12-2362-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Roy Den Hollander, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

--against--

Members of the Board of Regents of the University of the State of New York, in their official capacities, in their individual capacities, Merryl H. Tisch, Chancellor of the Board of Regents; in her official capacity, Chancellor of the Board of Regents; in her individual capacity, David M. Steiner, New York State Commissioner of the Department of Education; in his official capacity, New York State Commissioner of the Department of Education; in his individual capacity, Elsa Magee, Acting President of the New York State Higher Education Services Corp.; in his official capacity, Acting President of the New York State Higher Education Services Corp.; in his individual capacity, United States Department of Education, Arne Duncan, United States Secretary of Education; in his official capacity,

Defendants-Appellees.

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

BRIEF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

District Court Judge Laura Taylor Swain ruled that her court lacked subject matter jurisdiction to allow the post-judgment amendment of the Complaint that would add two new plaintiffs or substitute the two new plaintiffs for the original plaintiff ("Den Hollander") in this case, *Den Hollander II*. Prior to a motion to vacate and the motion to amend by Den Hollander, Judge Swain had granted summary judgment for the defendants-appellees based on Den Hollander being collaterally estopped from litigating standing.

Ironically, in the earlier case *Den Hollander I,* Second Circuit Judge Chester J. Straub, in oral argument, criticized attorney Den Hollander for not trying to amend the complaint post-judgment in that case, which had been disposed of for Den Hollander's lack of standing:

> *Judge Straub*: Did you ask [for] a further amendment after the court said there was no standing?
> *Den Hollander*: No at that point, the moment that I learned about the standing was the decision of the court. . . .
> *Judge Straub*: But did you ask?
> *Den Hollander*: No, I did not your honor.
> *Judge Straub*: [B]ut you first had the Magistrate judge's report.
> *Den Hollander*: That's correct your honor.
> *Judge Straub*: You objected to that but you didn't ask therein [for] leave to amend should the district court hold against you.
> *Den Hollander*: No I did not . . . objected to. . . .
> *Judge Straub*: The second time after he [District Judge Kaplan] did hold against, you didn't come back and say give me a chance to amend.
> *Den Hollander*: That's correct . . . .
> *Judge Straub*: Are you a lawyer . . . ?

(Transcript of oral argument before the Second Circuit in *Den Hollander I* on April 8, 2010, pp. 9, 10, App. 80).

It appears that whether a federal court can amend a complaint post-judgment that was disposed of for lack of standing depends on whether it will aid that court in ridding itself of bothersome men fighting for their rights violated by the government's preferential treatment of females.

SUBJECT MATTER JURISDICTION

The Southern District Court had jurisdiction under 28 U.S.C. § 1331, and the Second Circuit has jurisdiction under 28 U.S.C. § 1291.

Judge Swain's *Order* of October 31, 2011, App. 165, which accepted in its entirety Magistrate Henry B. Pitman's *Report and Recommendation* of July 1, 2011, App. 126, granted summary judgment for the defendants-appellees on the ground that collateral estoppel applied to the issue of Den Hollander's standing under the Establishment Clause.

Judge Swain's *Memorandum Order* of May 21, 2012, App. 205, denied two post-judgment motions by Den Hollander to (1) vacate the October 31, 2011, *Order* and judgment and (2) amend the Complaint by adding two new plaintiffs with Establishment Clause standing, or, in effect, substituting the two new plaintiffs for Den Hollander, and adding their factual allegations.

Judge Swain's *Order* was entered on October 31, 2011, App. 171, the *Memorandum Order* was entered on May 21, 2012, (Docket No. 44), App. 11-12,

the Notice of Appeal was filed on June 11, 2012, App. 214, and the Pre-Argument Statement was filed by paper on June 11, 2012 and ECF on June 26, 2012.

This is an appeal from the lower court's final orders.

STATEMENT OF ISSUES FOR REVIEW

1. Under Fed. R. Civ. P. 59(e), does newly discovered evidence to vacate a district court judgment include statements in a verified amended complaint by newly-discovered plaintiffs?

2. Will Judge Swain's failure to vacate her October 31, 2011, *Order* result in a manifest injustice?

3. When a district court disposes of an action for lack of subject matter jurisdiction, can that same court cure the jurisdictional defect by allowing the amendment of the original complaint to add new plaintiffs, or, in effect, to substitute new plaintiffs for the original plaintiff?

4. Did the lower court fail to comply with the requirements of *Foman v. Davis*, 371 U.S. 178 (1962), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), by not providing a plausibility analysis that the proposed November 19, 2011, Amended Complaint would inevitably be dismissed under Rule 12(b)(6)?

5. Did the district court err in finding that collateral estoppel prevented Den Hollander from litigating the issues of non-economic injury and taxpayer injury for Establishment Clause standing?

STATEMENT OF THE CASE

This is a putative class action seeking declaratory and injunctive relief against defendants-appellees the Board of Regents of the University of the State of New York and its Chancellor, the New York State Commissioner of the Department of Education, and the President of the New York State Higher Education Services Corporation (collectively, the "State") and the U.S. Department of Education and its Secretary (collectively, "USDOE"). The State and USDOE are alleged to violate the Establishment Clause of the First Amendment by aiding the new-age religion "Feminism" in higher education in New York State and particularly at Columbia University ("Columbia") and its Institute for Research on Women & Gender ("IRWG").

The Establishment Clause is violated by (1) the State propagating and entangling itself with the religion Feminism by requiring higher educational programs to conform to Feminist tenets as mandated by its policies, such as the State's *Equity for Women in the 1990s, Regents Policy and Action Plan* (1993), and using State tax dollars to enforce such conformity, (2) USDOE providing federal tax dollars to the State that are used to enforce the State's policies, such as *Equity for Women in the 1990s, Regents Policy and Action Plan* (1993), and (3) the State and USDOE providing funding to Columbia's IRWG, which promotes the religion Feminism.

Judge Swain accepted Magistrate Pitman's *Report and Recommendations*, App. 126, No. 10 Civ. 9277, 2011 U.S. Dist. LEXIS 126375 (S.D.N.Y. July 1, 2011), and granted the State and USDOE summary judgment on October 31, 2011, Judge Swain's *Order*, App. 165, No. 10 Civ. 9277, 2011 U.S. Dist. LEXIS 125593, 2011 WL 5222912 (S.D.N.Y. October 31, 2011). Judge Swain and Magistrate Pitman found that the issues of non-economic injury and taxpayer injury under Establishment Clause standing had been previously raised, litigated, and decided against Den Hollander in the prior case, *Den Hollander I*, and those decisions were necessary for the judgment in that case. As a result, both judges ruled that collateral estoppel prevented Den Hollander from litigating non-economic injury and taxpayer injury in this case, *Den Hollander II*.

Den Hollander made two post-judgment motions: (1) to vacate Judge Swain's October 31, 2011, *Order* and (2) to amend the Complaint by adding, or, in effect, substituting two new plaintiffs who did have Establishment Clause standing and for whom collateral estoppel did not apply. Judge Swain in a *Memorandum Order* denied the motion to vacate by ruling that the statements of newly-discovered plaintiffs and the new plaintiffs themselves were not new evidence, and denied the motion to amend by ruling that because her *Order* disposed of *Den Hollander II* for lack of subject matter jurisdiction—no standing, her court did not

have subject matter jurisdiction to add new plaintiffs, or, in effect, substitute new plaintiffs for Den Hollander.

In the May 21, 2012, *Memorandum Order*, Judge Swain did not articulate her analysis but rather referred to pages in the State and USDOE's opposition papers as her opinion. (*Memorandum Order*, p. 2, App. 206, No. 10 Cv 9277 (S.D.N.Y. May 21, 2012)(referred to the State's Opposition Memorandum pp. 5-8 and USDOE's Opposition Letter pp. 1-2)).

STATEMENT OF FACTS

On August 18, 2008, Den Hollander commenced a lawsuit, *Den Hollander I*, against the State, USDOE, and Columbia for violations of Title IX of the Education Amendments of 1972, Equal Protection under the Fifth and Fourteenth Amendments of the U.S. Constitution, the Establishment Clause of the First Amendment, and the N.Y. Civil Rights Law § 40-c.

In *Den Hollander I*, Magistrate Fox recommended dismissal for lack of standing under Title IX and Equal Protection but never reached the Establishment Clause standing issues of non-economic injury and taxpayer injury. (Fox's *Report and Recommendation*, pp. 6-10, App. 73-77, No. 08 Civ. 7286, 2009 U.S. Dist. LEXIS 34942, 2009 WL 1025960 (S.D.N.Y. April 15, 2009)).

District Court Judge Kaplan accepted Magistrate Fox's *Report and Recommendation*, ruling that "[h]aving reviewed the amended complaint, the

report and recommendations, and plaintiffs' objections, I have concluded that there was no error . . ." in the *Report and Recommendation*. (Kaplan *Order, Den Hollander I*, p. 1, App. 78, No. 08 Civ. 7286, 2009 U.S. Dist. LEXIS 131582 (S.D.N.Y. April 23, 2009)).

Judge Kaplan's only reference to the Establishment Clause action followed his adoption of the *Report and Recommendation*. His remarks did not touch on Establishment Clause non-economic injury or taxpayer injury:

> Finally, although the Magistrate Judge did not reach the merits, it bears noting that plaintiffs' central claim is that feminism is a religion and that alleged federal and state approval of or aid to Columbia's Institute for Research on Women and Gender therefore constitute a violation of the Establishment Clause of the First Amendment. Feminism is no more a religion than physics, and at least the core of the complaint therefore is frivolous. . . . The Establishment Clause claims are dismissed also on the alternative ground that they are absurd and utterly without merit."

(Kaplan *Order, Den Hollander I*, p. 2, App. 79).

On appeal to the Second Circuit, a court addressed for the first time the issue of taxpayer standing under the Establishment Clause during oral argument on April 8, 2010. (Transcript, pp. 2- 3, 5-8, 10 App. 81-82, 84-87, 89). On April 16, 2010, the Second Circuit's *Summary Order* affirmed the lower court's decision in *Den Hollander I* of no standing under Title XI and Equal Protection and added "[n]or has plaintiff made out the requirements for taxpayer standing for his Establishment Clause claim." *Summary Order*, pp. 3-4, App. 93-94, 372 Fed. Appx. 140 (2d Cir.

2010). The Second Circuit did not address in oral argument or its summary order non-economic injury under the Establishment Clause.

Den Hollander commenced this action, *Den Hollander II*, on December 13, 2010, alleging only that the State and USDOE violated the Establishment Clause by aiding the religion Feminism in higher education, including at Columbia and IRWG.

In *Den Hollander II*, Magistrate Pitman issued a *Report and Recommendation* holding that collateral estoppel prevented litigating non-economic injury and taxpayer injury under Establishment Clause standing because in *Den Hollander I* "Magistrate Judge [Fox] issued a Report and Recommendation that recommended a dismissal of all claims for lack of standing. . . ," and "District Judge [Kaplan] adopted the Report and Recommendation and dismissed the action for lack of standing . . . .'" (Pitman *Report and Recommendation*, pp. 8, App. 133). Magistrate Pitman's statement was inaccurate and misleading. Magistrate Fox's *Report and Recommendation* never reached either non-economic injury or taxpayer injury under the Establishment Clause, so Judge Kaplan's adoption of it could not have either.

In *Den Hollander II*, Judge Swain adopted Magistrate Pitman's "[r]eport in its entirety," Swain *Order*, pp. 6, App. 170, and mistakenly ruled that collateral estoppel applied to the issues of both non-economic injury and taxpayer injury

under the Establishment Clause. Judge Swain said, "The issue of Plaintiff's standing to litigate his Establishment Clause and related claims . . . was decided against him in *Den Hollander I*." (Swain *Order*, pp. 5, App. 169).

Following the entry of Judge Swain's *Order*, Den Hollander found two New York State residents willing to add their names as plaintiffs to this suit, *Den Hollander II*, with one factually alleging non-economic and taxpayer standing and the other taxpayer standing. On November 21, 2011, Den Hollander moved that Judge Swain's *Order* of October 31st be vacated and also moved that the Judge allow amendment of the Complaint to add, or, in effect, substitute the two new plaintiffs: Lt. Col. (Retired) Michael G. Leventhal and attorney Michael P. Schmitt, along with their factual allegations. Because Den Hollander filed the motion to vacate within 28 days of the entry of judgment, it is properly considered a motion to alter or amend under Fed. R. Civ. P. 59(e). *See* 12A C. Wright, *et al.*, *Federal Practice and Procedure, Civil*, § 1489 (3d ed. 2010).

On May 21, 2012, Judge Swain denied both motions "for substantially the reasons set forth in pages 5 - 8 of the State Defendants' Opposition Memorandum of Law and pages 1 - 2 of the Federal Defendants' opposition letter . . . ." (Swain *Memorandum Order*, p. 2, App. 206).

By adopting sections of the State and USDOE's oppositions for her decision, Judge Swain ended up holding 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 new evidence did not include the factual allegations in a verified complaint of the newly-discovered plaintiffs and did not included the new plaintiffs as well. In addition, she held that her court did not have subject matter jurisdiction to allow amendment of the Complaint under Fed. R. Civ. P. 15. to add, or, in effect substitute, new plaintiffs that would cure standing, and that the amendment would have been dismissed under Rule 12(b)(6) anyway.

SUMMARY OF THE ARGUMENTS

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 15, 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[1] without the same reasoning or invented law being used against those they personally agree with in future cases. It is an authoritarian prerogative that supposedly ended with the *Magna Carta*.[2]

The statements of the two new plaintiffs in the verified amended complaint are new evidence; therefore, the lower court's *Order* can be vacated.

The amendment adding the new plaintiffs, or, in effect, substituting them for Den Hollander will relate back to when the original Complaint was filed. That means on December 13, 2010, they are parties in the proceeding, and the lower court has the power to determine whether it has subject matter jurisdiction—whether the plaintiffs have standing. So even with the lower court throwing Den Hollander out on collateral estoppel grounds, it cannot grant summary judgment to the State and USDOE on the basis of collateral estoppel against the two new plaintiffs because collateral estoppel does not apply to them. They were never parties, nor privies, nor members of the putative class in *Den Hollander I*.

Collateral estoppel does <u>not</u> apply to the issue of non-economic injury under Establishment Clause standing because it was never addressed by any judge in *Den Hollander I*; therefore, it was never decided. As for taxpayer injury, collateral

[1] Men comprise a little over 49% of the population.
[2] 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.

estoppel does not apply because (1) it was never addressed by Magistrate Fox or Judge Kaplan in *Den Hollander I*, and (2) although taxpayer injury was raised in the Second Circuit, litigated and decided, that issue was not properly before that Court; therefore, its statements concerning taxpayer injury are a nullity.

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 non-economic injury and taxpayer injury were actually or properly determined, and uncertainty is not good enough for collateral estoppel to apply.

STANDARDS OF REVIEW

Fed. R. Civ. P. 59(e) motion: "[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." *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609, 613 (6th Cir. 1998).

Fed. R. Civ. P. 15 motion: *Foman v. Davis*, 371 U.S. 178, 182 (1962), is the leading case on a district court's discretion to grant or deny leave to amend a complaint post-judgment. *Moore's Federal Practice*, §15.15[1], 3rd ed. (2012).

Summary Judgment: "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).

Collateral Estoppel: In determining which issues have been actually litigated and decided, a federal 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).

ARGUMENTS

Motion to Vacate under Rule 59(e)

I. Under Fed. R. Civ. P. 59(e), newly discovered evidence to vacate a district court judgment includes statements in a verified amended complaint by newly-discovered plaintiffs.

"Where . . . [a] motion requests a substantive change in the district court's decision, it may be considered under Rule 59(e)." *Hannon v. Maschner*, 981 F.2d 1142, 1145 n.2 (10th Cir. 1992)(citing *Munden v. Ultra-Alaska Assoc.*, 849 F.2d 383, 387 (9th Cir. 1988), *superseded on other grounds*, *Cobb v. Weyerhaeuser Mortgage Co.*, 1994 U.S. App. LEXIS 5447 at *3 (9th Cir. 1994)). Rule 59(e) is available to vacate an order granting summary judgment. *Fields v. South Houston*, 922 F.2d 1183, 1188 (5th Cir. 1991). One ground for granting a Rule 59(e) motion is to allow the movant to present newly discovered or previously unavailable evidence. *Atlantic States Legal Found. v. Karg Bros.*, 841 F. Supp. 51, 53 (N.D.N.Y. 1993)(citation omitted).

As stated in the November 19, 2011, Amended Complaint, which was verified, the newly-discovered evidence that was previously unavailable shows that the taxpayer standing requirement under the Establishment Clause is satisfied for both of the proposed plaintiffs: Lieutenant Colonel (Ret.) Michael G. Leventhal and Michael P. Schmitt, Esq. (Nov. 19, 2011, Amended Complaint ¶¶ 13, 15, App. 174-175). In addition, attorney Schmitt provides evidence as to non-economic standing with the following:

> [He] uses the facilities and services he is entitled to as an alumnus of Hofstra Law School and is directly affected by the New York State defendants requiring Hofstra to comply with Feminist precepts and by the State defendants and USDOE using tax dollars to directly or indirectly support the propagation of the Feminist doctrine at Hofstra's Women's Studies program. (Nov. 19, 2011, Amended Complaint ¶ 14).
>
> 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. (Nov. 19, 2011, Amended Complaint ¶¶ 88-89).

Such evidence was discovered after Judge Swain's *Order* was entered. (Affidavit in Support of Motions to Vacate and Amend, ¶ 12, App. 204).

Introducing newly-discovered evidence, however, is not enough. Judge Swain held that the newly-discovered evidence must be of the sort that would probably have changed the result. (Judge Swain *Memorandum Order*, Addendum State Opp. p. 7 and USDOE Opp. p. 2); *see Figgie International, Incorporated. v. Miller*, 966 F.2d 1178, 1180 (7th Cir. 1992). Therefore, to modify a quote from former President Bill Clinton, the final resolution of this issue "depends on what the meaning of the word ['changed'] is." According to *The Merriam-Webster Dictionary*, 2004 ed., "change" means (1) to make or become different, alter or (2) to replace with another.

Judge Swain erred in holding that the addition of the newly-discovered evidence from two new plaintiffs would not change how this case ended in her Court. That evidence would have prevented the closing of this case due to summary judgment based on collateral estoppel. Even were the original plaintiff Den Hollander collaterally estopped, the two new plaintiffs would not be because they were never parties nor privies to *Den Hollander I*, and the new evidence shows they have standing under the Establishment Clause. For them, the case would continue, so the result of summary judgment of the entire case based on collateral estoppel would not apply and that is a changed result.

II. Judge Swain's Failure to vacate her October 31, 2011, *Order* will result in a manifest injustice.

In adopting certain arguments of the State as her reasoning for denying the motion to vacate, Judge Swain ruled that

> Finally, plaintiff does not identify any manifest injustice. As he admits, the proposed new plaintiffs are perfectly free to bring their own lawsuit in their own names, and, if successful, obtain injunctive and declaratory relief that would benefit not only them, but plaintiff and all others similarly situated. (Pltf. Mem., p. 6) The proposed new plaintiffs can, if they choose, avail themselves of Mr. Den Hollander's advice or direction in the prosecution of their own lawsuit.

(Swain *Memorandum Order*, Addendum State Opp. p. 7, App. 210).

Therein, however, lies a trap—most likely intentionally set. Were the new plaintiffs to believe that they could begin again by bringing a plenary action with the legal assistance of Den Hollander, the State, which authored the above quote, and the Judge, who adopted it, would argue they too are collaterally estopped based on *Fulani v. Bentsen*, 862 F. Supp. 1140, 1148 (S.D.N.Y. 1994), which relied on *Conte v. Justice*, 996 F.2d 1398, 1402 (2d Cir. 1993).

Fulani held that collateral estoppel binds not only the actual parties to a lawsuit, but also their privies, and the appearance of the same attorney in both actions creates the impression that the interests represented in both actions are identical. *Fulani* at 1148. So, were the new plaintiffs to bring a subsequent action in which Den Hollander is their attorney, the District Court and the Second Circuit Court of Appeals—given their less than impartial receptiveness to men's rights

cases—would most assuredly rely on privy to collaterally estop the new plaintiffs. That is a manifest injustice, since "[t]he Federal Rules . . . accept the principle that the purpose of pleading is to facilitate a proper decision on the merits," *Conley v. Gibson*, 355 U.S. 41, 48 (1957)—even for the rights of men.

Motion to Amend the Complaint Post-Judgment

III. When a district court disposes of an action for lack of subject matter jurisdiction, that same court can cure the jurisdictional defect by allowing amendment of the original complaint to add new plaintiffs, or, in effect, to substitute new plaintiffs for the original plaintiff.

By adopting the State and USDOE's reasoning as her opinion, Judge Swain accepted that if her October 31st *Order* was vacated, her Court would still "lack[] jurisdiction to entertain the motion" to amend the Complaint to add parties who had standing because her October 31st *Order* found that Den Hollander lacked standing. (*See* Judge Swain *Memorandum Order*, Addendum State Opp. pp. 7-8, App. 210-211).

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.

Further, Judge Swain adopted the argument that the amendment would not cure Den Hollander's standing, so, in effect, the amendment is one to substitute parties—two new plaintiffs for the original plaintiff. (Judge Swain *Memorandum Order*, Addendum State Opp. p. 7, App. 210). "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." Fed. R. Civ. P. 15(c)(1)(C); *E.R. Squibb & Sons, Inc. v. Lloyd's & Co.*, 241 F.3d 154, 162 (2d Cir. 2001)(Jacobs, J., Calabresi, J., Straub, J.). "[N]othing prevents a district court from granting a party leave to amend its complaint to assert a new basis for subject matter jurisdiction, provided that the amendment is not unduly delayed, advanced in bad faith, or prejudicial to the opposing party . . . ." *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 887 (3d Cir.1992). Relation back to the date of the original filing applies even when the amendment states a new basis for subject matter jurisdiction by changing or adding parties. *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).

In this case the new basis is the new plaintiffs and their factual allegations, and, as argued below in Point IV with respect to *Foman*, the amendment "is not unduly delayed, advanced in bad faith, or prejudicial to the opposing party."

Since Rule 15(c)(1)(C) is satisfied, the amendment would relate back to day one when Judge Swain had the authority to decide whether her Court had subject matter jurisdiction. The addition of the two new plaintiffs would be as if the

original Complaint included them as named plaintiffs. So even if Judge Swain still dismissed plaintiff Den Hollander under collateral estoppel, the two new plaintiffs could not be denied standing on those grounds because they were neither parties nor privies to *Den Hollander I*. With the new plaintiffs in the proceeding, the entire case would not have been terminated through summary judgment based on collateral estoppel.

"There [is no] doubt that a broad reading of Rule 15 would permit amendments for any purpose, including changes of parties. A number of courts in this [the Second] Circuit have allowed substitution of parties to be effected by amendments under Rule 15. Nevertheless, the preferred method is to consider such motions under Fed. R. Civ. P. 21, which specifically allows for the addition and elimination of parties." *Sheldon v. PHH Corp.*, 96 Civ. 1666, 1997 U.S. Dist. LEXIS 2217*10, 1997 WL 91280 at *2-*3 (S.D.N.Y. Mar. 4, 1997)(Kaplan, J.), *aff'd* 135 F.3d 848 (2d Cir. 1998).

As District Judge Kaplan further explained in *Sheldon*:

> "The basis of the rule allowing substitution of parties under Rule 21 is *Hackner v. Guaranty Trust Co. Of New York*, 117 F.2d 95, 98 (2d Cir. 1941), *cert. denied*, 313 U.S. 559 (1941), where a plaintiff 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:
>
> > 'no 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.

Hackner was a putative class action dismissed because the original named plaintiffs lacked 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). The new plaintiff in *Hackner* had a claim for relief, as do the two new plaintiffs here, which in that sense is an action. *Hackner*, 117 F.2d at 98. As the Supreme Court has pointed out, "there is no particular magic in the way [an action] is instituted." *Id.* (citing *Chisholm v. Gilmer*, 299 U.S. 99, 102 (1936)). The Second Circuit concluded in *Hackner*, as Judge Kaplan so appropriately quoted above:

> [N]o 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 [the newly added plaintiff] 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.

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, altered the judgment to find standing.[3]

Judge Swain, however, relied on cases from other circuits to conclude that had she vacated her October 31st *Order*, she did not have the authority to allow amendment of the Complaint. (Judge Swain *Memorandum Order*, Addendum State Opp. p. 8, App. 211, Addendum USDOE Opp. p. 2, App. 213). Even if Judge Swain is correct that some circuits hold that the lack of standing or jurisdiction may not be cured by amendment, that is not controlling in the Second Circuit, especially in light of *Hackner*, which Judge Swain failed to mention.

In any event, the out-of-circuit cases relied upon by Judge Swain are inapposite:

Third Circuit

Schwartz v. The Olympic, Inc., 74 F. Supp. 800 (D.Del. 1947). This case's authority in the Second Circuit was obviated by Judge Kaufman when he found the better view was that the Federal Rules permit an amendment to cure a

[3] Courts in other Circuits have also held that an amendment adding a party that brings the case within a district court's jurisdiction can be granted. *United Union Roofers v. Ins. Corp. of America*, 919 F.2d 1398, 1402 (9th Cir. 1990)(district court wrongly denied amendment of the complaint based on its original dismissal order that the union did not have standing). "As a general proposition . . . often a plaintiff will be able to amend its complaint to cure standing deficiencies. To deny any amending of the complaint places too high a premium on artful pleading and would be contrary to the provisions and purpose of Fed. R. Civ. P. 15." *Id.* In *Seely v. Cleveland Wrecking Co. of Cincinnati*, 15 F.R.D. 469 (E.D. Pa. 1954), the court permitted the addition of plaintiffs by amendment where the same transaction was involved.

jurisdictional defect that is more than merely technical; therefore, an amendment does not presuppose jurisdiction of the case. *National Maritime Union of America v. Curran*, 87 F. Supp. 423, 425-26 (S.D.N.Y. 1949). In addition, *Schwartz* was a brief "*ex cathedra* ruling unsupported by analysis or citation of precedent." *Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278, 1288-89 (5th Cir. 1981)(Wisdom, J., dissenting).

Fifth Circuit

Federal Recovery Servs. v. United States, 72 F.3d 447 (5th Cir, 1995), did not involve a Rule 59(e) motion based on new evidence. In fact, the plaintiff to be substituted was available at the time of the filing of the original complaint. In *Den Hollander II*, the two new plaintiffs were not available until after judgment was entered. Also, the Tenth Circuit in *U.S. Ex. Rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015, 1019 (1994) disapproved of the Fifth Circuit's "chicken and egg argument" that if jurisdiction is lacking at the beginning of a suit, it cannot be cured by adding parties. Further, the attorneys in *Federal Recovery Servs.*, driven by their greed to control the proceeds of the litigation, engaged in the inappropriate machination of creating a shell corporation just days before filing suit solely for that purpose. The only greed involved in *Den Hollander II* is one for fairness.

Summit Office Park, Inc. v. United States Steel Corp., 639 F.2d 1278 (5th Cir. 1981), did not involve a Rule 59(e) motion to vacate and the original plaintiff

tried to change the cause of action, which is contrary to Rule 15(c)(1)(C). "The holding in *Summit Office Park* by its terms extends 'only' to instances where a plaintiff who lacks standing to assert a claim attempts to substitute 'new plaintiffs, a new class, and a new cause of action.'" *Auto. Fin. Corp. v. Ray Huffines Chevrolet, Inc. (In re Parkway Sales and Leasing, Inc.)*, 411 B.R. 337, 349, 2009 Bankr. LEXIS 3611 (E.D. Tx. 2009)(quoting *Summit* at 1282). The Fifth Circuit in *Summit* specifically stated that its decision was not "a restriction or limitation on the amendment procedure as it pertains to adding parties plaintiff . . . ." *Summit* at 1282. The amendment in *Den Hollander II* does not seek to change the cause of action.

Turner v. First Wisconsin Mortg. Trust, 454 F. Supp. 899 (E.D. Wis. 1978), did not involve a Rule 59(e) motion and the original plaintiff tried to certify a class with her as the named plaintiff but was unable to because none of her claims were similar to the putative class. In effect, Rule 15(c)(1)(C) was not satisfied because "the plaintiff has no cause of action as to any of the counts of the first amended complaint . . . ." *Turner* at 908. In addition, *Turner* relied on *Schwartz*, 74 F.Supp. 800, for authority that the plaintiff could not add other plaintiffs under Rule 15. *Turner* at 913.

Enron Corp. Secs. v. Enron Corp., 279 F.R.D. 395 (S.D. Tex. 2011), did not involve a Rule 59(e) motion, Rule 15(c), or Rule 21, and relied on *Summit* and *Federal Recovery Services*.

Sixth Circuit

Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528 (6th Cir. 2002) and *Zangara v. Travelers Indem. Co. of Am.*, No. 05 Cv 731, 2006 U.S. Dist. LEXIS 14218, 2006 Westlaw 825231 (N.D. Ohio Mar. 30, 2006)(unreported case). Both *Zurich* and *Zangara* "are distinguishable because they involved attempts at party substitution that either would have dramatically altered the operative facts, *Zangara*, 2006 U.S. Dist. Lexis 14218 at *10, 2006 Westlaw 825231, at *3, or would have amounted to the substitution of a party engaged in the "bad faith" maneuvering of using a straw man as the original plaintiff who would be replaced later, *Zurich*, 297 F.3d at 532." *Corvello v. New Eng. Gas Co.*, 2011 U.S. Dist. LEXIS 98884*19 (D.R.I. 2011). The proposed amendment in *Den Hollander II* does not significantly alter the facts for, as Judge Swain said, it is "principally adding two new plaintiffs." (Swain *Memorandum Order*, p. 2, App. 206). Nor was Den Hollander acting as a straw man for the proposed new plaintiffs.

Eleventh Circuit

Wright v. Dougherty County, 358 F.3d 1352 (11th Cir. 2004), relied on *Summit* to deny amendment of the complaint to consolidate two actions because

voters in over-represented districts could not represent voters in under-represented districts. It did not involve a Rule 59(e) motion.

D.C. Circuit

Lans v. Gateway 2000, Inc., 110 F. Supp. 2d 1 (D.D.C. 2000), was a patent infringement suit. The law concerning standing for a patent infringement suit forbids curing standing once the complaint is filed because of public policy concerns about the dangers of allowing those without patent rights to institute an action. *Gaia Technologies, Inc. v. Reconversion Technologies, Inc.*, 93 F.3d 774, 780 (Fed. Cir. 1996). *Den Hollander II* does not involve the special rules for patent infringement standing.

IV. The lower court failed to comply with the requirements of *Foman v. Davis*, 371 U.S. 178 (1962), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), by not providing a plausibility analysis that the November 19, 2011, Amended Complaint would inevitably be dismissed under Rule 12(b)(6).

Second Circuit precedents make clear "that considerations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of judgment." *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011).

Williams relied on the U.S. Supreme Court's ruling in *Foman v. Davis*, 371 U.S. 178 (1962)(Goldberg, J.), to vacate a district court's order denying a post-judgment motion to replead. Quoting the Supreme Court in *Foman*:

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Williams at 213-14 (emphasis added). The liberal spirit of Rule 15 does not dissolve as soon as final judgment is entered. *Williams* at 214.

The only statements incorporated into Judge Swain's *Memorandum Order* for refusing to amend the Complaint because it would inevitably be dismissed under Rule 12(b)(6) are the State's Opposition at p. 8, bottom paragraph:

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

and USDOE's Opposition at p.2:

> Even if Plaintiff's request were timely, his proposed complaint [November 19, 2011, Amended Complaint] cannot be accepted because his claims plainly would not survive a motion to dismiss . . . .

Judge Swain, therefore, relied on the legal conclusion that the November 19, 2011, Amended Complaint would not withstand a motion to dismiss. However,

> [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 current procedure in determining dismissal under Rule 12(b)(6) requires the application of the "plausibility standard." The plausibility standard requires "a complaint with enough factual matter (taken as true) to suggest that" the elements of the cause of action are satisfied. *Arista Records LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A court's determinations are context-specific. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *South Cherry St., LLC v. Hennessee Group LLC*, 573 F.3d 98, 110 (2d Cir. 2009).

The procedure begins with "taking note of the elements a plaintiff must plead to state a claim …," *Iqbal*, 556 U.S. at 675, then proceeds in two steps: (1) Identifying the specific allegations in a complaint that are not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 679-81; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). Those are statements that cut and copy the elements of a cause of action; that is, they are conclusory. *Twombly*, 550 U.S. at 555.

(2) Next, the analysis considers the remaining factual allegations in a complaint as true and determines if they plausibly—not probably but more than possibly— infer that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 679-81; *Twombly*, 550 U.S. at 556; *Hayden v. Paterson*, 594 F.3d at 161. In doing so, the courts "draw[] all inferences in favor of the plaintiff," *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 692 (2d Cir. 2009), and 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.

Judge Swain's *Memorandum Order* did not engage in the above required analysis; therefore, her acceptance of inevitable dismissal of the November 19, 2011, Amended Complaint is not a "justifying reason" for refusing the post-judgment amendment as required by *Foman v. Davis*, 371 U.S. at 182.

Further, applying the *de novo* review standard of *Martin*, the exceptions cited in *Foman* for not freely granting leave to amend post-judgment are not present in this case; therefore, under *Foman* and *Martin*, Judge Swain's decision on inevitable dismissal was an abuse of discretion.

"Mere delay . . . absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend." *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981). Here plaintiff Den

Hollander began to prepare the two motions immediately on discovering that two other taxpayers were willing to join this action. (Affidavit in Support of Motions to Vacate and Amend, ¶ 12, App. 204). Prior to the two plaintiff's agreements to join this suit, no other individuals or organizations agreed to participate as plaintiffs in *Den Hollander II*; therefore, no other opportunities to join plaintiffs existed. That opportunity only arose after judgment was entered on October 31, 2011.

In determining what constitutes "prejudice," the Second Circuit considers whether the request to "amend [was] sought promptly after learning new facts, where 'no trial date had been set by the court and no motion for summary judgment had yet been filed by the defendants' and where 'the amendment will not involve a great deal of additional discovery.'" *Ruotolo v. City of New York*, 514 F.3d 184, 192 (2d Cir. 2010)(quoting *Fluor Corp*., 654 F.2d at 856).

In this case, summary judgment, which was opposed by the defendants, was granted on the Magistrate's own motion and concerned only the issue of collateral estoppel. The request for leave to amend by adding the new plaintiffs was sought promptly after learning about their willingness to join the case. Further, no trial date had been set, and the November 19, 2011, Amended Complaint would only result in additional discovery as to whether the two new plaintiffs are taxpayers, whether one has incurred non-economic injury, and whether Hofstra's Women's

Studies program benefits from government funds and propagates the religion Feminism.

In addition, the November 19, 2011, Amended Complaint would not change the cause of action of the case, which has never been judicially analyzed, and would not require the defendants "to engage in significant new preparation." *Routolo* at 192 (quoting 6 Wright, Miller & Kane, *Fed. Prac. and Proc.*, § 1487, at 623 and n.9 (1990 & 2007 Supp.)). The violations of the Establishment Clause as asserted by the new plaintiffs in the Amended Complaint result from the same series of ongoing transactions as alleged in the original Complaint by which the State inculcates Feminism into higher education using State and federal tax dollars.

Joinder of the two plaintiffs is before any discovery has taken place; therefore, it is <u>not</u> disfavored. *Cf. Giorgio Morandi, Inc. v. Textport Corp.*, 761 F. Supp. 12, 14 (S.D.N.Y. 1991).

Lastly, while "leave to amend need not be granted . . . where the proposed amendment would be 'futil[e],'" *Advanced Magnetics*., 106 F.3d 11, 18,—such is not the situation here. The addition of the two new plaintiffs would prevent collateral estoppel from applying, *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940), and, therefore, summary judgment for the reasons cited in the *Order* would be improper. Judge Swain's reliance on the State's cites in its Opposition at p. 8, last paragraph, concerning futility are distinguishable: *Lucente v. IBM Corp.*, 310 F.3d

243 (2d Cir. 2002) involved a change of legal theory, *Nettis v. Levitt*, 241 F.3d 186 (2d Cir. 2001), a fraud case in which two years of discovery had failed to produce evidence, and *Dougherty v. North Hempstead Board of Zoning Appeals*, 282 F.3d 83 (2d Cir. 2002), dealt with the application of the ripeness doctrine to equal protection and due process claims.

Collateral Estoppel

V. The lower court erred in finding that collateral estoppel prevented Den Hollander from litigating the issues of non-economic injury and taxpayer injury for Establishment Clause standing.

In order to rule that summary judgment based on collateral estoppel precluded Den Hollander from litigating standing under the Establishment Clause, Magistrate Pitman and Judge Swain had to find that what did not happen in the courts in *Den Hollander I* did happen.

Collateral estoppel requires that "'(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.'" *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006)(quoting *Purdy v. Zeldes*, 337 F.3d 253, 258 & n.5 (2d Cir. 2003)); accord *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 146 (2d Cir. 2005); *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288-89 (2d Cir. 2002).

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)). In addition, Magistrate Pitman held that "the weight of authority outside of [the Second] Circuit holds that a dismissal for lack of standing collaterally estops subsequent suits which present the precise standing issue that was actually determined." (Magistrate Pitman's *Report and Recommendation*, p. 23-24, App. 148-149,)(emphasis added)(numerous citations omitted). Similarity of issues is not enough—the issue in the current case must be the precise and identical issue that was decided in the prior action. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1399 (9th Cir. 1992).

As for "actually litigated and decided," that means a question of fact is put in issue by the pleadings, is controverted, is submitted to the trier of fact for its determination, and is determined; that is, actually resolved. *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 459-60 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); *see Arnold Graphics Industries, Inc. v. Independent Agent Center, Inc.*, 775 F.2d 38, 41-42 (2d Cir. 1985). 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)).

So for Den Hollander to be prevented from litigating non-economic injury and taxpayer injury under Establishment Clause standing in this case requires, in addition to the other elements, that in the prior case, *Den Hollander I*, those two precise issues were litigated and decided.

Injury for Establishment Clause standing is the "linchpin." *Cooper v. United States Postal Serv.*, 577 F.3d 479, 489 (2d Cir. 2009). Establishment Clause injury comes in two forms: (1) non-economic injury which comes from exposure to religious communications, *Cooper* at 490,[4] 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).

On non-economic injury, the Supreme Court has specifically 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 v. Syracuse Housing. Auth.*, 962 F.2d 1101, 1107 (2d Cir. 1992)(quoting *Association*

[4]In *Cooper*, the Second Circuit found non-economic 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. *Cooper*, 577 F.3d at 491.

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).

On taxpayer injury, a taxpayer "asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007). The law may be challenged on its face or as applied. *Bowen v. Kendrick*, 487 U.S. 589, 598 (1988). The Establishment Clause also applies to the states through the Fourteenth Amendment, so a state taxpayer may challenge state funding. *DeStefano v. Emergency Hous. Group*, 247 F.3d 397, 405 (2d Cir. 2001)(citations omitted).

A. In *Den Hollander I*, Magistrate Fox's Report and Recommendation did not address non-economic or taxpayer injury for Establishment Clause standing.

Magistrate Fox's *Report and Recommendation* in *Den Hollander I* did not address the standing issues of non-economic injury and taxpayer injury because he never determined them, nor were they litigated before him. A decision that does not mention the specific issue in question is too vague to afford issue preclusive effect. *See Barnes v. Hodel*, 819 F.2d 250, 252 (9th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988).

The only references by Magistrate Fox to the Establishment Clause in *Den Hollander I* were (1) "[t]he plaintiffs[5] allege that" the Federal defendants and the State defendants "violated the First Amendment's Establishment Clause, by 'aiding the establishment of the religion of Feminism at Columbia University through the University's Women's Studies program'"; (2) "the State defendants assert they are entitled to the relief they seek because . . . 'feminism' is not a religion, as contemplated by the First Amendment"; and (3) "[t]he Federal defendants contend they are entitled to the relief they seek because . . . the financial assistance provided to Columbia, by the federal government, does not violate the Establishment Clause . . . ." (Magistrate Fox's *Report and Recommendation*, pp. 2-3, App. 69-70).

Further evidence that Magistrate Fox never considered Establishment Clause standing is that his analysis of injury fails to address the type of injuries that support standing under the Establishment Clause: non-economic and taxpayer. (Magistrate Fox's *Report and Recommendation*, pp. 7-9, App. 74-76). Magistrate Fox relied solely on an analysis of injury that applies to discrimination-based claims—not establishment of religion claims. (*Id.*). The Second Circuit's *Summary Order* makes clear this distinction by separating its analysis and

[5] *Den Hollander I* had two named plaintiffs representing the putative class in the District Court, but when that Court dismissed the action, one of the plaintiffs withdrew leaving just Den Hollander.

authority relied on when addressing standing for "discrimination-based claims" from its remarks on "taxpayer standing." (Second Circuit *Summary Order*, pp. 3-4, App. 93-94).

Since the issues of non-economic and taxpayer injuries were never "actually litigated and decided" by Magistrate Fox, relitigation of those issues are not precluded based on the proceeding before him.

The most that can be read into the penumbras of Magistrate Fox's *Report and Recommendation* is uncertainty as to whether non-economic injury and taxpayer injury were considered. "A corollary of the actual litigation and decision requirements is that 'when a court cannot ascertain what was litigated and decided, issue preclusion [collateral estoppel] 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)(citing *Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1583-84 (11th Cir. 1991)); *accord NextWave Pers. Communs., Inc. v. FCC*, 254 F.3d 130, 148-49 (D.C. Cir 2001)(unclear whether the Second Circuit decided the issue, so collateral estoppel did not apply); *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684-85 (D.C. Cir. 1992)(uncertainty over whether issue was actually decided precludes collateral estoppel); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760,

764 n.1 (3rd Cir.), *cert denied*, 493 U.S. 821 (1989)("issue preclusion only attaches if the basis of the first court's decision is clear"); *Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 751-52 (5th Cir. 1986)(no collateral estoppel where court cannot tell whether issues previously reached and decided).

So either way, collateral estoppel does not apply to the proceeding before Magistrate Fox.

B. In *Den Hollander I*, Judge Kaplan's *Order* did not address non-economic injury or taxpayer injury under Establishment Clause standing.

Judge Kaplan's *Order* in *Den Hollander I* also did not address the standing issues of non-economic injury and taxpayer injury because he never determined them, nor were they litigated before him. Once again, a decision that does not mention the specific issue in question is too vague to afford issue preclusive effect. *See Barnes*, 819 F.2d at 252.

Judge Kaplan did, however, make gratuitous comments about the merits of the Establishment Clause claim, but such comments do not touch on non-economic and taxpayer standing:

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

> claims are dismissed also on the alternative ground that they are absurd and utterly without merit.

Had Judge Kaplan ruled that there was no Establishment Clause injury—either non-economic or taxpayer—then his above statements concerning the merits would have been meaningless *dicta* because the court would no longer have subject-matter jurisdiction to dismiss on the merits that Feminism was not a religion and that the Establishment Clause claim was "absurd and utterly without merit."

Alternatively, had Judge Kaplan ruled that non-economic or taxpayer injury did exist, then his court would have had subject-matter jurisdiction to dismiss the Establishment Clause claims on the merits.

Judge Kaplan may have thought that Den Hollander lacked non-economic 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 [collateral estoppel] cannot operate.'" *Securities Exch. Comm'n*, 192 F.3d at 309(quoting *Moore's Federal Practice*, § 132.03[2][g](citing *Mitchell*, 942 F.2d at 1583-84)); *accord NextWave Pers. Communs.*, 254 F.3d at 148-49; *Connors*, 953 F.2d at 684-85; *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d at 764 n.1; *Midwest Mechanical Contractors*, 801 F.2d at 751-52.

Both Magistrate Fox and Judge Kaplan presented no injury analysis concerning non-economic and taxpayer injury; therefore, the jurisdictional facts of non-economic and taxpayer standing were not determined in the district court.

C. In *Den Hollander I*, the oral argument in the Second Circuit Court of Appeals and the Court's *Summary Order* did not address non-economic injury and improperly considered and ruled on taxpayer injury under the Establishment Clause.

The Second Circuit never touched on the issue of non-economic standing in oral argument. It also never reached a decision on that issue, which is clear from the only statement in its *Summary Order* concerning Establishment Clause standing: "Nor has plaintiff made out the requirements for taxpayer standing for his Establishment Clause claim." (Second Circuit *Summary Order*, pp. 3-4, App. 93-94 (emphasis added)). Once again, a decision that does not mention the specific issue in question is too vague to afford issue preclusive effect. *See Barnes*, 819 F.2d at 252.

The Second Circuit made its "taxpayer" statement in the sentence before it summed up its decision with "we AFFIRMED the dismissal of the action for substantially the reasons stated in Judge Fox's thorough Report and Recommendation as adopted by the district court." (*Id.* pp. 3-4, App. 93-94).

The Second Circuit may have used the "taxpayer" and "thorough" statements to avoid the conclusion that Magistrate Fox had not decided taxpayer standing, which would have left the Second Circuit with a dismissal decision by

Judge Kaplan on the merits concerning the Establishment Clause. The reasoning would have gone like this: no decision by Magistrate Fox on taxpayer standing meant that when Judge Kaplan adopted the *Report and Recommendation*, the issue of taxpayer standing was still open. In making a dismissal decision on the merits under Fed. R. Civ. P. 12(b)(6), Judge Kaplan would have implied that he had found taxpayer standing; otherwise, he couldn't make a merits decision.

The problem[6] for the Second Circuit then would have been that Judge Kaplan's cursory Establishment Clause decision failed to comply with the Rule 12(b)(6) plausibility analysis set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Once again, under *Iqbal*, the decision should have identified the specific allegations of Feminism as a religion that were not entitled to the presumption of truth—that is, were conclusory. *Id*. at 681. The decision then should have considered whether the remaining allegations plausibly—not probably but more than possibly—inferred Feminism was a religion. *Id.* Judge Kaplan's decision did neither, so to avoid overturning his decision, the Second Circuit assumed Magistrate Fox actually decided taxpayer standing, which the Court made sure to emphasize with its taxpayer Establishment Clause statement followed by a

[6] "Problem" because the tenor of the times demands that men's rights cases fail because men, when in conflict with the preferential treatment of females, are not considered full citizens under the Constitution "and can therefore claim none of the rights and privileges which that instrument provided for and secures to citizens of the United States . . . ." *Dred Scott v. Sanford*, 60 U.S. 393, 404 (1857)(one group of human beings held not entitled to the "full rights of citizenship," therefore, the Supreme Court found jurisdiction lacking), *overruled in part, Slaughter House Cases*, 83 U.S. 36, 73 (1872).

summation of its holding referring to "Judge Fox's thorough Report and Recommendation."

While both issues of non-economic and taxpayer injuries were raised in the Second Circuit by Den Hollander's Brief and Reply, only taxpayer injury was litigated[7] and decided.

More importantly, however, neither issue was properly before the Court. "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *E.g., Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012)(quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992)). The general rule is that "a federal appellate court does not consider an issue not passed upon below." *Austin v. Healey*, 5 F.3d 598, 601 (2d Cir. 1993)(internal quotation marks omitted)(quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). Since the issues of non-economic and taxpayer injuries were not raised or passed upon in the lower court by either Magistrate Fox or Judge Kaplan, they could not properly have been raised or passed upon on appeal.

Relitigation of an issue is <u>not</u> precluded if the party against whom collateral estoppel is sought could not have appealed that issue. *McCoy*, 950 F.2d at 22;

[7] In oral argument, Second Circuit Judge Calabresi emphasized that the complaint had failed to allege that Den Hollander had taxpayer status. (Transcript of Oral Argument, pp. 2, 5, App. 81, 84; Magistrate Pitman's *Report and Recommendation*, p. 9, App. 134).

County of Suffolk v. Amerada Hess Corp., 2007 U.S. Dist. LEXIS 45543 n.22 (S.D.N.Y. 2007)("In the absence of a right to appeal, there can be no preclusive effect."). When "the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgments in the initial action," collateral estoppel will not apply, *Restatement (Second) of Judgments* § 28(1)(1982), such as when a party is "disabled as a matter of law from obtaining review by appeal …," *id.* at Comment a. "[I]nability to obtain appellate review … does prevent preclusion …." *Gelb v. Royal Globe Insurance Co.*, 798 F.2d 38, 44 (2d Cir. 1986)(emphasis added), *cert. denied*, 480 U.S. 948 (1987).

So despite what occurred in the Second Circuit in *Den Hollander I*, under the law, Den Hollander could not have appealed the issues of non-economic or taxpayer injury; therefore, he is not prevented from litigating both in this case.

Alternatively, if this Court decides the issue of non-economic injury was properly before the appeals' court in *Den Hollander I*, collateral estoppel still does not apply to that issue because the appeals court never decided it. *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"). Further, even assuming that Judge Kaplan and Magistrate Pitman had decided both the non-economic and taxpayer injury issues and each ground was necessary to their judgments, the Second Circuit only affirmed on one ground—taxpayer—and did

not consider the other—non-economic. Therefore, 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).

D. Magistrate Pitman and Judge Swain in this case, *Den Hollander II*, wrongly held that non-economic injury and taxpayer injury were determined in *Den Hollander I*.

In *Den Hollander II*, Magistrate Pitman said that Magistrate Fox in *Den Hollander I* "recommended a dismissal of all claims for lack of standing" by which Magistrate Pitman included non-economic and taxpayer injuries. (Magistrate Pitman's *Report and Recommendation*, p. 8, App. 133). Magistrate Pitman's statement, however, is false. Magistrate Fox in *Den Hollander I* never dealt with non-economic or taxpayer standing.

Magistrate Pitman further said in his *Report and Recommendation* that Den Hollander in *Den Hollander II* "also alleges non-economic standing—which he previously alleged in the [*Den Hollander I*] Complaint." (*Id.* p. 36, App. 161). That too is false. Neither non-economic nor taxpayer injury were alleged in the original or first amended complaints in *Den Hollander I*.

Magistrate Pitman continued to misrepresent the proceedings in *Den Hollander I* by saying the non-economic "ground for standing was previously litigated and decided in [*Den Hollander I*] by Judge Kaplan, who adopted Judge Fox's Report and Recommendation and dismissed for lack of standing." (*Id.* at 36,

App. 161). Judge Kaplan could not have adopted a decision concerning the Establishment Clause non-economic injury issue because Magistrate Fox had made none.

Magistrate Pitman also mistakenly asserted that in the Court of Appeals Den Hollander "had a full and fair opportunity to litigate the noneconomic standing issue, and the resolution of this issue was also necessary to a valid and final judgment on the issue of standing." (Magistrate Pitman's *Report and Recommendation*, pp. 36-37, App. 161-162 (emphasis added)). Once again, the Second Circuit never addressed the issue of non-economic standing. The Second Circuit did, however, address taxpayer standing but improperly so as argued above at Point V(C).

Judge Swain, in her *Order*, cited the law on collateral estoppel as

> [A] dismissal for lack of subject matter [jurisdiction] retains *some* preclusive effect [and] bars those matters that have been actually litigated—typically, the specific jurisdictional issue(s) that mandated the initial dismissal.' *Lowe v. United States*, 79 Fed. C1. 218, 229 [Fed. Ct. Cl. 2007] (original emphasis)(citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979)('the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action')).

(Swain *Order* pp. 5-6, App. 169-170). She then held "[t]hus, collateral estoppel bars [Den Hollander's] attempt to re-litigate his standing to bring an Establishment Clause claim . . . . The Court . . . concurs in Judge Pitman's conclusions regarding the scope and application of the collateral estoppel doctrine," and adopts

Magistrate Pitman's *Report and Recommendation* "in its entirety . . . ."[8] (Swain *Order* pp. 5, 6, App. 169-170).

Despite the requirements of the cited cases that the "specific jurisdictional issues" are "actually litigated," Judge Swain, as did Magistrate Pitman, mistakenly concluded that the Establishment Clause standing issue of non-economic injury was actually litigated and decided, and the taxpayer injury issue was properly litigated and decided in *Den Hollander I*. Judge Swain, therefore, wrongly ruled that Den Hollander's "standing to bring an Establishment Clause claim . . . was litigated in *Den Hollander I*" and "decided against him in *Den Hollander I*." (Swain *Order*, p. 5, App. 169).

While collateral estoppel would apply to standing under Title IX and Equal Protection because those issues were properly litigated and decided by Magistrate Fox, Judge Kaplan, and the Court of Appeals in *Den Hollander I*, collateral estoppel does not apply to (1) non-economic standing injury because it was never litigated or decided in either the lower court or the appeals' court and (2) taxpayer standing injury because it was never litigated or decided in the lower court, and was <u>not</u> legally before the appeals' court.

[8] 28 U.S.C. § 636(b)(1)(C) provides that the district court in reviewing a magistrate's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate."

The most favorable political correctness or Feminist spin that can be put on the court proceedings in *Den Hollander I* concerning non-economic and taxpayer injuries is uncertainty, and that is not good enough for collateral estoppel. *NextWave Pers. Communs.*, 254 F.3d at 148-49; *Securities Exch. Comm'n*, 192 F.3d at 309 (citing *Moore's Federal Practice*, § 132.03[2][g] (citing *Mitchell*, 942 F.2d at 1583-84)); *Connors*, 953 F.2d at 684-85; *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d at 764 n.1; *Midwest Mechanical Contractors*, 801 F.2d at 751-52.

Finally, the State and USDOE had the burden of proof and persuasion to establish collateral estoppel, *e.g., Connors*, 953 F.2d at 684 (D.C. Cir. 1992), but they have not been able to produce evidence that non-economic injury was actually litigated and decided nor that taxpayer injury was properly before the Court of Appeals in *Den Hollander I*. Collateral estoppel should therefore be disallowed.

CONCLUSION

For the reasons given, the lower court's denial of Den Hollander's motion to vacate Judge Swain's *Order* and motion to amend the Complaint and the lower court's grant of summary judgment should be reversed, together with such further relief as this Court deems just and proper.

Dated: July 6, 2012
New York, N.Y.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) by containing 11,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) by using Microsoft Word Times New Roman in font size 14.

ADDENDUM

ADDENDUM

U.S. Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Federal Rules of Civil Procedure

Rule 15. Amended and Supplemental Pleadings

(a) (2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

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(c) Relation Back of Amendments.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) *Notice to the United States.* When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

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Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

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Rule 59. New Trial; Altering or Amending a Judgment

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(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

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Rule 60. Relief from a Judgment or Order

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(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.