is a non-governmental body chartered by the Regents and representing the policy interests of New York's private colleges, such as Columbia and Hofstra.

24. On information and belief, the Commission has and continues to advocate the institutionalization of Feminism in higher education.

25. The Regents' Statewide Plans, under N.Y. Educ. Law § 237:

- a. define the missions and objectives of higher education;
- b. set goals, describe the time for meeting those goals, identify the resources needed,

and establish priorities; and

- c. evaluate the effectiveness of educational programs.

26. The Regents also periodically issue policy statements to supplement or modify the direction that higher educational institutions should take in their programs. NYSED website, <http://www.highered.nysed.gov/ocue/lrp/>; see N.Y. Educ. Law § 207.

27. The Regents preside over SED, which functions as the Regents' administrative arm in carrying out the Regents' mandates, policies, and plans. N.Y. Educ. Law § 101.

28. The Regents must approve or authorize all SED's regulations for effecting the Regents' mandates, policies, and plans. N.Y. Educ. Law § 207.

29. SED evaluates and monitors higher educational programs in New York colleges and universities, such as Columbia's IRWG and Hofstra's Women's Studies program, in order to assure the programs are consistent with the Statewide Plan and Policy Statements formulated by the Regents. 8 N.Y.C.R.R. § 52.1(c).

30. On behalf of the Regents, SED provides direct financial aid to colleges and universities under N.Y. Education Law § 6401, known as "Bundy Aid," which is paid based on the number of degrees awarded by a higher educational institution in order to support the operation of that institution. It is a "program of direct State aid to qualifying" institutions of higher education. McKinney's 1968 Session Laws, *Gov.*

Rockefeller Statement p. 2380.

31. “No portion” of “Bundy Aid” can “be used for the religious instruction ... or for the advancement or inhibition of religion.” 8 N.Y.C.R.R. § 150.2; *see also* N.Y. Educ. Law § 6401(2)(a)(iv).

32. USDOE establishes policies for federal financial aid to education in order to assist institutions of higher learning. 20 U.S.C. § 1070(a)(5).

33. USDOE regulates the operation of all parties involved in the financing process, distributes and monitors federal funds, and enforces equal access to education. USDOE website, <http://www2.ed.gov/about/what-we-do.html>.

34. On information and belief, USDOE provides awards, contracts, and research grants to higher educational institutions.

35. USDOE delegated to the Regents and SED the responsibility for determining which higher educational institutions in New York State are eligible for federal programs providing institutions federal awards, contracts, and research grants.

36. On information and belief, USDOE also provides funding to the Regents and SED that supports their turning higher education into a Feminist construct.

IV. Feminism as a Religion

37. A belief system need not be theistic in nature to be a religion but rather can stem from moral or ethical tenets that are held with the strength of traditional religious convictions.

38. The U.S. Supreme Court has rejected the view that religion is defined solely in terms of a Supreme Being by noting that “Buddhism, Taoism, Ethical Culture, Secular Humanism,” and other non-theistic belief-systems are religions.

39. The Equal Employment Opportunity Act, 42 U.S.C. § 2000e(j), defines the term “religion” as including “all aspects of religious observance and practice, as well as belief.”

40. Title VII of the Civil Rights Act of 1964 definition of religion under 29 C.F.R. § 1605.1 “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.”

41. Religious beliefs are generally characterized by, among other traits, ultimate ideas; metaphysical beliefs; a moral or ethical system; a shared and comprehensive doctrine; and the accoutrements of religion, such as founders, prophets, teachers, important writings, keepers of knowledge, structure or organization, holidays, and proselytizing.

42. Five U.S. Courts of Appeals and the U.S. Southern District Court for New York have used the following criteria to determine whether a belief system is a religion for purposes of the Establishment Clause: (a) most importantly is the nature of the ideas, do they address fundamental and ultimate questions having to do with deep and imponderable matters (a court must, at least to a degree, examine the content of the supposed religion to determine whether the subject matter it comprehends is consistent with the assertion that it

is, or is not, a religion); (b) do the ideas have a broader scope that lay claim to definitive and comprehensive truths; (c) least important, does the belief system have formal and external signs such as structure, organization, efforts at propagation, and observance of holidays similar to traditional religions.

43. The Feminist doctrine advanced and aided by the defendants in higher educational institutions, such as Columbia and Hofstra:

- a. Provides followers with a faith-based certainty that they are the sole possessors of the highest form of truth to the answers of life's persistent questions even though those truths cannot be proven empirically.
- b. Shapes the entirety of its followers' lives with thought patterns that make possible the description of realities, the formulation of beliefs, and the experiencing of inner attitudes, feelings, and sentiments.
- c. Provides a conscious push toward an ultimacy and transcendence that provide norms and power throughout life.
- d. Indoctrinates theories as to the place in the order of nature for males and females.
- e. Propagates basic attitudes to the fundamental problems of life.
- f. Provides answers on how to deal with certain situations that arise throughout life.
- g. Defines the fundamental concerns for

humans in modern day society.

- h. Proselytizes moral codes of right and wrong.
- i. Inculcates comprehensive beliefs on matters ranging from the insignificant through the ordinary to the material which are accepted as true, such as the difference between right and wrong, good and evil, how to live one's life and die one's death.
- j. Advocates a theory of humanity as believed it should be, purged of the evil elements which retard its progress toward the knowledge, love, and practice of the right.
- k. Organizes beliefs into a holistic system of a Feminist worldview with tenets for comprehension and commandments for conduct.
- l. Mandates a lifestyle that requires a broad system for conduct in all spheres of existence, including appropriate acts of volition; correct thinking; and acceptable language, such as "issues" for "problems," and "gender" for "sex" (unless it involves accusations of "sexual abuse" against a male).
- m. Advocates beliefs that are based upon a faith to which all else is subordinate and which all else is ultimately dependent.
- n. Is shared by an organized group.
- o. Combines Feminist research on various topics into a comprehensive belief system.

- p. Validates the spirit of its followers with importance, meaning, purpose, and security.
- q. Inculcates beliefs based on the teachings of certain prophet-like individuals, such as Mary Wollstonecraft.

44. The core of Columbia's Feminist apple is IRWG with 75 teachers of which only four are male and the core of Hofstra's Feminist fruit is its Women's Studies Program with 33 faculty members of which only two are male.

45. Under Columbia University Statutes §§ 350 and 351, IRWG is an institute within Columbia University that conforms to the policies of appropriate faculty bodies as designated by the University President. Institutes have budgets for research expenses, clerical and technician help and receive allocations from departmental budgets for other research expenses or salaries. The direction of each institute is assigned to a coordinating committee or an administrative committee of the University.

46. IRWG offers a Bachelor of Arts degree in Women's Studies and a graduate certification in Feminist Scholarship.

47. Hofstra's Women Studies is an interdisciplinary program in the College of Liberal Arts and Sciences with a designated faculty, employees, and budget. It offers a bachelor of arts degree in Women's Studies, internships with approved Feminist organizations, such as the Feminist Majority and National Organization of

Women, and consciousness raising through various events and speeches,

48. Columbia's IRWG exists to specifically bring Feminism to the Columbia Community:

- a. IRWG is a well-organized institution with its own budget, mission, goals, and structure that places the director on top, followed by administrative officers, instructors, and lastly the budding followers.
- b. IRWG's administrators and teachers preserve and teach Feminist precepts.
- c. IRWG, as it admits, propagates Feminism through its Women's Studies program with lectures, seminars, consciousness indoctrination sessions, publications, career preparations, counseling, historical revisionism, propagandizing, and unanimity of thought labeled "politically correct."
- d. IRWG's website states it "is the locus of interdisciplinary feminist scholarship and [feminist] teaching at Columbia University" and "[t]he [Women's Studies] program is intended to introduce students to the long arc of feminist discourse about the cultural and historical representation of nature, power, and the social construction of difference. It encourages them to engage the debates regarding the ethical and political issues of equality and justice that emerge in such discussions.

And it links the questions of gender and sexuality to those of racial, ethnic, and other kinds of hierarchical difference.”

- e. IRWG exalts certain Feminists to apostle-like status and celebrates certain days of the year as important to Feminism.

49. Hofstra’s Women’s Studies mission is to spread Feminism to the Hofstra Community:

- a. “The mission of women’s studies is . . . to study women and gender from feminist perspectives,”
- b. “[T]o create an academic community supportive of feminist scholarship and to nurture subsequent generations of feminist scholars and activists”
- c. “To this end, the Women’s Studies Program at Hofstra University seeks to educate our campus community about the experiences of women in particular . . . through our undergraduate curriculum and co-curricular events.”

50. In the Feminism inculcated at Columbia’s IRWG and Hofstra’s Women’s Studies, scientific differences between the sexes are replaced with the faith-based premise that such differences are socially constructed; that is, they result from social programming.

51. The Regents began promoting this doctrine of socially programmed sex differences before the creation of IRWG and Women’s Studies by declaring that “[b]oys and girls learn very early in life from their toys, their games, what they see on TV, and the

way adults treat them to conform to what is considered typical of their sex,” which is reinforced by education. *Equal Opportunity for Women-A Statement of Policy and Proposed Action*, Position Paper No. 14, p. 6 (1972).

52. Such a disregard for neuroscience, evolution, biology, and physics makes the belief incomprehensible and incorrect—a characteristic of religion, but essential for the Regents and SED to justify the continuing imposition of Feminism as the dominant belief system in the State’s higher education.

53. Feminism and the Regents’ policies avoid the scientific method in that their precepts are not the result of knowledge gained by testing hypotheses to develop understanding through the elucidation of facts or evaluation by experiments.

54. Unlike scientific knowledge, Feminism and the Regents’ Feminist policies ignore later refinement in the face of new information. The Regents, as did the Catholic Church in the Middle Ages, decide which scientific evidence is acceptable and which unacceptable depending on whether it supports Feminist doctrine.

55. For example, the Regents claim that females “do not get the same economic return on their education as men.” *Equity for Women, Regents Policy and Action Plan*.

56. Females, however, earn more per unit of time worked than males. The average man spends 44% more time working or doing work related activities than the average woman, U.S. Department of Labor,

Bureau of Labor Statistics, *Time Use Survey 2007*, Table A-1, while the average woman makes around 77% that of the average man. If the two were paid equally for their time actually worked, then the pay for the average woman should be 69.5% that of the average man—not 77%. Or put another way, if the two worked the same amount of time, for every dollar a male earns, a female makes \$1.10.

57. Feminism and the Regents' policies claim as unfair that "[t]he percentage of women in leadership positions ... continues to reflect a lack of access" to the "Glass Ceiling." *Equity for Women, Regents Policy and Action Plan* p. 2.

58. Feminism and the Regents' policies, however, fail to note the countervailing fact that the 25 most dangerous occupations in America are 90% occupied by men; males are 20 times more likely to be killed or injured on the job; and over all occupations, men suffer 92% of the job related deaths while making up less than 50% of the work force. U.S. Department of Labor, Bureau of Labor Statistics, Current Population Survey, *Employment and Fatalities by Gender of Worker* (2006). It's called the "Tombstone Basement."

59. Since men bear greater risks and burdens, fairness requires them to enjoy more of the benefits, but the Regents and Feminism ignore this logical principle in order to enforce Feminist precepts that provide females with preferential treatment throughout society.

60. Feminism and the Regents' policies claim that "[w]hen women and men have comparable education and experience, men are often paid more." *Equity for*

Women, Regents Policy and Action Plan pp. 2-3. Once again, this Feminist belief on which New York's higher education has been partly modeled is merely dogma lacking in empirical data.

61. Never married, college educated males who work full-time make only 85% of what comparable females earn. John Leo, *Of Men, Women, and Money*, (contributing editor U.S. News & World Report, citing Dr. Warren Farrell, *Why Men Earn More*). In 1960 it was 94%. *1960 U.S. Census of Population*.

62. Feminism and the Regents' policies foist the belief that "[w]omen in mid-life see a greater disparity in their earning." *Equity for Women, Regents Policy and Action Plan* p. 3.

63. Data from the *National Longitudinal Survey*, however, reveal that females between the ages of 18 and 34 have been out of the labor force 27 percent of the time, in contrast to 11 percent for men, and females ages 45 to 54 who have recently re-entered the workforce after a five or 10-year break are competing against men who have had 20 years of continuous experience. Denise Venable, *Wage Gap Myth*.

64. Feminism and the Regents' policies assert that female faculty have "mean salaries lower than their male counterparts," *Equity for Women, Regents Policy and Action Plan* p. 4, while ignoring that among professors who produce an equal number of journal articles, men are likely to be paid the same or just slightly less than females. Dr. Warren Farrell, *Why Men Earn More*.

65. These are just some of the Feminist beliefs

adopted by the Regents as reasons for injecting Feminism into their higher education policies and requiring colleges and universities to operate in accordance with the Feminist creed.

V. Standing

66. History reveals that the Establishment Clause was intended to protect both against the kind of governmental encroachment that might lead to the establishment of a national religion and against the taxation of citizens in order to support religion.

Taxpayer Standing

67. One of the injuries asserted in this action is the use of the three plaintiffs' New York State and U.S. tax dollars for expenditures that violate the Establishment Clause.

68. The State Legislature was mandated by the State Constitution to create and by implication fund the "corporation" named the University of the State of New York. *N.Y. Constitution*, Art. XI § 2.

69. The State Legislature annually appropriates specific sums to the University of the State of New York that the legislative mandate of N.Y. Educ. Law § 237 requires be spent, in part, on the formulation and execution of Regent Statewide Plans and policy statements, such as the major policy statement *Equity for Women, Regents Policy and Action Plan*.

70. The master plans and policy statements are also mandated by N.Y. Educ. Law § 237(1)(d)(3) to list resources for the execution of the University of the State of New York's plans and policies, including *Equity for Women, Regents Policy and Action Plan*.

71. Such resources are provided out of the specific appropriations for the University of the State of New York,¹ and SED serves as the Regents administrative arm expending the designated resources to carry out the University of the State of New York's policies, which includes its *Equity for Women, Regents Policy and Action Plan* that promotes Feminism in higher education.

72. The plaintiffs challenge the constitutionality of these expenditures.

73. The plaintiffs also challenge the constitutionality of funds provided by USDOE to the Regents and SED that are spent on carrying out the Regents Feminist policies, such as the *Equity for Women, Regents Policy and Action Plan*.

74. The plaintiffs challenge the constitutionality of State expenditures under N.Y. Education Law § 6401 or "Bundy Aid" that directly or indirectly benefit Columbia's IRWG and Hofstra's Women's Studies.

75. Bundy Aid is provided pursuant to statutory mandate from specific legislative appropriations and disbursements of New York State taxpayer dollars. These are not general appropriations for day-to-day

¹ From a different perspective, the Regents act as the legislature for higher education. N.Y. Educ. Law § 207. Funds from State taxpayers are provided to the University of the State of New York by the State Legislature. The Regents, acting as a legislature, specifically appropriate some of those funds for the implementation of its policy *Equity for Women, Regents Policy and Action Plan* and its Feminist tenets and SED expends those funds to enforce that policy at Columbia and Hofstra.

governmental operations.

76. In addition, the plaintiffs challenge the constitutionality of expenditures that directly or indirectly benefit Columbia's IRWG and Hofstra's Women's Studies that are made by USDOE pursuant to statutory mandate from specifically authorized appropriations of federal taxpayer dollars spent, on information and belief, for various awards, contracts, and research grants.

77. The State and U.S. statutes involved are not challenged on their face but that the funds authorized by the New York Legislature and Congress are being disbursed in a manner that advances the religion Feminism in higher education in New York and benefit, directly or indirectly, Columbia's IRWG and Hofstra's Women's Studies, both of which are pervasively sectarian.

78. It does not matter that the funding authorized by the State Legislature and Congress flows through and is administered by executive agencies because the funds come from programs of specific disbursement by the State Legislature and Congress using their taxing and spending powers.

Non-economic Standing

79. Plaintiffs Den Hollander and Schmitt also assert non-economic standing under the Establishment Clause.

80. For Den Hollander, the inculcation, manifestation, and exposure of Feminism at Columbia is offensive to him and makes him very uncomfortable with the result of interfering with his use and enjoyment of Columbia as a member of the

Columbia Community.

81. As one pre-discovery indication of the pervasiveness of Feminism at Columbia, the following searches by plaintiff Den Hollander on Columbia's website, <http://www.columbia.edu/>, provided the following results:

- a. "Feminist" yields 6020 references;
- b. "Feminism" yields 1440 references;
- c. "Masculinity" yields 613 references;
- d. "Masculine" yields 586 references;
- e. "Women's issues" yields 1620 references;
and
- f. "Men's issues" yields 454 references.

82. Plaintiff Den Hollander uses Columbia for library resources, career networking, e-mail services, discussion groups, career support, access to Columbia publications, attending various events, discounts and special offers, electronic learning, and pod-casts to listen to the newest ideas on campus.

83. Plaintiff Den Hollander receives communications from Columbia that enter his home through the Internet and U.S. Post which disseminate the offensive orthodoxy of Feminism.

84. For example, the Fall issue of *Columbia Magazine* carries the cover story "Stolen Souls" about human trafficking. The cover shows two females in silhouette and expounds on the horrors of female sex-trafficking with only an oblique reference to trafficking in slave labor for construction and agriculture, which primarily affects adult males and

young boys. Never mentioned, depicted, or even inferred in the seven-page article is the fact that most human trafficking is of males for hard labor. Roberts, Carey, *Half-Truths About Human Trafficking*, ifeminists.net, July 11, 2006. Further, the article did not even hint that frequently the alleged female sex-victims are ambitious ladies who volitionally migrate for the money. O'Neil, Brendan, *The Myth of Trafficking*, <http://www.newstatesman.com/200803270046>, March 27, 2008.

85. As an alumnus, plaintiff Den Hollander may also take courses in Columbia's Continuing Education auditing program without meeting the qualifications required of the general public and prepare for further graduate work through Columbia's Post Baccalaureate Studies.

86. Such programs, courses, and studies, however, due to the Regents and SED's requirement that all higher education activities conform to the doctrine of Feminism, assure that the plaintiff will encounter and be confronted with unwelcome and offensive Feminist dogma from the Columbia administration, professors, counselors, materials, and school activities.

87. For example, during one seminar at Columbia's School of International and Public Affairs, plaintiff Den Hollander stated that females in underdeveloped countries often view their children as human capital to help provide money for the family. The admitted Feminists in the seminar immediately engaged in a loudmouth barrage of obloquy and calumny against the plaintiff for

criticizing mothers. During the Feminist rant, the assistant professor turned away—intimidated. He later apologized to the plaintiff for failing to intervene to keep the discussion on a civil level.

88. Plaintiff Schmitt while attending Hofstra Law School agreed to be President of a campus right-to-life organization. Within a week, campus security detained him for questioning. A Feminist pro-choice organization falsely accused him of harassing and stalking its members. The charges were subsequently dropped when Schmitt counterclaimed against the Feminist accusers for filing false charges.

89. The intimidation for not adhering to Feminist tenets at Hofstra did not stop there. Due to the machinations of the dean of the law school, the dean of the entire University demanded that Schmitt immediately resign his position with the right-to-life group or be expelled because right-to-life was considered hostile to women's rights as defined by Feminism.

90. As one pre-discovery indication of the pervasiveness of Feminism at Hofstra, the following searches on Hofstra's website, <http://www.hofstra.edu/home/index.html> had the following results:

- g. "Feminist" yields 438 references;
- h. "Feminism" yields 264 references;
- i. "Masculinity" yields 90 references;
- j. "Masculine" yields 62 references;
- k. "Women's issues" yields 64 references; and

1. “Men’s issues” yields 0 references.

91. The alleged injuries to plaintiffs Den Hollander and Schmitt are not simply noncognizable, psychological consequences produced by a fleeting observation of personally disagreeable conduct.

92. Plaintiffs Den Hollander and Schmitt repeatedly come into direct contact with Feminism at their alma maters and the unwelcome observation of the manifestations of Feminism that would require them to alter their behavior in order to avoid such.

93. Plaintiffs Den Hollander and Schmitt are also made to feel that they are unwilling participants in a faith not their own when they enter a space dedicated to two separate functions, education and inculcating Feminism.

94. The prevalence of Feminism at Columbia and Hofstra make plaintiffs Den Hollander and Schmitt feel as nonadherents, outsiders, and not full members of their respective college communities.

95. For example, when plaintiff Den Hollander brought the *Den Hollander I* case in 2008, Columbia’s student newspaper, the Spectator, requested he write an opinion piece about why he filed the case. The Spectator, however, refused to publish the piece stating that it was “hard” on females.

96. Neither Columbia nor Hofstra have a Men’s Studies program, which illustrates preferential treatment for the majority, females, without similar assistance to the minority, males, which is consistent

with Feminist tenets.

97. For both taxpayer and noneconomic standing, the plaintiffs allege injuries that are both “fairly traceable” to the allegedly unlawful conduct of the defendants and “likely to be redressed by the requested relief,” since the relief sought is the cessation of the specifically identified and alleged unconstitutional conduct.

VI. The Regents, SED, and USDOE Aid the Religion Feminism

The Regents and SED’s higher education policies on their face promote and favor the religion Feminism while inhibiting other contradictory viewpoints.

98. Since at least 1984, the Regents and SED have abandoned neutrality and acted with the intent of endorsing, utilizing, and promoting a particular orthodoxy in higher education—that of Feminism.

99. The Regents and SED in 1984 started to remake higher education in accordance with Feminist doctrine that calls for the preferential treatment of females in areas where females were already leading males. The Regents required the adoption of Feminist beliefs and policies for higher education through their Statewide Plans and Policy Statements.

100. Previously in 1972, the Regents required that higher education take the lead in advancing affirmative action for females in admission to colleges and degrees earned. *Equal Opportunity for Women-A Statement of Policy and Proposed Action*, Position Paper No. 14, pp. 6-8 (1972).

101. The Regents' purpose in 1972 was to balance the number of males and females gaining the benefits of higher education, *see Regents Statewide Plan 1972*, p. 103-04, since females only made up 44% of all New York college students, *Regents Statewide Plan 1972*, p. 103, so in 1972 the Regents' policy had a secular purpose.

102. In 1984, however, when there were already more females attending and graduating from New York colleges and universities than males, the Regents' Statewide Plan still had as a top priority increasing the number of females who attended and completed college programs. *Regents Statewide Plan 1984*.

103. The *Regents Major Policy Statement for 1984* also required enhancing the college opportunities for females to not only attend college but to give them added assistance at ensuring their successful completion even though they were already graduating in higher numbers than males.

104. In 1988, the Regents Statewide Plan continued the Feminist policy of preferential treatment for females by calling for the increased participation of females in underrepresented fields even though it would further decrease the number of males receiving college degrees. *Regents Statewide Plan for 1988*.

105. In 1993, when over 55% of New York State's college students were female, SED *ORIS*, and females earned 60% of the associate degrees, 54% of the bachelor degrees, and 58% of the master's degrees, *New York Annual Educational Summary 1990-91*, Table 42, p. 50, the Regents published their

major policy statement that made Feminism the official doctrine for higher education: *Equity for Women in the 1990s, Regents Policy and Action Plan, Background Paper* (1993). The policy is still in effect today.

106. *Equity for Women* requires establishing specific goals, indicators of progress, and a timetable for action to provide females with additional benefits and more preferential treatment in State public and private colleges and universities. It amounts to a “super affirmative action,” which is consistent with Feminist doctrine.

107. *Equity for Women* creates a “comprehensive plan” and a “plan of action” for which “the entire educational community is accountable.” *Equity for Women, Regents Policy and Action Plan* pp. 1, 6.

108. The *Equity for Women, Regents Policy and Action Plan* made Feminism the criterion for governing educational content, operations, monitoring, and decision making by the Regents, SED, HESC, and institutions of higher learning.

109. The Regents and SED lead and support the continuing execution of the plan, *Equity for Women, Regents Policy and Action Plan* p. 6, which requires “the cooperation of members of faculties, boards of trustees ..., administrations of ... colleges ..., as well as ... employers, and community members.” *Id.* p. 6.

110. *Equity for Women* guides the SED’s actions with educators, educational institutions, and cultural institutions across the State, *Equity for Women, Regents Policy and Action Plan* p. v., and requires SED to give significant weight to the advice

provided by the Commissioner's Statewide Advisory Council on Equal Opportunity for Women and Girls, *id.* p. 6. (There is no Council on Equal Opportunity for Men and Boys, which is consistent with Feminist precepts.)

111. The Regents' *Equity for Women, Regents Policy and Action Plan* requires the following conformity with Feminist doctrine:

- a. Super affirmative action to increase the number of degrees received by females in those areas where they already receive well over 52%. *Equity for Women, Regents Policy and Action Plan* p. 3.
- b. "[C]hang[ing] the way [educators] think and act [including speech] in order to achieve" super affirmative action goals for females. *See id.* p. 5.
- c. "Major changes in curriculum and teaching" to accord with "[c]urrent studies about learning patterns and the intellectual development of women" that ends up promoting female friendly strategies over those helpful to males. *Id.* p. 2.
- d. The SED staff to re-train faculty in the Feminist view of appropriate sex roles and provide "regular monitoring and reinforcement [of that view] in educational settings." *Id.* p. 6.
- e. The SED staff to conduct "academic program reviews at colleges and universities" in order to determine whether

gender specific patterns (traditional sex roles that resulted from six million years of evolution) have disappeared. *Id.* p. 7.

- f. “Appropriate non-traditional role models” to increase the number of females enrolled in subjects such as mathematics, science, engineering, and computer technology with the quota numbers reported to Higher Education Data Systems, *id.* p. 7, which will further decrease the overall number of males graduating college.
- g. “Practices that support, recruit, and promote women will be identified and replicated” while all others will be “eliminated,” as determined by SED’s Affirmative Action Officer *Id.* p. 9.
- h. Focusing the support networks of colleges and creating others to promote the hiring and placement of females, *id.* p. 9, even though more females than males are hired on graduating college.
- i. Developing, supporting, and promoting research on current issues facing females, but not males, that will be incorporated into teacher training by SED. *Id.* p. 10.

112. The Regents’ *Equity for Women, Regents Policy and Action Plan* assigned SED the “responsibility to monitor progress toward the [above] stated goals,” *id.* p. 11, which causes an excessive entanglement with the religion Feminism.

113. In 2004, the Regents’ Statewide Plan recognized that a super-majority of all college

students were female, that females earned 63% of the Master's degrees and a majority of the Doctoral degrees in the State, yet consistent with Feminist doctrine, the Regents showed no concern for rebalancing the numbers to achieve equity for men. *2004 Statewide Plan* pp. 70, 72 chart 17.

114. As a result of the Regents' enforcing Feminist precepts, today, females make up 58% of all New York's college students, females receive over 55% of the Bachelor degrees, over 63% of the Master's degrees, and over a majority of the Doctoral degrees. SED, *ORIS*.

115. By 2016, females will receive 64% of the Associate's degrees, over 60% of the Bachelor's degrees, 53% of the Professional degrees, and 66% of the Doctoral degrees. National Center for Educational Statistics, *Digest of Educational Statistics*, Table 258.

116. The Regents and SED, however, continue to enforce the same Feminist policies from 27 years ago of ginning up the number of female graduates even though males are now the overwhelming minority in higher education in the State.

117. So why is this happening? Because the secular purpose that initially drove equal opportunity between the sexes in 1972 has turned into Feminist dogma—a religion that preaches females are the chosen ones deserving of preferential treatment with the result that the educational system will continue to focus on providing females benefits while ignoring males.

118. There's no other way to explain it. It's no

longer equality, since the results have gone far beyond equal treatment by the Regents and SED's own measures.

119. Since at least 1984, the Regents and SED have adopted Feminist beliefs in determining their educational policies for higher education, and then employed Feminist action plans based on those beliefs to create a higher educational system that operates consistent with and acceptable to Feminist doctrine while other contrary viewpoints are eliminated.

120. The Regents and SED have demonstrated a preference for the particular creed Feminism and created an impermissible entwinement of religious and civic authority that advances Feminism through SED's comprehensive, discriminating, and continuing surveillance of higher educational institutions to assure that administrators and teachers think, speak, and act appropriately—the way the Feminists demand.

121. The power and authority of the Regents and SED have been placed on the side of one particular set of believers—Feminists, which in effect forces others to conform to the establishment of Feminism or keep silent for fear of reprisals.

122. This establishment of a State religion in higher education risks the inevitable result of government incurring the hatred, disrespect, and even contempt of those who hold contrary beliefs.

123. USDOE, by delegating its college accrediting responsibilities to the Regents, knowingly facilitates and aids the Regents and SED's purpose and

divisiveness in advancing Feminism.

The Regents, SED, and USDOE's financing has an as applied aiding of the religion Feminism at Columbia's IRWG and Hofstra's Women's Studies.

124. Columbia's IRWG is considered an educational institution under 20 U.S.C. § 1681(c)(Title IX) while Hofstra's Women Studies program is considered an education program under 20 U.S.C. § 1687; 34 C.F.R. § 106.

125. The Regents, SED, and USDOE are responsible for and knowingly provide financing to Columbia's IRWG and Hofstra's Women's Studies both of which are subsumed in the Feminist mission.

126. IRWG's website, under "History of the Institute," states the "Institute faculty provide feminist instruction ... leading to an undergraduate major, concentrations of several varieties, and a graduate certification program" in Feminism while providing a lecture series titled "Feminist Intervention." IRWG website, <http://www.columbia.edu/cu/irwag/index.html>.

127. IRWG's website, under "Programs of Study," states the Institute provides a "theoretically diverse understanding" of Feminism through "courses in feminist theory, inquiry, and method..." *Id.*

128. The "Undergraduate and Graduate Programs" at IRWG center on courses in "feminist texts, theory, inquiry, perspectives, thought, and scholarship." *Id.*

129. IRWG's website, under "Calendar of Events," lists events centered on Feminism. *Id.*

130. According to the IRWG course guide, the Institute's "[p]rimary courses focus on women, gender, and/or feminist or [lesbian] perspectives." *Id.*

131. By its own admission, IRWG is the "locus" of Feminist instruction at Columbia. *Id.*

132. Hofstra's Women Studies program under its "Mission Statement" asserts "The mission of women's studies is . . . to study women and gender from feminist perspectives . . . to create an academic community supportive of feminist scholarship and to nurture subsequent generations of feminist scholars and activists To this end, the Women's Studies Program at Hofstra University seeks to educate our campus community about the experiences of women in particular . . . through our undergraduate curriculum and co-curricular events." Women's Studies website, www.hofstra.edu/Academics/colleges/HCLAS/WOMEN/women_mission.html.

133. All of the functions of Columbia's IRWG and Hofstra's Women's Studies serve the Feminist mission by advocating, instructing, promoting, inculcating, supporting, and providing training in Feminist doctrine.

134. Both impose on their faculty, employees, and students a unitary belief system of Feminist orthodoxy that dictates thought, speech, and conduct.

135. Consistent with Feminist precepts, Columbia's IRWG and Hofstra's Women's Studies advocate that the civil rights of today's males be minimized or eliminated not just as punishment for

the alleged wrongs of their forefathers but to assure the preferential treatment of modern-day females in determining the occupants of the prestigious and influential positions in current American society and into the indefinite future.

136. Columbia's IRWG and Hofstra's Women's Studies instruct, train, support, further, cultivate, and advocate strategies and tactics for demeaning and abridging the rights of men in accordance with Feminist doctrine.

137. Columbia's IRWG and Hofstra's Women's Studies propagate false Feminist myths about males.

138. Columbia's IRWG and Hofstra's Women's Studies, in accordance with Feminism, stereotype males as the primary cause for most, if not all, the world's ills throughout history. Females, on the other hand are credited with inherent goodness. As Dr. Warren Farrell said, "Feminists call it sexism to refer to God as He; they don't call it sexism to refer to the Devil as He."

139. Columbia's IRWG and Hofstra's Women's Studies instill the Feminist beliefs that males are oppressors and females the victims, and males reap the rewards of society while females shoulder the burdens.

140. Columbia's IRWG and Hofstra's Women's Studies ignored that many more males are trafficked for use at hard labor than females are trafficked for sexual activities even when assuming the females do not voluntarily travel to obtain high paying sex jobs. Moxon, Steve, *The Woman Racket: The new science explaining how the sexes relate at work, at play and*

in society, p. 226, Imprint Academic Philosophy Documentation Center, 2008

141. Columbia's IRWG and Hofstra's Women's Studies propagate the Feminist belief that males are responsible for most of the battering between the sexes when females batter males to the same extent or more. Martin Fiebert, *Annotated Bibliography Assaults by Women*, Department of Psychology, California State University, www.csulb.edu/~mfiebert/assault.htm.

142. Columbia's IRWG and Hofstra's Women's Studies follow the Feminist line that hides inconvenient facts, such as among the elderly, caretaker wives are most likely to abuse their older, sicker husbands, and females worldwide commit more dating violence than their male counterparts.

143. Columbia's IRWG and Hofstra's Women's Studies propagate the Feminist illusion that only females sacrifice for others when it is more likely for a man to sacrifice for someone else. For instance, all the firefighters and police who died on 9/11 were men, and only 20% of the male passengers survived the Titanic while 74% of the females lived.

144. Columbia's IRWG and Hofstra's Women's Studies advocate the Feminist precept that females should receive preferential treatment at the expense of the violation of men's rights because men are the disposal sex.

145. Columbia's IRWG and Hofstra's Women's Studies, as does Feminism, justify paternity and maturity fraud as well as parental alienation when it benefits a female.

146. Columbia's IRWG and Hofstra's Women's Studies propagandize the Feminist notion that when men are disadvantaged it is solely their fault, such as dying sooner than females, doing worse in almost everything in school, being less likely to attend college, paying for children their ex-wives have turned against them, being sentenced to more time for the same crime, having to register for the draft, or comprising more of the homeless.

147. Columbia's IRWG and Hofstra's Women's Studies, as does Feminism, advocate the punishment of men for speaking as they will and acting as they chose even when such actions do not violate any laws.

148. Columbia's IRWG and Hofstra's Women's Studies cultivate the preconceived Feminist judgment that children raised by single mothers do better in comparison to children raised by single fathers.

149. Columbia's IRWG and Hofstra's Women's Studies provide information consistent with Feminist doctrine on how females can engage in violence against males, even premeditated murder, and escape just punishment by falsely accusing the male of abuse.

150. Columbia's IRWG and Hofstra's Women's Studies offer only a Feminist curriculum that is deficient of texts and instruction providing a countervailing masculine view.

151. Columbia's IRWG and Hofstra's Women's Studies, consistent with Feminist doctrine, exalt females over males in most endeavors except for

example dying to defend this country.

152. Columbia's IRWG and Hofstra's Women's Studies have a catalogue of Feminist activities that permeate them and whatever secular teaching may exist cannot be separate from their Feminist missions.

153. Columbia's IRWG and Hofstra's Women's Studies are pervasively sectarian Feminist operations that are partially funded by the State and USDOE.

154. Since SED has approved and periodically re-approves Columbia's IRWG and Hofstra's Women's Studies operations and offerings of degrees, 8 N.Y.C.R.R. §§ 52.1 & 52.2, Columbia and Hofstra receive "Bundy Aid" under N.Y. Educ. Law § 6401 for each Women's Studies degree conferred.

155. Bundy aid benefits both Columbia's IRWG and Hofstra's Women's Studies.

156. Bundy funding originates from State taxes that the New York Legislature appropriates for higher education and mandates the Regents and SED to expend.

157. From 1996 to 2009, SED has paid to Columbia well over \$40 million in Bundy Aid, a portion of which benefited IRWG.

158. On information and belief, during the same period SED paid Hofstra millions of dollars in Bundy Aid, a portion of which benefitted Women's Studies.

159. On information and belief, Columbia's IRWG and Hofstra's Women's Studies also receive from USDOE financial awards, contracts, and research

grants appropriated and mandated by Congress for higher education.

160. Whenever government funding flows to an institution in which a substantial portion of its functions are subsumed in a religious mission, here Feminism at Columbia's IRWG and Hofstra's Women's Studies, the aid is considered to have a principal or primary effect of advancing religion even though the Legislature and Congress designated the funds for secular purposes.

161. Columbia's IRWG and Hofstra's Women's Studies administrators and teachers indoctrinate Feminism by supporting and instructing persons in a body of Feminist doctrine or principles, initiating persons by means of Feminist doctrinal instruction, imbuing persons with a Feminist partisan or ideological point of view, and inculcating Feminism.

162. On information and belief, State and federal funds that directly or indirectly benefit Columbia's IRWG and Hofstra's Women's Studies help indoctrinate Feminism by financing the materials used at both and the salaries of employees who administer and daily preside over Feminist courses, meetings, lectures, seminars, consciousness raising sessions, publications, counseling, and career advising for which the goals are to convince persons to turn their will and their lives over to the care of Feminism.

163. Such governmentally funded activities result in the impermissible governmental indoctrination of religion.

164. Total federal awards to Columbia University

in fiscal 2009 were \$686,700,000. “Awards include all federal assistance entered into directly between the University and the federal government” and “pass-throughs, which are not student loans.” Columbia University, *Notes to Summary Schedule of Expenditures of Federal Awards Year Ended June 30, 2009*.

165. Of the total federal awards to Columbia as of June 2008, \$17.6 million originated with USDOE, which on information and belief benefited IRWG.

166. Hofstra received 4.3% of its revenues in 2009 from government grants and contracts. *President’s Report 2009*. On information and belief, a portion benefitted Hofstra’s Women’s Studies.

167. On information and belief, Columbia University invests significant amounts in IRWG from the above sources, as does Hofstra with respect to Women’s Studies, which their managerial accounting practices will reveal through discovery.

168. The Regents and SED’s educational policies and funding and USDOE’s funding directly enable and endorse the inculcating of Feminism at Columbia and Hofstra.

VII. Relief Sought

169. Declare unconstitutional for violating the Establishment Clause and enjoin the State defendants’ policies and plans that require the institutionalization of Feminism in higher educational institutions, such as Columbia and Hofstra.

170. Declare that the use of New York State and federal funds to aid Feminism at Columbia’s IRWG

and Hofstra's Women Studies violate the Establishment Clause.

171. Enjoin the State and federal defendants from expending governmental funds that benefit Feminism in higher education.

172. Such other relief as this Court deems just and proper.

173. The plaintiffs request a jury trial.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2011 in New York, N.Y.

/S/

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106a

Equity for
Women



in the 1990s

*Regents Policy
and Action Plan
with Supporting
Background*

The University of the State
of New York The State
Education Department
January 1993

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Foreword

In 1972, Congress adopted Title IX as part of the Education Amendments of that year to end discrimination by gender in programs that received Federal funding. In that year, also, the Board of Regents issued a position paper which proposed that educational institutions take the lead in providing equal opportunity for girls and women. In these two decades, some progress has been made. Women no longer face quotas in college admission (indeed, they earn half or more of associate's, bachelor's, and master's degrees); and as a society, we have begun to reexamine our explicit and tacit gender-based stereotypes of what people can do.

Nevertheless, much remains to be done. This policy paper and the background paper accompanying it documented the persistence in our educational institutions of unequal treatment and unequal achievement between the sexes- inequities which contribute to unequal career opportunities later on. Women have a disproportionate share of low-paying jobs, are frequently overqualified for their work, and do not get the same economic return on their education as men. This long-standing disparity is harmful to individuals and to society. Women often find it difficult to provide for their families, whether as sole or contributing breadwinners. Their opportunities are curtailed; and our State and nation, competing in a global marketplace, are deprived of much valuable talent.

The goals of this policy paper define an education system that offers equal opportunity to all, regardless of gender. In the coming months and

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years, the Board of Regents and the State Education Department will work with all members of The University of the State of New York- our schools, colleges, universities, libraries, museums- to speed progress toward gender equity in our education system and, through it, in our society as a whole.

A handwritten signature in black ink that reads "Thomas Sobol". The signature is written in a cursive style with a large, stylized "S" and "O".

THOMAS SOBOL
President of The University
of the State of New York and
Commissioner of Education

Prefatory Note

Two papers are bound together in this document: a policy paper entitled "*Equal Opportunity for Women*" and a background paper which lays out supporting data and information in some detail. The papers were approved by the New York State Board of Regents in January 1993. They will guide the State Education Department's actions, with educators, educational institutions and cultural institutions across the State, to achieve "*Equity for Women in the 1990s.*"

The principal writer of both papers is Geraldine Burke of the State Education Department's Office for Planning, Research and Support Services. The Commissioner's Statewide Advisory Council on Equal Opportunity for Women and Girls has given substantial material and moral support and assistance in the research and writing of both papers.

*Equal Opportunity for Women: Regents
Policy Paper and Action Plan for the 1990s*

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***Perspective for the 1990s: Women's Equity
Issues***

In 1972, the Regents of The University of the State of New York issued a position paper¹ which proposed that educational institutions take the lead in providing equal opportunity for girls and women. The Regents established guidelines for accomplishing this goal by focusing on job opportunities in education, ending sexual stereotyping in the elementary and secondary schools, and promoting equal opportunity for women in higher and professional education.

In spite of the efforts of the past two decades, the educational system, like the larger society, is still marred by discriminatory attitudes toward women. Some educators themselves, however unintentionally, have been purveyors of cultural attitudes injurious to women's rights. We cannot simply raise the issue of gender equity in education one more time. A comprehensive plan is needed: one that requires the entire educational community to be accountable for making gender equity a reality in New York State.

Some progress has been made to address the lack of representation of women in positions of leadership and to enforce mandates that provide women equal protection under State and Federal law. Heightened awareness of racial and ethnic discrimination helped turn attention to

¹ Equal Opportunity for Women: A Statement of Policy and Proposed Action by the Regents of the University of the State of New York. Albany, New York the State Education Dep't, April 1972.

discrimination based on gender, as well. Equity issues in education were addressed with Congressional passage of Title IX as part of the Education Amendments of 1972. Programs receiving Federal funding were prohibited from discriminatory practices based on gender. However, even with this heightened awareness, progress since 1972 in correcting the inequities that women face is still limited, particularly in the areas of education, career opportunity, advancement, and earnings.

This paper focuses on inequalities based on gender. In such a focus, there is no intention to deny the existence of additional burdens imposed in our society by biases based upon such factors as race, ethnicity, language, and disability. Bias against women, however, is fundamental and pervasive. Relief from its effects assists all women to some degree. Therefore, it is the particular scope of this policy paper to call attention to ways in which New Yorkers can work toward the eradication of gender bias.

Gender Bias

Although gender bias is often subtle, its effects are not. Bias about the roles and capabilities of women and men has an adverse effect on all members of the community. Women and men need to be made aware of the obligation for and the opportunities of an education that is free of gender bias. In an era of increasing emphasis on excellence and accountability, we cannot afford to squander any of our talent.

Educators have placed some emphasis on developing strategies to encourage equal

participation of young men and women in mathematics, science, and vocational studies. But the recent report by the American Association of University Women, *How Our Schools Shortchange Girls*, and the work of gender education researchers identify several problem areas.

- Pervasive gender bias in classroom teaching styles by both men and women has been confirmed by research (Sadker and Sadker, 1984, 1985).
- The gender bias persists that young women are not able to think logically or to understand scientific principles to the same extent or at the same level as their male counterparts.
- Current studies about learning patterns and the intellectual development of women suggest that major revisions in curriculum and teaching are necessary to provide young women with equal access to educational and career opportunities.
- Changes in teaching strategies should reflect research evidence that girls and boys often have different learning patterns. Generally, girls favor learning via cooperation while boys learn through competition (Gilligan, Lyons and Hanmer, 1989).
- Cultural attitudes are still taught to children which presume a less significant status for women in careers, a practice that tends to perpetuate discrimination against

women.

Many women are held back because of deep-rooted, persistent beliefs about the proper roles of men and women in our society. Both women and men have inappropriate stereotypes about which each can accomplish. These stereotypes limit choices and opportunities. We must take particular care to eradicate gender bias which lingers in the school curriculum in both content and methods of instruction.

Career Patterns for Women

Most women and men continue to be employed in traditional careers. Women are the majority of clerical and retail sales workers, K-12 teachers, and nurses. Men continue to hold the skilled labor jobs and dominate the engineering, science, and computer fields. This pattern has remained essentially unchanged since the position paper of 1972. Women have a disproportionate share of low-paying jobs, are frequently overqualified for their work, and do not get the same economic return on their education as men. The percentage of women in leadership positions in business, industry, the professions, politics, and civil service continues to reflect a lack of access to the level afforded men which is now known as the "glass ceiling." In addition to bias against women in positions of leadership, there is a lack of understanding and acceptance of differences in leadership styles.

Statistics clearly indicate that when there is an eligible pool of qualified women, they continue to be underrepresented in positions of advanced leadership. Women continue to earn less than men,

and as national statistics for 1972 and 1989 show, the gap has been extremely slow in closing. For each dollar earned by males with the same educational attainment levels, women increased their median annual income from 1972 to 1989 as follows:

- with four years of high school, women's earnings increased from 56 to 66 cents;
- with four years of college, women's earnings increased from 59 to 69 cents; and
- with five years of college, the women's earnings increased from 65 to 69 cents.²

When women and men have comparable education and experience, men are often paid more. Salaries for college-educated women are still less than those of men whose education ended at high school. Women in mid-life see a greater disparity in their earnings. National statistics for 1989 confirm both these inequities:

- The median earnings for women over age 25 with 4 years of college (\$21,763) were still less than those of men over age 25 whose education ended at high school (\$22,378).³
- Women aged 25 and over with four-year college degrees received 62 cents of each dollar earned by a male counterpart.⁴

Some progress has been made in the

² Source U.S. Department of Education, Digest of Education Statistics 1992, Table 367, p.391.

³ Source: U.S. Department of Education. Digest of Education Statistics 1992, Table 368, p. 392.

⁴ *ibid.*

educational preparation of women for advancement in their chosen careers. In the past, quotas on the enrollment of women and higher standards of admission for women than for men indicated a widespread bias in colleges and universities. Graduate and professional schools had poor records in admitting women and awarding them higher degrees. In the past 20 years, however, the number of women earning degrees in New York postsecondary education and graduate schools has increased dramatically:

- Associate degrees increased from 47 percent to 60 percent;
- Bachelor's degrees increased from 46 percent to 54 percent;
- First professional⁵ degrees increased from 8 percent to 42 percent;
- Master's degrees increased from 47 percent to 58 percent; and
- Doctoral degrees increased from 22 percent to 40 percent.

In 1989, women earned 57 percent of New York's educational administration graduate degrees and 60 percent of both the School District Administrator certificates and School Administrator and Supervisor certificates.⁶ Yet, facts dearly

⁵ Degrees in dentistry, medicine, chiropractic, osteopathic medicine, optometry, pharmacy, podiatry, veterinary medicine, law, and theological professions.

⁶ Source: New York State Education Dep't, Women Administrators in New York State Public Schools 1968-1991, Table 4, p. 6 c1nd Table 7, p. 9.

demonstrate the limited number of women in positions of educational leadership in New York State. In 1991-92 women represented:

- 66 percent of all professional staff of the public schools, including 60 percent of teachers and 53.5 percent of nonteaching personnel;
- 8.5 percent of the superintendents;
- 1.8 percent of the secondary principals, and 37 percent of the elementary principals⁷

There are fewer women in educational administration than there were in the early part of the 20th century. In 20 years, only one woman was appointed as district superintendent in New York State. With the recent addition of another, there are only two women district superintendents in the 41 BOCES (Board of Cooperative Educational Services) districts in the State of New York.⁸

Women are a small minority of the decision-makers in our colleges and universities. Even in women's colleges, once the province of female leadership in higher education, men are being selected as presidents and deans. Fewer women faculty are full professors; most continue to be concentrated in the lower academic ranks, and they

⁷ Source: New York State Education Dep't, Public School Professional Personnel Report 1991-92, Table i, p. 5; Table 4, pp. 10-11; and Women Administrators in New York State Public Schools 1968-1991, Table 5, p. 7.

⁸ Source: New York State Education Dep't, Staff Bureau of Scholl District Organization, BOCES and Rural School Services, November 5, 1992.

are still often recruited at lower pay than men in the same field and rank. Now the educational community must take the lead in providing women with access to a broad spectrum of career opportunities and promoting strategies for recruitment, selection, and advancement. Statistics for 1990-91 New York State postsecondary institutions raise concern about the existing disparity:

- Women were 31 percent of total postsecondary faculty;
- Women faculty wide tenure were 16 percent of the total faculty of all ranks;
- Women faculty with tenure were 52 percent of all women faculty, compared to 71 percent of the male faculty who were tenured;
- Women full professors with tenure were 16 percent of the total number of full professors; and
- Women full professors had mean salaries lower than their male counterparts: for 11-12 month contracts, women earned \$57,130 compared to \$71,614 for men; and for 9-10 month contracts, women earned \$56,648 compared to \$62,473 for men.⁹

New Challenges

Women and men must be educated about their

⁹ Source: New York State Education Dep't, College & University Faculty Salary, New York State 1990-91, Table 2, p. 6; Table 2A, p. 9; Table 3, p. 15; and Table 3A p. 16.

rights to equal access, the issue that has dominated since 1972. In the 1990s, another gender issue has been recognized by government and acknowledged as repugnant. There has been a growing awareness of the pervasiveness of sexual harassment and other sexual offenses and the damage that results. Women are the most frequent victims college campuses, in the workplace, and in the schools. [11] The aftermath of such experiences can leave females with negative self-esteem and diminished ability to reach their full potential academically or professionally. Girls and women have now begun to internalize that their right to equitable treatment extends beyond access issues to the right to work and learn in a safe environment. As eloquently stated by Susan B. Anthony: "Men, their rights and nothing more; women, their rights, and nothing less."

***Regents Policy Principles to Achieve Equal
Opportunity for Women***

Equal opportunity for women continues to be a pressing concern. The Board of Regents reaffirms its commitment to end the double standard that makes itself evident in education, as called for by the Regents Position Paper in 1972. A Strategic Objective of A New Compact for Learning, the Regents strategy to improve elementary, middle, and secondary educational results in New York State, is that by the year 2000:

Students of both genders and all socioeconomic and racial/ethnic backgrounds will show similar achievement on State assessment measures.

New York State will not enjoy the full benefits of its people's talents until diversity is valued and women are encouraged, prepared, and employed in as wide a choice of careers as men. Accordingly, the Regents reaffirm the following principles:

- The Regents are committed to gender equity. We must change the way we think and act in order to achieve an educational system where leadership is gender-balanced and where schools are beacons of gender equity for a diverse society.
- Individuals will be valued and rewarded because of their competence, expertise, knowledge, motivation, and personal qualities and not because of their gender.
- In education and employment opportunities there should be no difference between the sexes, and all practices which interfere with equal opportunities for men and women must be eliminated.
- There should be statewide compliance with State and Federal Civil Rights and Equal Employment Laws and the affirmative action policies of the Federal Departments of Labor, Health and Human Services, and Education.
- Based on the premise that there are as many qualified women as men, the goal is to achieve more evenly balanced representation of women and men at all levels of administration in all educational and cultural institutions and the career

work sites of our State.

***Call to Action to Promote Equal Opportunity
for Girls and Women***

The challenge of global competition requires that society use all available talent. In seeking to remedy the existing limitations on opportunity for New York's girls and women, the Board of Regents supports the following plan of action as a systematic effort to require accountability from those who oversee components of our extensive educational community. The Board of Regents, the Commissioner, and the State Education Department will by example and initiative provide leadership and support for this effort. To effect the changes we envision, the commitment of the Board must be followed by the cooperation of members of the faculties, boards of trustees and boards of education, and administrations of our schools, colleges, and other educational institutions, as well as by parents, employers, and community members.

Several of the goals listed below are provided for in existing State and Federal statute and regulation. Instituting a law or a regulation, however, is not the same as effecting change. The Regents call upon all New Yorkers to join them in using existing laws to implement change through education and appropriate action.

In this continuing effort, the Board of Regents recognizes the value of knowledgeable advice, such as that provided by the Commissioner' Statewide Advisory Council on Equal Opportunity for Women and Girls. The Board charges the staff of the State Education Department to examine current data

collection, determine what changes need to be made and what additional data are needed to carry out these action strategies, and formulate a plan, in consultation with the field, for (1) the collection of the needed data without undue burden on institutions, and (2) the dissemination of data and information so collected to institutions, parents, business and industry, and the public.

ACTION STRATEGIES:

A. ENDING GENDER BIAS

1. **GOAL:** The Board of Regents has amended Commissioner's Regulations to require that, effective September 1993, all prospective teachers be prepared "to work effectively with students from minority cultures, *students of both sexes* [emphasis added] students from homes where English is not spoken, students with handicapping conditions, and gifted and talented student." In keeping with this regulation, gender bias will be eliminated in teaching through revised teacher education curriculum and inservice professional development for all educators, including teachers, college faculty, staff of cultural institutions such as libraries and museums, and supervisory administrators. Such professional development should regularly include the study of gender bias, with regular monitoring and reinforcement in educational settings.

Responsible Entities: School and college faculty and administrators, including deans and faculties of schools of education, administrators and

staff members of cultural institutions such as museums and libraries, State Education Department staff

Outcome Indicators: Teaching practices are observed to be free of gender bias; reports are collected showing number of inservice training efforts; SED staff conducting academic program reviews at colleges and universities note coverage of gender bias in teacher-preparation programs; gender-specific patterns disappear in course participation and test results shown annually in the Comprehensive Assessment Reports (CAR) and the Report to the Governor and the Legislature on the Educational Status of the State's Schools (Chapter 655 Report); others

Timeline: By the year 2000

2. GOAL: All career opportunities will be available to female students. Their participation will increase in gateway experiences to prepare for career areas where they are underrepresented, including advanced mathematics, science, engineering, computer science/computer technology, and vocational education courses. Career counseling will focus on job skills and personal attributes. The overt and covert messages given in educational institutions will reflect each student's ability to select. Appropriate non-traditional role models are essential.

Responsible Entities: School, BOCES, and college faculty, administrators, guidance counselors, and other staff members; parents; employers;

students

Outcome Indicators: Enrollment patterns by gender for vocational education programs as reported to SED's Occupational Education Reporting System (OERS), for other secondary courses as reported to Higher Education Data Systems (HEDS), for college programs as reported to HEDS

Timeline: By the year 2000

3. GOAL: Awareness will increase among educators, administrators of museums and other cultural institutions, employers, and parents of the need to expand career opportunities for women.

Responsible Entities: State Education Department; school and BOCES boards, administrators, and teachers; college faculty and administrators; parents, business, and industry

Outcome Indicators: Consistent increases in the number of women in careers where they are currently underrepresented, as measured by reports from the State and Federal Labor Departments, SED's professional licensure data system, and other sources

Timeline: Ongoing

B. IMPROVING OPPORTUNITIES FOR THE EDUCATION OF WOMEN AND GIRLS IN SCHOOLS, HIGHER EDUCATION, AND CULTURAL INSTITUTIONS

1. GOAL: Schools and colleges will give female and male students equal opportunities to learn and to apply and demonstrate what

they have learned. Teachers will promote all opportunities for all students in choosing texts and materials, grouping students, and other matters of practice.

Responsible Entities: School and college administrators and faculty members, other members of schools' and colleges' staff

Outcome Indicators: Teaching practices are observed to be free of gender bias; gender-specific patterns disappear in course participation and test results shown in the annual CAR and Chapter 655 reports, and in data on major fields of study reported to HEDS; others

Timeline: Starting immediately

2. GOAL: The State Education Department and all educational and cultural institutions will ensure an environment for learning and working that is equitable, supportive, safe, and free from sexual harassment.

Responsible Entities: Boards, faculties, administrators, and staff of all institutions in The University of the State of New York, including the State Education Department; parents; students

Outcome Indicators: Decrease in instances of sexual harassment and other crimes; increase in the number of programs to train students and staff in the prevention of sexual harassment; improved deployment of security forces and other safety measures

Timeline: Starting immediately

3. GOAL: Boys and girls will be equally

represented in the top quartile in all middle- and secondary-level studies, but particularly in mathematics, science, and vocational education.

Responsible Entities: School and district administrators, teachers, parents, students

Outcome Indicators: Participation and testing results provided in the annual CAR

Timeline: By the year 2000

4. GOAL: Athletic programs for both sexes will receive equitable support, including financial support, salaries and levels of coaching staff, program scheduling time, and publicity.

Responsible Entities: School and college boards, administrators, coaches, athletic directors, and sectional coordinators

Outcome Indicators: Compliance with Title IX provisions related to school budget patterns, athletic activity scheduling patterns, and athletics personnel staffing

Timeline: By the year 2000

C. IMPROVING CAREER OPPORTUNITIES IN EDUCATION, CULTURAL INSTITUTIONS, AND THE PROFESSIONS

1. GOAL: Affirmative action plans of educational institutions will include realistic increases and timetables for the recruitment and promotion of women in professional and managerial programs.'

Responsible Entities: Governing Boards and

executive officers of all New York State educational institutions

Outcome Indicators: Status reports by school district and college affirmative action officers

Timeline By the year 2000

2. GOAL: Practices that support, recruit, and promote woman will be identified and replicated. Practices that contribute to gender bias in employment in educational and cultural institutions will be identified and eliminated.

Responsible Entities: Commissioner of Education, school boards and administrators, college administrators

Outcome Indicators: Statistics on women employed by SED, public schools and colleges and universities provided by SED Affirmative Action Office, BEDS, and HEDS.

Timeline: By the year 2000

3. GOAL: Personnel responsible for recruitment and career advancement of employees in schools, colleges, universities, libraries, museums, and the State Education Department will receive training in the identification, impact, and avoidance of gender bias in hiring and other employment practices.

Responsible Entities: College, library, and museum officials, school superintendents, State Education Department officials

Outcome Indicators: Consistent increases in

the hiring and advancement of women until parity is reached, as determined from affirmative action reports and agency training record reports monitored by affirmative action officers

Timeline: Annually

4. GOAL: Colleges, universities, BOCES, school districts, and the State Education Department will use existing support networks more effectively, and will create others as needed, to promote the hiring and placement of certified women school administrators.

Responsible Entities: College, BOCES, school district, and SED administrators

Indicators: Staffing reports by gender to BEDS

Timeline: Annually

5. GOAL: Women will achieve equitable representation among college faculty and administrators in all areas, including schools of education.

Responsible Entities: College presidents, deans, other administrators, and faculty members

Outcome Indicators: Consistent increases in the representation of women in such positions until parity is reached, as determined by reports in SED's HEDS data collection

Timeline: By the year 2000

6. GOAL: The number of women in leadership positions in school districts, schools, cultural

institutions, colleges and universities, and the State Education Department will rise each year until parity is achieved. Toward this goal, the Regents will press for establishment of an administrative internship program for women to prepare for and advance into leadership roles in education and the State Education Department.

Responsible Entities: State Education Department, governing boards, university and college administrators

Outcome Indicators: Consistent increases in the percentage of women administrators as indicated by BEDS, HEDS, reports to SED's Office of Cultural Education, and the annual SED affirmative action report

Timeline: By the year 2000

7. GOAL: Women and men with comparable credentials and experience holding the same job in institutions belonging to The University of the State of New York will be paid an equal salary.

Responsible Entities: Governing boards, administrators of educational and cultural institutions, State Education Department officials

Outcome Indicators: Appropriate gender statistics on salaries provided by BEDS and HEDS

Timeline: By the year 2000

8. GOAL: Women will receive equitable shares

of the paid internships for administrative positions in the education field (K-12, higher education, cultural institutions, and SED) and in the distribution of loans, scholarships, fellowships and postgraduate stipends for teaching and research.

Responsible Entities: Internship sponsors, financial aid administrators, providers of scholarships, selection committees

Outcome Indicators: Records of internship and financial aid program participation by gender

Timeline: Annually

9. GOAL: Research on current issues facing woman will be developed, supported, and promoted; the findings will be appropriately incorporated into teacher education and school administrator certification programs.

Responsible Entities: Programs such as the State University at Albany's Center for Women in Government; schools of education; SED

Outcome Indicators: Incorporation of latest relevant research findings in teacher education and school administrator certification programs

Timeline: Ongoing

Conclusion

The evidence of inequalities in this statement and the supporting background paper, *Equity for Women in the 1990s*, clearly reflects the continued deep-rooted discrimination in education and employment of women. If the patterns of inequality are to be

changed, a major shift in attitude must occur in all areas of education. Affirmative action policies must be required and supported in all education institutions in our State. Activities at every level must encourage and promote equity of educational, economic, and professional outcomes. Therefore, we ask the governing boards and executive officers of these institutions to join in taking immediate action to provide and ensure equal opportunities for women.

The Regents reaffirm their commitment to gender equity and assign responsibility to monitor progress toward the stated goals to the Commissioner of Education and the State Education Department. A comprehensive report to the Regents on progress toward attainment of improvements in equal opportunities for women in New York State, as outlined in this proposed action plan, will be completed at the end of the 1996-97 school year.

09-1910-cv

Hollander v. Institute for Research on Women &
Gender at Columbia University

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of April, two thousand ten.

Present:

GUIDO CALABRESI,
CHESTER J. STRAUB,
*Circuit Judges.**

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 EDUCATION AT COLUMBIA
UNIVERSITY, TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY OF NEW YORK, also
known as COLUMBIA UNIVERSITY, U.S.
DEPARTMENT OF EDUCATION, RICHARD P.
MILLS, in his individual capacity,
COMMISSIONER RICHARD P. MILLS, NEW
YORK STATE COMMISSIONER OF THE
DEPARTMENT OF EDUCATION, in his official
capacity, MARGARET SPELLINGS, U.S.
SECRETARY OF EDUCATION, in her official
capacity, PRESIDENT JAMES C. ROSS,

* The Honorable Robert A. Katzmann, originally assigned to this panel, recused himself before oral argument. The remaining two members of the panel, who are in agreement, have determined this matter. See Second Circuit Internal Operating Procedure E(b); 28 U.S.C. § 46(d); *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998).

PRESIDENT OF THE NEW YORK STATE HIGHER EDUCATION SERVICES CORP., in his official capacity, JAMES C. ROSS, in his individual capacity, CHANCELLOR ROBERT M. BENNETT, CHANCELLOR OF THE BOARD OF REGENTS, in his official capacity, ROBERT M. BENNETT, in his individual capacity, BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE, in his or her individual or official capacity,

Defendants-Appellees.**

No. 09-1910-cv

For Plaintiffs-Appellants: ROY DEN
HOLLANDER, New
York, NY

For Columbia University
Defendants-Appellees: ROBERT D. KAPLAN,
Friedman Kaplan Seiler
& Adelman LLP, New
York, NY

For Federal Defendants-
Appellees: JEAN-DAVID
BARNEA, Assistant
United States Attorney
(Ross E. Morrison,
Assistant United States
Attorney, *of counsel*), for
Preet Bharara, United
States Attorney for the

** The Clerk of Court is instructed to amend the official caption in this case to conform to the listing of the parties above.

Southern District of New
York, New York,
For State Defendants- PATRICK J. WALSH,
Appellees: Assistant Solicitor
General, (Barbara D.
Underwood, Solicitor
General, Peter Karanjia,
Special Counsel to the
Solicitor General, *of
counsel*), *for* Andrew M.
Cuomo, Attorney General
of the State of New York,
New York

Appeal from the United States District Court for
the Southern District of New York (Kaplan, *J.*).

ON CONSIDERATION WHEREOF, it is
hereby **ORDERED, ADJUDGED**, and **DECREED**
that the order of the district court be and hereby is
AFFIRMED.

Plaintiff-Appellant Roy Den Hollander¹ appeals
from the judgment of the district court dated April
30, 2009 (Kaplan, *J.*), adopting the Report and
Recommendation dated April 15, 2009 by United
States Magistrate Judge Kevin Nathaniel Fox, and
granting defendants' motions to dismiss for lack of
standing. We assume the parties' familiarity with
the facts and specification of issues on appeal.

¹ William A. Nosal was a Class Representative when the case
was before the district court and as of the filing of the appeal at
bar, but has since withdrawn.

“The party seeking judicial review bears the burden of alleging facts that demonstrate its standing.” *Green Island Power Auth. v. Fed. Energy Regulatory Comm’n*, 577 F.3d 148, 159 (2d Cir. 2009) (internal quotation marks and brackets omitted). Plaintiff alleges that the existence of Columbia University’s Women’s Studies Program and the corresponding lack of an equivalent “Men’s Studies Program” inflicts harm on certain men as a class by, *inter alia*, promoting “misandry-feminism,” promoting feminism as a religion, and robbing men of an equivalent educational experience. As to the plaintiff’s discrimination-based claims, the district court properly dismissed the action for lack of standing as to all defendants because the plaintiff’s claims of harm amount to the kind of speculative harm for which courts cannot confer standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating that “the plaintiff must have suffered 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”) (internal quotation marks, citations, and footnote omitted); *Gully v. Nat’l Credit Union Admin. Bd.*, 341 F.3d 155, 160 (2d Cir. 2003) (same). Nor has plaintiff made out the requirements for taxpayer standing for his Establishment Clause claim. See *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001). Thus, with no occasion to reach any of plaintiffs’ further arguments on appeal—about which we share, in any event, the district court’s grave doubts—we **AFFIRM** the dismissal of the action for substantially the reasons stated in Judge Fox’s thorough Report and

139a

Recommendation as adopted by the district court.

FOR THE COURT: CATHERINE O'HAGAN
WOLFE, CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
Roy Den Hollander,

Plaintiff on behalf of himself and all others
similarly situated,

-against-

Members of the Board of Regents of the University of
the State of New York, in their official and
individual capacities; 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 M. 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; U.S. Department of Education; and U.S.
Secretary of Education, Arne Duncan, in his official
capacity;

Defendants.

-----X

Docket No.
10 CV 9277
(LTS)(HBP)

Transcription of oral argument before the U.S. Court of Appeals for the Second Circuit in *Den Hollander v. Inst. for Research on Women & Gender at Columbia University*, 372 Fed. App'x. 140 (2d Cir. 2010), which occurred on April 8, 2010 before Judges CALABRESI and STRAUB.

Judge Calabresi:

Good morning. We will hear *Hollander vs Institute of Research et al.* Judge Katzman is recused in this case. Under the rules we are permitted to hear it.

Den Hollander:

Good morning your honors my name is Roy Den Hollander. I am the class representative and the attorney for the punitive plaintive class. Behind me is Chairman of Foundation for Male Studies. If this case continues, he will be joining as another class representative.

This case, I think the key issue here, is that it opposed the use of tax dollars for supporting the new age religion of post-modern feminism, or some may call it ideological feminism.

The district court characterized the central claim in this case, or the “court claim” of this case, as the violation of the Establishment Clause. Since I, the class representative, did not have standing, that was the finding of the court, I did not have standing to oppose the use of taxpayer funds to support post-modern feminism.

Judge Calabresi:

Did you in the trial court make a statement of a taxpayer standing for an Establishment case?

Den Hollander:

No I did not, your honor.

The lower court made, I wouldn't call it a fact finding, I would call it more of a decree, that feminism is as much as a religion as physics and that the allegation of feminism as a religion was "absurd and utterly without merit."

Judge Calabresi:

That wasn't my question. My question was did you in your complaint allege taxpayer standing to challenge an establishment of religion under *Flast*? Did you make that claim of standing?

Den Hollander:

In my complaint was an Establishment Clause claim, and I stated that I was a resident in Manhattan. I think when you read complaints for standing purposes, you are supposed to draw, or should draw, inferences in favor the complaint. I think the fact that I had an Establishment Clause claim in the complaint, that it was clear I was alleging feminism as a religion, that I am a resident of Manhattan, I think the inference is a reasonable one that I am a taxpayer and when the court then...

Judge Calabresi:

How do I know that, if you didn't...

Den Hollander:

Is there anybody who has been admitted to this court who is a lawyer, who is a resident of Manhattan, who doesn't have taxpayer status. It's taxpayer status your honor.

Judge Calabresi:

I don't know, I don't know. I am just curious.

Den Hollander:

No. That is as close, that is close I got it. If the court decides to dismiss on the fact that I didn't go into specific detail, that I am assuming alleging standing on taxpayer status, then I obviously, I would request a remand in which I am allowed to basically, to put in that sentence. That is all that it would be a sentence: I am a taxpayer in New York and the federal government.

Judge Calabresi:

Generally taxpayers do not have standing to bring claims. They do have standing to bring limited time, limiting *Flasts* do have standing to bring claims with respect to Establishment that has been.

Now in bringing such a claim, does one have to have a plausible Establishment claim, or can one just come in as a taxpayer and say Establishment and then get standing?

Den Hollander:

I think it would depend upon whether you are looking at standing. So that is 12(b)(1). I don't believe the plausible standard that applies to 12(b)(6) applies to 12(b)(1). So I believe all that is

necessary under the 12(b)(1) standing, which is what was district court dismissed on, is the allegation, is that you are bringing in an Establishment Clause. They didn't you go into the requirements of [taxpayer] standing and the require...

Judge Calabresi:

We have any number, in any number of cases in order for someone to make a claim to get, they have to have a claim that is plausible on it. See, I am not reaching, I am not talking about the whole other set of claims that you are making with respect to Women's Studies.

I am just asking about standing, taxpayer standing as against individual standing with respect to Establishment. Whether a person can create jurisdiction simply, by using the words Establishment and taxpayer, or whether you need something. And my problem is that we have the *Allen* case in this circuit, which suggests that what is a religion is fairly narrowly defined for Establishment purposes.

Den Hollander:

Could I just address the Allen case?

In the Allen case, which was a criminal case, the court did not make a finding of "nuclearism" as a religion. The court dismissed that case based upon the fact that the statute, which was destruction of government property, did not aid religion. In other words, so was the aiding, if you look at the *Lemon* test, it was which was the aiding of religion. That was the court's decision in *U.S. v. Allen*. It was not that "nuclearism" reached the level of being a

religion as defined by the earlier Supreme Court cases *Seeger* and *Welch*.

Now if you go in and you just make a conclusory statement that, if I went in as a conclusory statement that feminism is a religion, that is not enough. For standing purposes, you have to come up with some basic allegations of basic facts.

You look at the amended complaint, and I believe in its pages 13 through 15, there's plenty of allegations of basic facts. And you then assume those allegations true and the inferences of feminism are religion. But once again, this is all allegation. And there's been no facts yet in this case despite what the lower court said.

That's one of my main arguments here, that the lower court made a finding of fact on a 12(b)(1) dismissal motion. There is no evidence, there is no judicial notice. And then, after making that finding of fact that feminism was not a religion, it then went on to use the backup of the 12(b)(6), which I couldn't understand because if the court didn't have jurisdiction under 12(b)(1), how could it make a 12(b)(6) finding. Now you can do that, but I don't think the district court can do it.

Judge Calabresi:

Thank you, you reserved 2 minutes.

Den Hollander:

Yes I did thank you.

Judge Calabresi:

We will hear from a variety of other people.

Columbia University's Attorney:

May it please the court that the complaint against Columbia University obviously is not an Establishment Clause claim but that the claim that the teaching of women's studies constitutes sex discrimination.

The dismissal of the complaint was appropriate both because the plaintiff lacks standing and also because he failed to state a claim for relief with respect to standing.

The plaintiff has not alleged any injury. In fact the simple and essential point here is that he never took any Women's Studies class, so whatever harm might be inflicted in such a class was not inflicted on him. As to this plaintiff, the concrete and particularized harm that would confer standing simply is not present.

The plaintiff also complained of some kind of anti-male animus that emanates across the university as a result of the teaching of Women's Studies. But that is precisely the non-specific and non-particularized harm that would not confer standing.

He also complains that there are no classes denominated Men's Studies. But again, there is no concrete allegation of injury to him. He is not alleging any job any degree or any other opportunity that he didn't receive. All he is alleging is that nobody at Columbia is teaching what he wants to hear: that America is truly a matriarchy, that men are at risk of paternity fraud, and so on. That is not an injury that would confer standing with respect to

the failure to state a claim.

Clearly men are not excluded from Women's Studies courses, and there are no fact allegations in the complaint suggesting that men who do take such courses are treated any differently than women.

The plaintiff alleges that if Women's Studies is to be taught at all, it is necessary that there be some Men's Studies curriculum. But even putting aside the fact that there are thousands and thousands of courses at Columbia that do deal with the issues relevant to men and that are taught by men, there's simply no legal requirement that each course or department be offset by some contrasting or opposite course or department. An African studies department for example does not require a white studies department.

The complaint in the case really is not a allegation of any kind of discriminatory conduct. It is an attack on a body of ideas, and that does not state a claim for discrimination.

Finally, if I may, I think it is important to my client to mention the First Amendment implications of this case. The plaintiff asked the district court to make a judgment with respect to the validity and legitimacy of ideas. He asked for judicial finding that even teaching Women's Studies is discriminatory, and for an order that would either ban the teaching of Women's Studies or mandate a contrary curriculum.

The Supreme Court has recognized the right of academic freedom that derives from the First Amendment and a judicial determination of which

ideas are permissible and which impermissible of what may be taught and what may not be taught and what must be taught would strike at the very heart of that freedom. Thank you.

U.S. Attorney:

Good afternoon, your honors,.

May it may please the court, Jean-David Barnea from the U.S. Attorney's office for the U.S. Department of Education.

The district court properly dismissed the plaintiff's constitutional claims against the federal defendants as frivolous and for lack of standing. As to the Establishment Clause claim, the most obvious reason why the district court dismissed the case was because feminism is not a religion based on its common sense abilities to review the allegations complaint under *Twombly* and *Iqbal* while....

Judge Calabresi:

Let me explore that a moment.

We can't decide the merits under Justice Scalia's opinions and *Steele* I believe without first deciding whether there is standing. So how do we decide standing with respect to an Establishment claim without looking at the merits, you are saying, of whether feminism is a establishment of religion. Or do we look to whether a plausible, that is he has to allege a plausible religion in order to get into taxpayer standing.

U.S. Attorney:

Your honor, in the federal government's brief, we did not contest that plaintiff had taxpayer standing

to bring his Establishment Clause claim. I haven't researched this extensively for this case...

Judge Calabresi:

Well, I know you haven't, but that's a problem that you didn't do that because that's the first question, that's a question of jurisdiction. The Supreme Court tells us that we have to look at that question first. So it is all very well for the government to say we don't need to worry about whether you have standing or not, we don't fight it. We will give him standing and then get to the merits, but we can't do that. We have to decide whether there is standing.

U.S. Attorney:

Well your honor in the govern...

Judge Calabresi:

Is it the position of the United States government that despite the fact there is no allegation that this individual is a taxpayer; he nevertheless satisfies the requirement of class and his progeny—that's extraordinary.

U.S. Attorney:

Well, your honor, I believe there is case law that doesn't...

Judge Calabresi:

And furthermore I take it, it is the position of the United State government that an Establishment Clause challenge by a taxpayer status need not recite all the statutes, which you then add in your brief over two or three pages, but that they need not

be set forth in the complaint. Do you realize the enormity of that?

Based on that position and that concession, taxpayer status is granted to anyone based upon whatever it is they want to say in some general fashion, and that the cases are meaningless.

U.S. Attorney:

Your honor this complaint was filed pro se and so the government believe...

Judge Calabresi:

I don't care if it was filed pro se.

We have to decide jurisdiction and you're standing here and telling us that somebody can come in and get taxpayer standing with no allegations of any sort and that we as a court have jurisdiction to decide the merit. Somebody comes in and says bananas are a religion, therefore, I was injured in something or other, and I have standing as a taxpayer to claim that that some wrong was done. That's just what you conceded.

U.S. Attorney:

Well, your honor, that's what the ability of a court to dismiss for frivolousness.

Judge Calabresi:

I'm sorry.

U.S. Attorney:

That those kinds of allegations are properly dismissed as frivolous. But once a person who appears to be a taxpayer from the face of the

complaint raises an Establishment Clause claim, it doesn't appear that the proper basis for dismissal is lack of standing...

Judge Calabresi:

The bottom line nevertheless is he does not have to say he is a taxpayer according to you, and he does not have to set forth the federal statutes which are part of the *Flast* analysis.

U.S. Attorney:

If he is a pro se plaintiff, the court can sort of read those into his complaint for him.

Judge Calabresi:

Can read anything? Ok thank you.

New York State Attorney:

Good morning may it please the court my name is Patrick Walsh on behalf of the state defendants

Judge Calabresi:

Good to see you again Mr. Walsh.

New York State Attorney:

Thank you your honor.

With respect to the taxpayer standing question, I think the Supreme Court's decision in *Hein* as well as this court's decision in *Altman* makes it clear that this is exactly the type of case for which taxpayer standing should not be expanded. And I'll note that in the plurality decision in *Hein*, two of the justices that signed the decision were of the opinion that they were in effect overruling *Flast*. Now...

Judge Calabresi:

Only two.

New York State Attorney:

I understand but I just...

Judge Calabresi:

That's not enough to undercut our cases, I mean our cases stand unless the Supreme Court does away with them.

New York State Attorney:

I understand your honor. I am only underscoring the point that the court and this court has long believed that *Flast* is a very narrow exception. So certainly the notion that you can simply allege whether it be plausible or implausible in Establishment Clause claim.

Judge Calabresi:

Is your argument that in an establishment clause claim, the assertion that it is an establishment has to be plausible in order to create taxpayer standing?

New York State Attorney:

Yes your honor, I think it is built into the second requirement of *Flast* itself.

Judge Calabresi:

And do you also say that a taxpayer has to assert that he is a taxpayer and assert the various things that *Flast* statutes and so on requires?

New York State Attorney:

I do your honor.

We defended the taxpayer standing question on the merits of taxpayer standing in deference to the fact that it might be possible to read into the complaint. But I do agree with the court that ordinarily it should be alleged explicitly. So I am in complete agreement. So I don't think there is taxpayer standing here.

There's no plausible allegation due to the *Allen* case that there's actually a religion of feminism. On that basis, as the court noted, there has to be a limitation within taxpayer standing and establishment clause cases based on plausibility of your alleged infringement. That hasn't been satisfied here.

In my brief time remaining unless the court has further issues with regard to standing, I'll note that even if there were standing in this case and even if feminism were a religion, none of the state's religious neutral secular activity amounts to a violation of the Establishment Clause. The granting of what's colloquial known as Bundy aid based on the number of degrees is completely neutral with regard to religion substance of class content et al. Similarly, the approval of degree programs is done on the basis of secular criteria the ...

Judge Straub:

But your friend here alleges ad nauseam the involvement of the state in setting forth absolute and strictly defined feminism requirements, and he's attacking feminism as a religion, and he says you are responsible for requiring it.

New York State Attorney:

Well I think the only allegation he makes that ties the state to requiring women's studies at Columbia is his claim that a 1993 Regent's report, which in very general terms, calls for in essence diversity and opportunity within education amounts to the state requiring feminism in the form of women's studies program at Columbia.

I see no link whatsoever between that 1993 Regents report and any academic decisions made by universities within the state system. Certainly nothing in the Regents report, nothing in any statute, regulation or state policy explicitly or implicitly requires the establishment of women's studies programs at universities.

Den Hollander:

Just in the last part by Attorney Walsh

First of all, *Hein* specifically said it was not overruling *Flast*.

Second, if you look at that 1990, it's the 1990 *Equity for Women's Report*, it is the policy statement by the Regents. The Regents are the legislature. They decide what goes on in higher education. If you look through it it's very specific. I am not going to bother reading it through because you have the sites to it in the complaint.

It's very specific, such things as change in thought patterns to female friendly strategies.

Back to, I think this is very interesting, whether the allegations in the complaint have to be plausible, I think the allegations for standing in a complaint

are generally accepted as true and then reasonable inferences are made from then. I believe that as far as the fact that I brought an Establishment Clause action, I believe the complaint complies to that.

Did I specifically say that I was a taxpayer in that complaint, no I did not. Then I would request the court to send me back to the district court, so I can add that one sentence...

Judge Straub:

How many times did you amend?

Den Hollander:

Once.

Judge Straub:

Once, so did you ask for a further amendment?

Den Hollander:

No it was as of right as I recall.

Judge Straub:

No, one amendment you have is of right.

Den Hollander:

That was the amendment I did.

Judge Straub:

Did you ask you a further amendment after the court said there was no standing?

Den Hollander:

No at that point, the moment that I learned about the standing was the decision of the court. I was thinking of 59(e) reconsideration but...

Judge Straub:

But did you ask?

Den Hollander:

No, I did not your honor.

Judge Straub:

Yes, but you first had the Magistrate judge's report.

Den Hollander:

That's correct your honor

Judge Straub:

You objected to that but you didn't ask therein to leave to amend should the district court hold against you.

Den Hollander:

No I did not I objected to...

Judge Straub:

The second time after he did hold against, you didn't come back and say give me a chance to amend.

Den Hollander:

That's correct your honor may I clarify? Magistrate's report didn't touch...

Judge Straub:

Are you a lawyer, are you?

Den Hollander:

I am your honor.

The magistrate report did not touch upon the

Establishment Clause. In my objections, I specifically objected that the magistrate's report did not address the Establishment Clause claims. The first time the establishment clause claims were addressed by the lower court were addressed by the district judge in his decision.

Judge Straub:

Wasn't there one case that you brought where you were denied leave to amend?

Den Hollander:

Not that I am aware of but there...

Judge Calabresi:

Why should the magistrate judge have addressed the Establishment Clause if you didn't allege that you were a taxpayer?

Den Hollander:

I would normally think that when a judge...

Judge Calabresi:

No, I mean if it is necessary to Establishment Clause to be a taxpayer and you didn't make that allegation. Why should the magistrate have discussed it. Then given he didn't discuss it for that reason, you could have asked for an amendment so that it would have to be.

Den Hollander:

No, had the magistrate put in that he was dismissing it because I did not allege that I was a taxpayer, that I did not specifically put those words in there, then of course I'd request an amendment.

Obviously and once again, you can't read what a judge's mind says.

But I think this is kind of interesting in that you may end up taking the plausibility standard for the 12(b)(6), which is *Ashcroft v. Iqbal* and applying it to standing, which my understanding has not yet been done in order to determine whether a complaint satisfies a requirement.

Judge Calabresi:

Thank you very much I have enjoyed hearing from all of you and we stand adjourned.

08-6183-cv

Den Hollander v. United States of America

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE

**REFERENCE TO THAT DATABASE AND THE
DOCKET NUMBER OF THE CASE IN WHICH
THE ORDER WAS ENTERED.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of December, two thousand nine.

Present:

AMALYA L. KEARSE,
ROBERT A. KATZMANN,
PETER W. HALL,
Circuit Judges.

ROY DEN HOLLANDER, SEAN MOFFETT,
BRUCE CARDOZO, and DAVID BRANNON,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, DIRECTOR OF
THE U.S. CITIZENSHIP AND IMMIGRATION
SERVICES, DIRECTOR OF THE DEPARTMENT
OF HOMELAND SECURITY, and DIRECTOR OF
THE EXECUTIVE OFFICE FOR IMMIGRATION,

Defendants-Appellees.

No. 08-6183-cv

For Plaintiffs-Appellants:	ROY	DEN
	HOLLANDER,	New
	York, NY	
For Defendants-Appellees:	NATASHA	OELTJEN,
	Assistant United States	
	Attorney (<i>for</i> Preet	
	Bharara, United States	
	Attorney for the	
	Southern District of New	
	York), New York, NY	

Appeal from the United States District Court for the Southern District of New York (Pauley, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of the district court be and hereby is **AFFIRMED**.

Plaintiffs Roy Den Hollander, Sean Moffett, Bruce Cardozo, and David Brannon appeal from the decision of the district court dismissing their suit pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of Article III standing. We assume the parties' familiarity with the facts and procedural history of the case.

Plaintiffs argue that they have standing to bring suit because the Violence Against Women Act, by allowing aliens who have been battered or subject to extreme cruelty by their spouses to self-petition for legal permanent resident status, created incentives for their alien wives and ex-wives to file false police complaints and false applications for

temporary restraining orders against them. This argument lacks merit because plaintiffs' injury is not fairly traceable to defendants, but to the independent actions of their wives or ex-wives who are not before this Court. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-43 (1976). The links in the chain of causation here, which depend upon the independent actions of (1) plaintiffs' wives or ex-wives, (2) state courts and state officials, and in some cases (3) private employers are too attenuated and too numerous to satisfy the standing requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court") (quotation marks and alterations omitted). Moreover, similar "incentive" arguments have been rejected as a basis for establishing causation. *See, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (concluding that the incentive created by the prospect of jail time was not sufficient to support finding that requested prosecution would result in the payment of child support).

Plaintiffs further argue that the government or third parties have or will disseminate information about them that was gathered during the self-petitioning process, harming their reputation and privacy. Plaintiffs fail to state an injury-in-fact, however, because this injury is purely speculative—plaintiffs have failed to allege that any information concerning them has or will likely be disseminated. *See Lujan*, 504 U.S. at 560 (an injury must be "actual or imminent, not conjectural or

hypothetical”) (internal quotation marks omitted). While the Violence Against Women Act does permit limited disclosure of information to certain third parties such as agencies that provide public benefits, *see* 8 U.S.C. §§ 1367(a), (b), there is no reason to believe that such information would include any information about plaintiffs themselves. Moreover, those parties to whom dissemination is permitted are bound by the statute’s non-disclosure provisions. *See id.* § 1367(c). Similarly, plaintiffs’ argument that they are injured because they are constrained in their marital affairs is purely speculative. Nowhere in plaintiffs’ complaint do they allege that they did not divorce because of the contested provisions or would marry an alien in the future but for the contested provisions. Finally, plaintiffs are not injured by being “shut out” of the self-petitioning process because they cannot show that they have been injured as a result of the self-petitioning process.

We have considered the remainder of plaintiffs’ arguments and conclude that they lack merit.

Accordingly, for the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

FOR THE COURT:

CATHERINE O’HAGAN
WOLFE, CLERK

By: _____

08-5547-cv

Den Hollander v. Copacabana Nightclub

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

August Term, 2008

(Argued: August 24, 2009 Decided: September 1,
2010)

Docket No. 08- 5547 – cv

ROY DEN HOLLANDER

Plaintiffs-Appellants,

v.

Copacabana Nightclub, China Club, Lotus, Sol, Jane
Doe Promoters and A.E.R. Lounge,

Defendants-Appellees,

Guest House and A.E.R. Nightclub,

Defendants.

Before: POOLER and WINTER, Circuit Judges,
Judge MAUSKOPF*, District Judge.

* The Honorable Roslynn R. Mausekopf, United States District
Court for the Eastern District of New York, sitting by
designation.

Plaintiff-appellant Roy Den Hollander, individually and on behalf of a putative class of similarly situated men, appeals the Rule 12(b)(6) dismissal of his Section 1983 action brought against several New York City nightclubs for discriminating against men on “Ladies’ Nights.” See Hollander v. Copacabana Nightclub, 580 F. Supp. 2d 335 (S.D.N.Y. 2008) (Cedarbaum, J.).

Upon review, we agree with the district court that the Nightclubs were not state actors.

Accordingly, we AFFIRM.

Roy Den Hollander, New York,
N.Y., for Plaintiff-Appellant.

Joseph Salvo, Gordon & Rees
LLP, New York, N.Y.
(Christopher B. Block, Thomas
B. Coppola, on the brief), for
Defendants-Appellees

Per Curiam:

The facts of the case are straightforward. During “Ladies’ Nights,” several New York City nightclubs (“Nightclubs”) charge males more for admission than females or give males less time than females to enter the Nightclubs for a reduced price or for free. Den Hollander, who was admitted to the Nightclubs under this admission regime, attributes these pernicious “Ladies’ Nights” to “40 years of lobbying and intimidation, [by] the special interest group called ‘Feminism’ [which] has succeed in creating a customary practice . . . of invidious discrimination of men.” Den Hollander filed suit, on behalf of himself and others like him,

alleging violation of his equal protection rights pursuant to 42 U.S.C. § 1983.

Den Hollander alleges that the Nightclubs engage in state action by selling alcohol on their premises under an extensive regulatory system. According to the amended complaint, the Nightclubs operate in New York and are licensed to sell alcohol on their premises. The New York Alcoholic Beverage Control Law (the “ABC Law”) closely regulates the manufacture, sale, and distribution of alcoholic beverages in New York, and the New York State Liquor Authority (the “SLA”) issues licenses in accordance with and oversees the implementation of the ABC Law.

The district court dismissed Den Hollander’s Section 1983 claim after concluding that the Nightclubs were not state actors. Without action on our part, Den Hollander paints a picture of a bleak future, where “none other than what’s left of the Wall Street Moguls” will be able to afford to attend Nightclubs. Because, however, we agree with the district court that Den Hollander has failed to sufficiently allege state action, we must affirm.

I. Discussion

We review de novo a district court’s decision to grant a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(b)(6). Desiano v. Warner-Lambert & Co., 467 F.3d 85, 89 (2d Cir. 2006). To survive a motion to dismiss, the complaint must set out only enough facts to state a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). This standard “is not akin to a ‘probability requirement,’ but it asks

for more than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” Id. (quoting Twombly, 550 U.S. at 557).

The only question before us is whether Den Hollander has adequately alleged that the Nightclubs’ admission policies constituted state action. To assert a Section 1983 claim, Den Hollander must plead that the Nightclubs’ conduct was done under the color of state law. Sybalski v. Independent Group Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (per curiam). State action “occurs where the challenged action of a private party is ‘fairly attributable’ to the state,” Logan v. Bennington Coll. Corp., 72 F.3d 1017, 1027 (2d Cir. 1995)(quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)), which is achieved when a two-prong test is met:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar, 457 U.S. at 937.

1. Standard of Review

Before applying this test to the allegations in the complaint, however, we must address Den Hollander's argument that in gender discrimination cases, state action can be established by a showing of a lesser degree of government involvement than in non-discrimination cases. He argues that because "constitutional scrutiny for sex discrimination approaches that for color discrimination," and "it follows that the state action determination in sex cases should also require a lesser degree of government involvement."

We find Den Hollander's pleadings so lacking that even under a lesser standard, he has failed to allege state action. Therefore, it is unnecessary for us to decide if a lesser standard is appropriate for gender discrimination cases. See Weise v. Syracuse University, 522 F.2d 397, 405 (2d Cir. 1975).

2. State Action

We analyze this case under both Lugar prongs, which are related, but not redundant. Where the defendant's "official character is such as to lend the weight of the state to his decisions," the two prongs collapse into a single inquiry. Lugar, 457 U.S. at 937. But where, as here, the defendants are "without such apparent authority, i.e., . . . private part[ies]," the prongs diverge. Id.

To prevail under either prong, Den Hollander must allege that the decision to adopt discriminatory admission fees and rules is fairly attributed to the state. We have made clear that a causal link between the harm and the state action is required:

“[i]t is not enough . . . for a plaintiff to plead state involvement in some activity of the institution alleged to have inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved with the activity that caused the injury giving rise to the action.” Syblanski, 546 F.3d at 257-58 (quotation marks omitted). Under both prongs, this requisite link is lacking.

The causal connection is obviously missing under the first prong, which requires that the deprivation be caused by a privilege or right granted by the state. The alleged deprivation here is discriminatory admission prices, (“The deprivation is males paying more than females or investing more of their time to gain admission.”), and the alleged grant by the state is the privilege to sell alcohol. The link Den Hollander suggests is too attenuated to be causal: he argues that the Nightclubs may only charge discriminatory prices because they sell alcohol – without the draw of alcohol, his argument goes, the Nightclubs would not be popular destinations and accordingly, would not be able to charge for admission. Regardless of the veracity of this statement, we cannot agree that the state’s liquor licensing laws have caused the Nightclubs to hold “Ladies’ Nights;” liquor licenses are not directly related to the pricing scheme.

To plead the second prong, Den Hollander must allege that the Nightclubs are state actors. The actions of nominally private entities are attributable to the state when those actions meet one of three tests: 1. The “compulsion test:” “the entity acts pursuant to the ‘coercive power’ of the state or is ‘controlled’ by the state,” 2. The “public function

test.” “the entity ‘has been delegated a public function by the [s]tate,’” or, 3. The “joint action test” or “close nexus test.” “the state provides ‘significant encouragement’ to the entity, the entity is a ‘willful participant in joint activity with the [s]tate,’ or the entity’s functions are ‘entwined’ with state policies.” Sybalski, 546 F.3d at 257(emphasis added) (quoting Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass’n, 531 U.S. 288, 296 (2001) (citations and internal quotation marks omitted)).

Den Hollander’s amended complaint fails under all three tests because Moose Lodge No. 107 v. Irvis directly refutes that a liquor license by itself may form a basis for state action. 407 U.S. 163, 177 (1972). It is with great reluctance that we call attention to a case upholding the constitutionality of discrimination against African Americans, but until the Supreme Court revisits Moose Lodge, we are required to follow its holding. In Moose Lodge, the Supreme Court found no state action in race discrimination in the serving of food and beverages at a private club (i.e. a club only open to its members and their guests). The Supreme Court specifically held that a liquor license is insufficient to establish state action. Den Hollander alleges no basis for state action other than the Nightclubs’ liquor licenses, therefore, his complaint is insufficient.

Accordingly we affirm the district court’s dismissal of his Section 1983 action against the Nightclubs for gender discrimination.