09-1910-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROY DEN HOLLANDER and WILLIAM A. NOSAL,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

INSTITUTE FOR RESEARCH ON WOMEN & GENDER AT COLUMBIA UNIVERSITY; SCHOOL OF CONTINUING EDUCATION AT COLUMBIA UNIVERSITY; TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; U.S. DEPARTMENT OF EDUCATION; ARNE DUNCAN, U.S. Secretary of Education in his official capacity; BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, in his or her official and individual capacity; CHANCELLOR OF THE BOARD OF REGENTS, MERRYL H. TISCH, in her official and individual capacity; NEW YORK STATE COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DAVID STEINER, in his official and individual capacity; and ACTING PRESIDENT OF THE NEW YORK STATE HIGHER EDUCATION SERVICES CORP., ELSA MAGEE, in her official and individual capacity,

Defendants-Appellees.

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

BRIEF FOR THE COLUMBIA UNIVERSITY DEFENDANTS-APPELLEES

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DISCLOSURE STATEMENT OF THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

Pursuant to Fed. R. App. P. 26.1, defendant-appellee The Trustees of Columbia University in the City of New York, a non-profit educational corporation formed by special act of the legislature of the State of New York, states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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Defendants-appellees Institute for Research on Women and Gender at Columbia University ("IRWG"), School of Continuing Education at Columbia University ("SCE"), and The Trustees of Columbia University in the City of New York (collectively, "Columbia" or the "University"), respectfully submit this brief in opposition to the appeal of plaintiff-appellant Roy Den Hollander.[1] Following the recommendation of Magistrate Judge Kevin N. Fox (A. 50-59), the District Court (Kaplan, J.) dismissed the Complaint in its entirety for lack of standing (A. 48-49).[2]

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[1] The First Amended Class Action Complaint (the "Complaint") (A. 12-47) was filed by Den Hollander and William A. Nosal (together, "plaintiffs"). Only Den Hollander ("plaintiff") is pursuing this appeal; Nosal has withdrawn from the case. (Appellant's Brief at 1.)

[2] As plaintiff has acknowledged (A. 28, Compl. ¶ 129), neither IRWG nor SCE exists as a separate legal entity capable of being sued. Each is simply an operating unit of the University, the formal corporate name of which is The Trustees of Columbia University in the City of New York. (A. 63, Declaration of Patricia Sachs Catapano ¶¶ 2-5). The District Court dismissed the case against all defendants and therefore did not reach the issue, but neither IRWG nor SCE was ever a proper party to this case. *See, e.g.*, *Murphy v. PriceWaterhouseCoopers, LLP*, 357 F. Supp. 2d 230, 241 (D.D.C. 2004) ("Unincorporated divisions of a corporation lack the capacity to be sued."); *Burns & Russell Co. of Baltimore v. Oldcastle, Inc.*, 166 F. Supp. 2d 432, 439-40 (D. Md. 2001) (unincorporated operating division of a corporation lacks the capacity to be sued).

PRELIMINARY STATEMENT

Asserting claims under the equal protection clause of the Fourteenth Amendment (via 42 U.S.C. § 1983), Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (2009), and N.Y. Civ. Rights Law § 40-c (McKinney 2009), plaintiff asked the District Court to prohibit the teaching of women's studies at Columbia or, in the alternative, to order the University to create a curriculum in men's studies, a field plaintiff does not even claim exists as a coherent scholarly discipline. His assertion that the District Court could and should have told Columbia's faculty what they can, cannot, and must teach is not based on any actual allegation of discriminatory conduct, but solely on his personal hostility to what he believes to be the content of women's studies courses.

Over hundreds of paragraphs, the Complaint spells out plaintiff's view of the feminist ideas he thinks are taught at Columbia. Plaintiff alleges, *inter alia*, that women's studies courses:

- "aim . . . to create and perpetuate a legal, social and economic substratum occupied by men toiling in a Fritz Lang 'Metropolis' like underworld" (A. 36, Compl. ¶ 189);
- "advocate that the civil rights of today's males be minimized or eliminated" (A. 22, Compl. ¶ 74);
- "advance the stereotypical inequity that a female is not responsible for her acts when intoxicated but that her male date is" (A. 23, Compl. ¶ 81);

- "provide information on how females can engage in violence against males, even premeditated murder, and escape just punishment" (A. 23, Compl. ¶ 83);

- "train[] Feminist 'storm-troopers'" (A. 38, Compl. ¶ 211);

- "derogate[] and demean[] males while propagandizing the superiority of females with a harm similar [to] … the Nazification of universities in Germany during the 1930s" (A. 38, Compl. ¶ 213);

- "depict[] fathers as bad parents, abusers, rapists, and molesters" (A. 40, Compl. ¶ 233);

- "condon[e] . . . the boiling of new born babies, the drowning of sons one after another, the liquidation of boyfriends or husbands" (A. 41, Compl. ¶ 236); and

- "train[] females to use tears, tantrums, fraud, threats of an unjust legal system, and sex to take advantage of men" (A. 43, Compl. ¶ 256).

As the Magistrate Judge and the District Judge held, this diatribe does not give rise to a case or controversy. To begin with, plaintiff has never taken a women's studies course, let alone been the victim of any discriminatory conduct in such a class. He does not allege that he was barred from women's studies courses, nor does he allege any facts suggesting that he would have been mistreated had he chosen to take one. In these circumstances, plaintiff does not allege the concrete or particularized injury from the teaching of women's studies that would give him standing to challenge Columbia's decision to offer such courses.

Plaintiff points out that there are no courses at Columbia explicitly labeled "men's studies," but he cannot dispute that thousands of courses throughout the University, many taught by men, teach the experiences and accomplishments of men, in every discipline and in every period of history. Moreover, plaintiff does not allege any actual opportunity or benefit that he (or anyone else) ever lost – the award of a degree, graduate school admission, a job, a promotion – because there are no courses specifically denominated "men's studies." Accordingly, as the Magistrate Judge and the District Judge concluded, plaintiff alleges no concrete and particularized injury from the absence of courses so labeled.

Because they found that plaintiff lacked standing, neither Magistrate Judge Fox nor Judge Kaplan reached the other compelling reason to dismiss the case against Columbia. Even if plaintiff had *standing* to sue, the Complaint would fail to state a claim for relief because it simply does not allege discrimination against men. The Complaint is an ideological attack on a body of ideas, a statement of opposition to the substantive content of certain university courses, not an allegation of any act of discrimination by any person in any class at any time.

Plaintiff repeats and elaborates his anti-feminist theme throughout the hundreds of paragraphs of his pleading, but the courts have no role to play

in evaluating the substantive merits or demerits of feminism or any other philosophy. Fundamental notions of academic freedom, rooted in the First Amendment, prohibit the government, including the courts, from deciding which ideas are good and which bad, which are worthy of being taught and which are not, which should be permitted and which prohibited.

Plaintiff may disagree, vehemently, with feminist ideas, as he sees them, but his critique does not justify trampling on the central tenet of academic freedom – that universities may decide what to teach free of government interference – by banning the discipline of women's studies from Columbia. In the absence of actual discriminatory behavior, none of which is alleged here, one individual's disagreement with the content of a university course simply raises no issue for the courts. To the contrary, it is the courts' duty to protect the marketplace of ideas by rejecting any demand that books be burned or classes banned.

JURISDICTIONAL STATEMENT

As Judge Kaplan held, the District Court lacked subject matter jurisdiction over this case because the plaintiffs lacked standing to sue. However, "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz,* 536 U.S. 622, 628, 122 S. Ct. 2450, 2454 (2002). Accordingly, the District Court had jurisdiction to

enter the judgment from which plaintiff appeals. This Court has jurisdiction under 28 U.S.C. § 1291 (2009). The final judgment of the District Court (A. 60), which was entered on April 30, 2009, disposed of all claims. The notice of appeal (A. 61) was filed on May 1, 2009.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was the District Court correct to conclude that plaintiff, who never took a women's studies course at Columbia, and who alleged no opportunity or benefit of which he was deprived because there were no courses labeled "men's studies," lacked standing to sue Columbia for offering women's studies classes?

2. Does the Complaint, which fails to allege that men and women are treated differently at Columbia, but merely attacks the ideas allegedly taught in certain classes, fail to state a claim for relief under either of the anti-discrimination statutes, or the constitutional provision, on which plaintiff relies?

3. Is Columbia's decision to offer courses in women's studies an act under color of state law merely because the University receives state funds and is subject to state regulation?

STATEMENT OF THE CASE

Columbia is a private university. (A. 29, Compl. ¶ 132; A. 63, Catapano Decl. ¶ 2.) It is subject to some governmental regulation, and both

the University and some of its students receive some funds from the state and federal government. The School of Continuing Education is one of the schools, along with Columbia College, the School of Law, the Graduate School of Business, the College of Physicians and Surgeons, and a dozen others, that comprise the University. (A. 63, Catapano Decl. ¶ 3.) The Institute for Research on Women and Gender is one of 223 research institutes and centers at Columbia. (A. 63, Catapano Decl. ¶ 5.)[3]

Plaintiff Roy Den Hollander is a University alumnus. (A. 37, Compl. ¶ 204.) Den Hollander filed the original complaint in this action on August 18, 2008, asserting claims against Columbia under the equal protection clause of the Fourteenth Amendment (via 42 U.S.C. § 1983), Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (2009), and N.Y. Civ. Rights Law § 40-c (McKinney 2009) based on the allegation that Columbia discriminates against men by teaching courses in women's studies. Plaintiff also sued various New York State and federal government agencies alleging, *inter alia*, that the government defendants, by supporting the teaching

[3] *See* Columbia University Research Institutes and Centers, www.columbia.edu/research/research_institutes.html.

of classes that present feminist ideas, violated the Establishment Clause of the First Amendment.

On October 24, 2008, Columbia (as well as the state and federal defendants) moved to dismiss the complaint. Rather than answering the motion, Den Hollander filed an amended complaint asserting the same causes of action and adding William A. Nosal, another University alumnus, as a plaintiff. Plaintiffs, neither of whom alleged that he had taken a women's studies course while at Columbia, sought a judgment banning the teaching of any women's studies courses or requiring the establishment of an anti-feminist "men's studies" curriculum at the University. (A. 46, Compl. ¶¶ 284-85.)

On January 9, 2009, all defendants moved to dismiss the amended pleading. On April 15, 2009, Magistrate Judge Kevin N. Fox issued a Report and Recommendation (A. 50-59) concluding that plaintiffs lacked standing to sue and recommending that the Complaint be dismissed. By order dated April 23, 2009 (A. 48-49), the District Court rejected plaintiffs' objections to the Magistrate Judge's Report, and granted the motions to dismiss. Plaintiff Den Hollander now appeals the judgment of the District Court. William Nosal has withdrawn from the case. (Appellant's Brief at 1.)

SUMMARY OF ARGUMENT

1. Plaintiff contends that the ideas presented in women's studies classes are anti-male, but he has never taken any of the courses he critiques. He theorizes that men who do take women's studies courses are in some fashion harmed as a result, but he has never experienced that himself. Plaintiff sues to remedy an alleged wrong that he, himself, has not suffered, and he therefore lacks the most basic requirement of standing, an actual injury.

2. Plaintiff also alleges that men are harmed by the absence of any courses labeled "men's studies," but he does not allege any job, school admission, or other opportunity that he personally lost because he did not take a men's studies class at Columbia. In addition, plaintiff does not and cannot allege that Columbia's course offerings fail to address the ideas, accomplishments, and concerns of men throughout history. His claim of injury is abstract and theoretical, not concrete and particular as Article III standing requires.

3. Plaintiff does not allege that men are excluded from women's studies courses or that men and women are otherwise treated differently at Columbia. His dispute is with the content of certain courses – the books read, the lectures delivered, the ideas discussed. Plaintiff believes that women's studies courses teach feminism, and that feminism "demonizes men and exalts

women." (A. 24, Compl. ¶ 91.) In the absence of any concrete allegation of actual discriminatory conduct, however, an attack on the ideological or political content of a university course will not support a claim of discrimination. Indeed, the inquiry plaintiff asked the District Court to undertake – to review the textbooks and lecture notes from women's studies classes and then decide which ideas are acceptable and which sufficiently anti-male so that their teaching must be enjoined – would be profoundly repugnant to the core principles of academic freedom embodied in the First Amendment.

4. While all of plaintiff's claims fail both because he lacks standing and because he has not alleged actionable discrimination, his equal protection claim, asserted via 42 U.S.C. § 1983, fails for the additional reason that Columbia, a private university, is not a state actor. Plaintiff's argument that a state's financial contributions to and regulation of a private university turn the teaching of particular courses into acts performed under color of state law is contradicted by a well-established body of contrary precedent.

ARGUMENT

I.

THE COMPLAINT ALLEGES NO FACTS THAT WOULD SUPPORT A FINDING THAT PLAINTIFF HAS STANDING TO SUE

As an "irreducible constitutional minimum," standing requires, *inter alia*, that the plaintiff "have suffered an injury in fact – an invasion of a

legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992) (internal citations and quotations omitted). "Abstract injury is not enough." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 1665 (1983). The plaintiff must have been injured "in a personal and individual way." *Lujan*, 504 U.S. at 561 n.1, 112 S. Ct. at 2136 n.1. Plaintiff has alleged no such injury.

Plaintiff does not allege that he ever took a women's studies course at Columbia. While he asserts that women's studies courses "impose a unitary belief system of Feminist orthodoxy" on their students (A. 44, Compl. ¶ 266), that the courses "stereotype males as the primary cause for most, if not all, the world's ills throughout history" (A. 22, Compl. ¶ 77), and that the courses teach a "fundamentally false belief system" (A. 24, Compl. ¶ 93), plaintiff does *not* allege that he has experienced, or been injured by, any of this himself. Simply put, plaintiff sues to shut down the women's studies program on the ground that it teaches a discriminatory curriculum, but he has never attended a single course that he attacks. The "injury" that plaintiff alleges is inflicted by the teaching of women's studies is, as to him, precisely the generalized, impersonal, abstract and hypothetical harm that does not impart standing to sue. *See, e.g.*, *Lujan*, 504 U.S. at 564, 112 S. Ct. at 2138 (plaintiffs lacked standing to challenge

endangered species regulation where they alleged only that they might someday visit the areas where the animals were found); *O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S. Ct. 669, 676 (1974) (plaintiffs lacked standing to challenge bond-setting, sentencing, and jury-fee practices where "[n]one of the named plaintiffs is identified as himself having suffered any injury in the manner specified"); *Den Hollander v. Chertoff*, No. 08 Civ. 1521 (WHP), 2008 WL 5191103, at *3-4 (S.D.N.Y. Dec. 3, 2008) (dismissing Den Hollander's challenge to the Violence Against Women Act because he was not personally subjected to any of the harms he alleged the statute would cause).

To be sure, plaintiff does not allege that he was ever *excluded* from a women's studies course. Many civil rights cases are premised on the contention that the plaintiff is barred from, or barred from competing for, benefits and opportunities provided to others. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003) (plaintiff alleged race-based admissions policy made it harder for white candidates to gain admission); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (plaintiffs alleged that discriminatory policy made it harder for them to obtain housing assistance). Here, plaintiff does not allege that he was barred from any course open to women. He disagrees with what he assumes the professor might say in a women's studies course – none of which

he has ever taken – but that does not allege the concrete, particularized injury that would give him standing to sue.

Plaintiff does allege that men who take women's studies courses are mistreated in their classes, "as though they were capitalists attending Moscow State University in the former Soviet Union" (A. 23, Compl. ¶ 87), but that does not change the standing analysis. Again, plaintiff does not allege that he personally ever suffered such treatment, or that he would have taken a women's studies course but for his fear of being treated badly. And in any event, the allegation of mistreatment is wholly conclusory, unsupported by a single allegation of fact concerning *any* action taken with respect to *any* student in *any* class. Florid prose – "[m]ales in Columbia's Program are demeaned as members of a Fritz Lang underclass" (Appellant's Brief at 43); "a male would be psychologically slaughtered in the anti-male Women's Studies Program" (*id.* at 46) – does not substitute for allegations of fact. Like most of the Complaint, the charge of mistreatment in women's studies classes is simply rhetoric.

Likewise, plaintiff's contention that he was injured by the women's studies classes he did not take because those classes are the "seed" from which Feminist ideas are dispersed "throughout the Columbia Community" (*id.* at 40) alleges no actual injury to him. Plaintiff makes conclusory statements about the "climate of intolerance toward Columbia male

students" (*id.* at 11), and he asserts that "[f]eminism fills the eyes and ears at Columbia with misandry" (*id.* at 28), but again, this is just rhetoric. It does not allege any act of discrimination that plaintiff suffered. In essence, plaintiff complains that he was exposed to feminist ideas at Columbia, but exposure to unfamiliar or uncomfortable ideas is one of the goals of a university education; it is not an injury.

In short, plaintiff's claim of injury is based entirely on the content of courses he never took. While the *content* of a college course, standing alone, without any allegation of exclusion or differential treatment, would not give rise to a discrimination claim under any circumstances (*see infra* Point II), a plaintiff who did not take the course, and thus could not have been directly and personally injured by its content, certainly lacks standing to bring such a claim.

Citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977), plaintiff argues that he did not need "to suffer a 'direct injury' by enrolling in a Women's Studies course," because "[f]or standing purposes [t]he injury may be indirect." (Appellant's Brief at 36). But here there is and can be no allegation of any injury at all. In *Village of Arlington Heights*, the plaintiff sought the rezoning of a parcel of land from single-family to multiple-family so that it could build low income housing. When the rezoning was denied, allegedly because of race discrimination,

plaintiff could not build the housing. There is no analog to that injury in this case. While plaintiff may believe that women's studies courses should be banned because of the ideas they allegedly present, that claim (in addition to running straight into the First Amendment) alleges nothing particular to Den Hollander. It alleges no concrete injury to him, and he therefore lacks standing.

Plaintiff also suggests that the obvious hostility to feminist ideas evident in his Complaint assures the "concrete adverseness" to Columbia that is required by standing doctrine (*see* Appellant's Brief at 32), but passionate intensity is not a substitute for concrete injury. *In re U.S. Catholic Conference*, 885 F.2d 1020, 1030 (2d Cir. 1989) ("It is obvious that plaintiffs express their . . . views strongly and articulately. Yet such strongly held beliefs are not a substitute for injury in fact").

Finally, plaintiff does not allege a concrete and particularized injury from the absence of courses expressly denominated "men's studies." While he argues that Columbia's failure to create a men's studies program prevents him from "competing on an equal footing with females in education and society as a whole" (Appellant's Brief at 56), he does not allege a single job, promotion, school admission, or other opportunity that he has ever been denied, or denied the ability to compete for, let alone the loss of any benefit or opportunity that could be rationally connected to the fact that he had never

taken a men's studies course at Columbia. In the cases on which Den Hollander relies, the plaintiffs were denied a specific, concrete opportunity or benefit as a result of the allegedly discriminatory conduct,[4] but no such deprivation is alleged here.

In fact, the allegation that Columbia does not teach men's studies is itself essentially meaningless. Plaintiff cannot rationally allege that the Columbia curriculum fails to teach the books written by men, the philosophies articulated by men, or the accomplishments of men in the sciences, arts, and social sciences. To the extent that "men's studies," as plaintiff uses the term, is something more than the study of the works and thoughts of men, plaintiff

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[4] For example, in *Northeastern Florida Chapter of the Ass'd Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 658-59, 113 S. Ct. 2297, 2299 (1993), non-minority business owners had standing to challenge an ordinance setting aside certain city contracts for minority-owned businesses because it prevented them from competing for those contracts. In *Bryant v. Yellen*, 447 U.S. 352, 366-67, 100 S. Ct. 2232, 2240-41 (1980), a statute arguably limited to 160 acres the amount of certain irrigated land any one person could own. Potential purchasers of excess land from those owners had standing to challenge a decision holding the statute inapplicable because it destroyed their opportunity to buy the land. Plaintiff here alleges no such concrete injury.

cannot even allege that it exists.[5] He points to no body of writing, no existing courses or programs, no professional journals, and no recognized scholars.

Indeed, plaintiff does not describe the men's studies program he asked the District Court to require as a scholarly discipline at all, but simply as a counterweight to feminism, as he sees it. According to plaintiff, men's studies "trains males to recognize and handle the powers females often use to manipulate them" (A. 40, Compl. ¶ 231), teaches that "America is . . . a *de facto* matriarchy" (A. 40, Compl. ¶ 234), "counters the historic belief in America . . . that females have a cart [sic] blanche to do whatever they want regardless of ethics or law" (A. 41, Compl. ¶ 235), "exposes the self-serving, schizoid paradigm of Feminist doctrine" (A. 41, Compl. ¶ 237), "instructs males . . . on how to avoid false accusations by females of sexual harassment or rape" (A. 41, Compl. ¶ 240), "counters the training in Women's Studies that sends forth Feminists to pervert American ideals" (A. 41 Compl. ¶ 242), "alerts males to the prevalent danger of female paternity fraud where the female lies about using birth control and then sues the tricked father for child support" (A. 42, Compl.

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[5] In an August 23, 2008 Los Angeles Times interview, Den Hollander said, "I don't know if men's studies even exists." Meghan Daum, *Roy Den Hollander's War on Feminism*, L.A. TIMES, Aug. 23, 2008, www.latimes.com/news/opinion/la-oe-daum23-2008aug23,0,7712480.column.

¶ 246), and "alerts males to the prevalent danger of marriage fraud where the female becomes pregnant by another man but marries the man she falsely claims is the child's father" (A. 42, Compl. ¶ 247). This is not a description of a body of scholarship but a call to arms "for battling effectively" in what plaintiff calls "the ever-present 'gender wars' raging in this society." (Appellant's Brief at 51.)

Plaintiff is free to espouse his views on the relationship between the sexes, but he lacks standing to sue Columbia University over the teaching of women's studies. In its entirety, his Complaint is an ideological assault on a body of ideas, rather than an allegation of any discriminatory conduct to which he was ever exposed at Columbia.

II.

THE COMPLAINT DOES NOT ALLEGE ACTIONABLE DISCRIMINATION

Having concluded that plaintiffs did not have standing to sue, the District Court dismissed the Complaint in its entirety without otherwise addressing the sufficiency of the claims against Columbia. For the reasons stated in Point I, the District Court's conclusion that plaintiff lacks standing should be affirmed. Even if this Court were to disagree, however, the judgment should be affirmed because the Complaint does not state a claim for sex

discrimination under the Equal Protection clause, Title IX, or New York State law.

This Court may affirm a judgment for any appropriate reason, whether or not addressed by the District Court. *See Colautti v. Franklin*, 439 U.S. 379, 397 n. 16, 99 S. Ct. 675, 686 n. 16 (1979) ("Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, 'whether or not that ground was relied upon or even considered by the trial court.'") (citations omitted); *Adirondack Transit Lines, Inc. v. United Transportation Union, Local 1582*, 305 F.3d 82, 88 (2d Cir. 2002) ("we are entitled to affirm the district court on any ground for which there is support in the record, even if not adopted by the district court"). As discussed below, plaintiff's allegation that the teaching of women's studies unlawfully discriminates against men fails to state a claim for relief as a matter of law.

A. First Amendment Principles of Academic Freedom Prohibit the Courts from Deciding What Can, Cannot, and Must Be Taught at Columbia

Plaintiff does not allege that men are barred from women's studies courses. His claim that the teaching of women's studies discriminates against men is based on the content of the courses – on plaintiff's view that feminist scholarship spreads lies about the nature of men and women and their respective roles in society. As discussed in Point II(B), the allegation that the

ideas presented in a university course are bad, or even pernicious, simply does not allege discrimination within the meaning of any of the statutes on which plaintiff relies. In addition, and as a threshold matter, plaintiff's suggestion that the Court should conduct a review of feminist scholarship to determine if it is good or bad, insightful or misguided, pro-equality or anti-male, and then make a judgment whether Columbia faculty should be allowed to teach women's studies courses at all, whether they should be allowed to use some texts but not others, whether some professors' lectures are acceptable but others' are not, whether a new "male curriculum" must be developed and taught and what that male curriculum should contain, is profoundly repugnant to core values of academic freedom rooted in the First Amendment.

Ever since the seminal case of *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203 (1957), the courts have recognized the "essentiality of freedom in the community of American universities." *Id.* at 250, 77 S. Ct. at 1211. In light of "the dependence of a free society on free universities," *id.* at 262, 77 S. Ct. at 1217 (Frankfurter, J. concurring), the Supreme Court has held that academic freedom is protected by the First Amendment:

> Our Nation is deeply committed to safeguarding of academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the

> *First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Keyishian v. Board of Regents of the Univ. of the State of New York, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967); *see also Grutter v. Bollinger*, 539 U.S. 306, 329, 123 S. Ct. 2325, 2339 (2003) (given "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312, 98 S. Ct. 2733, 2759 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the *First Amendment*"); *Burt v. Gates*, 502 F.3d 183, 190 (2d Cir. 2007) (recognizing the "*First Amendment* guarantee of academic freedom").

Academic freedom "imbu[es] certain core academic decisions with *First Amendment* protection." *Burt*, 502 F.3d at 191. A variety of university activities are entitled to protection, but Justice Frankfurter's concurrence in *Sweezy* sets forth the "'four essential freedoms' of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 354 U.S. at 263, 77 S. Ct. at 1218; *see also Radolf v. University of Connecticut*, 364 F. Supp. 2d 204, 216 (D. Conn. 2005) (academic freedom includes the right of a university "to be free from government interference with its curriculum").

It is doubtful that a university's fundamental First Amendment freedom to decide what to teach and how it shall be taught – the very freedoms plaintiff asked the District Court to abridge – may ever be circumscribed by a court or government agency. In *Sweezy*, in the context of an "investigation of subversive activities," 354 U.S. at 257, 77 S. Ct. at 1215, the New Hampshire attorney general asked the plaintiff to describe the content of a lecture he had given. Although, at that time, the Court did not dispute the importance of the government's interest in rooting out subversives, it nevertheless held that the question violated Sweezy's First Amendment rights, observing that "[w]e do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields." *Id.* at 251, 77 S. Ct. at 1212. Here, plaintiff does not ask for *information* about the content of courses, he asks that the courses be banned. It is impossible to imagine any state interest that would justify dictating what a university cannot (or must) teach, but what plaintiff offers to justify the extraordinary inquisition he seeks – his own opinion that feminist ideas are anti-male – is no "interest" at all. While plaintiff uses the language of discrimination, he is not alleging that men and women are in any way treated differently at Columbia. He is simply saying that he dislikes the

content of women's studies courses – that speech should be banned because he disagrees with it. That is incompatible with the First Amendment.[6]

Indeed, the government itself has recognized that it has no business regulating what a university may teach, even with respect to the enforcement of the anti-discrimination laws. In 1975, the following was added to the regulations implementing Title IX: "Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials." 34 C.F.R. § 106.42 (2009). The Department of Health, Education and Welfare (the predecessor to the Department of Education) explained the reasoning behind this provision:

> The new section explicitly states the Department's position that title IX does not reach the use of textbooks and curricular materials on the basis of their portraits of individuals in a stereotypic manner or on the basis that they otherwise project discrimination against persons on account of their sex. . . . [T]he

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[6] Even beyond core matters such as the content of courses, both federal and New York courts have stressed that the academic decisions of colleges and universities are entitled to great deference. *See, e.g.*, *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, 513 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect to the faculty's professional judgment."); *Bhandari v. The Trustees of Columbia Univ. in the City of New York*, No. 00 Civ. 1735 JGK, 2000 WL 310344, at *5 (S.D.N.Y. Mar. 27, 2000) ("Cognizant of the danger that judicial interference could pose to academic freedom, New York courts are deferential when reviewing university academic decisions").

> imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. . . . [T]he Department has construed title IX as not reaching textbooks and curricular materials on the ground that to follow another interpretation might place the Department in a position of limiting free expression in violation of the First Amendment.

40 Fed. Reg. 24135 (June 4, 1975). More generally, absent specific authorization, federal law prohibits the Department of Education from

> exercis[ing] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system …

20 U.S.C. § 3403(b) (2009).

Plaintiff asks nothing less than that the District Court undertake a detailed examination of the lectures delivered, books assigned, and discussions held in dozens of women's studies classes to determine if, as plaintiff alleges, the professors teach that "females can engage in violence against males, even premeditated murder, and escape just punishment" (A. 23, Compl. ¶ 83), "depict[] fathers as bad parents, abusers, rapists and molesters" (A. 40, Compl. ¶ 233), "condon[e] . . . the boiling of new born babies, the drowning of sons one after another, the liquidation of boyfriends or husbands" (A. 41, Compl. ¶ 236),

or otherwise present the points of view plaintiff alleges. Based on that review, the District Court would then have to decide if the ideas professed and discussed were legal or illegal and, as to each course or book or lecture, ban it or permit it.

Similarly, the District Court would have to review the rest of Columbia's curriculum – subject matter, textbooks, lectures – to determine whether there are enough courses with pro-male views to offset any anti-male views it finds in the women's studies courses. If not, it would have to enjoin Columbia to create a men's studies curriculum and decide what such a curriculum looks like, whether it is courses about the powers females use to manipulate men, women's carte blanche to do whatever they want regardless of ethics or law, and the prevalent danger of female paternity and marriage fraud, as plaintiff suggests, or something else. Constitutional, statutory and regulatory law all prohibit such profound interference with the University's academic freedom.

B. The Complaint Does Not Allege That Men and Women Are Treated Differently at Columbia

1. Plaintiff Alleges No Facts Showing that Women's Studies Courses Discriminate Against Men

As discussed above, no court, consistent with the First Amendment, can pass judgment on the ideological or political content of

private college courses. In addition, an attack on the content of courses to which all students are admitted on equal terms simply does not allege discrimination. While plaintiff pleads his disdain for feminism at length, he "does not refer to a single situation" in which Columbia treated him (or any other male student) differently than a similarly situated female student. *Odom v. Columbia Univ.*, 906 F. Supp. 188, 194 (S.D.N.Y. 1995) (dismissing student's discrimination claim where no actual example of disparate treatment was alleged). Discrimination exists when the "complainant is . . . subjected to differential treatment." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174, 125 S. Ct. 1497, 1504 (2005). Plaintiff alleges no such differential treatment; all of his claims should be dismissed for this reason as well.[7]

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[7] Differential treatment is the essence of discrimination whether alleged under Title IX, *see Jackson*, 544 U.S. at 173, 125 S. Ct. at 1503, the Equal Protection Clause, *see Sound Aircraft Servs., Inc. v. Town of East Hampton*, 192 F.3d 329, 335 (2d Cir. 1999) ("At its core, equal protection prohibits the government from treating similarly situated persons differently."); *Weser v. Glen*, 190 F. Supp. 2d 384, 395 (E.D.N.Y. 2002), *aff'd*, 41 F. App'x 521 (2d Cir. 2002) ("intentional discrimination proscribed by Title IX is discrimination that violates the Equal Protection Clause"), or state law, *see Howe v. Town of Hempstead*, No. 04 Civ. 0656 (DRH)(ETB), 2006 WL 3095819, at *5 (E.D.N.Y. Oct. 30, 2006) (prima facie case of discrimination is the same for federal and state discrimination claims, including claims brought pursuant to N.Y. Civ. Rights Law § 40-c).

Plaintiff makes liberal use of phrases such as "intentional discriminatory impact" (A. 12, Compl. ¶ 1(d)), "discriminatory intent" (A. 24, Compl. ¶ 89), "hostile learning environment" (A. 24, Compl. ¶ 94), "bias" (A. 25, Compl. ¶ 101), "prejudice" (A. 26, Compl. ¶ 104), "disparate treatment" (A. 28, Compl. ¶ 123), "dissimilar treatment" (A. 28, Compl. ¶ 124), "invidious discriminatory practices" (A. 28, Compl. ¶ 125), and "disparate impact" (A. 35, Compl. ¶ 188), but to survive a motion to dismiss "requires more than labels and conclusions," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007). Based on facts, not "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," the plaintiff must "state[] a plausible claim for relief [to] survive[] a motion to dismiss." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

Plaintiff does not do that. He does not allege that men are excluded from women's studies courses, and he does not allege a single instance in which any man was treated differently than his female classmates. Indeed, plaintiff does not allege anything about any actual person or about any actual course ever taught at Columbia. His claim of discrimination, in its entirety, is based on his critique of feminist ideas and on conclusory, rhetorical assertions of the injury men suffer from the alleged dominance of feminist thinking. That does not state a claim. *See Yusuf v. Vassar College*, 35 F.3d

709, 713 (2d Cir. 1994) (a "plaintiff alleging . . . gender discrimination by a university must do more than recite conclusory assertions"). Like the plaintiff alleging race discrimination in *Irvin v. Mister Car Wash*, No. 8:08-cv-1829-T-24-EAJ, 2008 WL 4642286, at *2 (M.D. Fla. October 20, 2008), plaintiff asks the Court "to grapple with . . . history and sociology," based only upon "magic words . . . that are not supported by facts."

2. Plaintiff Alleges No Facts Showing that the Absence of a Men's Studies Curriculum Discriminates Against Men

The allegation that the absence of courses labeled "men's studies" discriminates against men is also based solely on rhetoric. To begin with, plaintiff argues that the University "bans educational programs, concepts, and facts not considered Feminist" (Appellant's Brief at 11), that "a Men's Studies Program is banished from the University" (*id.* at 12), and that Columbia "censors male oriented viewpoints" (*id.* at 48 n.8). But the notion that Columbia has "banished" men's studies and censored male viewpoints is not supported by a single allegation of fact. Plaintiff does not name any professor who was allegedly fired or denied a position, any textbook that was banned, any course proposal that was vetoed, any speaking invitation that was rescinded because of anti-male bias. It is just rhetoric; no actual act of discrimination is alleged.

Plaintiff's contention that women's studies courses, uncorrected by an explicit men's studies curriculum, injure men is likewise unsupported by any allegation of fact. While plaintiff asserts that, by failing to establish a men's studies curriculum, Columbia "erects barriers to him effectively competing with female students and alumni" (*id.* at 12-13), and withholds the "knowledge, training, contacts, and support for competing with females" (*id.* at 30), thereby providing women "with a golf-like handicap in education and career opportunities" (*id.* at 45), the Complaint does not allege anything about any man denied any opportunity or advantage that would (or even might) have come to him had he been able to take a course labeled "men's studies." To be sure, plaintiff cannot allege that the absence of a men's studies curriculum at Columbia has prevented male graduates from competing successfully with women for the highest positions in business, government, academia or the professions.

Plaintiff's demand for the creation of a "men's studies" curriculum suggests he is arguing that, if a university offers courses about one group, it must offer courses about other, arguably opposing or competing groups. In plaintiff's words, the existence of women's studies courses demands "countervailing pro-male Men's Studies . . . to counter the dissembling Feminist dogma." (A. 25, Compl. ¶ 100; *see also* A. 23, Compl. ¶ 86

("Columbia . . . do[es] not balance the Feminist doctrine and dogma with a masculine curriculum")).[8] No statute or constitutional principle, however, mandates that a college balance its course offerings in that fashion. [9]

Colleges and universities are filled with courses and research centers that focus on particular subject matter, and sometimes on particular racial, ethnic or religious groups.[10] While members of different racial, ethnic or religious groups might feel slighted, or disagree with the perspective of the textbooks or the professors, in the absence of any allegation of exclusion or

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[8] As discussed above, plaintiff cannot even allege that the field of "men's studies" (as opposed to the virtually limitless number of courses that cover the thoughts, writings, and actions of men) exists as a distinct scholarly discipline, and plaintiffs' description of what a "masculine curriculum" might teach, *see* pp. 17-18, *supra*, bears no resemblance to a legitimate college course of study.

[9] Columbia's Center for Contemporary Black History "promotes the critical study of black history, culture, and politics within urban America since 1900, with an emphasis on understanding the central role of black intellectuals and public leaders in the making of modern society." *See* Center for Contemporary Black History: The Mission of CCBH, www.columbia.edu/cu/ccbh/html/ccbh_about.html. Following plaintiff's reasoning, this would require Columbia to create another center emphasizing the role of white intellectuals and public leaders. There is no support for that contention.

[10] Columbia has research institutes or centers on Contemporary Black History, Brazilian Studies, French and Francophone Studies, Iranian Studies, Israel and Jewish Studies, and Latin American Studies, to name just a few. *See* Columbia University: Research Institutes and Centers, www.columbia.edu/research/research_institutes.html.

differential treatment, there is no claim of discrimination. Likewise with respect to gender. The fact that plaintiff resents what he understands to be the perspective on women and gender at the IRWG does not allege discrimination in the absence of any claim of exclusion or differential treatment, and it does not entitle plaintiff to the creation of a new men's studies curriculum at Columbia.

Finally, all of plaintiff's arguments are premised on the notion that the Columbia curriculum does not teach about men or about issues of interest to men. That underlying claim is itself unsupported rhetoric. Plaintiff does not explain how a philosophy course on Aquinas, Galileo, Gassendi, Descartes, Spinoza, Leibniz, Berkeley, Hume, and Kant; an art history course on the male nude in western art; a history course on the American presidency since 1945; a classics course on Plato; an American Studies course on the Supreme Court; or an English course on Milton (or Shakespeare, or Beckett and Nabokov, or Pinter, or O'Neill, or Williams and Miller) reflect an absence of "male studies."[11] Nor does plaintiff allege anything to explain how the lectures, texts

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[11] See http://www.columbia.edu/cu/philosophy/crs/main/intro/index.html (Philosophy);
http://www.columbia.edu/cu/arthistory/html/dept_courses_s_2009.html#1_2 (Art History);
http://www.college.columbia.edu/bulletin/depts/history.php?tab=courses

or discussions in any of the thousands of other courses offered at Columbia discriminate against men. Plaintiff would like to see courses teaching about "the powers females often use to manipulate [men]" (A. 40, Compl. ¶ 231), courses asserting "that females have a cart [sic] blanche to do whatever they want regardless of ethics or law" (A. 41, ¶ 235), courses instructing "on how to avoid false accusations by females of sexual harassment or rape" (A. 41, Compl. ¶ 240), and courses "alert[ing] males to the prevalent danger of female paternity . . . [and] marriage fraud" (A. 42, Compl. ¶¶ 246-47), but no law allows plaintiff (or the courts) to dictate the political and ideological perspective from which professors must teach.

3. Plaintiff Alleges No Facts Stating a Claim Under Title IX

The absence of any actual allegation of discriminatory conduct is fatal to all of plaintiff's claims, but in what appears to be a semi-facetious attempt to bring his Complaint within the Title IX precedents on access to athletic opportunities, plaintiff alleges that "Women's Studies programs are today the varsity sport of choice for females at Columbia in its never-ending war against men." (A. 34, Compl. ¶ 177). From this premise, he argues that,

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(History); http://www.columbia.edu/cu/classics/program/courses.html (Classics); http://www.columbia.edu/cu/amstudies/courses/intermediate.html (American Studies); http://www.columbia.edu/cu/english/ug_distcours.htm (English).

"[i]f Title IX can require universities receiving federal financial assistance to provide separate female athletic programs, then it surely can require Columbia University to provide a Men's Studies program that takes the masculine point of view." (A. 36, Compl. ¶ 193). That proposition is mistaken for a number of reasons.

First of all, substantive academic courses are *not* sports. Requiring the creation of women's sports teams or the provision of equivalent athletic facilities does not raise the First Amendment academic freedom problems that flow from telling a university what it must teach. As noted above, the Title IX regulations affirmatively disclaim any intention to require particular curricular materials. 34 C.F.R. § 106.42 (2009). Moreover, even if women's studies were treated as a sport, there would be no Title IX issue. Men are not excluded from the "team" – the women's studies courses – or otherwise treated differently than women. *See* 34 C.F.R. § 106.41(a) (2009) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics . . . ."). Similarly, even if one were to assume that women's studies courses are not of interest to men, plaintiff could not plausibly deny that there are thousands of other courses available at Columbia that are. *See* 34 C.F.R. § 106.41(c)(1) (2009) (among

criteria for evaluating equal athletic opportunity is whether selection of sports accommodates interests of both sexes).

4. Plaintiff Alleges No Facts That Would Support an Inference of Discriminatory Intent

The Complaint also fails because it does not allege facts from which it could be inferred that Columbia has acted with discriminatory intent. *See Yusuf*, 35 F.3d at 713 (plaintiff must allege "circumstances giving rise to a plausible inference of [] discriminatory intent"); *Weser*, 190 F. Supp. 2d at 395 (E.D.N.Y. 2002), *aff'd*, 41 F. App'x 521 (2d Cir. 2002) (plaintiff must allege intentional discrimination to state a claim under Title IX); *Butler v. City of Batavia*, 545 F. Supp. 2d 289, 293 (W.D.N.Y. 2008) (dismissing discrimination claim where allegation of intent was based on mere speculation and a "formulaic recitation of the elements of a cause of action") (internal citations omitted). To survive a motion to dismiss, plaintiff would have to allege specific facts leading to a plausible conclusion that Columbia created a women's studies program "because of, not merely in spite of" any alleged adverse effects on men. *Hayden v. County of Nassau*, 180 F.3d 42, 50 (2d Cir. 1999); *Grimes v. Sobol*, 832 F. Supp. 704, 708 (S.D.N.Y. 1993), *aff'd*, 37 F.3d 857 (2d Cir. 1994) (same). He can allege nothing of the kind.

Plaintiff does not even attempt to explain why Columbia University would be motivated by anti-male bias. Nor does he attempt to

identify who it is at Columbia that is prejudiced against men. Instead, to justify an inference that Columbia permits the teaching of women's studies because of anti-male animus, he simply repeats his allegation that women's studies courses are anti-male. *See*, *e.g.*, A. 24, Compl. ¶ 91 ("Columbia's Women's Studies program demonizes men and exalts women as a manifestation of the ill will that lies behind the program"); A. 23, Compl. ¶ 85 ("Columbia University's Women's Studies program is deficient of texts and instruction that offer a male-positive perspective of men, which infers [sic] that one motivation for the program is antipathy toward men"); A. 24, Compl. ¶ 89 ("The negative stereotyping of men and lack of balance between female and male perspectives . . . reveal a discriminatory intent motivated by bigotry"); Appellant's Brief at 40 ("The Amended Complaint alleges that one motivation on the part of Columbia and the State is ill-will toward male students and alumni . . ."). Plaintiff's circular reasoning does not give rise to an inference of discriminatory intent. Columbia, like virtually every other major university, offers courses in women's studies.[12] Plaintiff's anti-feminist polemic cannot transform that

[12] Every Ivy League university has a program in women's studies. *See* www.pembrokecenter.org/about/ (Brown); www.arts.cornell.edu/fgss/ (Cornell); www.dartmouth.edu/~wstudies/ (Dartmouth); www.fas.harvard.edu/~wgs/undergraduate%20program/Undergraduate%20prog

simple fact into evidence of anti-male animus. The Complaint alleges nothing that would support an inference that the administration or faculty of the University wants "the civil rights of today's males [] minimized or eliminated," A. 22, Compl. ¶ 74, or otherwise seeks to harm men.

Plaintiff argues that it is "unsettled" whether he must allege discriminatory intent, or merely a disparate impact, to the extent he asserts a claim for violation of the regulations under Title IX. (Appellant's Brief at 39). The cases plaintiff cites rely on a footnote in *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582, 607 n. 27, 103 S. Ct. 3221, 3235 n. 27 (1983), which can be read to permit a private action for violation of the disparate-impact regulations under Title VI. A number of cases suggested that the same reasoning should apply to Title IX, which was modeled on Title VI. In 2001, however, the Supreme Court expressly held that there is *not* a private right of action to enforce the disparate-impact regulations under Title VI:

> Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602 [the disparate-impact

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ram.html (Harvard); www.sas.upenn.edu/wstudies/ (Penn.); www.princeton.edu/~prowom/ (Princeton); www.yale.edu/wgss/ (Yale).

> regulations]. We therefore hold that no such right of action exists.

Alexander v. Sandoval, 532 U.S. 275, 293, 121 S. Ct. 1511, 1523 (2001). Accordingly, applying the same reasoning to Title IX, there is no private right of action to enforce disparate-impact regulations; plaintiff must allege *intentional* discrimination. *Weser*, 190 F. Supp. 2d at 395, *aff'd*, 41 F. App'x 521 (2d Cir. 2002) ("Because Title IX is derived from Title VI, *Alexander v. Sandoval* implies that no such private right of action [enforcing disparate-impact regulations] exists under Title IX as well"). In any event, as discussed above, plaintiff does not allege any disparate impact. He offers only rhetoric, not a single example of any opportunity any man has been denied – with respect to employment, education, or otherwise – because women's studies courses are taught or because none of Columbia's many thousands of courses is denominated "men's studies."

III.

COLUMBIA IS NOT A STATE ACTOR

All of plaintiff's claims fail both because plaintiff lacks standing to sue and because he has not alleged actionable discrimination. His equal protection claim, asserted via 42 U.S.C. § 1983, also fails because Columbia is not a state actor. A private party defendant acts "under color of state law," a prerequisite to liability under § 1983, *Phillips v. The Sage Colleges*, 83 F.

App'x 340, 341 (2d Cir. 2003), only if there is a "close nexus between the State and the challenged action" of the defendant. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 453 (1974). This requirement "assure[s] that constitutional standards are invoked only when it can be said the State is *responsible* for the specific conduct of which the plaintiff complains." *Den Hollander v. Copacabana Nightclub*, No. 07 Civ. 5873 (MGC), 2008 WL 4449429, at *2 (S.D.N.Y. Sept. 29, 2008) (emphasis in original) (rejecting Den Hollander's argument that the state's regulation of liquor sales made a bar a state actor when it charged women less than men for admission). New York State is *not* responsible for Columbia's decision to teach women's studies or for the content of women's studies courses. Accordingly, the University has not acted under color of state law, and plaintiff's section 1983 claim fails for that reason as well.

To begin with, there is abundant authority that Columbia, in particular,[13] and private colleges and universities, in general,[14] are not state

[13] *See Milton v. Alvarez*, No. 04 Civ. 8265SAS, 2005 WL 1705523, at *3 (S.D.N.Y. July 19, 2005) (Columbia not a state actor); *Fundator v. Columbia University*, No. 95 Civ. 9653 (DC), 1996 WL 197780, at *1 (S.D.N.Y. Apr. 23, 1996) (same); *Gilinsky v. Columbia University*, 488 F. Supp. 1309, 1311-1312 (S.D.N.Y. 1980) (same); *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535, 549 (S.D.N.Y. 1968) (same).

actors. Plaintiff's contrary claim, based on the allegation that the University receives state funds (A. 20-21, 30-31, Compl. ¶¶ 49-51, 63-68, 149-54, 157), and is subject to state regulation (A. 16-20, 29-30, Compl. ¶¶ 24-48, 136-43), finds no support in the law. It is well-established that "[e]xtensive regulation and public funding, either alone or taken together, will not transform a private actor into a state actor." *Leeds v. Meltz*, 85 F.3d 51, 54 (2d Cir. 1996). Indeed, the Supreme Court has specifically rejected the argument that a private school's dependence on state funds, or its regulation by the state, converts its actions into state action. In *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S. Ct. 2764 (1982), a constitutional challenge to the plaintiffs' discharge by a private school, the Court held that the school was not a state actor even though "virtually all of the school's income was derived from government funding," and despite the fact that the school was subject to "extensive regulation" by the state, because neither the funding nor the regulation made the state responsible for the

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[14] *See Phillips*, 83 F. App'x at 341 (The Sage Colleges not state actors); *Hack v. The President and Fellows of Yale College*, 237 F.3d 81, 83-85 (2d Cir. 2000) (Yale not a state actor); *Albert v. Carovano*, 851 F.2d 561, 571 (2d Cir. 1988) (Hamilton College not a state actor); *Wahba v. New York University*, 492 F.2d 96, 100-103 (2d Cir. 1974) (NYU not a state actor); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1143 (2d Cir. 1973) (Brooklyn Law School not a state actor); *Curto v. Smith*, 248 F. Supp. 2d 132, 140 (N.D.N.Y. 2003) (Cornell not a state actor); *Tavoloni v. Mount Sinai Medical Center*, 984 F. Supp. 196, 204 (S.D.N.Y. 1997) (Mount Sinai School of Medicine not a state actor).

school's decision to fire the plaintiffs. *Id.* at 840-41, 102 S. Ct. at 2271; *see also Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968) (allegations that state regulates educational standards and provides financial aid insufficient to establish state action); *Liburd v. Bronx Lebanon Hosp. Center*, No. 07 Civ. 11316 (HB), 2008 WL 3861352, at *7-8 (S.D.N.Y. Aug. 19, 2008) (private hospital not a state actor simply because it received state funding and was subject to regulation); *Fundator*, 1996 WL 197780, at *1 (Columbia not a state actor because "[s]tate financial assistance . . . is insufficient to demonstrate state action"); *Grossner*, 287 F. Supp. at 547-48 (Columbia not a state actor because "receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government").

Plaintiff also mentions that Columbia received its charter from the state legislature in 1787 (A. 29, Compl. ¶ 132), and that it received state land in the same year (A. 29, Compl. ¶ 135). These allegations of centuries-old state aid are likewise insufficient to establish state action because they do not demonstrate state responsibility for the women's studies courses at issue. *See Tavoloni*, 984 F. Supp. at 201-02 (university hospital not transformed into state actor by state's provision of space, personnel and facilities because there was no "connection between the action complained of and the state support or regulation"); *see also Hack*, 237 F.3d at 83-84 (despite being "chartered by

special legislation," Yale was not a state actor because the "state could not control Yale's policies and operations even if it chose to"); *Grafton*, 478 F.2d at 1141-42 (Brooklyn Law School not a state actor even though it bought its property at a deep discount from New York City and received money pursuant to N.Y. Educ. Law § 6401 (McKinney 2009) for each degree conferred); *Curto*, 248 F. Supp. 2d at 139-40 (Cornell's College of Veterinary Medicine not a state actor despite its creation through state statute, its receipt of state funds, and its frequent consultation with SUNY Board of Trustees).

Doubtless aware of the insufficiency of what he can show – that Columbia receives state funding and is subject to some state regulation – plaintiff also alleges that the state defendants "control what is taught . . . [at] Columbia University" (A. 19, Compl. ¶ 41), and have "established objectives . . . by which Women's Studies programs would advocate and spread Feminism in New York colleges and universities" (A. 17, Compl. ¶ 38) with the goal of "remaking New York State's education, government, business, and culture in the image of Feminist tenets (A. 17, Compl. ¶ 36)." This is empty rhetoric. The state does not "control" what is taught at Columbia (or any private college or university), as a review of the regulations to which plaintiff refers makes clear.

Plaintiff's argument is based on the fact that the Commissioner of the Department of Education, acting on authority delegated from the Board of Regents, establishes regulations governing "the registration of courses of study in colleges, professional, technical and other schools." 8 N.Y. CRR § 13.1(a) (2009). Plaintiff suggests that the authority to "register" courses of study amounts to "control" over what is taught, as if the Commissioner could or did make a content-based review of college curricula, registering those with a political, ideological or other perspective he endorsed and refusing to register those with which he lacked sympathy. (*See* A. 29-30, Compl. ¶¶ 139-43.) The registration process is, of course, nothing of the kind.

Under the Commissioner's regulations, to be registered, a college curriculum must "show evidence of careful planning," its "goals and [] objectives" must be "clearly defined in writing," the college must have a "reviewing system" to "estimate the success of students and faculty in achieving such goals and objectives," and the "content and duration of curricula" must be "designed to implement their purposes." 8 N.Y. CRR § 52.1(b)(3) (2009). In addition, the college or university must possess the financial resources to accomplish the mission of each registered curriculum, it must have adequate classrooms, laboratories, libraries, and other facilities, its faculty must have adequate training and have earned the appropriate degrees,

courses must be offered with sufficient frequency to allow students to timely earn their degrees, course descriptions must clearly state the subject matter and requirements of each course, credit must be granted only to students who successfully achieve the goals of the course, and so on. 8 N.Y. CRR § 52.2 (2009). As these regulations make clear, "registration" turns on basic measures of institutional adequacy to administer the degree programs offered, not on the State's agreement or disagreement with the ideas expressed in those programs. To be sure, were it otherwise, the State would be in wholesale violation of the university's First Amendment right of academic freedom. (*See supra* Point II(A).)

The courts have held, over and over again, that a state's regulation of, and financial contribution to, its private colleges and universities does not transform the actions of those institutions into state action. The Complaint offers nothing that would allow for a contrary conclusion with respect to the teaching of women's studies, or the teaching of anything else, at Columbia.

CONCLUSION

For the reasons stated herein, the judgment of the District Court dismissing the Complaint in its entirety should be affirmed.

Dated: New York, New York
December 14, 2009

Respectfully submitted,

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I hereby certify that:

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Robert D. Kaplan

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Docket Number: 09-1910-cv

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 12/14/2009) and found to be VIRUS FREE.

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