12-2362

United States Court of Appeals for the Second Circuit

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.

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

BRIEF FOR STATE APPELLEES:
BOARD OF REGENTS, TISCH, STEINER, AND MAGEE

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State Appellees
120 Broadway
New York, New York 10271
(212) 416-6184

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Special Counsel
LAURA R. JOHNSON
Assistant Solicitor General of Counsel

Dated: October 18, 2012

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PRELIMINARY STATEMENT

For the second time, plaintiff Roy Den Hollander has sued various state and federal education officials for allegedly violating the Establishment Clause by providing general education funds that Columbia University uses to promote the so-called "feminist religion." The district court dismissed the first lawsuit for lack of standing and specifically noted that Den Hollander's claims were "frivolous." On appeal, this Court also expressed "grave doubts" about Den Hollander's Establishment Clause claims but ultimately affirmed the dismissal on standing grounds. *Hollander v. Inst. for Research on Women & Gender at Columbia Univ.*, 372 F. App'x 140, 142 (2d Cir. 2010) ("*Hollander I*").

Den Hollander continues to pursue his antifeminist agenda in this case, which involves claims essentially identical to his previous litigation. He appeals from a district court decision that again found that he lacked standing, and from the denial of his subsequent motion to vacate that judgment.

This Court should affirm the decisions below. As both this Court and the district court have already observed, Den Hollander's legal theory is fundamentally flawed. "Feminism" has none of the

characteristics of a genuine religion. And this Court has long rejected the proposition that disgruntled individuals like Den Hollander may embroil the government's secular programs in Establishment Clause litigation merely by labeling as a "religion" any political or social perspective to which they object. *United States v. Allen*, 760 F.2d 447, 450-51 (2d Cir. 1985).

Even putting aside the fundamental flaws in Den Hollander's claim, the district court properly dismissed the complaint for lack of standing. This Court has already determined that Den Hollander does not have standing to assert an identical Establishment Clause claim. Den Hollander's "new" allegations do not differ in any material way from those already held insufficient. And the district court properly exercised its discretion to deny Den Hollander's postjudgment motions to vacate the judgment and amend his baseless complaint.

ISSUES PRESENTED

1. Does Den Hollander have standing to bring this Establishment Clause claim when this Court has already held that he lacks standing?

2. Is feminism a religion for purposes of the Establishment Clause?

3. Did the district court abuse its discretion in denying Den Hollander's request to amend the complaint and thus commence yet a third round of litigation asserting the same baseless claims?

STATEMENT OF THE CASE

A. *Hollander I*

Roy Den Hollander filed the *Hollander I* lawsuit in the Southern District on August 18, 2008. He sued the same New York State officials he sues here. His Establishment Clause complaint in the two lawsuits is in essence identical.[1] In *Hollander I*, Den Hollander alleged, similar

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[1] Initially, Den Hollander also sued the trustees of Columbia University, and Columbia's Institute for Research on Women and Gender (IRWG) and its School of Continuing Education for discrimination and violation of equal protection based on Columbia's

(*continues on next page*)

to his allegations in this case, that feminism is a "religion" because of its supposedly comprehensive belief system. (J.A. 33-34, *compare* J.A. 102-103.) As he does here, Den Hollander contended that Columbia's Women's Studies program and IRGW were devoted to advancing the beliefs and teachings of the feminist religion. (J.A. 35; *compare* J.A. 96, 117-119.) Den Hollander alleged, as he does here, that the state defendants promoted those efforts to inculcate the feminist religion through policies favoring equality of women. Specifically, Den Hollander complained that the State improperly registered Columbia's curriculum, including the course offerings in Women's Studies, as an authorized New York State degree program; that the State improperly provided Columbia with general grants ("Bundy" aid) based on the number of degrees awarded; and that the State improperly gave female students loan guarantees, grants and scholarships at New York State colleges and universities. (J.A. 36-40; *compare* J.A. 98-100.)

The magistrate judge (Fox, M.J.) issued a Report recommending that the *Hollander I* complaint be dismissed for lack of standing (J.A.

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failure to provide "Men's Studies." (J.A. 32, 51-56.) Den Hollander has not pursued those claims in his present complaint.

68-77). The Report found that Den Hollander had not alleged any "injury in fact," since he was not a Columbia student, had not tried to enroll in a Women's Studies course, and had failed to allege that he otherwise suffered direct injury from exposure to the content of feminist teachings. At most, the Report concluded, Den Hollander had alleged a "subjective" injury that was insufficient to confer standing. (J.A. 74-76). The district court (Kaplan, J.) adopted this recommendation, and in the alternative, dismissed Den Hollander's Establishment Clause claims on the merits, finding that they "are absurd and utterly without merit," for "[f]eminism is no more a religion than physics, and at least the core of the complaint is therefore frivolous" (J.A. 78-79).

Den Hollander's *Hollander I* complaint had not expressly asserted that he was a state or federal taxpayer and had suffered injury in that capacity. But such a claim could be inferred from his allegations about the various forms of financial aid that Columbia or its students received. Indeed, in his *Hollander I* appeal, docketed by this Court under Dkt. # 09-1910-cv, Den Hollander contended that he had established taxpayer standing, and both he and the state defendants extensively addressed taxpayer standing in their appellate briefs.

At the oral argument, Den Hollander pressed his argument that he sued as an injured taxpayer, pointing out that the basic fact that he paid taxes could be inferred from his pleadings. (J.A. 80-81.) He asked the Court, should it find his complaint defective merely because it omitted an express allegation to that effect, to remand to the district court so that he could file an amended complaint expressly asserting taxpayer standing. (J.A. 81)

This Court did not remand. Instead, in a decision issued on April 16, 2010, it explicitly held that Hollander had not "made out the requirements for taxpayer standing for his Establishment Clause Claim." *Hollander I*, 372 F. App'x at 142 (citing *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001)). The Court went on to otherwise affirm the dismissal of Den Hollander's complaint "for substantially the reasons stated in Judge Fox's thorough report and Recommendation as adopted by the district court." *Id.*

B. *Hollander II*

Den Hollander filed this successor complaint on December 10, 2010. As outlined above, his Establishment Clause claim against the state and federal defendants is materially indistinguishable from the one in *Hollander I*.

C. The Orders Below

All of the defendants moved to dismiss Den Hollander's complaint on the ground that he was bound by the prior determination that he lacked standing. (Dist. Ct. Dkt. Nos. 7-9.) The state defendants also sought dismissal on the alternative grounds that the complaint failed to state an Establishment Clause claim. (*Id*.)

After converting the dismissal motions to motions for summary judgment, the magistrate judge (Pitman, J.) issued a Report and Recommendation (J.A. 126-164) recommending that summary judgment be granted to the defendants. He concluded that the question whether Den Hollander had standing with respect to his Establishment Clause claim, either as a taxpayer or as a result of other injury from the alleged violation, had already been determined adversely to him after a full and fair opportunity to litigate it. (J.A. 153-155.) Den Hollander's inclusion

in the new complaint of an express statement that he was a taxpayer, along with paystubs that showed tax withholding, was immaterial. The magistrate judge found that Den Hollander had always been in a position to supply evidence that he was a taxpayer; and, in any event, this Court had expressly rejected his claim of taxpayer standing in *Hollander I*. (J.A. 153-155.)

The district court adopted the Report and Recommendation in its entirety. (J.A. 165-170.) It subsequently denied Den Hollander's motions to vacate the judgment and to amend his complaint by adding two new plaintiffs who supposedly had taxpayer standing. (J.A. 205-206.)

STANDARD OF REVIEW

The Court reviews a grant of summary judgment de novo. *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir.2009). Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Brad v. Omya, Inc.*, 653 F.3d

156, 164 (2d Cir. 2011). The Court also reviews the district court's application of the principles of claim and issue preclusion de novo. *Chartier v. Marlin Mgmt., LLC*, 202 F.3d 89, 93 (2d Cir.2000). Denial of postjudgment motions for reconsideration are governed by an abuse-of-discretion standard. *Jowers v. Family Dollar Stores, Inc.*, 455 F. App'x 100, 101 (2d Cir. 2012) (summary order).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS

A. Den Hollander May Not Relitigate His Lack of Standing to Assert an Establishment Clause Violation.

Hollander I conclusively adjudicated Den Hollander's lack of standing to bring his claim of an Establishment Clause violation. In that earlier litigation, the district court rejected Den Hollander's assertion of noneconomic injury—*i.e.*, his feelings of offense and "subjective chill" from Columbia's and defendants' purported promotion of feminism. (J.A. 76.) This Court not only affirmed that ruling, but further found that Den Hollander did not have taxpayer standing

either. *Hollander I*, 372 F. App'x at 142. As the district court here correctly concluded, Den Hollander may not relitigate these earlier adverse standing determinations here.

Den Hollander is precluded from relitigating standing due to both collateral estoppel and the precedential effect of these prior decisions. Collateral estoppel "preclude[s] relitigation of the precise issue of jurisdiction that led to the initial dismissal," including lack of standing. Wright, Miller & Cooper, 18A *Federal Practice and Procedure* § 4436, at 149 (2002).[2] Den Hollander's revised allegations here—which in any event are materially indistinguishable from his earlier allegations—are insufficient to resurrect his assertion of standing "when those facts were available at the time the original complaint was filed," *Perry v. Sheahan*, 222 F.3d 309, 317-18 (7th Cir. 2000). And, independent of collateral estoppel, Den Hollander has given no "compelling

[2] *See also, e.g., In re V & M Mgmt., Inc.*, 321 F.3d 6, 8-9 (1st Cir. 2003) (per curiam); *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); *Cutler v. Hayes*, 818 F.2d 879, 889 (D.C. Cir. 1987); *cf. Arnold Graphics Indus., Inc. v. Indep. Agent Center, Inc.*, 775 F.2d 38, 41 (2d Cir. 1985) (recognizing potential collateral estoppel, citing 18A *Federal Practice and Procedure*, § 4436, *supra*).

justification" for ignoring the precedential effect of this Court's prior standing decision—when Den Hollander is raising the same claims, against the same defendants, arising from the same baseless allegations that Columbia is promoting "the religion Feminism" (J.A. 14, 95). *See Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *see also Skoros v. City of N. Y.*, 437 F.3d 1, 17 n.13 (2d Cir. 2006).

Den Hollander does not dispute any of these legal principles. Instead, he makes the remarkable assertion that his earlier lawsuit did not result in *any* adverse standing rulings that bind him today. That argument is meritless. Den Hollander concedes, as he must, that he fully briefed taxpayer standing before this Court in his prior litigation, and that this Court resolved the taxpayer standing issue against him. App. Br. at 42. Although Den Hollander now asserts that the issue was not "properly before the Court" because the district court had not expressly addressed taxpayer standing (*id.*), it is well established that "[a]n appellate court is free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Gmurzynska v. Hutton,* 355 F.3d 206, 210 (2d Cir. 2004) (per curiam) (quotation marks

omitted). Den Hollander has provided no support for his belief that such appellate rulings are neither binding nor conclusive on the very party who briefed and lost the issue in the earlier proceeding.

The prior litigation also resolved Den Hollander's assertions of noneconomic injury under the Establishment Clause. In *Hollander I*, Den Hollander alleged that Columbia "demonizes men" and "tramples under the boot-heel of Feminism the self-respect and pride of males" (J.A. 44-45) by offering academic programs on feminism, but none on "Men's Studies"; and by further "giv[ing] female students and female alumni an exclusive opportunity over their male competitors in the University and society" (J.A. 54). The district court, adopting the magistrate judge's recommendation (J.A. 78), found that Den Hollander had identified no injury-in-fact based on these allegations because Den Hollander had never attended, or sought to enroll in, Columbia's "feminist" programs; and because Den Hollander's complaints about unequal opportunities were "conjectural and speculative" (J.A. 76). In other words, the district court found, Den Hollander had identified nothing more than his subjective offense at Columbia's policies—and such an injury was insufficient to support his standing (J.A. 76). This

Court fully approved of this reasoning when it affirmed the district court's ruling for the reasons identified by the magistrate judge. *Hollander I*, 372 F. App'x at 142.

Den Hollander's complaint in this case alleges nearly identical noneconomic injuries. Once again, Den Hollander claims that Columbia's promotion of feminism "is offensive" and makes him feel "very uncomfortable" (J.A. 109). And once again the source of Den Hollander's offense and discomfort is Columbia's academic programs on "feminism" (J.A. 116-121) and the provision of more favorable opportunities to women (J.A. 111-115). But Den Hollander has still not alleged any attempt or interest in enrolling in Columbia's "feminist" classes. And he has still not identified any concrete or particularized harm to him due to the allegedly unequal provision of unspecified opportunities to female students. Consequently, as in *Hollander I*, Den Hollander's allegations continue to identify nothing more than "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 485 (1982). Because the district court and this Court have already rejected Den

Hollander's assertion of standing based on these allegations, Den Hollander is precluded from relitigating this question.

Den Hollander now simply denies that the district court ever even considered the question of his standing to litigate his Establishment Clause claim, as opposed to his discrimination claims. But Judge Fox's discussion of "injury in fact" in his *Hollander I* Report and Recommendation (J.A. 74-76) applied equally to Den Hollander's Establishment Clause claim as to his claims of discrimination. The recommendation that the entire complaint be dismissed for lack of standing otherwise makes no sense. And the magistrate judge expressly cited and relied on a seminal Supreme Court decision on Establishment Clause standing, *Valley Forge*. There is simply no support for Den Hollander's suggestion that the previous courts ignored the defects in his standing.

Den Hollander also asserts that he never expressly alleged noneconomic injury in *Hollander I*, and that he is thus free to relitigate the issue here. But it was Den Hollander's burden to allege facts that would establish his standing to invoke federal jurisdiction. *See Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 330 (2d Cir. 1997). He cannot

create an excuse to engage in a second round of litigation by failing to meet that burden. In any event, Den Hollander's failure to give the right label to his previously asserted injury-in-fact does not give him another bite at the apple. The injury that Den Hollander now labels "noneconomic" is the very same injury he alleged in *Hollander I*—offense, bordering on disgust, for Columbia's promotion of feminism and alleged favoritism toward women. The insufficiency of these allegations for Establishment Clause standing, however they are characterized, has already been resolved.

B. Den Hollander's Allegations Are Not Sufficient to Establish His Standing in Any Event.

If this Court were to reconsider Den Hollander's assertions of standing, it should still reject as inadequate his alleged injury-in-fact. "[A]t an irreducible minimum," article III requires that a plaintiff demonstrate (1) an actual or threatened injury, which is (2) fairly traceable to "'the putatively illegal conduct of the defendant,'" and (3) "'likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U.S. at 472. This "injury-in-fact" must be "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quotation marks omitted).

The test for taxpayer standing is particularly demanding because "[a]s a general matter, the interest of a . . . taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." *Hein v. Freedom From Religion Found. Inc.*, 551 U.S. 587, 599 (2007). The exception to this general rule in the Establishment Clause context is therefore narrow. It requires a plaintiff to show that the Legislature "expressly authorized or mandated" the alleged establishment of religion through an improper exercise of its taxing power. *Id.* at 608. Den Hollander has failed to make that showing here. The state funding programs that he challenges do not require recipients to use the money that they receive for any particular academic programs—let alone mandate that recipients expend state funds to promote "feminism." Rather, the New York Legislature has provided *general* aid to both universities and individual students to promote higher education. Private institutions like Columbia and individual undergraduates may subsequently choose to apply those

funds to particular academic programs, including "feminist" ones. But Den Hollander does not have standing to challenge those "true private choice[s]," *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002), when there is no evidence that the Legislature itself "expressly contemplated," *Hein*, 551 U.S. at 607, that some part of the funds it authorized to be disbursed would go to "aiding the modern-day religion Feminism at Columbia University" (J.A. 95). *See also In re U.S. Catholic Conference*, 885 F.2d 1020, 1028 (2d Cir. 1989); *Sherman v. Illinois*, 682 F.3d 643, 646-47 (7th Cir. 2012); *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 749-52 (6th Cir. 2012).

Den Hollander's assertions of noneconomic injury are equally meritless. A plaintiff asserting such injury must allege more than "generalized grievances about the conduct of government." *Flast v. Cohen*, 392 U.S. 83, 106 (1968). But here Den Hollander has failed to identify any concrete or particularized injury to himself that is distinct from "an abstract injury shared by the public," *Board of Educ. of Mt. Sinai Union Free Sch. Dist. v. N. Y. State Teachers Ret. Sys.*, 60 F.3d 106, 110 (2d Cir. 1995). For example, Den Hollander complains about the "feminist" academic offerings of Columbia's IRWG. But—as the

district court found in dismissing his first action—Den Hollander has never taken any IRWG course and thus has never been directly exposed to this alleged harm. *Cf. Suhre v. Haywood County*, 131 F.3d 1083, 1089 (4th Cir. 1997) (requiring "direct contact with a religious display" for Establishment Clause standing).

Den Hollander also asserts that he "may" take additional courses at Columbia. (J.A. 110.) But he has not identified those courses, nor any concrete steps he has taken to apply, nor any concrete harm that he would suffer upon being accepted. Likewise, Den Hollander complains about Columbia's dissemination of "the offensive orthodoxy of Feminism" through various channels, including e-mails, letters, and podcasts. (J.A. 109.) But Den Hollander has identified no such offensive communications, and he has never explained how his use of Columbia resources—including the library, "career networking," and "access to Columbia publications"—is at all stymied by "the pervasiveness of Feminism at Columbia." (J.A. 109.)

The fact of the matter is that Den Hollander has not been directly involved in higher education, at Columbia or elsewhere, for years. His complaint's assertion of injury rests entirely on the offense and

discomfort he feels as an observer of Columbia's purported turn toward "feminism" in its higher-education policies. Such allegations fail to establish any concrete, particularized injury that would enable Den Hollander to pursue his Establishment Clause claim. *See Valley Forge*, 454 U.S. at 486 ("standing is not measured by . . . the fervor of [a litigant's] advocacy").

C. The Court May Affirm on the Alternative Ground that Den Hollander has Failed to Present Evidence that Feminism is a "Religion."

This Court "may affirm the award of summary judgment on any ground with adequate support in the record." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001) (quotation marks omitted). If Den Hollander has standing to litigate his Establishment Clause claim (and he does not), the Court should nonetheless affirm the decision below. Even assuming that "feminists" were as ubiquitous and as powerful within academic circles as Den Hollander alleges, feminism is a social theory or political movement, not a "religion" within the purview of the Establishment Clause.

"[F]or establishment clause purposes," a "religion" is defined by "the conventional, majority view, rather than [the plaintiff's] view, of

what is religious and what is political." *Allen*, 760 F.2d at 450. This test is a narrow and objective one—in sharp contrast to the test applicable to free exercise claims, which is flexible and subjective. *See, e.g., Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

In *Allen*, for example, protesters opposed to nuclear weapons claimed that the federal government was promoting the religion of "nuclearism," which espoused the belief that "the bomb is the new source of salvation," and that nuclear weapons are "sacred objects." 760 F.2d at 449. This Court had little difficulty in rejecting this characterization of the government's nuclear policy, emphasizing that the protesters had asked it "to recognize as a 'religion' what that religion's alleged adherents have not identified as such." *Id.* at 450.

Similar reasoning disposes of Den Hollander's claims here. Feminism has a well-defined and commonly accepted meaning: it is "the theory of the political, economic, and social equality of the sexes," or "organized activity on behalf of women's rights and interests." *Merriam-Webster's Collegiate Dictionary* 461 (11th ed. 2003). Den Hollander has not alleged, and could not plausibly allege, that feminism has *any* of the formal or external signs of a religion, such as churches, priests, a

central creed, or belief in a higher being or order. And Den Hollander has identified no one—other than himself—who considers feminism a religion rather than a political movement or viewpoint or theory. *Cf. Allen*, 760 F.2d at 450 ("appellants ask us to recognize as a 'religion' what that religion's alleged adherents have not identified as such. . . . [T]he new religion's 'believers' would likely reject this interpretation of their beliefs and actions."). As Judge Kaplan correctly recognized in *Hollander I*, "[f]eminism is no more a religion than physics," and Den Hollander's attempt to invoke the Establishment Clause by fiat is "absurd and utterly without merit." (J.A. 79.)

In an effort to breath life into his Establishment Clause claim, Den Hollander uses a pastiche of conclusory language drawn from First Amendment decisions to characterize feminism: it allegedly "[m]andates a lifestyle"; "[a]dvocates beliefs that are based upon a faith to which all else is subordinate and [sic] which all else is ultimately dependent"; "[v]alidates the spirit of its followers with importance, meaning, purpose, and security"; and "[i]nculcates beliefs based on the teachings of certain prophet-like individuals, such as Mary Wollstonecraft." (*See* J.A. 103.) Den Hollander has offered little to no evidence that either

Columbia or the defendants promulgate anything resembling this caricature of feminism. But more fundamentally Den Hollander's allegations would describe any number of political, social, and other theories—none of which are religious. Academic and political institutions are replete with controversial ideas that have passionate followings: from originalism in law; to Marxism in economics; to libertarianism in politics. But neither academic programs nor public policy based on these ideas are conventionally characterized as religious.

Den Hollander's mere say-so cannot alter this reality. As this Court has recognized, any other rule would embroil vast swathes of government programs in Establishment Clause litigation by permitting disgruntled litigants to idiosyncratically recharacterize social or political viewpoints with which they disagree as "religion." *See Allen,* 760 F.2d at 450 (citing L. Tribe, *American Constitutional Law* 827-28 (1978)). The Establishment Clause "loses its sense and thus its ability to protect when carried to [this] extreme." *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 (9th Cir. 1996).

POINT II

THE DISTRICT COURT'S DENIAL OF THE MOTIONS TO VACATE AND AMEND WAS A PROPER EXERCISE OF DISCRETION

Den Hollander filed a postjudgment motion in which he asked the district court to vacate its decision in order to allow him to file an amended complaint adding two new plaintiffs, both Hofstra Law School alumni, who allegedly had standing to assert Establishment Clause claims against the defendants' promotion of "feminism." (J.A. 174-204.) The district court properly exercised its discretion to deny the motions, for at least two independently sufficient reasons.

First, since Den Hollander was estopped from asserting standing, it necessarily followed that he had no standing to make a motion to amend the complaint. See *Summit Office Park, Inc. v. U. S. Steel Corp.*, 639 F.2d 1278, 1282-83 (5th Cir. 1981) ("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"); *Turner v. First Wisc. Mortg. 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").

Den Hollander's reliance (Br. at 19-22) on this Court's decision in *Hackner v. Guaranty Trust Co. of N.Y.*, 117 F.2d 95, 98 (1941), is misplaced. As this Court has recently explained, *Hackner* "recognized a district court's discretion to treat the pleading of an intervenor as a separate action" in order to avoid the "delay and expense of a new suit." *Disability Advocates, Inc. v. N.Y. Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 161 (2d Cir. 2012). Here, there has been no motion to intervene. And far from avoiding delay and expense, Den Hollander seeks to start a third round of litigation by recruiting new litigants after his own complaint has been dismissed for a second time on standing grounds.

Second, amendment of the complaint was properly denied as futile. *See Lucente v. IBM Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). The proposed amended complaint, submitted with Den Hollander's motion, would fail on the merits because, as discussed in Point I-C above, Den Hollander's allegations that feminism is a religion do not suffice to make out an Establishment Clause claim.

CONCLUSION

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

Dated: New York, NY
October 18, 2012

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State Appellees

By: /s/ Laura R. Johnson
LAURA R. JOHNSON
Assistant Solicitor General

120 Broadway
New York, NY 10271
Telephone (212) 416-6184

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Special Counsel to the Solicitor General
LAURA R. JOHNSON
Assistant Solicitor General of Counsel