Oral Argument Miss Col II April 5, 2013

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Introduction

Good morning your honors, I'm Roy Den Hollander the plaintiff-appellant and an attorney admitted to practice before this Court.

There are a number of procedural issues in this case, but they all disappear if Feminism is not a religion, which was one of the grounds the district court used to deny the post-judgment amendment of the complaint, App. 211-213.

If Feminism is a not a religion, the motion to vacate the district court's summary judgment on *collateral estoppel* would be futile because the Proposed Amended Complaint would not survive a Rule 12(b)(6) motion to dismiss.

If Feminism is not a religion, this Court's reversal of the district court's *collateral estoppel* decision would not change the results because the original complaint would then be dismissed under Rule 12(b)(6).

So if Feminism is not a religion, this case is over.

Of course, I am alleging that Feminism is a religion according to the law and not pop-culture opinions.

[Go to Feminism = Religion **p. 34**]

How do you define Feminism?

A deeply and sincerely held belief system that is purely ethical or moral in source and content concerning what is right and wrong that imposes a duty of conscience with beliefs that are held with the strength of traditional religious convictions.

Be more specific.

[Go to *Application of these tests to the Feminism*, **p. 36**, Complaint ¶¶ 50, 53-68, App. 102-106; Prpsd. Amend. Cmplt. ¶¶ 43, 50-64, App. 179, 181-183.]

Proceedings Below

The district court granted the State and Federal Governments summary judgment by finding that *collateral estoppel* prevented me from litigating Establishment Clause standing because it had been litigated and decided in a previous case referred to as *Den Hollander I*.

I then made a motion to vacate the summary judgment under Rule 59(e), which was filed within 28 days of the judgment and to amend the complaint under Rule 15(a) by adding two plaintiffs and their factual allegations. The district court denied both motions.

State Attorney's Brief

Apologize

Apologize because I refuse to prostrate myself before an arrogant, uncivil, dissembling lawyer who cannot even cite to the correct complaint on the motion to amend?

My initial brief was civil, it focused on the legal issues. It did not dis, denigrate, or demean the attorneys on the other side. It did not resort to that all too common maxim of self-righteous hypocrites that "the personal is political," which means traduce non-believers, depict them as modern-day lepers and ignore the merits.

So how does the State's attorney respond? She pulls a chapter from the Feminist bible for intimidating men by submitting a brief of insults, condescension, and incivility.

She's the aggressor running the blitzkreig through the Ardennes forest venting her hostility toward men—not me.

I'm simply acting in self-defense by responding in kind with my reply, but that's not allowed in Feminarchy America. Females can say whatever they want about a man, be as uncivil as their imagination allows but when a man defends himself, it's on your knees and beg forgiveness.

Ladies are allowed to control and silence with personal attacks and **deception** and this society will reward them for it. [Cites wrong complaint and summary order, remarkable assertion, more at **p. 16**].

The State's attorney, like all Feminists, wants equality, but only the equality of the last few pages of Orwell's Animal Farm.

That's hypocrisy, but it is the core of the Feminist beliefs as followed by the federal courts in these United States—females deserve preferential treatment while men deserve paying the price—a religion of goddesses but no gods.

Aren't you being overly sensitive?

Not when it comes to my right to be treated as a human being. My brief did not belittle and demean her, but when she engaged in such conduct toward me, I treated her as I would any other uncivil person.

The State's attorney resorted to the all too typical Feminist tactic of trying to discredit a man's arguments by pegging him as "disgruntled" and pursuing an "antifeminist agenda."

In the former Soviet Union the often used label of opprobrium was "anti-communist" and in the McCarthy era in America "communist sympathizer." Today in America it's "anti-feminist" or "politically incorrect."

Even assuming all her caviling is true, what does it have to do with legal arguments before a judiciary that is suppose to rule on the merits and not on a party's personal beliefs or personal disposition.

Besides, what's wrong with an "antifeminist agenda," "anticommunist agenda," "antifascist agenda," or "anti-1984 agenda" by a "disgruntled" American man? Many disgruntled men, including me, fought in the streets against the Vietnam War.

Disgruntled men have fought against the abuses of the powerful in the name of civil rights throughout the history of this country.

Such is not a vice and neutrality in the face of injustice is not a virtue.

[Since I'm going to be held in contempt, I should at least be granted my say.]

[When I come across a lawyer who tries to intimidate and belittle me, I don't get mad, I escalate.]

Examples State attorney's rudeness:

The State's attorney personally insulted and demeaned me and called my motives into question by saying I was "disgruntled." *State Brf.* p. 2, 22.

She tried to personally discredit me by relying on the modern-day Feminist tactic for depicting men as subhuman, non-believers by labeling me "anti-feminist." *State Brf.* p. 1.

To paint me in the negative light of a modern-day leper, she characterizes my response to Feminism as bordering on "disgust." *State Brf.* p. 15.

To discredit me as a lawyer, she says my complaint is baseless and I make the same baseless allegations as previously, *State Brf.* pp. 2, 3, 11.

She condescendingly says I make the remarkable assertion that my earlier lawsuit did not result in any adverse standing rulings that bind me today, p.11. That is remarkably false, since my brief at p. 46 states "collateral estoppel would apply to standing under Title IX and Equal Protection." [So did my Objections to Magistrate Pitman's *Report* at ¶ 44, Docket 25.]

To demean me as arrogant, she says I rely on my mere say-so that Feminism is a religion, *State Brf.* p. 22, falsely implying I failed to apply the tests for religion laid out by the Supreme Court and five other circuit courts, *Reply* pp. 10-11.

Meanwhile the State's attorney on her mere say-so, sanctimoniously asserts Feminism is a not a religion and uses as authority an inapposite case, *United States v. Allen*, 760 F.2d 447, 450-51 (2d Cir. 1985). *State Brf.* pp. 19, 20.

She also relies on a statement by a powerful judge, Judge Kaplan in *Den Hollander I*, that Feminism is not a religion, which was made without any reliance on the traditional procedure for reaching a judicial decision. *State Brf.* p.5.

The State's attorney thought process is simply the medieval rationale of the nobility: "I think so—therefore it is right."

She even disparagingly refers to the religion analysis of the Supreme Court and five courts of Appeals as a "pastiche." *State Brf.* p. 21.

The State's attorney engages in the all too common Feminist linguistic tactic of creating

false impressions to exploit the modern-day bigotry that only men are incompetent:

> She asserts that because I made no "motion to intervene," *Hackner* does not apply. To her it is irrelevant that I made a motion to amend, and rather fickle of her considering that the State conceded a motion to amend was the correct procedure for adding parties. *State Brf.* p. 24 (*See State Opposition to Motions to Vacate and Amend*, pp.5-7, Docket 36, App.11). *Hackner* is about substituting parties, specifically plaintiffs—just as is the proposed amendment in this case.
>
> She intentionally confuses a standing decision on Equal Protection and Tile IX with a decision on Establishment Clause standing. *State Brf.* p. 14.

All in all, it's the Feminist tactic of personally attacking those who disagree with them.

Motion to Recuse

Apologize—No, draw and quarter me in Times Square, disbar me, I will not.

Instead, I move you recuse yourself under the Judicial Conduct Act for bias, bigotry and prejudice against any man who fails to genuflect before every uncivil, unjust, man-hating act of a female abusing her position of power.

I move you recuse yourself for placing the man-demonizing tenets of Feminism and political correctionalism—both extra-judicial sources—above a key principal of justice—that it is blind. That it should not search out to punish members of a disfavored group just because they are such. Especially members of the group that built this country.

As U.S. Supreme Court Justice Jackson wrote in 1943, during another time of intolerance and hatred directed by the majority at those in the minority:

> "Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. **As** first and moderate methods to attain unity have failed, those bent on its accomplishments must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to efforts of totalitarian [regimes]. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640-41 (1943).

Today in America, it is Feminism and political correctionalism that are succeeding in stamping their brand of unanimity of thought, speech, and action on the nation at the expense of liberty and the rule of law.

Just the appearance of making such a requirement of a male attorney when faced with a female attorney for the government who believes civility is a sign of weakness and her truth is not subject to proof is enough to show a predisposition for a belief system that demands the termination of this case regardless of the purpose of the FRCP to avoid the turning of cases based on technicalities. Wright, Miller & Kane, *Fed. Prac. and Proc.*, § 1215, at pp. 165-173, 3rd ed. (2004).

Disbarment or suspension

That's fine with me your honor.

I didn't become a lawyer to make money but to defend my rights, and that isn't possible in the courts of these United States.

I'm already in America's virtual gulag along with the other members of Bakunin's lumpen proletariat, which in America means men because they have lost their liberties to a Feminist tyranny. As Clarence Darrow said, Liberty is the most precious thing to man, for without it, life is not worth living.

That doesn't mean I won't fight you on this, but the end result is really irrelevant.

This is just like opposing the war in Vietnam. Back then, it was impossible to use the apparatus of government to stop the wholesale violation of the rights of men. The courts wouldn't help, so I like many others joined SDS, Students for a Democratic Society, and took the battle to the streets. This court will throw this men's rights case out and the Supreme Court will refuse to hear it, just as it did the other two men's rights cases I brought, so for me it's back to the streets—back to civil disobedience to again fight for my rights.

Standards of Review

Summary Judgment:

This Court held that "We review the district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party. . . ."—here Den Hollander. *Johnson v. Goord*, 445 F.3d 532, 534 (2d Cir. 2006).

Summary judgment was on the issue of *collateral estoppel* concerning standing; therefore, *de novo* review.

Collateral Estoppel:

In determining which issues have been actually litigated and decided, a federal circuit court is free to go beyond the judgment and may examine the pleadings and the evidence in the prior action.

James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 459 n.7 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971).

Fed. R. Civ. P. 59(e) motion to vacate:

"[W]hen the Rule 59(e) motion seeks review of a grant of summary judgment, as in the case at bar, we apply a *de novo* standard of review." *Fletcher v. Apfel*, 210 F.3d 510, 512 (5th Cir. 2000); *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609, 613 (6th Cir. 1998).

The State's attorney asserts that the "[d]enial of postjudgment motions" to vacate under Rule 59(e) and amend the complaint are governed by an "abuse-of-discretion standard" for which she cites a "summary order," *Jowers v. Family Dollar Stores, Inc.*, 455 F. App'x 100, 101 (2d Cir. 2012). (*State Brf.* p.9). Local Rule 32.1.1(a) of this Court, however, states that "[r]ulings by summary order do not have precedential effect."

USDOE relies on *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 150-154 (2d Cir. 2008), which did not involve summary judgment and actually resulted in this Court making a *de novo* determination over choice of law to decided whether the district court's grant of the 59(e) motion was proper.

Fed. R. Civ. P. 15 motion to amend:

A Rule 15 motion relies on *Foman v. Davis*, 371 U.S. 178 (1962), for determining whether a district court properly denied leave for a post-judgment amendment. *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002). Denial must be based on a "justifying reason" and be consistent with the liberal amendment policy. *United States on behalf of Maritime Admin. v. Continental Illinois Nat'l Bank & Trust Co.*, 889 F.2d 1248, 1254 (2d Cir. 1989).

"Outright refusal to grant the leave without any 'justifying reason' for the denial is an abuse of discretion." *Jin* at 101 (citing *Foman* at 182). *USDOE's Brief* at p.15 ignores that.

The district court did not provide a justifying reason; only the legal conclusion that the proposed amended complaint would not survive a motion to dismiss. Swain *Memorandum Order*, App. 211-213.

"[W]hen a district court bases its decision solely on a legal conclusion that the amended pleading would not withstand a motion to dismiss, this court [of appeals] must review the legal conclusion *de novo*. Whether an abuse of discretion occurred in such a case depends in whole upon the correctness of the district court's predicate legal conclusion." *Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986).

Abuse of Discretion

Abuse of discretion exists where a district court decision is based on a clearly erroneous finding of fact, errant conclusion of law, or improper application of law to the facts. Moore 206.05[1].

Clearly Erroneous

When there is no evidence tending to show a required element of the claim or there is no basis in the record to support the finding, or based on fundamental confusion of the facts. Moore 206.03[7]

Collateral Estoppel

Identical issue—raised—litigated—decided.

Defendants must show:

1. the identical issue was raised in a previous proceeding;
2. the issue was actually litigated and decided—contested by the parties and submitted for determination by the court, 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).

Identical issue fact or law

The Supreme Court has held that for *collateral estoppel* to apply the "question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged" previously. *Montana v. United States*, 440 U.S. 147, 157 (1979)(quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)).

Collateral Estoppel is confined to "situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding". *Neaderland v. Commissioner*, 424 F.2d 639, 642 (2d Cir. 1970)

Not similar

Collateral estoppel does not apply even though the issues are similar. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1399 (9th Cir. 1992).

Closely related issues

Even if taxpayer injury was litigated, it is not "closely related" to noneconomic injury. The fact issues are different:

Taxpayer injury determines whether the plaintiff is a taxpayer and in close proximity to the alleged violation.

Noneconomic injury requires that the plaintiff (1) came into "direct contact with religious displays that were made a part of his experience" (2) such contact made him uncomfortable, and (3) to avoid contact, he would have to alter his behavior. *Cooper v. U.S. Postal Service*, 577 F.3d 479, 491 (2d Cir. 2009); see *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101, 1108 (2d Cir. 1992); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1152-53 (10th Cir. 2010).

Not what might have been issues

Collateral estoppel applies only to issues directly litigated—"not what might have been thus litigated and determined." *United States v. International Bldg. Co.*, 345 U.S. 502, 505 (1953)(quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

Facts which might have been decided, but were not, are not precluded by *collateral estoppel*. *Conn. Light & Power Co. v. Fed. Power Commission*, 557 F.2d 349, 353 (2d Cir. 1977)(citing *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 687 (1895); Restatement, *Judgments* § 68).

It is insufficient for the invocation of *collateral estoppel* that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered. Moore 132.03[4][a] n.105.

Issue must be in pleadings

If the court in the previous action assumes to adjudicate an issue not submitted by the parties in their pleadings nor drawn into controversy with evidence and bases its judgment on such adjudication, the judgment is not conclusive under *collateral estoppel*. *Diplomatic Elec., Inc. v. Westinghouse Elec. Supply Co.*, 430 F.2d 38, 45 (5th Cir. 1970).

Mere use of evidence insufficient

Just because offered evidence on one issue would prove a second issue, does not mean the second issue was actually litigated. Wright, Miller & Kane, *Fed. Prac. and Proc.*, § 4419, at p. 494, 3rd ed. (2004).

Use of evidence is insufficient for establishing that an issue was actually litigated. *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359-60 (11th Cir. 1998).

Cannot be inferred from decision

Collateral estoppel does not apply to points that can "only be inferred by arguing from the decree." *No. Carolina R. Co. v. Story*, 268 U.S. 288, 294 (1925).

The possibility that a particular finding [taxpayer and noneconomic injury] may have played a central role in the subjective process of deciding is not considered for determining whether necessarily decided. Wright, Miller & Kane, *Fed. Prac. and Proc.*, § 4421, at p. 545, 3rd ed.

If Kaplan ruled on the merits with respect to the Establishment Clause that Feminism is not a religion, then taxpayer and noneconomic standing not precluded because to do so would require an inference from his decree and delving into his subjective decision making.

Errors by district court in *Den Hollander II*

The first mistake made by Magistrate Pitman and Judge Swain was that the issues of noneconomic and taxpayer injuries were alleged in the *Den Hollander I* original complaint and first amended complaint—they were not.

The second mistake was concluding that taxpayer and noneconomic injuries were litigated and determined by Magistrate Fox and Judge Kaplan in *Den Hollander I*. It was not.

The third mistake was concluding that noneconomic injury was litigated and determined in the Court of Appeals in *Den Hollander I*—it wasn't.

Record in *Den Hollander I*

It is important to remember that in *Den Hollander I* there were three causes of action, each with its own standing requirements. The standing requirements for Equal Protection and Title IX were litigated, and decided by Magistrate Fox, Judge Kaplan and the Court of Appeals.

However, the Establishment Clause standing of noneconomic injury was never litigated and decided in the District Court or the Court of Appeals.

Collateral estoppel does not apply with respect to the unreviewed ground. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986).

Collateral estoppel does not apply to points that can "only be inferred by arguing from the decree." *No. Carolina R. Co. v. Story*, 268 U.S. 288, 294 (1925).

See U.S. v. International Bldg. Co., 345 U.S. 502, 505 (1953)("no showing either in the record or by extrinsic evidence" that the issue was "determined by that court").

At best there is **uncertainty** and that is not good enough for collateral estoppel. "[W]hen a court cannot ascertain what was litigated and decided, issue preclusion cannot operate.'" *Securities Exch. Comm'n v. Monarch Funding Corp.*, 192 F.3d 295, 309 (2d Cir. 1999)(quoting 18 James W. Moore et al, *Moore's Federal Practice*, § 132.03[2][g] (3d ed. 1998) (citing *Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1583-84 (11th Cir. 1991).

Noneconomic standing

Establishment Clause standing exists where noneconomic injury comes from exposure to religious communications. *Cooper*, 577 F.3d at 489 n.9 (2009); *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101, 1108 (2d Cir. 1992); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1152-53 (10th Cir. 2010). The Supreme Court specifically has recognized that a party "may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." *Sullivan*, 962 F.2d at 1107(quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)). Such exposure to an unwelcome religious communication works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct. *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997).

Magistrate Fox

Magistrate Fox's *Report and Recommendation* in *Den Hollander I* does not mention noneconomic injury or taxpayer injury under the Establishment Clause, so the district court in this case, *Den Hollander II* , could not possibly ascertain whether it was litigated and decided at the magistrate level.

"A corollary of the actual litigation and decision requirements is that 'when a court cannot ascertain what was litigated and decided, issue preclusion cannot operate.'" *Securities Exch. Comm'n v. Monarch Funding Corp.*, 192 F.3d 295, 309 (2d Cir. 1999)(issue not mentioned raising the question of whether it was ever really litigated)(quoting 18 James W. Moore et al, *Moore's Federal Practice*, § 132.03[2][g])(3d ed. 1998); *See Barnes v. Hodel*, 819 F.2d 250, 252 (9th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988).

Further evidence that Magistrate Fox in *Den Hollander I* never decided noneconomic or taxpayer injury is that his injury analysis only deals with the Tile IX and Equal Protection discrimination-based claims. (Magistrate Fox *Report and Recommendation*, pp. 7-9, App. 74-76).

Magistrate Fox did quote from the taxpayer standing case, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982), but not to support an argument of no Establishment Clause standing, rather for support that the plaintiffs Equal Protection and Title IX injury in *Den Hollander I* was not an injury in fact but just a "subjective chill" and courts are not meant for the "vindication of value interests of concerned bystanders." The people actually involved have standing but the plaintiffs never enrolled in the Women's Studies program. It's similar to a bystander of a fender-bender car accident.

The *Valley Forge* cite used by Magistrate Fox does not even deal with Establishment Clause standing and quotes, in part, from the secular case *U.S. v. SCRAP*, 412 U.S. 669, 687 (1973). The cited part of the *Valley Forge* opinion reviews the general requirements for Article III standing. The cite states that general grievances by taxpayers over the unconstitutional acts of government do not provide standing, which is how Magistrate Fox used it in denying Equal Protection and Title IX standing. The part of *Valley Forge* that applies to Establishment Clause standing is at 479—not 473 that Magistrate Fox cited.

However, a noneconomic injury from exposure to an unwelcome religious communication does work a personal injury distinct from and in addition to a bystander's general grievance against unconstitutional government conduct. *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997). People watching the attack on the World Trade Center suffered from post traumatic stress.

Judge Kaplan

Since Magistrate Fox's *Report and Recommendation* did not decided noneconomic injury or taxpayer injury under the Establishment Clause, Judge Kaplan's adoption of it could not have either.

Judge Kaplan's Establishment Clause remarks expressed his belief that Feminism was not a religion, which is a merits issue and not a standing issue concerning taxpayer or noneconomic standing. Kaplan said, "Feminism is no more a religion than physics. . . . The Establishment Clause claims are dismissed also on the alternative ground that they are absurd and utterly without merit." (Emphasis added).

Had Judge Kaplan really meant there was no Establishment Clause injury, then his statements about the merits make no sense, since he would no longer have jurisdiction on the Establishment Clause claim to make a Rule 12(b)(6) finding.

Judge Kaplan may have thought that Den Hollander lacked noneconomic and taxpayer standing or that he had standing under one or both, but we do not know that because there's nothing in his Order that specifically refers to either. Once again uncertainty and once again "'when a court cannot ascertain what was litigated and decided, issue preclusion cannot operate.'" *Securities Exch. Comm'n*, 192 F.3d at 309.

Collateral estoppel does not apply to points that can "only be inferred by arguing from the decree." *No. Carolina R. Co. v. Story*, 268 U.S. 288, 294 (1925).

Both Magistrate Fox and Judge Kaplan presented no injury analysis concerning Establishment Clause noneconomic and taxpayer injuries; therefore, the jurisdictional facts of noneconomic and taxpayer standing were not determined in the district court.

Possible Interpretations of the District Court Record in Den Hollander I

1. Fox only decided Title IX and EP standing, so when Kaplan accepted Fox's *Report*, the issue of Establishment Clause standing remained open, Kaplan may have assumed Den Hollander had standing, and, therefore, proceeded to decide the Establishment Clause claim on the merits.

2. Fox decided all three federal claims, so when Kaplan accepted Fox's *Report*, he too dismissed for lack of Establishment Clause standing and his subsequent statements about the Establishment Clause merits were dicta.

3. Fox did not rely on any Establishment Clause cases for his injury analysis. His cite to *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473, (1982), was for the rule that an injury could not be a generalized grievance brought by a taxpayer-bystander, otherwise, it would "convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders," and would ignore "a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." Fox did not even refer to *Valley's* analysis concerning Establishment Clause standing.

4. Fox did rely on the Establishment Clause case *Valley Forge* for an Establishment Clause injury analysis, but cited to no other cases that deal with the Establishment Clause.

Problem with all these hypotheticals is that we don't know which was the subjective decision of the judges.

"[W]hen a court cannot ascertain what was litigated and decided, issue preclusion cannot operate.'" *Securities Exch. Comm'n v. Monarch Funding Corp.*, 192 F.3d 295, 309 (2d Cir. 1999)(quoting 18 James W. Moore et al, *Moore's Federal Practice*, § 132.03[2][g] (3d ed. 1998) (citing *Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1583-84 (11th Cir. 1991); see also id. § 132.03[3][d])). [updated cites]

If Kaplan's remarks were dicta or gratuitous, why did he make them?

To curry favor with the ruling ideologies in America and the courts: political correctionalism and its sister belief system Feminism.

Let's be realistic. This Court can interpret the facts however it wants and that "however" will be against a member of one of this country's minorities because current popular belief considers that minority inferior to the majority.

Are you saying this Court is bias?

No, I'm saying most if not all federal courts, including this one, are biased against men fighting for their rights when violated by the preferential treatment given females by the government. And that includes the Supreme Court. These courts make decisions consistent with Politically Correct and Feminist ideologies as opposed to the laws and Constitution of this land.

That's arbitrary decision making, which is a classic abuse of power.

You asked me a question, do you want the truth as I see it, or a lie?

Court of Appeals

If this Court decides that the Court of Appeals in *Den Hollander I* could raise and decide the taxpayer and noneconomic standing issues without them being addressed below, the Court of Appeals still failed to decide the issue of noneconomic injury, so *collateral estoppel* does not apply to that issue.

Collateral estoppel does not apply with respect to the unreviewed ground. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986); *See United States v. International Bldg. Co.*, 345 U.S. at 505 ("no showing either in the record or by extrinsic evidence" that the issue was "determined by that court").

<u>Basis for decision on noneconomic standing here and now</u>

This Court could decide noneconomic standing now based on either the original complaint in *Den Hollander II*, or if it permits the amendment of the complaint, based on the proposed amended complaint. Either would require a plausibility analysis, something the State and USDOE do not provide.

The State's attorney does try to mislead by saying the "Noneconomic Standing" section in the *Den Hollander II* Complaint, App.109-111, is "nearly identical" to the noneconomic injuries alleged in the *Den Hollander I* Amended Complaint. (*State Brf.* p.13). That is false because there is no noneconomic injury raised in the *Den Hollander I* Amended Complaint, but there is in the original complaint in *Den Hollander II* and the proposed amended complaint. Original Complaint at ¶¶ 79-91, App. 109-110; Proposed Amended Complaint at ¶¶ 79-97.

Pervasiveness of Feminism at Columbia:

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.

Another pre-discovery indication of the pervasiveness of Feminism at Columbia comes from the magazine Columbia, which enters Den Hollander's home by mail every quarter. From Spring 2007 to Winter 2012, the following were dealt with in a number of articles:

Feminism 3 articles
Feminist 12 articles
Masculinity 0 articles
Masculine 1 article
Women's Issues 2 articles
Women's Rights 4 articles
Men's Issues 0 articles
Men's Rights 0 articles

(Only Proposed Amended Complaint) The Fall 2011 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 Tr*afficking, 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.

(Only Proposed Amended Complaint) During one seminar at Columbia's School of International and Public Affairs, Den Hollander said 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.

This is just an example of the prevalence and power of Feminism at Columbia, which discovery will expand upon.

Columbia's Continuing Education and Post Baccalaureate Studies must conform to the State's Feminist *Equity for Women, Regents Policy and Action Plan*. Such assures that the plaintiff will encounter and be confronted with unwelcome and offensive Feminist dogma from the Columbia administration, professors, counselors, materials, and school activities in those programs that Den Hollander was thinking of taking.

Pervasiveness of Feminism at Hofstra (Only in Proposed Amended Complaint):

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
l. "Men's issues" yields 0 references.

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.

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.

This is just an example of the prevalence and power of Feminism at Hofstra, which discovery will expand upon.

Chart of record in *Den Hollander I* references to taxpayer or noneconomic injury or standing

Search terms: standing, injury, tax, economic, establishment, religion

Issue	*Documents*	*Raised*	*Litigated*	*Decided*	*Necessary merits*
SDNY					
tax/nonecon	Complaint	No			
tax/nonecon	Mtns Dsmss and Opp	No			

tax/nonecon	Fox R&R	No	No	No
tax/nonecon	Kaplan Order	No	No	No

Appeal

tax	RDH Appl Brf	Yes		
nonecon	RDH Appl Brf	Yes		
tax/nonecon	Col Appl Brf	No		
tax	NY Appl Brf	Yes, pp 24-25		
nonecon	NY Appl Brf	No		
tax	US Appl Brf	No, note p. 15		
nonecon	US Appl Brf	apparently no		
tax	Oral Argmnt	Yes		
nonecon	Oral Argmnt	No		
tax	Appl Order	Yes	Yes	Yes
nonecon	Appl Order	No	No	No

Where's the clear indication that the taxpayer and noneconomic standing issues were decided? In the penumbras or margins of the orders?

So, *Den Hollander I* is bounced out of court because I did not include the words "I am a taxpayer." Yet, when this Court failed to mention the key issue of noneconomic standing, it really did decide that issue somewhere in the penumbras of its Summary Order. So why wasn't my silence interrupted to mean that I had alleged taxpayer standing. Sounds like two standards, one for the powerless and one for the powerful.

Defendants attorneys' dissembling about the record in *Den Hollander I*.

The State attorney's argument that *collateral estoppel* applies to the issues of noneconomic and taxpayer injury relies on two irrational assumptions: (1) words and their usage do not mean what dictionaries and grammar books say they do, and (2) silence about an issue actually means that issue was decided, *contra Arnold Graphics Indus., Inc. v. Indep. Agent Center, Inc.*, 775 F.2d 38, 41 (2d Cir 1985).

Apparently the State's argument that collateral estoppel applies to noneconomic injury is that the State's attorney has the unique ability to read the minds of the judges in *Den Hollander I* and know what they decided even though it is not written in their opinions or stated in oral argument.

The possibility that a particular finding may have played a central role in the subjective process of deciding is not considered for determining whether it was necessarily decided. Wright, Miller & Kane, *Fed. Prac. and Proc.*, § 4421, at p. 545, 3rd ed

The State's attorney also chooses to re-write the Complaint to better fit her revisionist history of *Den Hollander I*.

For example, the State's attorney cites to allegations in the *Den Hollander I* Amended Complaint that are part of the Equal Protection and Title IX sections and bizarrely asserts Den Hollander really meant those allegations to belong to the separate Establishment Clause action. (*State Brf.* p.12).

She juxtaposes the Amended Complaint's allegations, so she can divine out of the silence of Magistrate Fox's *Report* and Judge Kaplan's *Order* that they actually considered and decided noneconomic injury when they did not.

When divination is insufficient, she simply re-writes the words:

For example, she says the district court found nothing more than quote: "feelings of offense" and "subjective offense." (*State Brf.* pp. 9, 12) The words "feelings" and "offense" are not in Magistrate Fox's *Report* or Judge Kaplan's *Order*.

"Feelings" and "offense" are part of Establishment Clause noneconomic injury analysis. *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101, 1108 (2d Cir. 1992).

And *collateral estoppel* requires the specific issue be clearly addressed. *See Barnes v. Hodel*, 819 F.2d 250, 252 (9th Cir. 1987), cert. denied, 484 U.S. 1005 (1988).

She is simply trying to mislead by creating the impression that the district court reached a decision on Establishment Clause noneconomic injury when it did not.

The State's attorney says the "Noneconomic Standing" section in the *Den Hollander II* Complaint, App.109-111, is "nearly identical" to the noneconomic injuries alleged in the *Den Hollander I* Amended Complaint. (*State Brf.* p.13). That is false. There are no Establishment Clause allegations of noneconomic injury in the *Den Hollander I* Amended Complaint.

So what's going on here? She knows this Court does not have the time to check her assertions, so is she making them up anyway in the hope they slide by?

USDOE also wrongly claims that noneconomic injury allegations were raised in the *Den Hollander I* complaint.

If the State and USDOE believed that the issues of noneconomic and taxpayer injuries were raised and litigated in the district court in *Den Hollander I,* then why did they fail to address those issues in their motions to dismiss before Magistrate Fox?

If the State believed the issue of noneconomic injury was raised and litigated in the Court of Appeals in *Den Hollander I,* then why did it fail to address that issue in its Brief?

Even if the State and USDOE's attorneys are right, the mere fact that an issue is raised in a pleading, however, does not establish that the issue was actually litigated and determined. *Matter of Troy Dodson Constr. Co.*, 993 F.2d 1211, 1214 (5th Cir. 1993); Moore 132.03[3][b] n.75.

The State's attorney also claims that Magistrate Fox's cite to *Valley Forge* is sufficient to make clear that he decided Establishment Clause standing:

The *Valley Forge* cite does not deal with Establishment Clause standing and quotes, in part, from the secular case *U.S. v. SCRAP*, 412 U.S. 669, 687 (1973). The cited part of the *Valley Forge* opinion reviews the general requirements for Article III standing. The cite states that general grievances by bystanders over the unconstitutional acts of government do not provide standing, which is how Magistrate Fox used it in denying Equal Protection and Title IX standing, since the plaintiffs were mere bystanders because they had not enrolled in Women's Studies. The part of *Valley Forge* that applies to taxpayer standing is at 479—not 473 that Magistrate Fox cited.

USDOE states that a party's failure to raise arguments in a prior case cannot prevent *collateral estoppel* from applying in a subsequent proceeding, *USDOE Brf.* p.17.

Actually, it does prevent *collateral estoppel* because whether a fact issue is raised and litigated means there is a fight over it in court, and the way parties fight in court is with arguments. No argument—no fight, and a fact issue goes uncontroverted.

Facts which might have been decided, but were not, are not precluded. *Conn. Light & Power Co. v. Fed. Power Commission*, 557 F.2d 349, 353 (2d Cir. 1977)(citing *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 687 (1895); Restatement, *Judgments* § 68).

USDOE argues that the word "standing" is sufficient to satisfy the *collateral estoppel* requirement that the "precise" and "identical" issues of noneconomic and taxpayer injuries were previously litigated.

While use of the word "standing" might include noneconomic and taxpayer injuries, there are no indications in any of the *Den Hollander I* courts that it necessarily does. Even the Court of Appeals found it necessary to separate standing for the "discrimination-based claims" from that for "taxpayer standing." (*Summary Order*, pp. 3-4, App. 93-94). Care must be taken to ensure accurate identification of the jurisdictional issue resolved in the prior action. *Casey v. Department of State*, 980 F.2d 1472, 1475 n.3 (D.C. Cir. 1992)("we cannot isolate 'the precise issue of jurisdiction' decided … therefore [we] assign no preclusive weight to the dismissal").

USDOE relies on *Fabrikant v. French*, 691 F.3d 193, 212 (2d Cir. 2012), for the proposition that the Court of Appeals could consider the fact issues of noneconomic and taxpayer injuries for the first time on appeal. *Fabrikant* states that "we generally ignore arguments advanced for the first time on appeal (or, as here, at oral argument)" unless it concerns a question of law. The issue of injury in fact for standing purposes is a fact question not one of law.

Even were this Court to rule that the Appeals Court in *Den Hollander I* was permitted under the law to decide the issue of taxpayer standing, it still failed to decide noneconomic standing. When an appeal is taken and the appellate court affirms on one ground and does not consider the other, there is no issue preclusion with respect to the unreviewed ground, *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986).

The best result from construing the proceedings in favor of the State and USDOE in *Den Hollander I* is that there exists uncertainty over whether noneconomic injury was actually determined, and uncertainty is not good enough for collateral estoppel to apply.

Alternative Grounds

Judge Swain did remark without any cites: "Plaintiffs attempt to litigate alternative grounds for standing in this lawsuit is improper and unavailing." (Swain *Order* p. 5).

The Second Circuit has endorsed what has been called the general rule with regard to alternative, independently sufficient grounds. If an appeal is taken and the appellate court affirms on one ground and does not consider the other, there is no issue preclusion with respect to the unreviewed ground. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986); *Moore* 132.03[4][b][ii]116.

This view is also followed in the Third, Seventh, Ninth, Eleventh, and District of Columbia Circuits.

The Court of Appeals never considered noneconomic injury; therefore, there is no preclusion on that issue.

Mistakes by RDH over Magistrate Fox and Judge Kaplan's holdings

You could have pleaded the issues of noneconomic injury and taxpayer injury in Den Hollander I but didn't. So why should we allow you to plead both in this case?

Because I had not been trained in the hyper-technical pleading requirements of the 19th century. When I realized that 19th century pleading standards still applied for men's rights case, I asked this court to send the case back to the lower court to discover whether I was a taxpayer or not—this Court refused.

I, just like the Second Circuit Court of Appeals, make mistakes.

That's why collateral estoppel includes the saving grace element that an issue not raised in a prior case, even when the two cases are based on the same cause of action, can be pled in the second case. *Balderman v. United States Veterans Admin.*, 870 F.2d 57, 62 (2d Cir. 1989)(citing *Lawlor v. National Screen Service*, 349 U.S. 322, 326 (1955)); *Restatement (Second) of Judgments* § 27 (1982).

Besides, the absence of a complete allegation of subject matter jurisdiction does not require an amendment of the complaint when the district judge readily can recognize the existence of a federal question. Wright, Miller & Kane, *Fed. Prac. and Proc.*, Civil 2d § 1214, at p. 164, 3rd ed. (2004).

I wrongly stated that Magistrate Fox and Judge Kaplan dismissed the Establishment Clause claims for lack of standing. Motion to Amend Reply pp. 2-3, 10, Docket 39; SJ Statement of Material Facts p. 1 ¶¶ 1, 40, Docket 21; Memo of Law Opposition to Mtns to Dismiss p. 1, Docket 11; Objections to Magistrate Pitman's *Report and Recommendation*, ¶¶ 35, 52, Docket 25.

Another mistake, this time with language, was in my quote from the Second Circuit oral argument where I stated in my Objections to Magistrate Pitman's *Report and Recommendation* that "The first

time the establishment clause claims were addressed by the lower court were addressed by the district judge in his decision." Kaplan didn't "address" the claims, he just gratuitously mentioned them to curry favor with the political correctionalists and Feminists.

Curable Defect

When jurisdiction was inadequately pled but existed in fact at the time of the first proceeding, *collateral attack* does not apply. *Smith v. McNeal*, 109 U.S. 426 (1883).

Before the issue of curable defect can arise, the "precise standing issue," Magistrate Pitman's words, *Report* App. 148-49, must have been "actually determined."

1. The "precise standing issue" of noneconomic injury was never "actually determined" by any judge in *Den Hollander I*. (*Den Hollander Brf*. pp.35-40).

2. Some of the cases relied on by Magistrate Pitman did not have the precise standing issue decided in the earlier case:

Dresser v. Backus, 2000 WL 1086852 (4th Cir. 2000)(unpublished)(prior litigation determined same fact issue that plaintiff had no interest in shares of a corporation);
Hooker v. Federal Election Comm'n, 21 F. App'x 402 (6th Cir. 2001)(per curiam)(prior litigation determined same injury issues of diluted voting power, denial of undivided loyalty, and denial of the right to have their Senators exclusively elected by Tennessee citizens, *Hooker v. Sasser*, 893 F. Supp. 764, 767 (M.D. Tenn. 1995));
Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agric., 378 F.3d 1132 (10th Cir. 2004)(*Park I* determined that lack of ripeness prevented jurisdiction and in *Park II* ripeness still prevented jurisdiction);
Magnus Elecs., Inc. v. La Republica Argentina,830 F.2d 1396 (7th Cir. 1987)(In *Magnus II*, the plaintiff attempted to base subject matter jurisdiction under the first and third clauses of section 28 U.S.C. § 1605(a)(2) while in *Magnus I*, the plaintiff formally alleged jurisdiction only under the third clause but the district court specifically considered the applicability of the first clause as well, *Magnus Elecs., Inc.*, at 1401 n.7);
DaCosta v. United States, 2010 WL 537572 at *4 (Fed. Cl. 2010)(*DaCosta I* decided same injury issue raised in *DaCosta II* that there was no implied contract-in-fact)(Has no precedential value).

Reply p. 23.

3. Other cases relied on by Magistrate Pitman did not involve the absence of a jurisdictional fact in a prior pleading that existed at the time of that pleading:

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979);
Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591 (1948**)**;
Ball v. A.O. Smith Corp., 451 F.3d 66 (2d Cir. 2006);
Uzdavines v. Weeks Marine, Inc., 418 F.3d 138 (2d Cir. 2005);
Bear, Stearns & Co. v. 1109580 Ont., Inc., 409 F.3d 87 (2d Cir. 2005);

Purdy v. Zeldes, 337 F.3d 253 (2d Cir. 2003);
Marvel Characters v. Simon, 310 F.3d 280 (2d Cir. 2002);
Boguslavsky v. Kaplan, 159 F.3d 715 (2d Cir. 1998);
Mrazek v. Suffolk Cnty. Bd. of Elections, 630 F.2d 890 (2d Cir. 1980);
Harley v. Minnesota Mining and Manufacturing Co., 284 F.3d 901 (8th Cir. 2002);
Brereton v. Bountiful City Corp., 434 F.3d 1213 (10th Cir. 2006)(also whether dismissal for lack of standing must be with or without prejudice for *collateral estoppel* to apply);
Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987)(also estoppel used to prevent defendants from challenging prior finding that plaintiffs actually had standing);
Ammex, Inc. v. U.S., 384 F.3d 1368 (Fed. Cir. 2004)(also collateral estoppel will bar the relitigation of any matters in a second proceeding concerning a second taxable year that were actually presented and determined in the first suit);
People of Bikini v. United States, 77 Fed. Cl. 744 (Fed. Ct. Cl. 2007)(also plaintiffs estopped from relitigating dismissal for lack of subject matter jurisdiction caused by U.S. withdrawing consent to be sued);
Bui v. IBP, Inc., 205 F. Supp. 2d 1181(D. Kansas 2002)(also district court invoked collateral estoppel because prior case with same issues was currently on appeal to the Tenth Circuit).

Reply p. 24.

4. Supreme Court and Second Circuit cases allow Den Hollander to cure his failure to allege a jurisdictional prerequisite that existed at the time of the first case by pleading such in *Den Hollander II.*

Smith v. McNeal, 109 U.S. 426 (1883).

In *Smith* the plaintiffs in the first pleading failed to allege that the title to the land they claimed under a Tax Law, when the confederate former owners failed to pay taxes, was disputed by the defendants, so the pleading was dismissed for lack of jurisdiction.

> "The first suit was therefore dismissed, because the declaration did not state the jurisdictional facts upon which the right of the court to entertain the suit was brought. In other words, the case was dismissed for a defect in pleading. In the present suit the defect of the declaration in the first suit is supplied."

Magistrate Pitman held that *Dozier v. Ford Motor Co*., 702 F.2d 1189 (D.C. Cir. 1983) overruled *Smith* because *Smith* was decided before the Federal Rules of Civil Procedure allowed for the liberal amendment of pleadings. (Pitman's *Report* p. 31, App. 156). That reasoning is faulty because since 1938 two Second Circuit cases have relied on *Smith* in upholding the defect in pleading cure. *York v. Guaranty Trust Co.*, 143 F.2d 503, 518-19 and n.21 (1944), *overruled on other grounds*, 326 U.S. 99 (this Supreme Court case was later abandoned in *Hanna v. Plumer*, 380 U.S. 460 (1965); *Ripperger v. A. C. Allyn & Co.*, 113 F.2d 332, 333-334 (2d Cir. 1940), *cert. denied*, 311 U.S. 695.

Smith continues to be cited as good law by the courts of the Fourth, Sixth, and Seventh Circuits and by the Federal Court of Claims.

Ripperger v. A. C. Allyn & Co., 113 F.2d 332 (2d Cir. 1940), *cert. denied*, 311 U.S. 695.

Magistrate Pitman simply replaces its holding for the one he wants that curable defect does not apply to facts that existed at time of first pleading.

Ripperger relied on *Smith* stating that when "the first suit was dismissed because the complaint did not allege the requisite jurisdictional facts … the dismissal was held to be no bar to a second suit in the same court in which the complaint did state them." *Ripperger* at 333.

The Court in *Ripperger* did not allow a second suit because "both complaints [were] alike except for [a] non-jurisdictional allegation in the second complaint…." *Id.* at 333-334.

Other cases support *Ripperger's* holding:

Kendall v. Overseas Dev. Corp., 700 F.2d 536, 539 (9th Cir. 1983)("an alteration of the non-jurisdictional allegations does nothing to cure the original lack of in personam jurisdiction")(emphasis added);

Josephson's Nat'l Bar Review v. Nexus Corp., 359 F. Supp. 1144, 1146 (N.D. Ill. 1973);

Panaview Door & Window Co. v. Van Ness, 135 F. Supp. 253, 260 (D. Cal. 1955)(dismissal of prior action will not "bar a second suit where the pleader in the prior suit failed to allege some essential jurisdictional fact which later is supplied in a new pleading.").

Reply p. 26

York *v. Guaranty Trust Co.*, 143 F.2d 503, 518-19 and n.21 (1944), *overruled on other grounds*, 326 U.S. 99 (this Supreme Court case was later abandoned in *Hanna v. Plumer*, 380 U.S. 460 (1965)).

Magistrate Pitman wrongly declared footnote 21 dicta.

Footnote 21 is used to support the Second Circuit's decision in *York* that the jurisdictional holding in a prior case, *Hackner v. Guaranty Trust Co. Of New York*, 117 F.2d 95, 98 (2d Cir. 1941), *cert. denied*, 313 U.S. 559 (1941), that the plaintiff Mrs. York had not reached the diversity amount of over $3,000 would not be used to give effect to defendant Guaranty Trust's collateral attack on her diversity claim in *York*.

Mrs. York, after the first dismissal for her lack of standing in *Hackner*, filed another case alleging facts that existed when *Hackner* was filed but were not pleaded in that there was an additional amount of value in possible liquidation proceeds of a company in which she held bonds and that brought her over the $3,000 diversity amount.

The *York* Court ruled that its decision in *Hackner* as to the diversity amount was not an "adjudication"; therefore, Mrs. York now had met the standing requirement to bring this second case.

The Second Circuit cited the support for that decision in Footnote 21:

> "This too should be noted: As appears from *Ripperger v. A.C. Allyn & Co.* and *Smith v. McNeal*, 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 (1892); *Sylvan Beach v. Koch*, 140 F.2d 852, 860 (8th Cir. 1944); *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 121 F. 313, 318 (6th Cir. 1903)."

Magistrate Pitman also in error said that "as already discussed, the cases relied upon in the *York* footnote are of questionable help to Hollander." (Pitman's *Report* pp. 34, App.159). Magistrate Pitman, however, never discussed those cases. So how could he know that they are of "questionable help to Hollander"? He couldn't, unless there is a secret addendum.

The Second Circuit, however, believed that those cases were of some support for the proposition that collateral estoppel was "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," since the Second Circuit used a "*Cf.*" signal. "*Cf.*" means that "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." *The Bluebook, A Uniform System of Citation*, p. 23, 17th ed. (2000).

Two other cases in this Circuit do not treat footnote 21 as dicta: *Steele v. Guaranty Trust Co.*, 164 F.2d 387, 388-89 (2d Cir, 1947))(dismissed for lack of jurisdiction as to the plaintiffs other than Mrs. York, the plaintiff in *York v. Guaranty Trust Co.*), and *In re Soya Products Co.*, 112 F. Supp. 94, 97 (S.D.N.Y. 1993).

Lexis lists footnote 21 as one of its Headnotes—HN 7, and Lexis headnotes are used to indicate the black letter law of a case.

Lowe v. U.S., 79 Fed. Cl. 218, 229, 230 (Fed. Ct. Cl. 2007

"[C]ollateral estoppel does not apply to the prior jurisdictional determination because the issue of the court's subject matter jurisdiction over the case as situated 'post-cure' has not yet been litigated."

5. Cases in the Third, Fifth, Eighth, and Tenth Circuits allow curing a jurisdictional defect by stating facts that existed prior to dismissal of the first action.

Magistrate Pitman dismissed the Fifth Circuit case *Mann v. Merrill Lynch, Pierce, Fenner & Smith*, 488 F.2d 75, 76 (5th Cir. 1973) by stating two other circuits "declined to adopt its reasoning." (Pitman's *Report*, p.35 n.6, App.160).

The Magistrate, however, failed to state that two different circuits followed *Mann*.

The Eighth Circuit held, "[t]he issue here is indistinguishable" from the *Mann* decision. *Johnson v. Boyd-Richardson Co.*, 650 F.2d 147, 149 (8th Cir. 1981)(plaintiff permitted to bring second action when first action dismissed for using the wrong name for the defendant).

The Tenth Circuit held this was "[a] case factually close" to the *Mann*. *Trujillo v. Colorado*, 649 F.2d 823, 825 (10th Cir. 1981)(plaintiff permitted to bring second action when first action was dismissed for failure to join proper parties that existed at the time of filing of the first action).

The Third Circuit in *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3rd Cir. 1972), held "jurisdictional dismissals do not bar further litigation of the cause of action when the subsequent complaint cures the jurisdictional defect." In *Smith*, a prior dismissal for lack of

jurisdiction on the grounds of an unfair labor practice did not bar relitigation using the same facts for the jurisdictional grounds of a breach of contract.

The only cases that might support Magistrate Pitman's curable defect position are *In re V & M Mgmt.*, Inc., 321 F.3d 6 (1st Cir. 2003); *Perry v. Sheahan*, 222 F.3d 309 (7th Cir. 2000), and *DaCosta v. United States*, No. 09-558 T, 2010 WL 537572 (Fed. Cl. Feb. 16, 2010)(which has no precedential value)—three circuits but no U.S. Supreme Court.

Magistrate Pitman's efforts to serve the prevalent anti-male ideological bias of the federal courts have resulted in him:

a. overruling a U.S. Supreme Court decision—*Smith v. McNeal*,
b. decreeing a second U.S. Supreme Court case of "questionable help to Hollander"—*Wiggins Ferry Co. v. Ohio & M.R. Co.*,
c. re-writing the analysis of a Second Circuit opinion—*Ripperger v. A. C. Allyn & Co.*,
d. declaring that another Second Circuit case's reliance on the law for deciding an issue was mere dicta—*York v. Guaranty Trust Co.*,
e. [ignoring *Lowe v. U.S.* in the Federal Court of Claims,]
f. scouring the other circuits for cases while ignoring those cases in other circuits that the Second Circuit considered pertinent to the fact situation here: *Sylvan Beach v. Koch*, 140 F.2d 852, 860 (8th Cir. 1944); *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 121 F. 313, 318 (6th Cir. 1903). Those two cases conflict with the interpretations the Magistrate has given to two other cases he relies on from the Sixth and Eighth Circuits—*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), and
g. ignoring cases in other circuits that support not applying collateral estoppel in the fact situation here.

In the end, it is Magistrate Pitman with three relevant cases from two different circuits and the Court of Claims to my ten (10): two of them U.S. Supreme Court, two Second Circuit, two Eighth Circuit, one Fifth Circuit, one Sixth Circuit, one Tenth Circuit and one Court of Claims. Looks like the weight of authority is in my favor.

Post-Judgment Motions
***Memorandum Order* Useless**

Judge Swain adopted wholesale sections of the defendants' memoranda on the post-judgment motions without authoring her own opinion. "[District judges should] avoid as far as [they] possibly can simply signing what some lawyer puts under [their] noses. These lawyers … in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case." *Miranda v. Bennett*, 322 F.3d 171, 177 (2d Cir. 2003)(Kearse, J.)(quoting *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964)).

If Judge Swain did not adopt sections of the State and USDOE's memoranda of law, then what would you call what she did? Okay, so how do you know exactly what her reasoning and holding are? You have to read the defendants memoranda of law.

The Memorandum Order's reference to the State and USDOE's papers in order to fix Judge Swain's reasoning in a tangible form rather than using her own articulation has the same practical effect of a summary order by a court of appeals. A summary order has no precedential effect, so it does not matter whether the law and analysis used is right or wrong because it cannot come back to haunt a court of appeals.

Whatever precedential value may be accorded Judge Swain's *Memorandum Order,* it remains in effect hidden because Lexis and Westlaw keyword searches concerning new evidence, post-judgment amendments, standing, jurisdiction, Rules 59, and collateral estoppel will not find it. So for all practical purposes, it is the same as a Second Circuit summary order. This procedure of referring to a party's papers for its analysis allows the Southern District Court to arbitrarily rule against dissidents and minorities without the same flawed reasoning or invented law being used against those the court personally agrees with in future cases. It is an authoritarian prerogative that supposedly ended with the Magna Carta.

Lord Denning described the *Magna Carta* as "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.

If there is no practical accountability for the powerful, then their decisions are arbitrary.

Are you calling Judge Swain a despot?

Not only her, but every judge I have appeared before in this trilogy of men's rights or anti-feminists cases, except for Judge Calabresi, and so far you all.

Why Judge Calabresi?

Because he's smarter than me, civil, and a friend with whom he attended law school thinks highly of him.

Vacate Motion

Are you appealing denial of the motion to vacate?

No, I'm appealing the judgment on *collateral estoppel* and in that appeal asking this Court to review the denial of the motion to vacate under Rule 59(e). *R Best Produce, Inc. v. DiSapio,* 540 f.3d 115,122 (2d Cir. 2008)(a court will treat as an appeal from the underlying judgment when appeal mistakenly taken from denial of 59(e) motion).

Rule 59(e)

Substantive postjudgment motions brought within the time for Rule 59(e) are functionally motions under 59(e). *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1103 (2d Cir. 1990).

The universal rule is that if a post-judgment motion is filed within 28 days of the entry of judgment and calls into question the correctness of that judgment it should be treated as a motion under Rule 59(e), however it may be formally styled." *Ross v. Global Marine, Inc.*, 859 F.2d 336, 337-38 (5th Cir. 1988); *Van Skiver v. U.S.*, 952 F.2d 1241, 1243-44 (10th Cir. 1991); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1562 (Fed. Cir. 1994); *Hindi Owen Engel ke, Inc. v. GRM Indus., Inc.* 869F.Supp. 539, 546 (N.D. Ill. 1994).

Rule 59(e) is used to obtain substantial modification of the judgment and suspends finality of judgment so as to rectify the judgment. Tolls time to appeal.

Rule 59(e) granted when movant clearly establishes a ground for relief such as newly discovered evidence. *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006).

Rule 59(e) motions only apply to decisions on the merits and a decision on standing is not on the merits?

When the Supreme Court was referring to "merits" it meant the "the underlying merits of the controversy" in question. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174-77 (1989).

It did not mean whether the judgment to be altered was a decision on the merits for *res judicata* purposes, but whether the 59(e) motion deals with issues collateral to the judgment in the specific underlying action.

If the Rule 59(e) motion "raises issues wholly collateral to the judgment in the main cause of action" then it is not a Rule 59(e) motion. *Buchanan v. Stanships, Inc*., 485 U.S. 265, 268 (1988).

Collateral issues are uniquely separable from the cause of action ruled on in the judgment; they do not seek a change in the judgment. *See White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 452 (1982).

The controversy here addressed by the motion to alter was whether issue preclusion applied—that was the crux of the judgment.

In deciding whether issue preclusion applied, a district court must examine—or in the case of a postjudgment motion, reexamine—matters encompassed within the merits of the underlying action. *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174-77 (1989). Here for example, were the proposed new parties privy to the prior action, were the issues of taxpayer and noneconomic injuries raised, litigated and decided for them in the prior action.

Examples of collateral issues include:

A request for attorney's fees because it required a separate decision from whether the plaintiff was injured, attorney's fees under § 1988 are not considered compensation for the injury. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 452 (1982).

A motion for costs filed under Rule 54(d) "raises issues wholly collateral to the judgment in the main cause of action." *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (1988).

Rule 60 (b)

Rule 60(b) is used to relieve a party of the final judgment if filed after time to appeal passed. It is a collateral attack on the final judgment.

Newly discovered evidence

Rule 59(e) used when newly discovered evidence becomes available after judgment. *Schiller v. Physcians Res. Group, Inc.*, 342 F.3d 563, 567 (5th Cir. 2003); *Atlantic States Legal Found., Inc. v. Karg Bros., Inc.*, 841 F.Supp. 51, 55-56 (N.D.N.Y. 1993).

Judge Swain held that once she disposed of the case *Den Hollander II* for lack of standing due to collateral estoppel, her *Order* could not be vacated under Fed. R. Civ. P. 59(e) because "newly-discovered plaintiffs, are not newly-discovered *evidence*" (her emphasis), App. 210.

Evidence is "[a]ny species of proof presented . . . through the medium of witnesses, records, documents, exhibits, and concrete objects for the purpose of inducing belief in the minds of the [court] as to their contentions." American Jurisprudence, *Evidence* § 1.

Judge Swain ignored that persons are simply a medium for providing evidence, so new persons with different fact situations mean new evidence as compared with *Den Hollander I*. The new plaintiffs provided new factual allegations in a verified complaint.

In an analogy to a Second Circuit case concerning a new trial under Rule 59(a), this Court said that the plaintiff had a new witness willing to testify, which meant new evidence. *Li Butti v. U.S.*, 178 F.3d 114. 119 (2d Cir. 1999)(plaintiff failed to show how testimony would change result).

"Evidence, broadly defined, is the means from which an inference may logically be drawn as to the existence of a fact . . . ." *Black's Law Dictionary*, 9th ed. (quoting 31A C.J. S., *Evidence* § 3, at 67-68 (1996)).

Evidence is "[a]ny circumstance which affords an inference as to whether the matter alleged is true or false." American Jurisprudence, *Evidence* § 1.

With the two new plaintiffs in the case, the logical inference is that the ultimate fact of collateral estoppel does not apply; therefore, summary judgment based on collateral estoppel would be obviated and the case would continue.

Genesis of new plaintiffs

USDOE accuses Den Hollander of lying. Why would Den Hollander lie about finding the two new plaintiffs after Judge Swain's summary judgment on *collateral estoppel.* If he knew of them sooner, he would have added them to the complaint.

Prior to the filing of *Den Hollander I*, the plaintiff had started an ongoing effort to find additional plaintiffs to join litigation that opposed the governmental imposition of a state approved belief system—Feminism—on higher education. The plaintiff contacted various individuals and student organizations at Columbia and found one other plaintiff for *Den Hollander I*, but the Feminist opprobrium directed toward him as a result caused his withdrawal from the case. Other attempts at enrolling individuals—email to individuals interested in men's rights, contacting men's rights organizations, such as the Male Studies Foundation—who were taxpayers in New York State were unsuccessful. After Judge Swain's ruling, I was contacted by one N.Y. resident on a different matter and thought he might be willing to join the case, which he did. I then remembered another N.Y. resident whose rights were then being violated by VAWA and he also agreed to join.

Manifest Injustice

How do you know that a new suit by the new plaintiffs will be barred by collateral estoppel?

The past is prologue. Federal courts will use any technicality to dispose of a men's rights case.

Fulani v. Bentsen, 862 F.Supp. 1140 (S.D.N.Y. 1994) held that "[O]ne whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, even though the first party was not formally a party to the litigation." *E.g., Conte v. Justice*, 996 F.2d 1398, 1402 (2d Cir.1993); *Alpert's Newspaper Delivery Inc. v. New York Times Co.*,876 F.2d 266, 270 (2d Cir.1989); *Ruiz v. Comm'r of Dep't of Transp.*,858 F.2d 898, 903 (2d Cir.1988); *Expert Elec., Inc. v. Levine*,554 F.2d 1227, 1233 (2d Cir.),*cert. denied*, 434 U.S. 903 (1977).

Amend Motion
Power of the Court

Substantively speaking, this motion to amend was the first effort to amend the complaint.

Why not just bring another case with these two new plaintiffs?

To quote this Court in *Hackner v. Guaranty Trust Co. Of New York*, 117 F.2d 95, 98 (2d Cir. 1941), *cert. denied*, 313 U.S. 559 (1941), it would avoid "delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are."

It would also avoid promoting dilatory contests over whether a particular amendment is allowable as an amendment or must be filed as a new complaint.

In addition, I'm asking for review of the lower court's decision that I was collaterally estopped to allege standing, so if this Court decides to overrule the district court on *collateral estoppel*, then the case will end up back there anyway.

Finally, *Fulani v. Bentsen*, 862 F.Supp. 1140 (S.D.N.Y. 1994), will result in the new action in which I'm the attorney being dismissed on *collateral estoppels* grounds. "[O]ne whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, even though the first party was not formally a party to the litigation." *E.g., Conte v. Justice*, 996 F.2d 1398, 1402 (2d Cir.1993).

What must come first: a plaintiff with standing or an amendment to add a plaintiff with standing? In this circuit, it does not matter.

Judge Swain held that even if she vacated her *Order* her court did not have subject matter jurisdiction to allow amendment of the Complaint to add new plaintiffs that would cure standing.

According to her, once a district court makes a summary judgment decision that there is no standing, that's it. The complaint can no longer be amended. That's pretty technical and sounds like the 19th century.

Such a superficially persuasive argument rests on the metaphysical notion that since there was no plaintiff before the court with a valid cause of action, there was no proper party available to amend the complaint.

However, when a court grants a 59(e) motion, the previous judgment no longer exists. *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 520 (7th Cir. 1993).

Therefore, if Judge Swain's October 31st *Order* is vacated, then there is no ruling by her that Den Hollander lacked standing, so her court could then entertain a motion to amend. Once she vacates the *Order*, she has the power that every court has to make a decision on standing, which includes whether to allow an amended complaint that impacts standing.

The addition of the two new plaintiffs would be as if the original complaint included them as named plaintiffs. So, regardless of what the Court does regarding Den Hollander, the two new plaintiffs will not be denied standing on collateral estoppel grounds. Therefore, the case cannot be terminated through summary judgment based on collateral estoppel.

The propose amendment brings an otherwise valid complaint by real, live plaintiffs before the district court. The manner in which the complaint came before the court should be irrelevant unless it prejudices someone in some articulable way.

Case law in this circuit holds a district court has the power to amend a complaint to substitute a plaintiff with standing when the original plaintiff lacked standing:

Hackner v. Guaranty Trust Co. Of New York, 117 F.2d 95 (2d Cir. 1941), *cert. denied*, 313 U.S. 559 (1941).

In an opinion by Judge Charles E. Clark, who served as reporter for the Federal Rules Advisory Committee that drafted *Rule 15*, this Court held that the amended complaint was a valid way of commencing suit, even though all of the original plaintiffs had been dismissed.

Hackner was a putative class action where the district court dismissed the complaint because the original named plaintiffs lacked standing. None of the plaintiffs had the required diversity amount. The district court rejected their amended complaint to substitute plaintiffs who had standing.

The Court of Appeals, however, allowed the amendment because it substituted a new plaintiff who met the jurisdictional amount for diversity actions. The amended complaint did not cure the original plaintiffs' lack of standing.

The Second Circuit in *Hackner* stated the "Defendants' claim that one cannot amend a nonexistent action is purely formal, in the light of the wide and flexible content given to the concept of action under the new rules." *Hackner*, 117 F.2d at 98; accord *Bowles v. J. J. Schmitt & Co*., 170 F.2d 617, 621 (2d Cir. 1948)("We have held in effect that an action can be started in favor of a new plaintiff without particular formalities so long as there is adequate service."); *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 200 F.2d 876, 879 (2d Cir. 1952)(Clark, J., concurring). As the Supreme Court has pointed out, "there is no particular magic in the way [an action] is instituted." *Hackner*, 117 F.2d at 98 (citing *Chisholm v. Gilmer*, 299 U.S. 99, 102 (1936)).

The new plaintiff in *Hackner* had a claim for relief, as do the two new plaintiffs here. *Hackner*, 117 F.2d at 98.

Hackner remains the rule in the Second Circuit for curing standing by adding a new plaintiff:

"In the classic case of *Hackner* . . . [the Court of Appeals] allowed the substitution of a new unrelated plaintiff for the one who could not show federal jurisdiction." *United States v. Matles*, 247 F.2d 378, 380 (2d Cir. 1957), *rev'd on other grounds, Matles v. United States*, 356 U.S. 256 (1957).

Based on *Hackner*, the Court of Appeals recognized the power of the district courts to grant an amendment adding an unrelated party that brings the case within the court's jurisdiction. *Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Company*, 700 F.2d 889, 893 n.9 (2d Cir. 1983); see *Staggers v. Otto Gerdau Co.*, 359 F.2d 292, 296 (2d Cir. 1966)(under Rule 15, a court may substitute new plaintiffs).

In *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 19-21 (2d Cir. 1997), the Court of Appeals permitted the substitution of plaintiffs by amendment that would relate back to the date of the original complaint pursuant to Rule 15(c).

In Atlantic States Legal Found., 841 F. Supp. 51, 53-55 (N.D.N.Y. 1993), the district court, after granting partial summary judgment in favor of the defendant based on the plaintiffs' lack of standing, vacated the judgment to find standing.

State's dissembling about Hackner:

In the State's effort to keep *Hackner* from applying, it intentionally creates a false impression that the plaintiffs in *Hackner* made a motion to "Intervene" under Rule 24 and not a motion to amend the complaint. Based on that factual falsehood, the State then argues that Den Hollander did not make a motion to Intervene under Rule 24; therefore, *Hackner* does not apply. *State Brf.* p. 24.

The *Hackner* Court, however, stated that the "defendants were served with an Amendment to Complaint striking the name of C. J. Bowman as party plaintiff and adding as plaintiffs Grace W. York, who was alleged to be still holding notes in the amount of $6,000, and Eunice E. Eastman, who had held notes in the amount of $10,000, but had been induced to part with them on the same terms as had the original plaintiffs."

The *Hackner* Court then held: "Hence no formidable obstacle to a continuance of the suit appears here, whether the matter is treated as one of amendment or of power of the court to add or substitute parties, Federal Rule 21, or of commencement of a new action by filing a complaint with the clerk, Rule 3. In any event we think this action can continue with respect to Eastman without the delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are."

Even the case cited by the State for support of its disingenuous argument, *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 161 (2d Cir. 2012), states that *Hackner* dealt with amendment to the complaint by substituting plaintiffs.

In *Disability*, unlike in *Hackner*, the United States tried to intervene six years later, after discovery, after a trial had concluded , the district court had already made important decisions of fact and law and where the plaintiff had no standing. It was just too late—six years too late.

In *Den Hollander II* there has been no trial, no discovery, and the summary judgment was only on standing, not on the substantive allegations. We're still in the first inning in this case.

Hackner is about substituting parties, specifically plaintiffs—just as is the proposed amendment in this case.

<u>*National Maritime Union of America, v. Curran*</u>, 87 F. Supp. 423, 425-26 (S.D.N.Y. 1949).

Held that the court had discretion to allow substitution of plaintiffs to satisfy diversity jurisdiction requirements in order to give the court jurisdiction where no jurisdiction existed when the complaint was filed.

The district court recognized that all the original plaintiffs in a suit can be dropped and new ones added by amendment.

Southern District Court Judge Kaufman stated: "Though there is authority for the view that an amendment presupposes jurisdiction of the case [citations omitted], the better view, which seems to be more in keeping with the spirit and liberality of the Federal Rules, does permit an amendment to cure a jurisdictional defect . . . . *E.g., Hackner v. Guaranty Trust Co. of New York*, 2 Cir., 1941, 117 F.2d 95, *certiorari denied* 1941, 313 U.S. 559, 61 S.Ct. 835, 85 L.Ed. 1520; *International Allied Printing Trades Ass'n v. Master Printers Union*, D.C.N.J. 1940, 34 F.Supp. 178; *Moreschi v. Mosteller*, D.C.W.D. Pa. 1939, 28 F.Supp. 613."

As Judge Kaplan said in *Sheldon v. PHH Corp*., 96 Civ. 1666, 1997 U.S. Dist. LEXIS 221*11 n.7, 1997 WL 91280 (S.D.N.Y. Mar. 4, 1997)(Kaplan, J.), *aff'd* 135 F.3d 848 (2d Cir. 1998):

"*Hackner's* holding was endorsed and explained in *National Maritime Union of America v. Curran*, 87 F. Supp. 423, 425-26 (S.D.N.Y. 1949). The question that Judge Kaufman there asked was whether 'Rule 21, allowing parties to be dropped or added, [can] be then construed to permit a complete substitution of all the parties.' *Id.*, at 425. In answering the question in the affirmative, the court relied on *Hackner* and a number of other decisions that supported substitution under Rule 21 and noted that this was a policy superior to allowing substitutions under Rule 15. *Id.* at 426."

'The rationale for this conclusion seems to be that because Rule 21 specifically provides for the addition or elimination of parties . . . . Wright, Miller & Kane, *Fed. Prac. And Proc.*, Civil 2d § 1479, at pp. 569-70 (1990).

National Maritime, however, chose not to permit the amendment, it did so only under the theory that amendments adding or dropping parties must meet *Rule 21*'s leave of court requirement as well as the requirements of *Rule 15*.

Park B. Smith, Inc. v. CHF Indus., Inc., 811 F. Supp. 2d 766, 773 (S.D.N.Y. 2011).

Courts in the Second Circuit have generally allowed for substitution when a mistake has been made as to the person entitled to bring suit and such substitution will not alter the substance of the action.

Also *Board of Elections v. Lomenzo*, 365 F. Supp. 50, 53 (S.D.N.Y. 1973).

Similar results have been reached by cases in other circuits following *Hackner*:

Health Research Group v. Kennedy, 82 F.R.D. 21, 29-30 (D.D.C. 1979).

Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257, 265 (9th Cir. 1964) *cert. denied*, 380 U.S. 956 (1965).

Morrow v. Spiess, 349 F.2d 931, 933 (10 Cir. 1965).

Travelers Indem. Co. v. United States ex rel. Construction Specialties Co., 382 F.2d 103, 105-06 (10th Cir. 1967) (quoting Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

"There is a division of authority among the circuits concerning the allowance of amendments which involve the adding of parties. However, we believe the philosophy underlying the federal rules [has been] well expressed by the Supreme Court . . . and is controlling: 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' This purpose is not furthered by giving Rule 15 lip service rather than full fealty. Nor is the purpose of the federal rules furthered by denying the addition of a party who has a close identity of interest with the old party when … [there will be no prejudice]. The ends of justice are not served when forfeiture of just claims because of technical rules is allowed."

State's cases

The State relies, in part, on two district court opinions outside this circuit that are brief ex cathedra rulings unsupported by analysis or citation of precedent: *Turner v. First Wisconsin Mortgage Trust*, 454 F. Supp. 899, 913 (E.D.Wis. 1978), and in the lower court *Schwartz v. The Olympic, Inc.*, 74 F. Supp. 800, 801 (D.Del. 1947), both of

Relation Back

The Second Circuit has held:

> Once subject matter jurisdiction is 'cured' by an amendment, courts regularly have treated the defect as having been eliminated from the outset of the action. In other words, where a change in parties, necessary to the existence of jurisdiction, is appropriate and is made (even on or after appeal), appellate courts have acted as if the trial court had jurisdiction from the beginning of the litigation.

Le Blanc v. Cleveland, 248 F.3d 95, 99 (2d cir. 2001)(quoting *E.R. Squibb & Sons, Inc. v. Lloyd's & Co.*, 241 F.3d 154, 163 (2d Cir. 2001).

When the amendment states a new basis for subject matter jurisdiction by changing or adding parties, relation back to the date of the original filing applies. *Woods v. Indiana University-Purdue Univ.*, 996 F.2d 880, 884 (7th Cir. 1993); see *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 954 (5th Cir. 1994).

"The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." Notes of Advisory Committee on Rules—1966 Amendment.

Addition v. Substitution

USDOE tries to make a distinction between "adding" and "substituting" parties. (*USDOE Brf.* p. 26.

Rule 15(a) can be used to add or substitute a party. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3rd Cir. 1976); *Wilger v. Dep't of Pensions & Sec. State of Ala.*, 593 F.2d 12 (5th Cir. 1979); Wright & Miller, *Fed. Prac. and Proc.*, § 1474. 3rd ed., p. 629.

Although Rule 15(c)(1)(C) refers only to an amendment that "changes the party," courts and commentators agree that the word "changes" must be interpreted sensibly and pragmatically to include the addition of parties. *Andujar v. Rogowski*, 113 F.R.D. 151, 154 n.4 (S.D.N.Y. 1986).

Rule 21 specifically states a court may "add or drop a party."

So even under USDOE's Clintonesque linguistics, the district court could add the two new plaintiffs and then drop Den Hollander with the end result being one of substitution. Therefore, all those cases that USDOE alleges as not applying do apply.

Amend Motion

No Justifying Reason, So Abuse of Discretion

Judge Swain ruled that the amendment would have been dismissed under Rule 12(b)(6) anyway, App. 211-213.

Judge Swain did not engage in the required plausibility analysis and her decision was based solely on a legal conclusion. Therefore, her decision of inevitable dismissal is not a "justifying reason" as

required by *Foman v. Davis*, 371 U.S.178, 182 (1962) and *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002), for denying the amendment.

The current procedure in determining dismissal under Rule 12(b)(6) requires the application of the "plausibility standard." (1) Identifying the specific allegations in a complaint that are conclusory, (2) Consider the remaining factual allegations in a complaint as true and determine if they plausibly—not probably but more than possibly— infer that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662 679-81 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Hayden v. Paterson*, 594 F.3d, 150, 161 2d Cir. 2010).

A complaint cannot be dismissed based on a judge's or opposing counsel's disbelief of the factual allegations even if it strikes them that actual proof is improbable. *Twombly*, 550 U.S. at 555-56.

"[W]hen a district court bases its decision solely on a legal conclusion that the amended pleading would not withstand a motion to dismiss, this court [of appeals] must review the legal conclusion *de novo*. Whether an abuse of discretion occurred in such a case depends in whole upon the correctness of the district court's predicate legal conclusion." *Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986).

The exceptions cited in *Foman* for not freely granting leave to amend post-judgment are not present in this case:

No delay
No prejudice—no discovery, no change in cause of action, same series of transactions
No futility—merits never addressed in any court

Therefore, under *Foman*, *Jin* and *Martin*, Judge Swain's decision of inevitable dismissal was an abuse of discretion.

State and USDOE misplaced arguments

The State's attorney took into account the wrong complaint. The pertinent complaint is the proposed amended complaint. *State Brf.* pp. 17, 18.

The State's attorney and USDOE argue that a justifying reason to deny amendment is that the proposed amendment is futile because student aid does not violate the Establishment Clause. (*State Brf.* pp. 16-17; *USDOE Brf.* pp. 30, 31). They missed, however, that the proposed amendment does not allege student aid as violating the Establishment Clause.

State's attorney argues the proposed amendment futile because the noneconomic allegations are "meritless." Once again, she cites to the wrong complaint—the original complaint instead of the proposed amended complaint. (*State Brf.* pp. 17, 18). And to make a decision based on merits requires compliance with *Iqbal*, 556 U.S. at 679-81; *Twombly*, 550 U.S. at 556; *Hayden v. Paterson*, 594 F.3d at 161.

The State's attorney also claims futility because Feminism is not a religion, but she doesn't even make the required merits analysis of *Iqbal*, 556 U.S. at 679-81; *Twombly*, 550 U.S. at 556; *Hayden v. Paterson*, 594 F.3d at 161.

USDOE also fails to provide the analysis for dismissing a complaint as required by *Iqbal*, 556 U.S. at 679-81; *Twombly*, 550 U.S. at 556; *Hayden v. Paterson*, 594 F.3d at 161.

The closest that USDOE comes to the required analysis is its assertion that the proposed amended complaint provides "no factual allegations" of funds provided by Congress for specific USDOE programs that are applied so as to aid the inculcation of Feminism in New York's higher education. That is simply false as the proposed amended complaint alleges at ¶¶32-36, 76-78, 123, 125, 159-160, 162-168, App.177-178, 185-186, 194-195, 199-201.

Amend Motion

Feminism is a religion and defendants aid it, so amendment not futile

If a judgment must be vacated first before a motion to amend post-judgment can be considered, why should the lower court even address the amendment?

In dealing with post-judgment motions to vacate and amend "it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previous judgment." *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011).

Such is what the lower court did by incorporating parts of the State and USDOE's memoranda of law into its *Memorandum Order* with the result that the amended complaint would be dismissed anyway under Rule 12(b)(6). *Memorandum Order* App. 211-213.

A court's determinations are context-specific. *Iqbal*, 129 S. Ct. at 1950; *South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 110 (2d Cir. 2009).

Here that means whether the allegations in the proposed amended complaint are plausible that Feminism is a religion.

If not, then the proposed amended complaint is futile and all the other issues disappear.

<u>Feminism = Religion</u>

Court Tests

The original complaint and proposed amended complaint allege that under decisions of the U.S. Supreme Court; the Third, Fourth, Eighth, Ninth, and Tenth Circuit Courts of Appeals; Title VII of the Civil Rights Act of 1964; and a case from the Southern District of New York; the belief system Feminism, as propagated and aided by the defendants, satisfies the tests for being a religion under the First Amendment, whether the Establishment or Free Exercise clauses:

Third— *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979)
Fourth—*Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986)
Eighth—*Love v. Reed*, 216 F.3d 682 (8th Cir. 2000)
Ninth—*Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996)
Tenth—*United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), circuits,
SDNY-- *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

The Supreme Court ruled that the test for determining whether a belief system is religious is that it "stems from … moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions." *Welsh v. U.S.*, 398 U.S. 333, 339-340 (1970); *U.S. v. Seeger*, 380 U.S. 163, 176, 186 (1965).

"If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience … those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons. Because his beliefs function as a religion in his life …." *Welsh*, 398 U.S. at 340 (internal quotes *Seeger*, 380 U.S. at 176).

"Buddhism, Taoism, Ethical Culture, Secular Humanism," and other non-theistic belief-systems are religions. *Torasco v. Watkins*, 367 U.S. 488, 495 n. 11 (1961).

Even the ethical beliefs of an atheist who does not believe in an afterlife are considered religious. *U.S. v. Bush*, 509 F.2d 776, 780, 782-783 (7th Cir. 1975).

The Equal Employment Opportunity Commission in Title VII employment cases considers as religion moral or ethical beliefs sincerely held with the strength of traditional religions. 29 C.F.R. §1605.1; *LaViolette v. Daley*, E.E.O.C. No. 01A01748 (Sept. 13, 2002).

The New York Southern District Court in *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, determined whether a belief system was religion for Establishment Clause proposes by using the Establishment Clause analysis from *Malnak v. Yogi*, 592 F.2d 197, 208-210 (3d Cir. 1979)(Adams, J. concurring).

Judge Adams's guidelines in *Malnak* have been followed by the Third, Fourth, Eighth, Ninth, and Tenth Circuit Courts of Appeals.

The *Malnak* test looks at three factors: whether the belief-system (1) addresses fundamental and ultimate questions having to do with deep and imponderable matters, (2) do the ideas have a broader scope that lay claim to definitive and comprehensive truths, (3) has formal and external signs such as structure, organization, efforts at propagation, and observance of holidays. Not all of the indicia need be satisfied for a belief system to be a religion, but in the case of the Feminism promoted by the State and financially aided by the State and USDOE, all three are. (Compl. ¶¶ 50, 53-69, 92-110; Prpsd Amend. Compl. ¶¶ 43, 48-65, 98-116).

In other words, 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.

Application of these tests to the Feminism propagate under Equity for Women Policy and Action Plan.

The Feminism required in higher education by the Regents addresses fundamental and ultimate questions having to do with deep and imponderable matters—what's more fundamental and imponderable than the relations between the sexes, the creation and destruction of life, how to live one's life and die one's death?

The State's Feminism:

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.

State Feminism Irrationality

"'[I]ntensely personal' convictions which some might find 'incomprehensible' or 'incorrect' come within the meaning of 'religious belief'…." *Welsh*, 398 U.S. at 339 (internal quotes *Seeger*, 380 U.S. at 184-185):

For the State's Feminism one example is that sexual differences are a result of upbringing. The Regents declared 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).

Such a disregard for neuroscience, evolution, biology, and physics makes the belief incomprehensible and irrational—a characteristic of religion.

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.

State Feminism Absolute Truths

Religious ideas have a broader scope that lay claim to definitive and comprehensive truths, regardless of empirical data:

Feminism and the Regents' policies claim that females "do not get the same economic return on their education as men." *Equity for Women, Regents Policy and Action Plan*. Yet, females earn more per unit of time worked than males. If the two worked the same amount of time, for every dollar a male earns, a female makes $1.09.

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. 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.

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.

Females hold 51.4% of all the managerial and professional positions. The Atlantic, Nov. 2011, *All the Single Ladies*, Kate Bolick.

Females are 15 times more likely than men to become top executives in major corporations before age 40. Dr. Warren Farrell.

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.

Female pay exceeds men in more than 80 different fields, a female investment banker starts at 116% that of a man, female sales engineers earn 143% of their male counterparts. Dr. Warren Farrell, *Why Men Earn More*.

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). In 1960 it was 94%. *1960 U.S. Census of Population*.

Of all adults who work part time, females earn 115% that of men. *National Center for Policy Analysis*, Denise Venable.

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*.

"Feminism remains an ideology many measure themselves against . . . ." Jennifer Scanlon, editor, *Significant Contemporary American Feminists*, p. xv.

Feminism is non-falsifiable, which makes it more like a religion, *Who Stole Feminism?*, Christina Hoff Sommers, p. 96.

Feminism is more like a religious undertaking than an intellectual one, Sir Karl Popper.

Feminist theologian Serene Jones, President of Union Theological Seminary, authored the book *Feminist Theory and Christian Theology: Cartographies of Grace*, in which she explores how Christian ideas — of salvation, for example — relate to feminist notions of how women can transform their lives. As President of Union Theological, her strategy is to have the Seminary weigh in with a moral seriousness on issues related to justice and peace and beauty at Columbia University. *Columbia Magazine*, Spring 2008, News.

The Skeptical Feminist: A Philosophical Inquiry, by Janet Radcliffe Richards points out similarities between Feminism and religion.

State's attorney ignores the application of the tests for religion:

The State's attorney argues Feminism is not a religion because "'the conventional, majority view'" holds such. (*State Brf.* p.19). How does she know? Did she conduct a poll? No, she just decrees it, the way the nobility did in the middle ages.

She relies on the criminal case *U.S. v. Allen*, 760 F.2d 447 (2d Cir. 1985), for defining religion as the "conventional, majority view." The problem is that statement is *dicta*. The *Allen* Court held there was no aiding of religion. It never ruled on whether "nuclearism" was a religion. It stated that "even if 'nuclearism' could be classified as a religion," the statute in question did not aid "nuclearism" because it had a secular purpose and did not have the effect of advancing such nor entanglement. *Allen*, at 451-52.

The State and USDOE claim that the definition of religion is "narrower" in Establishment Clause cases, *State Memo. Mtn. Dsmss.* pp. 13-15, Docket No.9; *USDOE Memo. Mtn Dsmss* p. 2 n.3, even though the courts have never ruled such, *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 n.6 (9th Cir. 1996).

USDOE does rely on a number of cases but as applied here, those case show that Feminism is a religion:

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972), stated religion is not merely a matter of personal preference, but is shared by an organized group, and intimately related to daily living. *Yoder* cited to Justice Harlan's concurring opinion in *Welsh v. U.S.*, 398 U.S. 333, 353 (1970), that religion is more than devotion "to individual principles acquired on an individualized basis"; that it involves "shared beliefs by a recognizable and cohesive group." The Feminism propagated at Columbia's IRWG, Hofstra's Women's Studies program, and by the State is a well organized, far reaching belief system of widely accepted tenets that mandate daily activities in how to live, work and relate to others. (Proposed Amended Complaint ¶¶43-65, App.179-184).

U.S. v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996) and *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 (9th Cir. 1996) state "that religious beliefs are generally characterized by, [among other traits], 'ultimate ideas,' 'metaphysical beliefs,' a 'moral or ethical system,' and the 'accoutrements of religion' … [that] 'demonstrate any shared or comprehensive doctrine or 'display any of the structural characteristics or formal signs associated with traditional religions." *Meyers* includes under accoutrements: comprehensiveness of beliefs; founders, prophets, or teachers; important writings; keepers of knowledge; structure or organization; holidays; and propagation.

The proposed Amended Complaint alleges for IRWG, Hofstra's Women's Studies program and the State's *Equity for Women in the 1990s Regents Policy and Action Plan, Background Paper* (1993) and the State's other policy statements, the characteristics cited in *Meyers* and *Alvarado*. (Proposed Amended Complaint ¶¶43-65, 99-113, App.179-184, 190-193).

Therefore, by USDOE's own cited criteria, the proposed Amended Complaint alleges the Feminism promoted and financed by the State and financed by USDOE satisfies the requirements of a religion.

Frivolity

USDOE asserts that the proposed amended complaint's allegations, ¶¶ 37-65, App. 178-184, of Feminism as a religion are frivolous. USDOE does not refer to any statute, rule or otherwise under which it bases that allegation, nor does it provide any analysis. USDOE just makes a conclusory statement.

A federal court has jurisdiction to hear claims on the margins of reasonable possibility. See *Nolan v. Meyer*, 520 F.2d 1276, 1278 (2d Cir.), *cert. denied*, 423 U.S. 1034, 46 L. Ed. 2d 408, 96 S. Ct. 567 (1975); *Blaney v. Florida Nat'l Bank*, 357 F.2d 27, 28-29, 31 (5th Cir. 1966).

If the ethical beliefs of an atheist who does not believe in an afterlife are considered religious, *United States v. Bush*, 509 F.2d 776 (7th Cir. 1975), why not Feminism, which has more of the attributes of a traditional religion than atheism.

USDOE relies on the decree by Judge Kaplan that Feminism is not a religion and the "core of the [*Den Hollander I*] complaint therefore is frivolous." (*USDOE Brf.* pp. 2, 27).

A judge makes a statement without any of the required analysis for dismissing on the merits, without any evidence necessary for a summary judgment, and now that statement is written into the black letter of the law.

Are we back in the days when a **nobility of the powerful** simply decree what is the rule of the land? I don't think so.

Besides, it is unclear whether Judge Kaplan even had jurisdiction to rule on the merits.

"Jurisdiction, whether it be subject-matter or personal, concerns the authority of the court to hear and determine the controversy." *Local 538 United Bhd. of Carpenters & Joiners v. U.S. Fid. & Guar. Co.*, 154 F.3d 52, 55 (2d Cir. 1998). Without it, a court lacks the power to adjudicate a cause of action, such as an Establishment Clause violation. See, *U.S. ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969).

28 USC § 1915 (e)(2):

Applies to *pro se* plaintiffs whether they paid full fees of not. *Fogle v. Pierson*, 435 F.3d 1252, 1257-58 (10th Cir. 2006).

Den Hollander is *pro se* in district court.

A determination of frivolous under the statute is the same as a determination of dismissal under Rule 12(b)(6). The plausibility standard applies and USDOE has not provide such an analysis.

Actions based on plausible allegations of constitutional violations are usually not dismissed as frivolous. *Thomas v. Scully*, 942 F.2d 259, 260 (2d Cir. 1991).

Inherent court power:

An inherent power to sanction may be imposed either for commencing or for continuing an action in bad faith, vexatiously, wantonly, or for oppressive reasons. *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986).

To ensure, however, that fear of sanctions will not deter persons with colorable claims from pursuing those claims, this Court has declined to uphold sanctions under bad-faith unless there are "clear evidence that the challenged actions are entirely without color, . . . [are taken] for reasons of harassment or delay or for other improper purposes" and lack "a high degree of specificity in the factual findings of [the] lower courts." *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986).

28 USC 1927:

Like a sanction made pursuant to the court's inherent power, an award under Sec. 1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay. See *Acevedo v. Immigration and Naturalization Service*, 538 F.2d 918, 920 (2d Cir.1976).

An award made under Sec. 1927 must be supported by a finding of bad faith similar to that necessary to invoke the court's inherent power. *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986).

Attorney must exhibit a significant degree of recklessness, bad faith, or improper motive.

42 U.S.C. Sec. 1988:

Attorneys' fees may be awarded only if the court finds that the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986).

The proper test for that award is whether the claim itself is clearly meritless. *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986).

Rule 11:

I'm not asking for extension, modification or reversal of existing law but for the application of existing law.

Sanctions are not intended to impede zealous or creative advocacy. Courts must exercise extreme caution in sanctioning attorneys under Rule 11, particularly where such sanctions emerge from an attorney's efforts to secure the court's recognition of new rights, and "so as not to discourage attorneys from advocating positrons which, though today perceived as absurd, may become tomorrow's law." *Larez v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994).

The court is to avoid hindsight and resolve all doubts in favor of the signer. *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986).

The advisory committee note to the amended rule states that the signer's conduct is to be judged as of the time the pleading or other paper is signed.

Absence of legal precedent, presentation of unreasonable legal argument or failure to prevail on merits [never reached the merits] of particular legal contention cannot justify finding of frivolousness. *Leach v. Boyer*, 929 F.Supp. 319. 324 (N.D. Ind. 1996).

Frivolousness requires that under existing precedents there was no chance of success or a party failed to advance a reasonable argument. *Securities Indus. Assoc. v. Clarke*, 898 F.2d 318, 321 (2d Cir. 1990).

Frivolousness when based on legal theories plainly foreclosed by well-established legal principles and authoritative precedent. To my knowledge, there has never been a case that dealt with whether Feminism was a religion.

A legal argument need not ultimately prevail to be warranted by existing law. *Associated Indemnity Corp. v. Fairchild Indus., Inc.*, 961 F.2d 32, 36 (2d Cir. 1992).

Factual contentions require evidentiary support. *Fed. Proc.* §62.845.

The extent to which a litigant has researched the issues, engaged in reasonable investigation, and found some support for his theories should be taken into account. Moore's, *Fed. Prac.* § 11.11(5).

Rule 11 is violated only when it is "patently clear that a claim has absolutely no chance of success." *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985).

Sanctions shall be imposed when it appears that a competent attorney could not form the requisite reasonable belief as to the validity of what is asserted in the paper. *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986).

Motion for sanctions must be made separate from other motions.

Aiding the religion of Feminism

Where a law on its face or by its application has an incidental effect of aiding a religion.

Facially—The Regents' policies, such as *Equity for Women, Regents Policy and Action Plan.* require higher education in N.Y. to follow Feminist precepts.

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.

Applied—The promulgation of Regent policies are mandated by the State Legislature and specific funds are appropriated to USNY for the enforcement of the Regents' policies. N.Y. Educ. Law § 237, (Prpsd Amend. Compl. ¶¶ 19, 22-26, 69-71).

Applied—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*.

Applied—SED's disbursements to IRWG and Hofstra' Women's Studies, admittedly Feminist institutions, of Bundy aid, N.Y. Educ. Law § 6401, that is mandated and appropriated by the State Legislature for higher education. (Prpsd Amend. Compl. ¶¶ 73-75).

Applied—On information and belief, USDOE disburses Congressional appropriations to IRWG and Hofstra's Women's Studies in the form of financial awards, contracts, and research grants. (Compl. ¶ 76).

Lemon Test

When laws on their face or the application of laws incidentally aid a religion, they will violate the Establishment Clause unless they have (1) a secular purpose, (2) their primary or principle effect does not advance religion or inhibit religion, **and** (3) they must not excessively entangle the government with religion. *Cooper v. United States Postal Serv*., 577 F.3d 479, 4494 (2d Cir. 2009)(citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971)).

The State and federal governments fail this test on three fronts:

Macro View of N.Y. higher education

Purpose Violation:

Purpose aims at preventing government from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).

The Regents' secular purpose in 1972 for its policies to balance off the number of females and males in higher education, *Regents Statewide Plan* 1972, p. 103-04 (DH Decl. Opp. Ex. K, Docket 13), was replaced around 1984 with a purpose to turn higher education in N.Y. into a Feminist construct.

In 1984 more females than males were attending and graduating from New York colleges and universities, yet the State continued its policy of increasing the number of females who graduated,

providing females added assistance so they graduated, and increasing the opportunities available to them. *Regents Statewide Plan 1984* (DH Decl. Opp. Ex. L); *Regents Major Policy Statement for 1984* (DH S/J Decl. Ex. M), Docket No. 13.

The State's purpose was no longer secular affirmative-action because the results had gone far beyond equal treatment by the State's own measures. *See Johnson v. Transportation Agency*, 480 U.S. 616, 632, 637 (1987)(the purpose of affirmative-action is to eliminate the effects of past discrimination and obtain equitable representation).

In 1988, the State called for the increased participation of females in underrepresented fields, such as mathematics and science, even though it would further decrease the number of males receiving college degrees. *Regents Statewide Plan for 1988* (DH Decl. Opp. N), Docket No. 13.

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 made clear their Feminist purpose in the major policy statement *Equity for Women, Regents Policy and Action Plan, Background Paper* (1993), which is still in effect today that discovery can easily prove.

Equity for Women, Regents Policy and Action Plan 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 dogma. (*Equity for Women*, DH Decl. Opp. Ex. H, Docket No. 13):

> *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.)
>
> *Conformity with Feminist doctrine Equity for Women*
>
> The Regents' *Equity for Women, Regents Policy and Action Plan* requires:
>
> 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," which promotes female friendly strategies over those helpful to males. *Id.* p. 2.

d. Establish "[a]ppropriate 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.

e. Focus the support networks of colleges and create others to promote the hiring and placement of females, *id.* p. 9, even though more females than males are hired on graduating college.

f. Develop, support, and promote research on current issues facing females, but not males, which will be incorporated into teacher training by SED. *Id.* p. 10.

The purpose of *Equity for Women, Regents Policy and Action Plan* is what the Feminists call a "transformation" project of the educational community to one that is based on Feminist percepts. 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 and institutions of higher learning.

In 2004, the Regents' Statewide Plan recognized that a super-majority of all college students were female, that females earned 55% of the Bachelor degrees, 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 (DH Decl. Opp. Ex. P, Docket No. 13).

When a government consistently over a 28 year period enforces policies favorable to the already preferentially treated majority at the expense of the minority, the only objective conclusion is that a particular belief system, which exalts the majority over the minority, is at work. In America in this day and age, that belief system is Feminism.

As a result of the Regents' enforcing Feminist precepts, today, females make up 58% of all New York's college students. *SED, ORIS*.

Funding

The State uses appropriations authorized by the legislature to enforce *Equity for Women, Regents Policy and Action Plan*

USDOE knowingly provides funding to the Regents and SED that is used to enforce the State's *Equity for Women, Regents Policy and Action Plan* (1993).

Entanglement Violation:

Equity for Women, Regents Policy and Action Plan 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, DH Decl. Opp. Ex. H, Docket No. 13.

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.

The *Equity for Women, Regents Policy and Action Plan* requires the State to monitor all higher educational institutions, including Columbia and Hofstra, to assure the policy's implementation:

> • SED was assigned the "responsibility to monitor progress toward the stated goals," *Equity for Women-Action Plan* p. 11;
>
> • SED staff to re-train faculty as to appropriate sex roles and provide "regular monitoring and reinforcement [of that view] in educational settings," *Equity for Women-Action Plan* p. 6;
>
> • SED staff to conduct "academic program reviews at colleges and universities" in order to determine whether gender specific patterns have disappeared, *Equity for Women-Action Plan* p. 7;
>
> • "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, *Equity for Women-Action Plan* p. 9.

Such monitoring by public authorities excessively entangles the State with implementing Feminist tenets in higher education in N.Y., including at Columbia and Hofstra. *Lemon*, 403 U.S. at 627 (the Supreme Court found excessive entanglement from a state subsidy for religious school teachers because to assure the teachers taught only secular matters would require a monitoring program that would be just a little short of ongoing surveillance).

The *Equity for Women, Regents Policy and Action Plan's* extensive monitoring also creates an impermissible joint exercise of religious and civic authority that advances Feminism through college and State affirmative action officers. *See Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 430 (2d Cir. 2002).

Curriculum

The State in the district court wrongly claimed that individual courses escape the State's approval and fall outside the registration process. (*State Memo. Mtn Dsmss* p. 6 n.5, Docket No.9). The State's Education Regulations define curriculum in the following way: "Curriculum means a sequence of courses which together comprise a program of instruction," 8 N.Y.C.R.R. § 126.1(d); "Curriculum or program means the formal educational requirements necessary to qualify for certificates or degrees. A curriculum or program includes general education or specialized study in depth in a particular field, or both," 8 N.Y.C.R.R. § 50.1(i).

Under these definitions, the State cannot approve a curriculum for registration unless it approves the courses that are included in that curriculum. That is why the regulations require the "objectives of

each curriculum and its courses shall be well defined in writing," and "[c]ourse description shall clearly state the subject matter and requirements of each course." 8 N.Y.C.R.R. § 52.2(c)(1). It is also the reason that to register curricula, "[t]he content and duration of curricula shall be designed to implement" a curriculum's purposes. 8 N.Y.C.R.R. § 52.1(b)(3).

8 N.Y.C.R.R. § 52.1(c) requires curricula to be consistent with the Regents Statewide Plan; and § 52.1(h) states that new registration is required for any curriculum in which changes affect the title, focus, design or requirements.

Micro View Funding of IRWG and Hofstra's Women Studies

Principal and Primary Effect

Public funding may not be provided to an institution "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988)(quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

"The general prohibition on funding pervasively sectarian institutions is essentially a prophylactic rule, designed to prevent the 'risk' that the government's money, though designated for a specific secular purpose, 'may nonetheless advance the pervasively sectarian institution's 'religious mission.'" *Lamont v. Woods*, 948 F.2d 825, 842 (2d Cir. 1991)(internal quotes, *Bowen*, 487 U.S. at 610).

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.

Sectarian Operations

Assuming Feminism is a religion, then Columbia's IRWG and Hofstra's Women's Studies are pervasively sectarian Feminist operations.

Columbia's IRWG and Hofstra's Women's Studies admittedly propagate Feminism. Proposed Amended Complaint ¶¶ 126-133, App. 195-196.

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.

Examples of the Feminist concepts inculcated at IRWG and Hofstra's Women's Studies. Proposed Amended Complaint ¶¶ 136-151, App. 196-198.

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. Proposed Amended Complaint ¶¶ 161, 162, App. 200.

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

Bundy Aid

State Bundy aid, on information and belief, go to and benefit Columbia's IRWG and Hofstra's Women's Studies.

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

From 1996 to 2009, SED has paid to Columbia over $40 million in Bundy Aid, a portion of which, on information and belief, benefited IRWG.

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

The purpose of the State's "Bundy" aid, N.Y. Educ. Law § 6401, is to "provide[] direct unrestricted financial support to certain independent postsecondary institutions" in order to help "preserve the strength and vitality of [New York's] private and independent institutions of higher education…." http://www.highered.nysed.gov/oris/bundy/ (Overview). It is not, as the State argued below, to help students finance their education. (*State Mtn Dsmss Memo.*, pp. 20-22, Docket 9).

Bundy aid differs from student aid in that it is the institution making choices as to whether to apply for such funds—not the students. The Supreme Court requires full free private choices by students—not institutions—in order to avoid violating the neutrality requirement of the Establishment Clause.

> "[T]he distinction between a per-capita school-aid program [Bundy aid] and a true private-choice program is significant for purposes of endorsement. *See*, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984)(O'Connor, J., concurring). In terms of public perception, a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools."

Mitchell v. Helms, 530 U.S. 793, 842-843 (2000)(plurality decision)(O'Connor, J., concurring in judgment).

Bundy aid to IRWG and Hofstra's Women's Studies is also similar to the aid provided sectarian schools in two Supreme Court cases that found violations of the Establishment Clause. In *Levitt v. Comm. for Public Educ.*, 413 U.S. 472 (1973), an unrestricted lump sum per student was required by the State to be paid to private schools for internal testing, and in *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), grants were paid to private schools for maintenance and repair based on the number of pupils in the school.

USDOE Aid

On information and belief, USDOE provides awards, contracts, and research grants, appropriated and mandated by Congress, to IRWG and Hofstra's Women's Studies.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), grants under the Federal Higher Education Facilities Act violated the Establishment Clause when the government could no longer assure the grants were used for non-sectarian activities.

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.

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*. On information and belief, Columbia University invests significant amounts in IRWG from the above source.

Of the total federal awards to Columbia in 2008, $17.6 million originated with USDOE, which on information and belief benefited IRWG.

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

Conclusion Aiding Religion

Since at least 1984, the Regents and SED have adopted Feminist beliefs as true 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.

The allegations of the State's lack of neutrality and extensive involvement in enforcing its Feminist action plan in higher education is not based on some set of hypothetical facts but the State's own admissions in its Statewide Plans and policy statements. In addition, its purpose cannot be to make up for a lack of New York laws that prohibit sex discrimination in colleges and universities. *See* N.Y. Civil Rights Law § 40-c and N.Y. Exec. Law § 291(2).

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 to ensure Columbia and IRWG administrators and teachers think, speak, and act appropriately.

The power, authority and tax dollars of the Regents, SED, and USDOE 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.

State's request for summary judgment that Feminism not a religion.

That's what Judge Kaplan tried to do, perhaps you will succeed.

Precedential Value

In a bizarre "hail Mary," the State's attorney asserts that "the precedential effect of this Court's prior standing decision" bars this action. *State Brf.* pp. 10-11.

The Second Circuit's decision in *Den Hollander I* was a Summary Order—it has no precedential effect. Second Circuit Local Rule 32.1.1(a) states that "[r]ulings by summary order do not have precedential effect."

State's Attorney Deceptions

She says the district court found nothing more than quote: "feelings of offense" and "subjective offense." (*State Brf.* pp. 9, 12) The words "feelings" and "offense" are not in Magistrate Fox's *Report* or Judge Kaplan's *Order*.

Cites original complaint instead of proposed amended complaint on motion to amend. *State Brf.* pp. 17, 18.

She says I make the remarkable assertion that my earlier lawsuit did not result in any adverse standing rulings that bind me today, p.11. That is remarkably false, since my brief at p. 46 states "collateral estoppel would apply to standing under Title IX and Equal Protection." [So did my Objections to Magistrate Pitman's *Report* at ¶ 44, Docket 25.]

The State's attorney says the "Noneconomic Standing" section in the *Den Hollander II* Complaint, App.109-111, is "nearly identical" to the noneconomic injuries alleged in the *Den Hollander I* Amended Complaint. (*State Brf.* p.13). That is false because there is no noneconomic injury raised in the *Den Hollander I* Amended Complaint. (But there is in the original complaint in *Den Hollander II* and the proposed amended complaint. Original Complaint at ¶¶ 79-91, App. 109-110; Proposed Amended Complaint at ¶¶ 79-97).

The State's attorney cites to allegations in the *Den Hollander I* Amended Complaint that are part of the Equal Protection and Title IX sections and bizarrely asserts Den Hollander really meant those allegations to belong to the separate Establishment Clause action. (*State Brf.* p.12).

The State's attorney asserts that the "[d]enial of postjudgment motions" to vacate under Rule 59(e) and amend the complaint are governed by an "abuse-of-discretion standard" for which she cites a "summary order," *Jowers v. Family Dollar Stores, Inc.*, 455 F. App'x 100, 101 (2d Cir. 2012). (*State Brf.* p.9). Local Rule 32.1.1(a) of this Court, however, states that "[r]ulings by summary order do not have precedential effect."

She asserts that because I made no "motion to intervene," *Hackner* does not apply. To her it is irrelevant that I made a motion to amend, and rather fickle of her considering that the State conceded a motion to amend was the correct procedure for adding parties. *State Brf.* p. 24 (*See State Opposition to Motions to Vacate and Amend*, pp.5-7, Docket 36, App.11). *Hackner* is about substituting parties, specifically plaintiffs—just as is the proposed amendment in this case.

Conclusion

It's the same old story—switch the sexes, then ask yourself how you would rule.

The purpose of this case is simply to give males what the government has given females. I'm not asking for millions of dollars because some female boss propositioned me or made sexually explicit remarks. I'm just asking for fairness from this government. And it is a lesson of history that no ideology has been able to trump the concept of fairness for very long.

The use of an overbroad application of collateral estoppel in order to ban unpopular citizens from a fair adjudication of their claims is inconsistent with the Federal Rules and sends a clear message that those principles spoken about so often with such apparent passion by politicians, the judiciary, and Hollywood actors do not apply to men.

"[T]he Courts are supposed 'to protect unpopular individuals … and their ideas from suppression—at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

Nice words, but for men who dare to fight for their rights—just words.

The Establishment Clause issue in this case is before the federal courts again because in the prior proceeding the courts chose to resort to the hyper-technical pleading requirements of the 19th century when the slightest misstep would immediately and forever end an aggrieved party's chance at justice.

"It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . technicalities." *Foman v. Davis*, 371 U.S. at 181.

The putative class representative failed to include four words in the *Den Hollander I* complaint: "I am a taxpayer." That's it! Based on the absence of those four words, the Second Circuit threw the case into the street. The Second Circuit did not bother to consider the obvious fact that the class representative was a taxpayer—after all he was admitted to practice in the Second Circuit and the complaint stated he was a resident of New York. What person living and working in this country does not have taxpayer status—none. The Second Circuit did not bother to consider using judicial notice to find the class representative was a taxpayer even though the Federal Defendants conceded such. And the Second Circuit did not bother to consider remanding the case to the district court for a hearing on whether the class representative was a taxpayer, which the Second Circuit had the power to do and the class representative requested.

The question is why was the Second Circuit so determined to prevent even the appearance of rendering justice on the issue of whether Feminism is a religion aided by government? Because to do so would mean a modern-day excommunication from the Feminist Establishment—a barrage of

personal attacks from Feminist ideologues, criticism from the media, and ostracism from the politically correct elite.

The courts of the Second Circuit once again confirmed that when it comes to protecting the rights of men, a case will never make it to trial unless it is to eliminate those rights.

Complaint and Proposed Amended Complaint Allegations

Feminist beliefs adopted by Regents ¶¶ 54-68, App. 104-106; Amended ¶¶ 50-64, App. 181-183.
Such as, males are paid more. But if the average female and average male worked the same amount of time, then for every dollar a male earns a female would earn $1.10.
Regents Feminist requirements ¶¶ 100-105, App. 112-114; Amended ¶¶ 106-111, App. 191-193.
Taxpayer ¶¶ 6, 13, App.96, 97; Amended ¶¶ 11, 13, 15, App. 174-175.
Expenditure taxpayer funds ¶¶ 3, 4, 73-75, App. 95, 96, 107; Amended ¶¶ 3-6, 68-76, App. 173, 184, 185.
Noneconomic injury ¶¶ 7, 79-90, App. 109-110; Amended ¶¶ 79-96, App. 186-189.
Feminism as religion ¶¶ 44 -51, 53, 54, 58, App. 101-104; Amended ¶¶37-64, App. 178-184
State and federal aiding
Purpose ¶¶ 2, 92-99, 107-115, 117, App. 95, 111, 112, 114, 115; Amended ¶¶ 2, 98-106, 113-123, App. 190-194.
Effect ¶¶ 32, 40, 42, 43, 118-151, 156, 157, 161, App. 99-101, 116-121; ¶¶ 30, 34, 36, 126-167, App. 177-178, 195-201.
Entwinement ¶¶ 100-106, App. 112, 113; ¶¶ 106-112, App. 191-93.
Plaintiffs' direct contact with Columbia or Hofstra's Feminism ¶¶ 70-91, App. 109, 110; Amended ¶¶ 79-97, App. 186-189.

Regents Power

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.

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 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, State and federal funding.
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.

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.

The Regents also periodically issue policy statements to supplement or set 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.

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*.

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*.

Such resources are provided out of the specific appropriations for the University of the State of New York, 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.

State Education Department Power

SED evaluates and monitors higher educational programs in New York colleges and universities, such as IRWG'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).

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. Bundy Aid supports the operation of that institution.

USDOE Power

USDOE provides funds 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.*

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

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.

USDOE provides awards, contracts, and research grants to higher educational institutions.

Chronology Women's Studies Cases

Den Hollander I:

Original Complaint, August 18, 2008

First Amended Complaint, December 1, 2008

Magistrate Fox's *Report and Recommendation*, April 15, 2009

Judge Kaplan's *Order*, April 23, 2009

Second Circuit oral argument on April 8, 2010

Second Circuit *Summary Order*, April 16, 2010

Den Hollander II:

Complaint, December 10, 2010

Magistrate Pitman's *Order* converting defendants-appellees' motions to dismiss to motions for summary judgment, June 3, 2011

Magistrate Pitman's *Report and Recommendation*, July 1, 2011

Judge Swain's *Order*, October 31, 2011, granting summary judgment

Motions to Vacate and Amend, November 19, 2011
With [proposed] Verified Amended Complaint, November 19, 2011

Judge Swain's *Memorandum Order*, May 21, 2012

Notice of Appeal, dated June 11, 2012

Heightened contradictions from three anti-feminist cases

<u>General</u>

<u>Men have no rights when opposing in the courts of these United States the favored treatment of society's majority—females.</u>

<u>The courts of the Second Circuit again and again confirmed that when it comes to protecting the rights of men, a case will never make it to trial unless it is to eliminate those rights.</u>

I have brought three men's rights cases.

Not once, not even close to once, did any federal court 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 a totalitarian belief system—Feminism.

Every court has used one or another of the many methods that bureaucrats endowed with governmental power use to rule arbitrarily in order to further their personal beliefs or demonstrate sequacious allegiance to trendy ideologies of the day.

Every case was thrown out of court at the very first instance, regardless of what the blindfolded lady in the courthouse allegedly represents.

When the judiciary uses the many technicalities provided it for summarily ridding the courts of countermajoritarian and nonconformist cases and forgets its power in equity to do justice with at least a fair hearing on the merits of grievances brought by society's minority:

> "[H]istory 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).

Ladies' Nights

In the "Ladies Nights' case, where public accommodation nightclubs charged males more for admission, the federal courts simply decreed that "state action" exists 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 an alcoholic drink—a distinction without a difference."

The "distinction" was necessary in order not to overrule a 1969 case that found state action when a bar discriminated against two females. The courts claimed in the 1969 case that the two females were refused alcoholic drinks, so state action was involved. However, the files of the original case do not refer to any refusal to serve alcoholic drinks. The courts simply invented a fact to reach the decision required by the judiciary's anti-male ideology because now it was males being discriminated against—which is acceptable.

VAWA

In the Violence Against Women's Act case, the Department of Homeland Security's immigration division uses 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.

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 (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 federal courts dismissed the case for lack of injury by resting their decisions on the following Kafkian logic: Since Homeland Security's fact-findings about what an American did and whom the Government provided those fact-findings to (such as certain Feminist organizations and potential government employers) are kept secret from the American, any allegation of harm stemming from those secret fact-findings is "speculative."

The plaintiffs, including me, could not find out what the Government did behind closed doors concerning us because we were locked out; therefore, we could not specifically say what took place or how those fact-findings were used against us. The courts ruled our allegations speculative even though it was the Government's secrecy which we were challenging that allowed the courts to rule our allegations speculative—Catch 22.

Once again, the federal courts' subservience to society's preoccupation with punishing males for any perceived or imagined slight to females, citizen or alien, caused them to ignore the wisdom of one of the better Supreme Court Justices who said, 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).

Women's Studies

The first round of this case relied on, in part, Equal Protection and Title IX challenges to the legality of Women's Studies programs in New York State's higher education system where females make up 58% of all college students, receive over 55% of the Bachelor degrees, over 63% of the Master's degrees, and over a majority of the Doctoral degrees. N.Y. State Department of Education, *ORIS.*[1]

The federal courts again dismissed at their first chance by ruling that any harm caused the minority—males—by the lack of a Men's Studies program was "speculative." The federal courts do not say the same about the lack of a female sports team when a college only has a male team, but that's because males, even as a minority, are disfavored by the federal courts.

As for the claim that Feminism was a religion in *Den Hollander I*, the district court made a finding of fact by decree during motions to dismiss.

[1] By 2016, across America, females will receive 64% of the Associate degrees, over 60% of the Bachelor degrees, 53% of the Professional degrees, and 66% of the Doctoral degrees. National Center for Educational Statistics, *Digest of Educational Statistics*, Table 258.

District Judge Kaplan issued a decree without any evidence that "Feminism is no more a religion than physics…." Now that may be so, although I doubt it, but in this day and age we are beyond accepting proclamations of the truth by the powerful just because they are powerful.

The Second Circuit Court of Appeals took a different tact on the religion issue by resorting to the hyper-technical pleading rules of the 1930s and 19th century. Because I did not say "I am a taxpayer" in the complaint, I did not have standing to bring an Establishment Clause challenge.

The Second Circuit did not bother to consider using judicial notice to find that I was a taxpayer even though the Federal Defendants conceded such. And the Second Circuit did not bother to consider remanding the case to the district court for a hearing on whether I was a taxpayer, which the Second Circuit had the power to do and I requested.

Instead, the Court reached back 80 years to use a tactic long since relegated to the dustbin of history in order to throw another men's rights case into the street.

The Second Circuit Court also made a reference that the complaint did not cite to the relevant statutes that were applied in violation of the Establishment Clause, but that is simply false. "*Equity for Women in the 1990s*" is a Regents' policy statement carrying the effect of law on higher educational institutions, Educ. Law § 207 (although § 207 was not cited, a summary of the text was at ¶ 28 of the Complaint), and the Bundy aid statute was specifically cited at ¶¶ 49 and 157 in the complaint in the original action.

Further, the substance of the relevant statutes were pleaded, but the statutes were not cited. "Affirmative pleading of the precise statutory basis for subject matter jurisdiction is not required if the complaint alleges facts to establish jurisdiction…." *Moore's Fed. Prac.*, § 8.03[3], 3 ed. (citations from 2d, 5th, 7th, and 9th Circuits omitted).

It has been a six years of the federal courts extinguishing any attempt to vindicate the rights of men through judicial action.

Through these years, the federal courts have been consistent in using their bias towards men to do the opposite of what they are supposed to do: "[I]n 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)(Mr. Justice Douglas dissenting).

The federal courts have consistently failed to realize that "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy those men may be; a democratic government must therefore practice fairness. . . ." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Mr. Justice Frankfurter concurring).

So, I will try for the U.S. Supreme Court as I did with the "Ladies' Nights" and "Violence Against Women's Act" cases, but the results will be the same, since there is no justice for the rights of men in the courts of these United States due to the institutionalized prejudice against men.

Cases

Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 19-21 (2d Cir. 1997).

Power to add a party. In securities fraud case, the plaintiff lacked standing based on certain invalidly assigned claims but an amendment adding the assignors of those claims to the action should have been allowed.

Alpert's Newspaper Delivery Inc. v. New York Times Co.,876 F.2d 266, 270 (2d Cir.1989).

Independent delivers of NY Times tried to prevent Times from using its own deliverers by suing it for antitrust violations that failed in previous action called *Belfiore*.

The "admitted sponsor and orchestrator" of the first action was the MRA, which had, since at least 1977, been amassing a " 'legal fund' to challenge the Times should it ever attempt to modify or eliminate the independent dealer system of home delivery." *Belfiore*, 654 F.Supp. at 844 n. 2. The MRA was, by admission of counsel for the *Belfiore* plaintiffs both in the district court and during argument before us, supervising the strategy of the litigation, had actually filed the complaint, had furnished legal assistance and was paying the independents' counsel in *Belfiore*.

MRA was also behind the second action.

Despite the fact that the MRA was not a named party in either action, it was the admitted mastermind and financier of the *Belfiore* litigation and it is providing similar tactical and financial help in the instant case.

In *Expert Electric, Inc. v. Levine*, 554 F.2d 1227 at 1233 (2d Cir.), cert. denied, 434 U.S. 903, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977), we stated that one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, even though the first party was not formally a party to the litigation. The issue is one of substance rather than the names in the caption of the case; the inquiry is not limited to a traditional privity analysis.

Ruiz v. Commissioner of Department of Transportation of the City of New York, 858 F.2d 898 (2d Cir.1988), we found identity of parties when two groups of truck drivers filed two suits, one in state court and one in federal court, challenging a New York vehicle weight regulation. We reasoned that, since the two groups were using the same attorneys in the two actions, the allegations were identical, and there were indications of an industry-wide strategy coordinated by counsel for the Industry Advancement Fund, sufficient identity of parties existed to bar relitigation of previously raised claims.

Atlantic States Legal Found., Inc. v. Karg Bros., Inc., 841 F.Supp. 51, 55-56 (N.D.N.Y. 1993).

Power to add party.

The district court, after granting partial summary judgment in favor of the defendant based on environmentalists lack of standing, vacated the judgment to find standing based on its prior precedents.

Arnold Graphics Indus., Inc. v. Indep. Agent Center, Inc., 775 F.2d 38, 41 (2d Cir 1985).

Plaintiff allowed to substitute defendant company as the defendant-judgment-debtor from a *de facto* merger because the issue of *de facto* merger had not been previously litigated.

Buchanan v. Stanships, Inc., 485 U.S. 265 (1988).

Supreme Court considered whether a motion for the allowance of costs under FRCP 54(d) was a motion to alter or amend the judgment. In concluding that it was not, the Court relied on the

fact that FRCP 58 draws a "sharp distinction" between a district court's judgment on the merits and an award of costs. 485 U.S., at 268.

Moreover, the Court observed that, as with the attorney's fees in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), a motion for costs filed under Rule 54(d) "raises issues wholly collateral to the judgment in the main cause of action." 485 U.S., at 268.

Casey v. Department of State, 980 F.2d 1472, 1475 n.3 (D.C. Cir. 1992).

Plaintiff sought injunction against U.S. State Department to prevent his extradition to the U.S. from Costa Rico. Circuit denied State's *collateral estoppel* argument because the prior case did not specify which grounds it had dismissed plaintiff's similar complaint.

Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 430 (2d Cir. 2002).

N.Y. laws regulating kosher meats required the State's entanglement with Judaism and therefore violated the Establishment Clause.

Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

Grants were paid to private schools for maintenance and repair based on the number of pupils in the school, which violated the Establishment Clause.

Conte v. Justice, 996 F.2d 1398, 1402 (2d Cir.1993). Decided under NY law.

Car accident in which Kenneth Conte found liable by NY State court. His representative in that action was Laura Conte. Laura and Kenneth bring subsequent suit in federal court.

Both collaterally estopped. Laura because she appeared in a representative capacity on behalf of her son and had every incentive to fully litigate his claim, thereby controlling the lawsuit, and, accordingly, became bound by the determination as his privy.

Collateral estoppel binds not only the actual parties to a lawsuit, but also their privies. See *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277, 317 N.Y.S.2d 315, 320, 265 N.E.2d 739, 743 (1970).

Among other things, privity has been held to include those who, although not actual parties, exercise practical control over an action. Due in large part to the general nature of litigation, however, no single factor is determinative upon the issue of control; rather courts look to the totality of the circumstances in determining the issue of control.

Several factors indicative of control have emerged. Clearly, the appearance of the same attorney in both actions creates the impression that the interests represented are identical. Id. ("[i]t is of singular significance that the two actions were prosecuted simultaneously by the same law firm"); see *Ruiz v. Commissioner of the Dep't of Transp.*, 858 F.2d 898, 903 (2d Cir.1988)(citing Watts); *In re Arbitration between City School Dist. of Poughkeepsie*, 35 N.Y.2d 599, 606 n. *, 364 N.Y.S.2d 492, 496 n. *, 324 N.E.2d 144, 147 n. * (1974)(retention of the same attorney "in some circumstances may be a factor in concluding that the parties must be held to have an identity of interest for certain purposes"). *But see Green v. Santa Fe Indus. Inc.*, 70 N.Y.2d 244, 254, 519 N.Y.S.2d 793, 797, 514 N.E.2d 105, 109 (1987)(although same attorney no privity existed); *Weiner v. Greyhound Bus Lines, Inc.*, 55 A.D.2d 189, 193, 389 N.Y.S.2d 884, 888 (2d Dep't 1976).

Accordingly, a finding of privity through control is strained where, although the theories of recovery in the prior and present actions are the same, the claims are discrete as to each plaintiff because they did not involve the identical property. *See Green*, 70 N.Y.2d at 254, 519 N.Y.S.2d at 797, 514 N.E.2d at 109.

Privity may also exist if there is an indication that the prior action was "managed as [the party to be bound] thought it should be." *Watts*, 27 N.Y.2d at 278, 317 N.Y.S.2d at 321, 265 N.E.2d at 744; see *Green*, 70 N.Y.2d at 254, 519 N.Y.S.2d at 797, 514 N.E.2d at 109; *Ruiz*, 858 F.2d at 903.

Cooper v. United States Postal Serv., 577 F.3d 479, 489 (2d Cir. 2009).

In Cooper, the Second Circuit found noneconomic standing where the plaintiff (1) came into "direct contact with religious displays that were made a part of his experience in using the postal facility nearest his home," (2) such contact made him uncomfortable, and (3) to avoid contact, he would have to alter his behavior.

Establishment Clause injury comes in two forms: (1) noneconomic injury which comes from exposure to religious communications, and (2) "a broad swath of litigants [that] can demonstrate standing under *Flast v. Cohen*, 392 U.S. 83 (1968), which permits litigants to raise claims on the ground that their 'tax money is being extracted and spent in violation of specific constitutional protections,'" *Cooper* at 489 n.9 (internal quotation *Flast* at 106).

Costello v. US, 365 US 265, 284-88 (1961).

Dismissal of denaturalization proceedings for defective affidavit of good cause was for lack of jurisdiction and did not bar subsequent proceeding that submitted proper affidavit. [Here proper complaint submitted to cure *Den Hollander I* complaint]

DaCosta v. United States, No. 09-558 T, 2010 WL 537572 (Fed. Cl. Feb. 16, 2010).

Has no precedential value.

Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012).

Unlike in *Hackner*, however, the United States intervened in this case after the trial had concluded in which the plaintiff had no standing and the district court had already made important decisions of fact and law.

In *Den Hollander* there has been no trial and the summary judgment was on standing only, not on the substantive allegations.

Since *Hackner*, this prudential approach has found favor in other courts. *See, e.g., Miller & Miller Auctioneers, Inc. v. G.W. Murphy Indus., Inc.*, 472 F.2d 893, 895 (10th Cir. 1973).

E.R. Squibb & Sons, Inc. v. Lloyd's & Co., 241 F.3d 154, 163 (2d Cir. 2001)Jacobs, Calabresi, Straub).

Substitution of defendant related back to when complaint originally filed at which time the diversity amount was $10,000 and not $75,000, so the Court had jurisdiction over defendant.

"[W]e hold that, where it is appropriate to relate back an amendment to a pleading under Rule 15, jurisdiction is assessed as if the amendment had taken place at the time the complaint was first filed."

Fulani v. Bentsen, 862 F. Supp. 1140 (S.D.N.Y. 1994).

Minor presidential candidate challenged the tax-exempt status of the non-profit organization that sponsored a presidential debate in 1988 and again in 1992. DC Circuit held she had no standing in 1988.

Even though there were differences in the parties challenging the tax-exempt status in 1992, different campaign committees, the SDNY ruled the parties in 1992 were privy to the parties in 1988.

It is well settled that collateral estoppel binds not only the actual parties to a lawsuit, but also their privies. *Conte v. Justice,* 996 F.2d 1398, 1402 (2d Cir.1993). Thus, "one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, even though the first party was not formally a party to the litigation. The issue is one of substance rather than the names in the caption of the case." *Alpert's Newspaper Delivery Inc. v. New York Times Co.*,876 F.2d 266, 270 (2d Cir.1989); *see also Expert Elec., Inc. v. Levine*,554 F.2d 1227, 1233 (2d Cir.),*cert. denied*, 434 U.S. 903 (1977).

While no single factor is determinative of whether a person is privy to a litigation, courts have held that persons are in privity where they "`are successors to a property interest, ... control an action although not formal parties to it, ... [have] interests [that] are represented by a party to the action, and possibly [are] co-parties to a prior action'." *Ruiz v. Comm'r of Dep't of Transp.*,858 F.2d 898, 903 (2d Cir.1988)(quoting *Watts v. Swiss Bank Corp.*,27 N.Y.2d 270, 277, 317 N.Y.S.2d 315, 265 N.E.2d 739 (1970)). In addition, "the appearance of the same attorney in both actions creates the impression that the interests represented are identical." *Conte v. Justice,* 996 F.2d at 1402.

Fulani herself was primarily responsible for the initiation and continuation of both lawsuits. The fact that plaintiffs were represented by the same attorney in both lawsuits further bolsters the conclusion that the interests represented in both actions are identical, and Fulani's asserted injury has not changed.

GAF Corp. v. US, 818 F.2d 901, 913-14 (Dc Cir. 1987).

"A claim of jurisdiction is not precluded if, however, in the interim subsequent to the initial dismissal there are developments tending to "cure" the jurisdictional deficiency identified in the first suit.73 This so-called "curable defect" exception applies "where a 'precondition requisite' to the court's proceeding with the original suit was not alleged or proven, and is supplied in the second suit. *Dozier v. Ford Motor Co.*, 227 U.S.App.D.C. 1, 4, 702 F.2d 1189, 1192 (1983). c*ompare id.* (jurisdictional deficiency must be remedied by occurrences subsequent to original dismissal) (limiting "curable defects" exception to post-transactional incidents of jurisdiction) with *Mann v. Merrill Lynch, Pierce, Fenner & Smith*, 488 F.2d 75, 76 (5th Cir.1973) (dismissal of suit for failure to allege diversity is no bar to new suit properly pleading diversity sufficient to establish jurisdiction). . . . The preclusive effect of the first jurisdictional judgment is limited to matters actually raised and necessarily decided; it does not extend to matters that could have been raised, as would the preclusive effect of a judgment on the merits."

Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986).

Plaintiff convict of insurance fraud connected with a fire. Second Circuit in prior case did not review the issue of whether the plaintiff had set the fire; therefore, *collateral estoppel* in this case did not apply to that issue.

Hackner v. Guaranty Trust Co. Of New York, 117 F.2d 95, 98 (2d Cir. 1941), *cert. denied*, 313 U.S. 559 (1941).

Power to add a party.

A number of bond holders sued Guaranty Trust for fraud. None of the original plaintiffs met the jurisdictional amount for diversity.

A plaintiff (Eastman) with the requisite jurisdictional damages for a diversity action was substituted for a series of plaintiffs whose claims could not be aggregated to meet the jurisdictional threshold. The court reasoned that:

"[N]o formidable obstacle appears here, whether the matter is treated as one of amendment or of power of the court to add or substitute parties, Federal Rule 21, or of commencement of a new action . . . . In any event we think this action can continue with respect to [the substituted party] without the delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are." *Hackner*, 117 F.2d at 98.

The *Hackner* Court was not explicit in its use of Rule 21, but did hold that the substitution of a party (even the only party left on one side of the dispute, as *Hackner* was) did not require the institution of a new suit." *Sheldon*, 1997 U.S. Dist. LEXIS 2217*11 n.7.

In re Soya Products Co., 112 F. Supp. 94, 97 (S.D.N.Y. 1993).

A creditor's death and the debtor's failure to preserve creditor's testimony did not bar reconsideration of deceased creditor's claim against debtor. The debtor successfully argued that the pendency of other litigation, which involved the same parties and the same subject matter as that involved in part in the bankruptcy proof of claim and which could have given rise to a collateral estoppel on an issue in a contest on the proof of claim, constitutes a complete excuse for the delay which the creditor now asserts was laches.

Jin v. Metro. Life Ins. Co., 310 F.3d 84, 101 (2d Cir. 2002).

Sexual harassment suit against boss. Alleged victim made motion to amend complaint under Rule 15 but motion denied. The motion was filed long after the close of discovery and almost four months after the ruling on a summary judgment motion. In fact, Jin's motion for leave to amend came over four years after she filed her original complaint and over three years after the close of discovery. It was therefore reasonable for the district court to find that Jin's late filing constituted undue delay.

LeBlanc v. Ossen, et al., 248 F.3d 95, 99 (2d Cir. 2001)(Chf. Judge Walker, and Calabresi, Feinberg).

Plaintiffs rented kayak and struck by powerboat on Hudson. Sued motor boat owner in fed ct under admiralty SMJ. Defendants file 3P complaint against renter of kayak. The district court held that it lacked admiralty jurisdiction because the Hudson River was not a navigable waterway at the location where the accident occurred. 2d Cir affirmed *See LeBlanc v. Cleveland*, 198 F.3d 353 (2d Cir. 1999). One plaintiff moved to Vacate under 60(b)(1) and (6) and amend compl. to create diversity SMJ. LeBlanc Canadian citizen when case first brought but co-pl a NY resident.

Amend to drop co-pl.

> "Once subject matter jurisdiction is 'cured' by an amendment, courts regularly have treated the defect as having been eliminated from the outset of the action. In other words, where a change in parties, necessary to the existence of jurisdiction, is appropriate and is made (even on or after appeal), appellate courts have acted as if the trial court had jurisdiction from the beginning of the litigation."

E.R. Squibb & Sons, Inc. v. Lloyd's & Co., 241 F.3d 154, 163 (2d Cir. 2001)(citing *Newman-Green*, 490 U.S. at 829); *see also Squibb*, 241 F.3d at 163 ("As a general matter, it is widely accepted that amendments to cure subject matter jurisdiction relate back."); *Curley*, 915 F.2d 81 (recharacterizing lawsuit as a class action rather than a derivative action, dismissing dispensable non-diverse party pursuant to Rule 21, and confirming the existence of subject-matter jurisdiction in the dispensable party's absence); 3 James William Moore, *Moore's Federal Practice* P 15.15 [3.-2], at 15-154 (1996)

We hold that an amendment to allege diversity jurisdiction relates back under Rule 15 of the Federal Rules of Civil Procedure.

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

The Supreme Court found excessive entanglement from a state subsidy for religious school teachers because to assure the teachers taught only secular matters would require a monitoring program that would be just a little short of ongoing surveillance).

Levitt v. Comm. for Public Educ., 413 U.S. 472 (1973), an unrestricted lump sum per student was required by the State to be paid to private schools for internal testing, which violated the Establishment Clause.

Li Butti v. U.S., 178 F.3d 114. 119 (2d Cir. 1999).

Lowe v. U.S., 79 Fed. Cl. 218, 229, 230 (Fed. Ct. Cl. 2007).

A former Marine, asserts six monetary claims against defendant arising out of his service in the Marine Corps and a 1997 court-martial resulting in plaintiff's imprisonment, forfeiture of pay, and dishonorable discharge. Court found that *collateral estoppel* applied to Counts I and III because they had been brought previously and the new fact alleged did not go to SMJ.

McCowan v. Sears, Roebuck & Co., 908 F.2d 1099, 1103 (2d Cir. 1990).

National Maritime Union of America v. Curran, 87 F. Supp. 423, 425-26 (S.D.N.Y. 1949).

Court denied local union officials motion to amend by substituting original plaintiffs with out of state union members with only nominal interests in action against the national union.

No. Carolina R. Co. v. Story, 268 U.S. 288, 294 (1925).

A decision by a state supreme court that a judgment recovered against a carrier for personal injuries suffered while its railroad was under federal control is not a decision that the first judgment established plaintiff's right to levy execution on the carrier's property.

Osterneck v. Ernst & Whinney, 489 U.S. 169, 174-77 (1989).

While petitioners motion for prejudgment interest was still pending, they filed a notice of appeal from the judgment. FRAP 4(a)(4) provides that a notice of appeal filed while a timely Rule 59(e) motion is pending has no effect.

Since prejudgment interest "is an element of [plaintiff's] complete compensation, the postjudgment motion for discretionary prejudgment interest was a motion to alter or amend the judgment under Rule 59(e); therefore, the petitioners notice of appeal had no effect.

Park B. Smith, Inc. v. CHF Indus., Inc., 811 F. Supp. 2d 766, 773 (S.D.N.Y. 2011).

Motion to substitute as plaintiff the owner and assignee of patents granted.

Perry v. Sheahan, 222 F.3d 309 (7th Cir. 2000).

Only facts arising after the complaint was dismissed--or at least after the final opportunity to present the facts to the court--can operate to defeat the bar of issue preclusion.

Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Company, 700 F.2d 889, 893 n.9 (2d Cir. 1983).

Power to add a party.

Court dismissed ERISA complaint because ERISA provides the exclusive jurisdictional grant on what parties can bring it and plaintiffs lacked such.

District Judge Conner properly exercised his discretion to deny the motion to amend after noting that possible statute of limitations defenses distinguished this case from Hackner, where no such obstacles appeared.

Ripperger v. A. C. Allyn & Co., 113 F.2d 332 (2d Cir. 1940), *cert. denied*, 311 U.S. 695.

Corporate receiver sued corporations for misuse of assets in second suit. Both complaints were alike except for the non-jurisdictional allegation in the second complaint that the appellees had respectively appointed an agent for service of process within the state of New York. Collateral estoppel applied.

Securities Exch. Comm'n v. Monarch Funding Corp., 192 F.3d 295, 309 (2d Cir. 1999).

Securities fraud case in which collateral estoppels did not apply to sentencing findings that defendant would be barred from securities industry because it received little attention.

Sheldon v. PHH Corp., 96 Civ. 1666, 1997 U.S. Dist. LEXIS 2217*11 n.7, 1997 WL 91280 (S.D.N.Y. Mar. 4, 1997)(Kaplan, J.), *aff'd 135 F.3d 848* (2d Cir. 1998)

"*Hackner's* holding was endorsed and explained in *National Maritime Union of America v. Curran*, 87 F. Supp. 423, 425-26 (S.D.N.Y. 1949). The question that Judge Kaufman there asked was whether 'Rule 21, allowing parties to be dropped or added, [can] be then construed to permit a complete substitution of all the parties.' *Id.*, at 425. In answering the question in the affirmative, the court relied on *Hackner* and a number of other decisions that supported substitution under Rule 21 and noted that this was a policy superior to allowing substitutions under Rule 15. *Id.* at 426."

Smith v. McNeal, 109 U.S. 426 (1883).

In *Smith* the plaintiffs in the first pleading failed to allege that the title to the land they claimed under a Tax Law where the confederate former owners failed to pay taxes was disputed by the defendants, so the pleading was dismissed for lack of jurisdiction.

> "The first suit was therefore dismissed, because the declaration did not state the jurisdictional facts upon which the right of the court to entertain the suit was brought. In other words, the case was dismissed for a defect in pleading. In the present suit the defect of the declaration in the first suit is supplied."

Since the case had been dismissed over a jurisdictional issue, the statute of limitations was tolled and plaintiffs allowed to bring second suit.

Staggers v. Otto Gerdau Co., 359 F.2d 292, 296 (2d Cir. 1966).

Power to add a party.

Estate administrator allowed to substitute plaintiff in contract action.

Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997).

Richard Suhre, a resident of Haywood County, North Carolina, had standing to assert that the maintenance of a Ten Commandments display in the main courtroom of the Haywood County Courthouse violated the Establishment Clause because rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable.

Thompson v. County of Franklin, 15 F.3d 245, 248 (2d Cir. 1994).

Indian challenge authority of local government to tax her land that was allegedly part of Indian country.

The Court is "required to address [a standing] issue even if the court[ ] below [has] not passed on it ... and even if the parties fail to raise the issue before us." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990).

"The jurisdictional nature of the standing inquiry, therefore, convinces us that we have an independent obligation to examine Thompson's standing under arguments not raised below, in a case such as this one, where the underlying claims and theories of the action itself remain unchanged from those alleged in the complaint."

But standing, moreover, like other jurisdictional inquiries, "cannot be 'inferred argumentatively from averments in the pleadings,' ... but rather 'must affirmatively appear in the record.' " *FW/PBS, Inc.*, 493 U.S. at 231, 110 S.Ct. at 608 (citations omitted).

Tilton v. Richardson, 403 U.S. 672 (1971).

Construction grants that did not provide for assurances after 20 years that the buildings were used on for secular purposes violated the Establishment Clause.

U.S. v. International Bldg. Co., 345 U.S. 502, 505 (1953).

IRS and taxpayer agree to settlement for number of tax years. Settlement did not bar taxpayer from bringing suit claiming he had a depreciation of more than IRS claimed. "A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties."

U.S. v. Matles, 247 F.2d 378, 380 (2d Cir. 1957), rev'd on other grounds, *Matles v. U. S.*, 356 U.S. 256 (1957).

Power to add a party.

U.S. brought case to de-naturalize plaintiff because of his communist activities. The Court cited *Hackner*, stating "Denaturalization proceedings are civil actions subject to the Federal Rules of Civil Procedure under which the initiation of the suit has dwindled in significance as a decisive event. For the freedom of amendment under, e.g., F.R. 15(a) and (b) permits what is essentially a

new suit to be instituted by a shift during the course of litigation from one claim to another." Therefore, no new service of process by the U.S. Marshal was required.

U.S. v. Meyers, 95 F.3d 1475, 1483-1484 (10th Cir. 1996).

Meyers convicted of selling marijuana. Meyers filed motions to dismiss based on religious freedom under the First Amendment and the Religious Freedom Restoration Act. District Court concluded Meyers beliefs were not a religion. Court of Appeals reviewed the requirements for a religion.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473 (1982).

Nonprofit organization challenged the federal government's gift of surplus property to a Christian organization.

The Third Circuit Court expanded standing to be based on the citizen's right that the government will not make any law respecting religion—a generalized grievance. That is why Justice Rehnquist dealt with the problem of "the generalized interest of all citizens in constitutional governance" as a basis for standing.

It is to that part of *Valley*, Point II of the Opinion, that Magistrate Fox cited and for the proposition that a generalized grievance is insufficient as an injury for standing. Standing requires that a party personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.

Magistrate Fox used the *Valley* cite to support his finding of no standing under Equal Protection or Title IX because neither of the plaintiffs had enrolled in Columbia's Women's Studies; therefore, they only presented a generalized grievance.

And the "federal courts have abjured appeals to their authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders.' United States v. SCRAP, 412 U.S. 669, 687 (1973). Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the 'cases and controversies' language of Art. III forecloses the conversion of courts of the United States into judicial version of college debating forums." *Valley* at 473.

"The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Valley* at 473 (quoting another non-Establishment Clause case, *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

Rehnquist's opinion in Point III then deals with the history behind the rule against taxpayer suits, which resulted in the *Flast* exception.

The *Flast* plaintiffs brought a constitutional challenge to an exercise by Congress of its power under Art. I, 8, to spend for the general welfare and the Establishment Clause operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, 8.

In *Valley* the source of the complaint was not a congressional action, but a decision by HEW to transfer a parcel of federal property, and the property transfer about which plaintiffs complain was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, 8.

Since the *Valley* plaintiffs did not fall into the *Flast* exception to taxpayer suits, the standing analysis was based on the general rule of requiring an identifiable personal injury.

V & M Management v. Farrell, 321 F.3d 6, 8-9 (1st Cir. 2003).

Distinguished because there the plaintiff conceded that the standing issues were litigated and decided, but rather alleged the bankruptcy court was biased.

York v. Guaranty Trust Co., 143 F.2d 503 (1944), *overruled on other grounds*, 326 U.S. 99 (this Supreme Court case was later abandoned in *Hanna v. Plumer*, 380 U.S. 460 (1965).

Second Circuit held that the jurisdictional holding in a prior case that the plaintiff Mrs. York had not reached the diversity amount of over $3,000 would not be used to give effect to defendant Guaranty Trust's collateral attack on her diversity claim in this case. *York v. Guaranty Trust Co.* York, 143 F.2d at 518-19.

White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982).

Plaintiff made motion for attorney's fees 4.5 months after final judgment in case concerning unemployment entitlements.

If it was a Rule 59(e) motion than it would be denied because filed after the then 10-day time limit for such motions.

A request for attorney's fees under 42 U.S.C. § 1988 was not a Rule 59(e) motion because it raised legal issues "collateral to the main cause of action," 455 U.S., at 451, requiring an inquiry that was wholly "separate from the decision on the merits," *id.*, at 451-452.

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

Wisconsin compulsory education laws violated the Amish's free exercise of religion by schooling their children themselves.

Other Authorities

Rule 15(c)(1)(C): "An amendment of a pleading relates back to the date of the original pleading when . . . the amendment changes the party . . . ," provided the amendment also asserts a "claim . . . that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."

Bulletin of The Statewide Plan for Higher Education 2012-2020:

Every eight years the Board of Regents, in collaboration with the higher education community, develops and adopts the Statewide Plan for Higher Education. The Plan sets system goals and objectives and addresses priority matters of statewide concern to the State's residents, workforce, and community as well as our higher education institutions. These serve as the foundation for the Plan, which includes the long-range master plans of the State University of New York, The City University of New York, and New York's independent and proprietary higher education institutions. Section 237 of the Education Law establishes the purposes of master planning and the Regents responsibility in that process. The Regents are required to create a master plan for higher education. This plan is called the "Statewide Plan for Higher Education." Section 237 defines the "purposes of planning" as follows:

> Master planning for higher education in New York State should:
> a. Define and differentiate the missions and objectives of higher education.
> b. Identify the needs, problems, societal conditions and interests of the

citizens of the state of New York to which programs of higher education may most appropriately be addressed.

c. Define and differentiate the missions and objectives of institutions of higher education.

d. Develop programs to meet the needs, solve the problems, affect the conditions and respond to the public's interests by:

(1) Setting goals.

(2) Describing the time required to meet those goals.

(3) Identifying the resources needed to achieve the goals.

(4) Establishing priorities.

e. Be in sufficient detail to enable all participants in the planning process, representatives of the people and the citizens themselves to evaluate the needs, objectives, program proposals, priorities, costs and results of higher education.

f. Optimize the use of resources.

g. Evaluate program effectiveness.