UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROY DEN HOLLANDER,	:	
Plaintiff,	:	
-against-	:	10 Civ. 9277 (LTS) (HBP)
MEMBERS OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, in their official and individual capacities, *et al.*,	:	**ORIGINAL FILED BY E.C.F.**
Defendants.	:	

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

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for State Defendants
120 Broadway - 24th Floor
New York, New York 10271
(212) 416-8634

CLEMENT J. COLUCCI
Assistant Attorney General
Of Counsel

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Defendants the members of the Board of Regents of the University of the State of New York; Merryl Tisch, Chancellor of the Board of Regents; Commissioner John B. King, Jr. of the New York State Education Department ("SED"); and Elsa Magee, Acting President of the New York State Higher Education Services Corporation ("HESC") (collectively, the "State Defendants),"[1] by their attorney, ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, respectfully submit this memorandum of law in opposition to plaintiff's motions to vacate this Court's October 31, 2011 judgment dismissing this action on the grounds that plaintiff lacked standing to pursue it, and to amend the complaint, pursuant to Rules 15(a) and 20 of the Federal Rules of Civil Procedure, to add two new defendants who plaintiff alleges have standing

[1] Although the proposed amended complaint names each of the State Defendants in both their official and individual capacities, plaintiff seeks only declaratory and injunctive relief, which is properly awarded only against official-capacity defendants. *See* proposed amended complaint ("PAC"), ¶¶ 1, 169-73. Furthermore, although the caption of the proposed amended complaint names the Acting President of HESC, the body of the proposed amended complaint, unlike the earlier versions, makes no allegations concerning HESC.

to pursue the substantive claims plaintiff originally sought to pursue -- while, inexplicably, remaining a named plaintiff himself.

Plaintiff's motion should be denied because: (1) there are no grounds for vacating the Court's October 31, 2011 order; (2) plaintiff lacks standing to pursue amendment, and the Court, therefore, lacks jurisdiction to entertain the motion; and (3) amendment would be futile because the proposed amended complaint, like its predecessors, fails to state a claim upon which relief can be granted.

PREVIOUS PROCEEDINGS

Plaintiff Roy Den Hollander alleges that feminism is a religion and that the defendants' actions have violated the Establishment Clause. Insofar as the proposed amended complaint concerns Mr. Den Hollander, it asserts the same claims and makes essentially the same allegations as his previously dismissed actions. (PAC, ¶¶ 37-78, 98-168)

A. *Den Hollander I*

On August 18, 2008, plaintiff commenced the action *Den Hollander v. Institute for Research on Women and Gender at Columbia University, et al., SDNY Case No.* 08 Civ. 7286 (LAK) ("*Den Hollander I*"). In *Den Hollander I*, plaintiff asserted that he was a New York State resident and an alumnus of Columbia University and that he had an interest in attending continuing education courses at his alma mater, but was deterred from doing so because he expects to be exposed to what he characterized as unwelcome and offensive Feminist dogma from Columbia administration, professors, counselors, materials, and school activities. Furthermore, he contended that Columbia University's Institute for Research on Women and Gender Studies ("IRWGS"), promotes what plaintiff conceives of as the Religion of Feminism with the active regulatory and financial assistance of the defendants, in violation of the

Establishment Clause. In *Den Hollander I,* plaintiff sued essentially the same State and Federal defendants (or their predecessors in office), for the same acts, on the same legal theory as has asserted in this action.[2] On December 1, 2008, plaintiff filed an amended complaint naming an additional individual plaintiff and purporting to proceed as a class action. (*Den Hollander I* Docket Document 17)

On April 15, 2009, Magistrate Judge Kevin Nathaniel Fox issued a Report and Recommendation recommending dismissal of *Den Hollander I* on the grounds of standing, finding that plaintiff's alleged harm was speculative and that he had not made out a claim for taxpayer standing. (*Den Hollander I* Docket Document 33) On April 24, 2009, District Judge Lewis Kaplan adopted the Report and Recommendation and, in addition, found that the complaint failed to state a cause of action on the merits. *Den Hollander I*, 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009) (*Den Hollander I* Docket Document 36) By summary order dated April 16, 2010, the United States Court of Appeals for the Second Circuit affirmed the District Court's decision, resting entirely on standing grounds. *Den Hollander v. Institute for Research on Women & Gender at Columbia University, et al.,* 09-1910-cv, 372 Fed. App'x 140 (2d Cir. 2010). Plaintiff did not seek further review in the Supreme Court.

B. The Present Action: Original Complaint

On December 13, 2010, plaintiff filed the present action (*Den Hollander II*) The only substantive differences between *Den Hollander I* and the present action were that plaintiff did not name the Columbia-affiliated defendants he previously sued, and did not assert claims under the Equal Protection Clause or Title IX of the Education Amendments of 1972, 20 U.S.C. §

[2] That *Den Hollander I* complaint named additional defendants and asserted additional claims not named or asserted in the complaint in the present action, or in the proposed amended complaint.

1681, *et seq.*, claims he had raised, in *Den Hollander I*. (*Compare Den Hollander I* Docket Document 1 *with Den Hollander II* Docket Document 1) As before, plaintiff claimed that Columbia promulgates a religion of Feminism, and that the New York State and Federal governments, through regulation and financial aid to colleges and students, promoted the Religion of Feminism and thereby violate the Establishment Clause.

C. The Present Action: Disposition

The case was referred to Magistrate Judge Henry Pitman for general pre-trial purposes, including reports and recommendations on dispositive motions. (*Den Hollander II* Docket Document 4) The various defendants moved to dismiss the complaint on the grounds that: (1) plaintiff was precluded from re-litigating the question of standing resolved against him in *Den Hollander I*; and (2) the complaint failed to state a claim upon which relief can be granted. (*Den Hollander II* Docket Documents 7-9, 14)

Magistrate Judge Pitman converted defendants' motions to summary judgment motions, *see Den Hollander II* Docket Document 17, and, after additional submissions, issued a Report and Recommendation recommending that summary judgment be granted on the ground that collateral estoppel precluded the action because plaintiff had previously litigated his standing and lost. (*Den Hollander II* Docket Document 24)

Plaintiff filed objections to the Report and Recommendation, *see Den Hollander II* Docket Document 25, and, after considering all parties' submissions, this Court adopted the Report and Recommendation in its entirety in an October 31, 2011 Order. (*Den Hollander II* Docket Document 29) Judgment dismissing the complaint was entered the same day. (*Den Hollander II* Docket Document 30)

D. The Proposed Amendment

By motion filed on November 21, 2011, plaintiff moves to vacate the October 31, 2011 judgment and to amend the complaint, mainly for the purpose of adding two additional plaintiffs, who assert their potential standing as taxpayers and on other grounds. (PAC, ¶¶ 67-97) The proposed amended complaint also makes some factual allegations concerning the proposed new defendants themselves and their grievances[3], *see* PAC, ¶¶ 1, 5-7, 13-15, 43-44, 47, 49-50, 88-96, 125, 132-54, 158-63, 166-68, but, as plaintiff rightly asserts, these new factual allegations make no significant change in the theory of the case or the underlying legal issues. (Pltf. Mem., p. 5)

ARGUMENT

POINT I

THERE ARE NO GROUNDS TO VACATE THIS COURT'S ORDER

Plaintiff correctly states that a party seeking to file an amended complaint after judgment has been entered must first have the judgment vacated or set aside pursuant to FRCP 59(e) or 60(b).[4] *See* Pltf. Mem., p. 3, citing cases. But having stated the correct rule, plaintiff then fails to so much as mention any grounds to vacate or set aside the judgment, *id.*, pp. 3-8, and "[u]nless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint." *National Petrochemical Co. of Iran v. M/T Stolt*

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

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

Sheaf, 930 F.2d 240, 245 (2d Cir. 1991). Because there is no such basis, this Court should not entertain the proposed amendment.

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

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

Den Hollander I determined that plaintiff lacked standing to pursue this Establishment Clause claim. *Den Hollander v. Institute for Research on Women & Gender at Columbia University, et al.,* 09-1910-cv, 372 Fed. App'x 140 (2d Cir. 2010). This Court has determined that this same named plaintiff -- Roy Den Hollander -- was barred from re-litigating his standing and precluded from pursuing this claim even on the basis of a better-articulated theory of standing that, if valid, would have been available to him in *Den Hollander I.* (*Den Hollander II* Docket Document 29) The most important amendment plaintiff wishes to make is to add two new named plaintiffs who, if the allegations of the proposed amended complaint are to be believed, can successfully assert taxpayer standing. (PAC, ¶¶ 13, 15, 67-78) But the apparently

newly-discovered existence of these potential plaintiffs does not constitute one of the recognized reasons for vacating or amending a judgment.

Plaintiff does not contend that there has been some intervening change in the law. And new plaintiffs, even newly-discovered plaintiffs, are not newly-discovered *evidence*. The addition of these new plaintiffs would not cure plaintiff's *own* lack of standing to pursue these claims, and, therefore, would not be grounds to alter the original decision. *See U.S. v. Internat'l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001) (newly-discovered evidence must be of the sort that would probably have changed the result). Although plaintiff obviously disagrees with this Court's October 31, 2011 decision, he does not assert clear error. Finally, plaintiff does not identify any manifest injustice. As he admits, the proposed new plaintiffs are perfectly free to bring their own lawsuit in their own names, and, if successful, obtain injunctive and declaratory relief that would benefit not only them, but plaintiff and all others similarly situated. (Pltf. Mem., p. 6) The proposed new plaintiffs can, if they choose, avail themselves of Mr. Den Hollander's advice or direction in the prosecution of their own lawsuit.

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

POINT II

PLAINTIFF LACKS STANDING TO SEEK AMENDMENT

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

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

POINT III

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

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

Zoning Appeals, 282 F.3d 83, 88 (2d Cir. 2002). Plaintiff's claim that the State Defendants have violated his rights under the Establishment Clause "by requir[ing] that higher education institutions . . . to adhere to the religious doctrine of Feminism" and using public funds to carry out their educational policies of inculcating Feminism," (PAC, ¶¶ 2-3), fails because "Feminism" is not a religion, but a secular academic point of view, and, as such, not the proper subject of an Establishment Clause challenge. Furthermore, even assuming that "Feminism" is a religion, the State Defendants' enforcement of secular, religion-neutral educational standards and provision of generally-available financial aid to institutions and students do not violate the Establishment Clause.

A. The State Defendants: Powers and Responsibilities

The Board of Regents, its Chancellor, and the Commissioner of Education have various regulatory powers and oversee some forms of financial assistance to students and to institutions of higher education.

1. The Regents and the Commissioner: Since 1784, the Regents of the University of the State of New York have been empowered "to encourage and promote education, to visit and inspect its several institutions, to distribute to or expand or administer for them such property or funds as the state may appropriate therefor or as the university may own or hold in trust or otherwise." N.Y. Educ. Law § 201; *see also* N.Y. Educ. Law § 202 (describing organization of the Board of Regents); N.Y. Const., Art. 11, § 2 (continuing Board of Regents). The Regents appoint a Commissioner of Education to head the New York State Education Department, which "is charged with the general management and supervision of all public schools and all of the educational work of the state, including the operations of The University of the State of New York." N.Y. Educ. Law § 101.

All institutions of higher education in New York State, whether public or private, are part of the University of the State of New York, and must comply with its rules or any applicable laws. *See* N.Y. Educ. Law § 214. The Regents, the Commissioner, or any of their representatives "may visit, examine into and inspect, any institution in the university," and require reports. N.Y. Educ. Law § 215. The Regents may suspend the charter, or other rights and privileges, of any institution in the University of the State of New York "[f]or refusal or continued neglect . . . to make any report required, or for violation of any law or any rule of the university." *Id*. The Regents have broad power to "exercise legislative functions concerning the educational system of the state, determine its educational policies, and . . . establish rules for carrying into effect the laws and policies of the state, relating to education."[5] N.Y. Educ. Law § 207.

The Regents are empowered to "register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in this state." N.Y. Educ. Law § 210. Pursuant to this authority, the Regents have set requirements for earned undergraduate and graduate degrees. *See* 8 N.Y.C.R.R. § 3.47.

The basic requirement is that "[n]o earned undergraduate or graduate degree shall be conferred unless the applicant has completed a program registered by the department [of Education]." 8 N.Y.C.R.R. § 3.47(a)(1). The Regents have established standards governing the

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[5] One limit on the Regents's authority is relevant to the issues raised in this case: "But no enactment of the regents shall modify in any degree the freedom of the governing body of any seminary for the training of priests or clergymen to determine and regulate the entire course of religious, doctrinal, or theological instruction to be given in such institution." N.Y. Educ. Law § 207. As a result, although the Regents have broad general regulatory authority over explicitly religious educational institutions, such as seminaries, they have no authority to judge the correctness of any religious teaching. *See Warder v. Bd. of Regents*, 53 N.Y.2d 186, 440 N.Y.S.2d 875 (1981), *cert. denied*, 454 U.S. 1125 (1981) (denial of charter to seminary upheld when based on finding of secular, academic deficiencies).

eligibility of students to pursue undergraduate or graduate degrees, *see* 8 N.Y.C.R.R. § 3.47(a)(2), and general standards applicable to all registered undergraduate and graduate degrees. *See* 8 N.Y.C.R.R. § 3.47(c), (d). Currently, the Regents have registered 150 different degree programs that may be offered by qualifying institutions in New York State, including 20 in explicitly religious subjects, ranging from the S.M.B. degree for a Bachelor of Sacred Music to the S.T.D. degree for a Doctor of Sacred Theology. *See* 8 N.Y.C.R.R. § 3.50 (listing registered degrees).

"[E]very curriculum creditable toward a degree offered by institutions of higher education" in New York State must be registered with SED.[6] *See* 8 N.Y.C.R.R. § 52.1(a)(1). Under authority granted by the Regents, the Commissioner has set standards for the registration of undergraduate and graduate curricula. *See* 8 N.Y.C.R.R. § 52.2. The Commissioner's standards address such objective criteria as financial resources and physical plant and equipment, *see* 8 N.Y.C.R.R. § 52.2(a); sufficient, trained faculty, *see id.* § 52.2(b); minimum amounts of full-time equivalent study with adequately available course selections, *see id.* § 52.2(c); and various other requirements concerning admission to programs of study and administration. *See id.* § 52.2(d)-(f). "Registration or reregistration of a curriculum may be denied if the commissioner finds that curriculum, or any part thereof, not to be in compliance with statute or this Title." 8 N.Y.C.R.R. § 52.2(l).

The Commissioner and the Regents can refuse to register proposed degree programs if they fail to meet these secular, religion-neutral academic standards. *See Moore v. Bd. of Regents*, 44 N.Y.2d 593, 407 N.Y.S.2d 452 (1978) (upholding denial of registration for Ph.D. programs in

[6] All courses offered must be "part of a registered curriculum," but individual courses are not themselves registered. *See* 8 N.Y.C.R.R. § 52.1(f); *see also id.* § 52.2 (describing registration standards). The institution must, however, describe courses offered in writing and state their subject matter and requirements. *See* 8 N.Y.C.R.R. § 52.2(c)(1).

English and History at the State University of New York at Albany based upon lack of sufficient faculty resources); *Warder v. Bd. of Regents*, 53 N.Y.2d 186, 440 N.Y.S.2d 875 (1981), *cert. denied*, 454 U.S. 1125 (1981) (upholding denial of charter to seminary based upon finding of secular, academic deficiencies).

Beyond their regulatory role in higher education, the Regents and SED also have a financial role. Non-profit colleges and universities incorporated by the Regents, which maintain one or more registered degree programs and meeting various educational standards receive cash awards, known as "Bundy Aid," *see Excelsior Coll. v. N.Y. State Educ. Dep't*, 306 A.D.2d 675, 761 N.Y.S.2d 700 (3d Dep't 2003), based solely on the number and type of earned degrees awarded. *See* N.Y. Educ. Law § 6401.

These are the activities that, in plaintiff's view, violate the Establishment Clause.

B. "Feminism" is Not a Religion for Purposes of the Establishment Clause

Plaintiff appears to believe that some adherents of the secular viewpoint commonly known as "feminism" hold to it with the fervor often associated with religion. (PAC, ¶¶ 37-43) But the Constitution does not prohibit the establishment of, or protect the free exercise of, philosophies or viewpoints that share characteristics with religion; it prohibits the establishment, and protects the free exercise, of *religion* and only religion. "A way of life, however virtuous or admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *see also Thomas v. Review Bd.*, 450 U.S. 707, 713 (1981) ("Only beliefs rooted in religion are protected by the Free Exercise clause, which, by its terms, gives special protection to the exercise of religion.").

The Supreme Court, having clarified decades ago that the First Amendment's Religion

Clauses apply only to religion, and abandoned earlier suggestions that they apply as well to secular beliefs functionally equivalent to religion, *see U.S. v. Seeger,* 380 U.S. 163, 166 (1965) and *Welsh v. U.S.*, 398 U.S. 333, 340 (1970) (both expanding the Selective Service Act's exemption for conscientious objectors to include objectors with non-religious moral or ethical beliefs and suggesting that a different reading might violate the Religion Clauses), has not since attempted to define "religion." *See* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses,* 41 Stan. L. Rev. 233, 264 (1989) ("While explicitly acknowledging the need to distinguish religion from other belief systems, . . . the Court remains unwilling to commence the task."). In the absence of cases requiring it to decide whether a given belief is "religious," the Court can hardly be blamed for declining to take on "a difficult and delicate task." *Thomas*, 450 U.S. at 714. But lower courts and commentators have struggled with the question, mainly in Free Exercise cases, though not, as relevant here, in Establishment Clause cases.

The scholarly commentary on how or whether to define religion is voluminous.[7] Lower courts have evolved three-part tests, s*ee Africa v. Commonwealth of Penn.*, 662 F.2d 1025, 1032-1036 (3d Cir. 1981), and ten-part tests, *see U.S. v. Meyers*, 93 F.3d 1475, 1482-85 (10th Cir. 1996). The Second Circuit has attempted a broad, but not boundless, definition in Free Exercise cases:

> The term "religion" was defined by the Supreme Court nearly 100 years ago . . . as having reference to a person's views of his relationship to his Creator. This definition seems unduly narrow today. In every religion there is an awareness of what is called divine and a response to that divinity. . . . But, there are religions which do not positively require the assumption of a God, for example, Buddhism and the Unitarian Church. Hence a broader

[7] A summary of the scholarly literature can be found in Jeffrey Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study*, 83 N. Dak. L. Rev. 123 (2007), citing and discussing the principal works appearing in the last few decades.

> definition of the word religion – one which we think more accurately captures its essence – is that formulated by the pre-eminent American philosopher, William James, who said religion means: "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine." . . . In referring to an individual's relation to what he considers the divine, Professor James used the word "divine" in its broadest sense as denoting any object that is godlike, whether it is or is not a specific deity.

U.S. v. Moon, 718 F.2d 1210, 1226-27 (2d Cir. 1983) (internal citations omitted).

One common thread in all these purported tests and definitions is that, in Free Exercise cases, what matters is the subjective perspective of the *believer*, not an objective examination of whether the purportedly religious belief is shared by others or doctrinally correct. *See Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("courts have jettisoned the objective, content-based approach previously employed to define religious belief, in favor of a more subjective definition of religion, which examines an individual's inward attitudes towards a particular belief system").

This "expansive definition of religion has been developed primarily to protect an individual's free exercise of religion, recognizing that an individual's most sincere beliefs do not necessarily fall within traditional religious categories." *United States v. Allen*, 760 F.2d 447, 450 (2d Cir. 1985). "Free Exercise cases generally involve claims brought by individuals or groups claiming to belong to a cognizable religion," *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996), and thus necessarily involve determining whether the *claimants'* beliefs are religious.

In contrast, "Establishment cases usually, though not always, involve well known religions, because these are most likely to generate the dangers the clause is designed to prevent." *Alvarado*, 94 F.3d at 1227; *see also* George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 Geo. L. Rev. 1519, 1563-64 (1983) (Establishment

Clause cases turn on the meaning of "establishment," not the meaning of "religion"); Laurence H. Tribe, *American Constitutional Law*, p. 1187 (2d ed. 1988) (the meaning of "religion" rarely arises in Establishment Clause cases). *But see Smith v. Bd. of Sch. Comm'rs*, 665 F. Supp. 684 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987) (district court erroneously held that "secular humanism" was a religion, that it was taught in schools, and that such teaching violated the Establishment Clause).

In Establishment Clause cases, as opposed to Free Exercise cases, relying on the claimants' beliefs about the religious character of the practice giving rise to litigation is problematic, especially where the claimants "ask [the court] to recognize as a 'religion' what that religion's alleged adherents have not identified as such." *Allen*, 760 F.2d at 450. In a Free Exercise case, claimants with a purely subjective and idiosyncratic viewpoint that is nevertheless religious put the government to the often manageable burden of accommodating objections to generally-applicable laws or government programs by, for example, paying unemployment insurance to persons whose religious beliefs prevent them from working on particular days, *see Sherbert v. Verner*, 374 U.S. 398 (1963); or at particular jobs, *see Thomas v. Review Bd.*, 450 U.S. 707 (1981); or exempting objecting students from flag salute ceremonies, *see West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); or providing a particular diet, *see Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003); or the time, place, and wherewithal to pray, *see Salahuddin v. Coughlin*, 993 F.2d 306 (2d Cir. 1993). In an Establishment Clause case, by contrast, the claimant seeks to stop the government from enforcing its laws or pursuing its programs at all. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962) (state-sponsored prayer in public school); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching of "creation science" in public schools).

Government cannot function, however, if every individual can claim that some program or activity offends his or her subjective and idiosyncratic conception of "religion" and, in the name of the Establishment Clause, bring it to a halt. *See* Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses*, 52 U. Pitt. L. Rev. 75, 154 (1990) ("applying the same broad definition in establishment cases could shut down the modern regulatory state"). The educational system is particularly vulnerable to claims that it violates the Establishment Clause by promoting some arguably religious teaching with which a plaintiff might disagree:

> Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them . . . has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with their doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.

McCollum v. Bd. of Educ., 330 U.S. 203, 235 (1948) (Jackson, J., concurring). This threat to the educational system is exponentially greater when the universe of potential claimants is expanded, as it has been in Free Exercise cases, beyond "separate and substantial religious bodies" to subjective and idiosyncratic individual religious or quasi-religious belief. Were it otherwise, by labeling any belief with which he or she disagrees a religion, any person would be able to prohibit any government conduct they choose.

The Second Circuit, however, has pre-empted that exponentially expanded threat in Establishment Clause cases by defining "religion" for Establishment Clause purposes not subjectively and idiosyncratically, but objectively, as that which is conventionally recognized as "religion":

> we adopt for establishment clause purposes the conventional, majority view, rather than the appellant's view, of what is

> religious and what is political. . . . That the Government advances what is, conceivably, someone's religion, however, does not make what most citizens consider a political or military action a violation of the establishment clause.

Allen, 760 F.2d at 450 (rejecting Establishment Clause defense to charge of destroying military property allegedly used to advance "religion" of "Nuclearism"). The Second Circuit's approach recognizes that governments generally act in response to the desires of politically significant constituencies; if they do something that establishes "religion," they generally do it in response to communally-recognized religious sentiment, not idiosyncratic, individual religious claims. It is, in addition, consistent with the Supreme Court's holding that whether a government action has the primary effect of advancing religion is determined objectively, by whether a reasonable observer would perceive the practice as having that effect. *See Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 620, 635-36, 642-43 (1989); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir.), *cert. denied*, 534 U.S. 827 (2001).

In Allen, anti-nuclear protesters alleged that "nuclearism" was a religion and the government's support of "pronuclear" entities violated the establishment clause. There, the Second Circuit found that a person's beliefs as to nuclear weapons was not a religion but a political belief. Here, similarly, feminism is, by the "conventional, majority view" not a religion for the purposes of the Establishment Clause. Therefore, the Establishment Clause claim would have to be dismissed, rendering amendment futile.

C. Registration of Curricula and Degree Programs That Comply With Religion-Neutral Academic Standards Does Not Constitute an Establishment of Religion

Whether "Feminism" is a religion or not, the actions of the Regents and the Commissioner in registering degree programs and approving curricula do not establish religion. Rather, the State applies secular, religion-neutral academic criteria to determine which

educational institutions – be they secular or religious – may offer what degrees in what subjects, both secular and religious. *See* N.Y.C.R.R. Part 52 (Commissioner's Regulations).

To survive an Establishment Clause challenge, government practices must: (1) "have a secular legislative purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see also Altman*, 245 F.3d at 75. The State's registration and approval of degree programs and curricula easily passes all three parts of the test.

1. Secular Purpose: The question to be answered in determining whether the challenged activities have a secular purpose is "whether government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). The purpose of the State's regulatory scheme for registering degree programs and approving curricula is apparent on its face. It is intended to insure educational quality. Nothing in it refers to religion.[8] The criteria governing whether to register a degree program – in either a secular or a religious subject – or to approve a curriculum, are objective, secular criteria designed to advance educational quality, and nothing else. *See* pp. 9-12, *supra*. Both secular and religious programs have been approved and both secular and religious programs have been disapproved, and for purely secular reasons each time. *See Moore*, 44 N.Y.2d 593, 407 N.Y.S.2d 452 (1978) (denying registration for Ph.D. programs in English and History); *Warder*, 53 N.Y.2d 186, 440 N.Y.S.2d 875 (1981), *cert. denied*, 454 U.S. 1125 (1981) (denying charter to seminary). Nothing in the complaint suggests that this comprehensive, secular, religion-neutral scheme to assure

[8] Except for N.Y. Educ. Law § 207, which denies the Regents and the Commissioner the power to interfere with the academic freedom of religious institutions to determine religious orthodoxy. *See* fn. 5, *supra.*

educational quality is nevertheless intended to advance religion generally or any particular religion. Therefore, it passes the "secular purpose" test.

2. Primary Effect: "For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original). The State's registering degree programs and approving curricula do not themselves advance religion. At most, they permit the academic teaching of religious subjects with some assurance of quality. It is by no means a foregone conclusion that the study even of explicitly religious subjects will enhance religious faith. *See* Bart D. Ehrman, *God's Problem: How the Bible Fails to Answer Our Most Important Question – Why We Suffer* (2008) (prominent religious scholar explains how his scholarly explorations into the foundations of his faith led to loss of belief). Because the State's activities neither advance nor inhibit religion, they pass the "primary effects" test.

3. Entanglement: "[T]he First Amendment rests upon the premise that both religion and government can best achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum*, 333 U.S. at 212. Entanglement issues particularly arise when the State's activities create the danger of "state inspection and evaluation of the religious content of a religious organization." *Larson v. Valente*, 456 U.S. 228, 255 (1982). No such danger exists in this case. The regulations that the Regents and the Commissioner enforce do not require, authorize, or even permit, examination into the religious content of curricula or courses. *See* pp. 9-12, *supra*. The examination engaged in when determining whether to register a doctoral program in theology is the same type of examination required to determine whether to register a doctoral program in American history. *See Id.*, *supra*. If the institution has the proper

resources and systems (including a rationally-designed curriculum), its program is registered. The particular religion or religious subject matter taught, like the particular view on a secular subject, is irrelevant.

The Commissioner and the Regents must review proposed programs before registering them, and may periodically review them for compliance with regulations, but that does not amount to excessive entanglement. *See Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988) (no excessive entanglement where government reviews adolescent counseling programs of religious institutions receiving government grants, reviews the materials used, and monitors the program by periodic visits). The State's system for registering degree programs and curricula creates no danger of religious entanglement.

D. Bundy Aid May be Given Even to Religious Institutions and Programs Without Violating the Establishment Clause

Plaintiffs also contend that the Regents and Commissioner provide direct financial aid known as "Bundy Aid" to Columbia and Hofstra under Education Law § 6401, which "directly or indirectly benefits Columbia's IRWG and Hofstra's Women's Studies." (PAC, ¶¶ 74, 161-62) Bundy aid is given to all qualifying institutions (including Columbia and Hofstra) *per capita*, based upon the graduates produced. *See* pp. 12-13, *supra*.

It appears that plaintiff believes that the provision of financial assistance to the Columbia University and Hofstra University violates the Establishment Clause in some way. (PAC, ¶¶ 74-78, 161-63) Under the controlling Supreme Court precedent, it does not.

Columbia and Hofstra are private, non-sectarian universities. Financial aid to private, non-sectarian universities presents no Establishment Clause problem. Universities may offer courses and majors in explicitly religious subjects without violating the Establishment Clause.

See Edwards v. Aguillard, 482 U.S. at 594. Even assuming that there is a "religion of Feminism," and the women's studies programs at Columbia and Hofstra teach about it – and the complaint alleges nothing more – aid to Columbia and Hofstra would not violate the Establishment Clause.

Whatever plaintiff's theory may be, even direct financial aid to sectarian institutions that teach explicitly religious subjects presents no Establishment Clause issue so long as the aid: (1) has a secular purpose, (2) neither results in religious indoctrination by government nor defines its recipients by reference to religion, and (3) does not create excessive entanglement. *See Mitchell v. Helms*, 530 U.S. 793, 807 (2000); *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997). Because Bundy aid is given to all qualifying institutions of higher education, *see* p. 12, *supra*, and involves nothing more than the cutting of a check and periodic review to see that the qualifying institutions continue to qualify, there can be no serious question concerning either the first prong of the test, secular purpose, or the third prong of the test, entanglement. The only issues warranting discussion are whether Bundy aid results in religious indoctrination by government or defines its recipients by reference to religion.

1. Religiously-Neutral Definition of Beneficiaries: Bundy aid is distributed to any qualifying institution of higher education, based solely on the number and type of degrees earned. *See* N.Y. Educ. Law § 6401(3). The religious affiliation, if any, of either the student or the institution is irrelevant. It cannot, therefore, be said that the State defines Bundy aid recipients by reference to religion. *See Mitchell*, 503 U.S. at 830 (upholding aid program directed to a "[b]road array of schools eligible for aid without regard to their religious affiliations or lack thereof" based on enrollment); *Agostini*, 521 U.S. at 231 (noting that Court has "sustained programs that provided aid to *all* eligible children regardless of where they attend school").

2. No Indoctrination by the Government: The key issue is whether an

institution's use of government aid to indoctrinate students in religion is attributable to the government. *See Agostini*, 521 U.S. at 230. Where, as here, "the religious, irreligious, and a-religious alike are eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Mitchell*, 530 U.S. at 809.

Furthermore, because the aid is given in a non-discriminatory fashion and is based entirely on where students choose to go to college and whether they graduate, it follows that students' private choices, not governmental action, determine whether the students are exposed to religious indoctrination. *See Mitchell*, 530 U.S. at 810 ("if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment"). If Bundy aid were distributed in a way that created incentives for students to prefer colleges or universities where they might undergo religious indoctrination, an Establishment Clause issue might arise, but "[t]his incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

Private colleges and universities in New York State, whether secular or religious, receive the same dollar amount of Bundy aid per student, per degree. Aid distributed on this basis creates no economic incentive that would cause a student to prefer a religious over a secular school, or vice versa. The aid, if large enough, might create an incentive for a student to attend *some* college rather than none at all, but the Bundy aid distribution formula does not tilt the playing field or otherwise influence the students' private choice of which college to attend. Using state

money to facilitate such private choice does not violate the Establishment Clause. "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Mitchell*, 530 U.S. at 816 (upholding government aid to private schools, including religious schools, distributed on the basis of enrollment).

CONCLUSION

For the reasons given, plaintiff's motion to vacate the judgment and amend the complaint should be denied, together with such further relief as the Court deems just and proper.

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Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for State Defendants
By:
/S/
_____
CLEMENT J. COLUCCI
Assistant Attorney General
120 Broadway
New York, New York 10271
(212) 416-8634
Clement.Colucci@ag.ny.gov