NO: 12-1489

In The
Supreme Court of the United States

ROY DEN HOLLANDER
Petitioner, on behalf of himself and all others similarly situated,

v.

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

Respondents.

On Petition for Writ of Certiorari to the Untied States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition concerns the Establishment Clause claims in two successive lawsuits. In the first suit, the Court of Appeals for the Second Circuit held that the petitioner-attorney Roy Den Hollander ("Den Hollander") failed to allege taxpayer standing because he did not include in the complaint words specifically stating that he was a "taxpayer." The other basis for Establishment Clause standing—non-economic injury, was never litigated or decided in the first suit. In the second suit, the Second Circuit held that issue preclusion, also called collateral estoppel, prevented Den Hollander from asserting both taxpayer and non-economic standing under the Establishment Clause. The Second Circuit also ruled Den Hollander could not vacate the district court's judgment in the second suit and add two new plaintiffs, asserting new facts, who were not involved in the first suit, and warned Den Hollander that if he represented those two plaintiffs in a new action on a similar Establishment Clause claim, he would be sanctioned under Fed. R. Civ. P. 11.

1. For issue preclusion to apply, must an issue be fully litigated and actually decided in the first action?

2. In order to vacate a judgment under Fed. R. Civ. P. 59(e), do new plaintiffs who allege new facts constitute new evidence?

LIST OF PARTIES

All parties to this proceeding are listed on the cover.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Rules

Other Authorities

APPENDIX INDEX

Page

Documents from this case *Den Hollander II* that are referred to in the Petition for a Writ of Certiorari:

Documents from the prior case *Den Hollander I* that are referred to in the Petition for a Writ of Certiorari in this case *Den Hollander II*:

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit (App. 1a) is not published but is available at *Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, 2013 U.S. App. LEXIS 7368 (2d Cir. April 10, 2013).[1]

The Second Circuit affirmed the October 31, 2011 order of the United States District Court for the Southern District of New York (App. 44a), which is not published but is available at *Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, 2011 U.S. Dist. LEXIS 125593, (S.D.N.Y. October 31, 2011).

The Second Circuit also affirmed the district court's memorandum order of May 21, 2012, which is not published and not available on Lexis or Westlaw but is printed in the Appendix at 52a.

JURISDICTION

The Second Circuit entered judgment on April 10, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 1331, and the Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

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[1] The petitioner's last name consists of two words, "Den Hollander," since he is of Dutch ancestry. Petitioner has repeatedly tried to correct opposing attorneys, judges, and the courts to use both words instead of just "Hollander," sometimes with success—often times not. In this petition, the petitioner uses the correct surname.

STATUTORY PROVISION INVOLVED

Fed. R. Civ. P. 59(e) states, "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."

STATEMENT OF THE CASE

In 2008, the petitioner-attorney Roy Den Hollander ("Den Hollander") started the lawsuit, *Den Hollander I*, against the State of New York, the United States Department of Education, and Columbia University in the City of New York. The federal causes of action were for violation of Title IX of the Education Amendments of 1972, Equal Protection under the Fifth and Fourteenth Amendments of the United States Constitution, and the Establishment Clause of the First Amendment.

In *Den Hollander I*, the magistrate recommended dismissal for lack of standing under Title IX and Equal Protection but never decided the Establishment Clause standing issues of non-economic injury and taxpayer injury, which were not raised by either the pleadings or motions to dismiss. (Magistrate Fox Report and Recommendation, App. 120a-123a, No. 08 Civ. 7286, 2009 U.S. Dist. LEXIS 34942 (S.D.N.Y. April 15, 2009)).

The district court judge accepted the magistrate's report, but also never decided the Establishment Clause standing issues of non-economic injury and taxpayer injury, which were not raised before him by any of the parties. The judge, however, did make a remark concerning the merits of the Establishment Clause claim:

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

(Judge Kaplan Order, App. 127a, No. 08 Civ. 7286, 2009 U.S. Dist. LEXIS 131582 *4-5 (S.D.N.Y. April 23, 2009)).

On appeal to the Second Circuit, the issues of non-economic and taxpayer standing under the Establishment Clause were raised for the first time in Den Hollander's brief. However, none of the defendants' briefs addressed non-economic standing, and only New York State argued against taxpayer standing.

During a brief oral argument before the Court of Appeals in April 2010, a court for the first time addressed the issue of taxpayer standing under the Establishment Clause. (Transcript, App. 131a-146a). Six days later, the Second Circuit's Summary Order affirmed the district court's decision in *Den Hollander I* of no standing under Title XI and Equal Protection. The Court of Appeals also added that "[n]or has plaintiff made out the requirements for taxpayer standing for his Establishment Clause

claim." (Summary Order, App. 110a, 372 Fed. Appx. 140, 142 (2d Cir. 2010), 2010 U.S. App. LEXIS 7902 *3 (April 16, 2010)). The Second Circuit did not address in oral argument or its summary order non-economic standing under the Establishment Clause.

In December 2010, Den Hollander began this suit, *Den Hollander II*, alleging only a cause of action under the Establishment Clause that New York State and the U.S. Department of Education aided the religion Feminism in higher education in New York.

In *Den Hollander II*, the magistrate recommended summary judgment in favor of New York State and the U.S. Department of Education. The magistrate argued that the doctrine of issue preclusion, or collateral estoppel, prevented Den Hollander from litigating non-economic standing and taxpayer standing under the Establishment Clause because both issues had been fully litigated and actually decided in *Den Hollander I*. (Magistrate Pitman Report and Recommendation, App. 33a, 40a, 10 Civ. 9277, 2011 U.S. Dist. LEXIS 126375 *34, 43-44 (S.D.N.Y. July 1, 2011)).

The district court in *Den Hollander II* adopted the magistrate's report in its entirety and ruled that issue preclusion applied to the issues of both non-economic standing and taxpayer standing under the Establishment Clause. (Judge Swain Order, App. 49a, No. 10 Civ. 9277, 2011 U.S. Dist. LEXIS 125593 *7-10 (S.D.N.Y. October 31, 2011)).

Following entry of the district court's order, Den Hollander found two residents of New York State willing to join the case as plaintiffs, which

would add new facts to the proceeding. Den Hollander moved to vacate the district court order under Fed. R. Civ. P. 59(e) and amend the complaint to include the two new plaintiffs and the new facts they alleged.

The district court denied both motions in an order that simply signed off on certain sections of New York State and the U.S. Department of Education's memoranda of law in opposition to the post-judgment motions. (Judge Swain Memorandum Order, App. 54a, 10 Civ. 9277 (S.D.N.Y. May 21, 2012)).

On appeal to the Second Circuit, that Court held that the two issues of Establishment Clause non-economic and taxpayer standing were "fully litigated and decided" in *Den Hollander I*; therefore, Den Hollander was barred from relitigating those standing issues in the present action *Den Hollander II*. (*Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, App. 5a, No. 12-2362-cv, 2013 U.S. App. LEXIS 7368 *4 (2d Cir. April 10, 2013)).

The Second Circuit also affirmed the district court's denial of the motions to vacate its judgment and allow amendment of the complaint to add the additional facts alleged by adding two new plaintiffs. The Second Circuit ruled that Fed. R. Civ. P. 59(e) did not allow vacating the district court judgment because "new plaintiffs are not 'new evidence.'" (*Id.* at App. 7a and *6).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is Strongly At Odds With The Doctrine Of *Issue Preclusion* Established By This Court.

The Court of Appeals departed from the practice and procedure for determining whether issue preclusion applies by ignoring the full policy behind the doctrine and the requirement that an issue be fully litigated and decided in a prior action. As a result, the Court of Appeals for a second time prevented the exercise of subject matter jurisdiction which avoided a decision on the merits that would have been hard to justify or politically unpopular.

The central issue on the merits was whether Feminism is a religion under U.S. Supreme Court and various courts of appeals' standards—a question never previously properly decided by a federal court.[2] In order to diminish the chances of this issue ever being determined by a court, the Second Circuit also threatened attorney Den Hollander with sanctions if he ever represented any party raising that issue in any case. (*Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*,

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[2] Cases that established standards for determining whether a belief system is a religion are *Welsh v. U.S.*, 398 U.S. 333, 339-340 (1970); *U.S. v. Seeger*, 380 U.S. 163, 176, 186 (1965); *Torasco v. Watkins*, 367 U.S. 488, 495 n. 11 (1961); *Malnak v. Yogi*, 592 F.2d 197, 211-212 (3rd Cir. 1979)(Adams, J., concurring); *U.S. v. Bush*, 509 F.2d 776, 780, 782-783 (7th Cir. 1975); and *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227-1229 (9th Cir. 1996).

App. 7a, No. 12-2362-cv, 2013 U.S. App. LEXIS 7368 *7 (2d Cir. April 10, 2013)).

Issue preclusion, or collateral estoppel, requires that the "question expressly and definitely presented in [the second] suit is the same as that definitely and actually litigated and adjudged" in the first suit whether the issue arises on the same or a different claim. *Montana v. United States*, 440 U.S. 147, 157 (1979)(quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)); *e.g., New Hampshire v. Maine*, 532 U.S. 742, 748-749 (2001)(citing Restatement (Second) of Judgments §§ 17, 27 (1980)); *Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998); *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897).

The policy behind issue preclusion requires a balancing of two concerns: a desire not to deprive a litigant of an adequate day in court and a desire to prevent repetitious litigation of what is essentially the same dispute. Restatement (Second) of Judgments § 27 *comment c*. (1982).

A court's interest in avoiding repetitious litigation is less compelling when the issue on which preclusion is sought has not actually been litigated or decided previously. Restatement (Second) of Judgments § 27 *comment e*. (1982). Allowing preclusion to apply to issues not fully litigated and decided not only denies a party of a meaningful day in court but also discourages compromise, reduces the likelihood that the issues in an action will be narrowed by agreement, and results in intensifying litigation. *Id*.

The Second Circuit ignored these policy concerns in using the doctrine to deny Den Hollander non-economic and taxpayer standing under the Establishment Clause. (*Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, App. 5a, No. 12-2362-cv, 2013 U.S. App. LEXIS 7368 *4 (2d Cir. April 10, 2013)).

Non-economic standing comes from exposure to unwelcomed religious communications. *See Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). Taxpayer standing permits litigants to raise claims on the ground that their "tax money is being extracted and spent in violation of specific constitutional protections." *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

Whether non-economic and taxpayer standing were "fully litigated and decided" in *Den Hollander I* requires that they were put in issue by the pleadings, were controverted, were submitted to the court for its determination, and were determined—that is, resolved. Restatement (Second) of Judgments § 27 *comment d*. (1982). In addition, issue preclusion applies only to issues directly litigated—"not what might have been thus litigated and determined." *United States v. International Bldg. Co.*, 345 U.S. 502, 505 (1953)(quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

A corollary of the fully litigated and decided requirements is that care must be taken to ensure accurate identification of the jurisdictional issue resolved in the prior action. *Casey v. Department of State*, 980 F.2d 1472, 1475 n.3 (D.C. Cir. 1992)("we cannot isolate 'the precise issue of jurisdiction'

decided . . . therefore [we] assign no preclusive weight to the dismissal"); *accord NextWave Pers. Communs., Inc. v. FCC*, 254 F.3d 130, 148-49 (D.C. Cir 2001)(unclear whether the Second Circuit decided the issue, so issue preclusion did not apply); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 764 n.1 (3rd Cir.), *cert denied*, 493 U.S. 821 (1989)("issue preclusion only attaches if the basis of the first court's decision is clear"); *Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 751-52 (5th Cir. 1986)(no issue preclusion where the court cannot tell whether issue previously reached and decided).

All the courts in *Den Hollander I* were silent as to non-economic standing, so whether any of them decided or even intended to decide that issue is impossible to tell. Although an issue that is distinctly presented in the pleadings and necessarily resolved may be reflected in a decision even when it may not be expressly mentioned, *see Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 477-478 (1930), non-economic standing was not pleaded in *Den Hollander I*.

As for taxpayer standing, it too was not pleaded, and while the Second Circuit included that issue in its decision in *Den Hollander I*, a few minutes of argument before the panel of judges can hardly be considered "fully litigated."

The federal courts and the public whom they serve have a basic interest that this "make or break a case" doctrine be uniformly administered so as to serve predictability and simplicity. The Second

Circuit's decision in this proceeding threatens the goal of uniformity of federal court jurisdiction.

The most charitable explanation as to what happened in *Den Hollander I* is that the district court and Court of Appeals dropped the ball by failing to decide non-economic standing and to allow for a full consideration of taxpayer standing. The issue then becomes whether in the words of former Secretary of Defense Donald Rumsfeld, such is "close enough for government work"—close enough for justice in a democracy. It is not, but the Second Circuit held differently and issued a Summary Order confirming the words of former Justice Stevens, "occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify." J. Cole & E. Bucklo, *A Life Well Lived: An Interview With Justice John Paul Stevens*, 32 Litigation 8, 67 (Spring 2006).

II. The Second Circuit eliminated one of the ways for providing a court with new evidence under Fed. R. Civ. P. 59(e).

Fed. R. Civ. P. 59(e) is available to vacate an order granting summary judgment. *Fields v. South Houston*, 922 F.2d 1183, 1188 (5th Cir. 1991). One ground for granting a Rule 59(e) motion is to allow the movant to present newly discovered or previously unavailable evidence. *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006); *Schiller v. Physicians Res. Group, Inc.*, 342 F.3d 563, 567 (5th Cir. 2003).

In a pithy statement that ignored reality and again assured the merits of this case would never be reached, the Second Circuit declared that "new plaintiffs are not 'new evidence.'" (*Den Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y.*, App. 7a, No. 12-2362-cv, 2013 U.S. App. LEXIS 7368 *6 (2d Cir. April 10, 2013)).

This is an extremely narrow view of evidence. Evidence is "[a]ny circumstance which affords an inference as to whether the matter alleged is true or false." *American Jurisprudence*, Evidence § 1. It consists of "[a]ny species of proof presented . . . through the medium of witnesses, records, documents, exhibits, and concrete objects for the purpose of inducing belief in the minds of the [judges] as to their contentions." *American Jurisprudence*, Evidence § 1.

The Second Circuit overlooked that persons are simply a medium for providing evidence, so new plaintiffs with different fact situations mean new evidence. The proposed new plaintiffs in this proceeding would have provided new factual allegations by way of a verified complaint. (*Proposed Verified Amended Complaint*, ¶¶ 13, 14, 15, 88, 89, App. 69a, 88a, November 19, 2011).

In an analogy to a case concerning a new trial under Rule 59(a), the Second Circuit actually ruled that the plaintiff had a new witness willing to testify, which meant new evidence. *Li Butti v. United States*, 178 F.3d 114, 119 (2d Cir. 1999).

Furthermore, since evidence "is the means from which an inference may logically be drawn as to the existence of a fact," *Black's Law Dictionary*, 9th

ed. (quoting 31A *C.J.S.*, Evidence § 3, at 67-68 (1996)), the addition of two new plaintiffs who were not privy to *Den Hollander I* infers that the ultimate fact of issue preclusion would not apply; therefore, summary judgment based on it would not apply, and the case would most likely continue to the merits.

The Second Circuit, however, assured the merits would never be reached by eliminating one of the traditional ways for providing a court with evidence—statements by the parties. It is as though Judge Julius Hoffman bound and gagged Bobby Seale because the Judge personally disagreed with what Mr. Seale had to say.

CONCLUSION

This Court and the Courts of Appeals have decided whether a variety of belief systems were religions under the First Amendment:

- belief in and devotion to goodness and virtue for their own sake, *United States v. Seeger*, 380 U.S. 163, 166 (1965);
- Buddhism, Taoism, Ethical Culture, and Secular Humanism, *Torasco v. Watkins*, 367 U.S. 488, 495 n. 11 (1961);
- Aztec mythology about Quetzalcoatl—the "Plumed Serpent," *Alvarado v. City of San Jose*, 94 F.3d 1223, 1225 (9th Cir. 1996);
- selling and using marijuana, *United States v. Meyers*, 95 F.3d 1475, 1479 (10th Cir. 1996);

- witchcraft, *Dettmer v. Landon*, 799 F.2d 929, 930 (4th Cir. 1986);
- eating only raw foods, breathing unpolluted air, and drinking pure water, *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1027-28 (3rd Cir. 1981);
- concentrating on a sound while meditating in order to receive beneficial effects, *Malnak v. Yogi*, 592 F.2d 197, 198 (3rd Cir. 1979); and
- atheism, *U.S. v. Bush*, 509 F.2d 776, 780 (7th Cir. 1975).

So why then are the courts of the Second Circuit so reluctant to reach the merits on whether Feminism is a religion? After all, Feminism is more widespread and is having a greater impact on this society than any of the above belief systems.

For the reasons set forth, this Petition for Writ of Certiorari should be granted.

Respectfully submitted

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of April, two thousand thirteen.

Present: BARRINGTON D. PARKER,
SUSAN L. CARNEY,
Circuit Judges,
JED S. RAKOFF,
District Judge.*

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

ROY DEN HOLLANDER, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

MEMBERS OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, in their official capacities, in their individual capacities, MERRYL H. TISCH, Chancellor of the Board of Regents; in her official capacity, Chancellor of the Board of Regents; in her individual capacity, DAVID M. STEINER, New York State Commissioner of the Department of Education; in his official capacity, New York State Commissioner of the Department of Education; in his individual capacity, ELSA MAGEE, Acting President of the New York State Higher Education Services Corp.; in his official capacity, Acting President of the New York State Higher Education Services Corp.; in his individual capacity, UNITED STATES DEPARTMENT OF EDUCATION, ARNE DUNCAN, United States Secretary of Education; in his official capacity,

Defendants-Appellees.

No. 12-2362-cv

Appearing for Plaintiff-Appellant:	ROY DEN HOLLANDER, Law Office of Roy D. Hollander, New York, NY.
Appearing for New York State Defendants-Appellees:	LESLIE B. DUBECK, Assistant Solicitor General (Barbara D. Underwood, solicitor General, Steven C. Wu, Special Counsel to the Solicitor General, Laura R. Johnson, Assistant Solicitor General, on the brief), for Eric T. Schneiderman, Attorney General of the State of New York.
Appearing for Federal Defendants:	SARAH J. NORTH (Jean-David Barnea, Sarah S.Normand, on the brief), Assistant United States Attorneys, for Preet Bharara, United States Attorney for the Southern District of New York.

Appeal from the United States District Court for the Southern District of New York (Laura Taylor Swain, Judge). ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED, and DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff-Appellant Roy Den Hollander appeals

from an October 31, 2011 judgment of the District Court (Swain, J.) dismissing his complaint, and a May 21, 2012 order of the District Court denying his motion to vacate the judgment and amend his complaint. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal, to which we refer only as necessary to explain our decision.

In December 2010, Hollander brought this putative class action against several New York State education officials (the "State Defendants"), as well as the United States Department of Education and the United States Secretary of Education (the "Federal Defendants"). Hollander claims that the State and Federal Defendants violate the Establishment Clause of the United States Constitution by providing public funding to Columbia University, which maintains an Institute for Research on Women's and Gender Studies and a Women's Studies program. According to Hollander, feminism is a "modern-day religion," Compl. ¶ 1, and by providing public funding to Columbia, the Defendants unconstitutionally "promote and favor the religion Feminism while inhibiting other contradictory viewpoints," id. § VI. Hollander, who seeks declaratory and injunctive relief, contends that he has standing to bring his Establishment Clause claim both as a New York State and federal taxpayer, id. ¶¶ 72-78, and as a Columbia alumnus whose "direct contact with the offensive religion" of feminism, id. ¶ 80, makes him "very uncomfortable" and interferes with his "use and enjoyment of Columbia as [a] member[ ] of the Columbia community," id. ¶ 79.

Several years ago, we affirmed the dismissal of a nearly identical suit – also brought by Hollander – for lack of standing. Hollander v. Institute for Research on Women & Gender at Columbia Univ., 372 F. App'x 140 (2d Cir. 2010) ("Hollander I") (summary order). In Hollander I, as here, Hollander claimed that "the existence of Columbia University's Women's Studies Program" promoted "feminism as a religion," and that federal and state funding of Columbia therefore violated the Establishment Clause. Id. at 141. We concluded that Hollander's "claims of harm amount[ed] to the kind of speculative harm for which courts cannot confer standing," id., and that Hollander had failed to "ma[ke] out the requirements for taxpayer standing for his Establishment Clause claim," id. at 142.

In the present case, the District Court granted summary judgment to the Defendants after concluding that "collateral estoppel precludes this action because [Hollander] previously litigated the issue of his standing to bring such a claim." Hollander v. Members of the Bd. of Regents of the Univ. of the State of N.Y., No. 10 Civ. 9277, 2011 WL 5222912, at *1 (S.D.N.Y. Oct. 31, 2011) (adopting Report and Recommendation of Magistrate Judge Pitman). For substantially the reasons stated in Judge Pitman's thorough Report and Recommendation, as adopted by the District Court, we agree that summary judgment was correctly entered. Hollander's standing to assert an Establishment Clause claim based on the Defendants' provision of public funding to Columbia was fully litigated and decided in Hollander I. He is therefore barred from relitigating the standing issue

in the present action. See, e.g., Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890, 896 n.10 (2d Cir. 1980); see also Coll. Sports Council v. Dep't of Educ., 465 F.3d 20, 22-23 (D.C. Cir. 2006) (per curiam); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4402 (2d ed. 2012). "[I]t does not make sense to allow a plaintiff to begin the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of from the beginning of the suit, until [he] finally satisfies the jurisdictional requirements [for standing]." Perry v. Sheahan, 222 F.3d 309, 318 (7th Cir. 2000) (internal quotation marks omitted). Accordingly, we affirm the District Court's judgment dismissing Hollander's complaint.

We also affirm the District Court's order denying Hollander's motion to vacate the judgment and amend his complaint. "A party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b)." Williams v. Citigroup Inc., 659 F.3d 208, 213 (2d Cir. 2011) (per curiam) (internal quotation marks and brackets omitted). Hollander's motion to vacate arose under Rule 59(e). A court may grant a Rule 59(e) motion only if the movant satisfies the heavy burden of demonstrating "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks omitted); see also Munafo v. Metro. Transp. Auth., 381 F.3d 99, 105 (2d Cir. 2004). Hollander contends

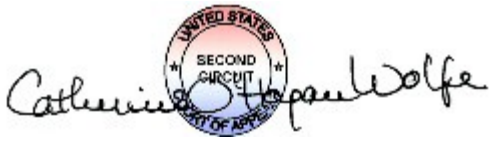
that vacatur was warranted here because, after the District Court entered judgment against him, he discovered two new potential plaintiffs who allegedly have standing to challenge the Defendants' funding decisions. But new plaintiffs are not "new evidence," and Hollander's discovery of additional individuals willing to press Establishment Clause claims against the Defendants does not satisfy the requirements of Rule 59(e). See United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 392 (2d Cir. 2001). Nor has Hollander shown that the denial of his Rule 59(e) motion works a "manifest injustice" against the recently discovered plaintiffs. Nothing in the District Court's order purports to preclude those individuals from bringing suit in their own names. We therefore discern no abuse of discretion in the District Court's denial of Hollander's motion to vacate the judgment and amend his complaint. Schwartz v. Liberty Mut. Ins. Co., 539 F.3d 135, 150 (2d Cir. 2008).

One additional point deserves mention. By presenting a court with a pleading, an attorney certifies, inter alia, that (1) the pleading "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"; (2) "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"; and (3) "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b). Hollander is an attorney. Before again invoking his

feminism-as-religion thesis in support of an Establishment Clause claim, we expect him to consider carefully whether his conduct passes muster under Rule 11.

We have considered Hollander's remaining arguments and find them to be unavailing. Accordingly, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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ROY DEN HOLLANDER, on behalf of himself and all others similarly situated,

Plaintiff,

-against-

MEMBERS OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, in their official and individual capacities; 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 M. STEINER, in his official and individual capacity; ACTING PRESIDENT OF THE NEW YORK STATE HIGHER EDUCATION SERVICES CORP., ELSA MAGEE, in her official and individual capacity; U.S. DEPARTMENT OF EDUCATION, and U.S. SECRETARY OF EDUCATION, ARNE DUNCAN, in his official capacity,

Defendants.

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10 Civ. 9277 (LTS)(HBP)

REPORT AND RECOMMENDATION

PITMAN, United States Magistrate Judge:

TO THE HONORABLE LAURA TAYLOR SWAIN, United States District Judge,

I. Introduction

Plaintiff Roy Den Hollander commenced this putative class action pro se against defendants pursuant to the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 ("Section 1983"), alleging violations of the Establishment Clause of the First Amendment ("the Establishment Clause"). Hollander, a Columbia University ("Columbia") Business School graduate, seeks declaratory and injunctive relief against defendants for their alleged roles in the establishment of "the modern-day religion Feminism" at Columbia and its Institute for Research on Women and Gender ("IRWG"). By notice of motion dated January 14, 2011, defendants Members of the Board of Regents of the University of the State of New York, Chancellor of the Board of Regents Merryl H. Tisch, New York State Commissioner of the Department of Education David M. Steiner and Acting President of the New York State Higher Education Services Corp. Elsa Magee (collectively, the "State Defendants"), move to dismiss Hollander's complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure (Docket Item 7). By letter motion dated April 1, 2011, defendants U.S. Department of Education and U.S. Secretary of Education Arne Duncan (collectively, the "Federal Defendants") move to dismiss on the grounds of collateral

estoppel. By Order dated June 3, 2011, I announced my intention to convert the motions to motions for summary judgment pursuant to Fed.R.Civ.P. 12(d) (Docket Item 17). For the reasons set forth below, I respectfully recommend that defendants' motions for summary judgment be granted.

II. Facts

A. Parties

Plaintiff Hollander is an alumnus of the Columbia Business School and a New York State and federal taxpayer (Com- plaint, dated December 10, 2010 (Docket Item 1) ("Compl."), at ¶ 13). The putative class consists of Columbia "alumni, students and employees who are New York State and federal taxpayers that find the inculcation and manifestations of Feminism at Columbia offensive" (Compl. at ¶ 14).

Defendants Members of the Board of Regents of the University of the State of New York ("the Board of Regents") compose the body that, inter alia, regulates state educational institutions, administers funds allocated by the state to the institutions and appoints the Commissioner of the Department of Education. N.Y. Educ. L. §§ 101, 201. Defendant Merryl H. Tisch is the Chancellor of the Board of Regents. Members of the Board of Regents, http://www.regents.nysed.gov/members/bios/tisch.html (last visited June 13, 2011). Defendant David M. Steiner was the Commissioner of the New York State Department of Education at the time the complaint was filed.[1]

[1] On June 15, 2011, Steiner was succeeded by Dr. John B. King,

Defendant Elsa Magee is the acting president of the New York State Higher Education Services Corporation, a body that administers New York State financial aid and supports the administration of federal financial aid. N.Y. Educ. L. § 652(2); HESC Directory -- Executive Management and Office of the President, http://www.hesc.com/content.nsf/CA/HESC _Directory_Executive_ Management_ and_Office_of_the_President (last visited June 13, 2011). Defendant United States Department of Education, inter alia, provides financial aid to institutions of higher education. 20 U.S.C. §§ 1070(a)(5), 3402(6). Defendant Arne Duncan is the United States Secretary of Education and supervises the Department of Education.20 U.S.C. § 3411; Arne Duncan, U.S. Secretary of Education -– Biography, http://www2.ed.gov/news/staff/bios/dun can.html (last visited June 13, 2011).

B. The Underlying Action

On or about August 18, 2008, Hollander commenced an action (the "Underlying Action," Docket No. 08 Civ. 7286) against the same defendants who are in this action, or their predecessors.[2] He claimed that defendants violated

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Jr. Board of Regents Elects John King Commissioner of Education, http://www.oms.nysed.gov/press/BORElectsJohn-KingCOE.html (last visited June 13, 2011).

[2] In the Underlying Action, the defendants were the Board of Regents of the University of the State of New York, Chancellor of the Board of Regents Robert M. Bennett, New York State Commissioner of the Department of Education Richard P. Mills, President of the New York State Higher Education Services Corp. James C. Ross, the U.S. Department of Education and U.S. Secretary of Education Margaret Spellings.

the Establishment Clause "by aiding the establishment of the religion Feminism" through Columbia's Women's Studies program. Hollander also asserted claims for violations of the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., and New York Civil Rights Law § 40-c for their fostering, aiding or carrying out intentional discrimination against men through the Women's Studies program (First Amended Class Action Complaint in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286, filed December 1, 2008 ("Underlying Action Compl.") (Docket Item 17), at ¶ 1).

With respect to the Establishment Clause claim, the complaint in the Underlying Action alleged that

> The establishment clause forbids government action that benefits a religion. A belief system need not be theistic in nature to be a religion but rather can stem from moral, ethical or even malevolent tenets that are held

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Bennett, Mills, Ross and Spellings have since been succeeded by Tisch, Steiner, Magee and Duncan, respectively. In the Underlying Action, Hollander also sued the IRWG, the School of Continuing Education at Columbia and the Trustees of Columbia, but they are not parties to this action.

Following the commencement of the Underlying Action, William A. Nosal was added as a class representative. However, he later withdrew. See Hollander v. Inst. for Research on Women & Gender at Columbia Univ., 372 F. App'x 140, 2010 WL 1508269 at *1 n.1 (2d Cir. Apr. 16, 2010) (unpublished).

> with the strength of traditional religious convictions. Gods or goddesses are not needed for a religion.

(Underlying Action Compl. at ¶ 4). The complaint in the Underlying Action alleged that the feminism taught at Columbia and its IRWG constituted a religion because, inter alia, it promoted theories with respect to the natural order of males and females, combined strains of feminist research "into a comprehensive belief system that has spread throughout Columbia into the society as a whole" and mandated a lifestyle (Underlying Action Compl. at ¶ 5). The complaint in the Underlying Action further alleged that the IRWG administrators and teachers were akin to "priestesses" because of their teachings, and that the IRWG "exalt[ed] certain Feminists to apostle-like status," treated certain days like feminism holidays and promoted feminism through the Women's Studies program (Underlying Action Compl. at ¶ 6).

Specifically, the complaint in the Underlying Action alleged that the Women's Studies program

> (1) 'instructs, trains, supports, furthers, cultivates and advocates strategies, and tactics for demeaning and abridging the rights of men'; (2) advocates 'that the civil rights of males be diminished or eliminated'; and (3) 'stereotype[s] males as the primary cause for most, if not all, the world's ills throughout history,' while crediting females 'with inherent goodness.'

(Report and Recommendation in Hollander v. Inst. for Research on Women & Gender at Columbia

University, 08 Civ. 7286, filed April 15, 2009 ("Report and Recommendation") (Docket Item 33), at 4,quoting Underlying Action Compl. at ¶¶ 75-77).

While the plaintiffs did not allege that they enrolled or attempted to enroll in any Women's Studies courses, the complaint in the Underlying Action alleged that the few males who did participate in the Women's Studies program were discriminated against in various ways (Underlying Action Compl. at ¶ 87). The plaintiffs alleged that no Men's Studies program existed, but they intended to enroll in such a program as soon as it was offered (Underlying Action Compl. at ¶¶ 223-25). They stated that the promotion of the Women's Studies program effectively denied class members the opportunity to take Men's Studies courses (Underlying Action Compl. at ¶ 210).

By motions filed on January 9, 2009, all defendants moved to dismiss the Underlying Action Complaint on various grounds, including lack of standing (Docket Items 21, 23 and 25 in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286). On April 15, 2009, the Honorable Kevin Nathaniel Fox, United States Magistrate Judge, issued a Report and Recommendation that recommended a dismissal of all claims for lack of standing (Docket Item 33 in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286). Judge Fox concluded that the plaintiffs lacked standing because their alleged injury, "which is purportedly based upon the content of, or the discriminatory impact flowing from, the Women's Studies program at Columbia, is not an 'injury in fact'" since plaintiffs

were neither enrolled in the program nor denied an opportunity to enroll (Report and Recommendation at 8-9). Judge Fox also concluded that any alleged injury stemming from the absence of a Men's Studies program was not concrete and particularized (Report and Recommendation at 9). By Order dated April 23, 2009, the Honorable Lewis A. Kaplan, United States District Judge, adopted the Report and Recommendation and dismissed the action for lack of standing (Docket Item 36 in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286). Judge Kaplan also dismissed the Establishment Clause claims "on the alternative ground that they are absurd and utterly without merit" (Order at 2).

On May 1, 2009, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit (Docket Item 38). They argued on appeal that they had standing to sue as taxpayers. Brief of Plaintiffs-Appellants, Hollander v. Inst. for Research on Women & Gender at Columbia University, No. 09-1910-cv, 2009 WL 8105887 at *2, *20-*24 (2d Cir. Aug. 25, 2009). At oral argument, Hollander conceded that he did not make an express assertion of taxpayer standing for his Establishment Clause claims in the complaint in the Underlying Action (Transcription of Oral Argument, annexed as Ex. E to Declaration of Roy Den Hollander in Support of Opposition to Motions to Dismiss, dated March 8, 2011 ("Hollander Decl.") (Docket Item 15), at 2). However, he argued that an inference should have been drawn that he was also asserting New York State and federal taxpayer standing as a basis of standing (Transcription of Oral Argument at 2).

Hollander also conceded that, in filing his objections to Judge Fox's Report and Recommendation, he did not ask for leave to amend the complaint with respect to standing in the event the court ruled against him (Transcription of Oral Argument at 9-10). However, he did request a remand from the Second Circuit so he could amend his complaint to assert taxpayer standing (Transcription of Oral Argument at 2).

By Summary Order dated April 16, 2010, the Second Circuit affirmed the dismissal of the Underlying Action for lack of standing. Hollander v. Inst. for Research on Women & Gender at Columbia Univ., supra, 372 F. App'x 140, 2010 WL 1508269 at *1. Specifically, the Court of Appeals held that "plaintiff's claims of harm amount to the kind of speculative harm for which courts cannot confer standing," adding, "[n]or has plaintiff made out the requirements for taxpayer standing for his Establishment Clause claim." Hollander v. Inst. for Research on Women & Gender at Columbia Univ., supra, 372 F. App'x 140, 2010 WL 1508269 at *1 (citations omitted).

C. The Present Action

On December 13, 2010, Hollander commenced the present action, seeking declaratory and injunctive relief for violations of the Establishment Clause (Compl.). His allegations with respect to his Establishment Clause claims are similar to those in the Underlying Action (compare Underlying Action Compl. at ¶¶5-6, with Compl. at ¶¶ 50, 53). In this action, however, Hollander expressly alleges that he has standing as a federal and New York State

taxpayer (Compl. at ¶¶ 6, 13; Hollander Decl. at ¶7).[3] In summary, Hollander alleges taxpayer standing for an economic injury caused by defendants' expenditure of government funds to Columbia's Women's Studies program (Compl. at ¶¶ 72-78). He also alleges, as a non-economic injury, that members of the putative class feel that the "inculcation, manifestation, and exposure of Feminism at Columbia is offensive . . . and makes its members very uncomfortable" (Compl. at ¶ 79).

By notice of motion dated January 14, 2011, the State Defendants move to dismiss Hollander's complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) (Docket Item 7). In support of their motion, the State Defendants argue that: (1) the action should be dismissed on res judicata grounds; and (2) "Feminism" is not a religion and the defendants' actions do not tend to establish religion (Memorandum of Law in Support of the State Defendants' Motion to Dismiss, dated January 14, 2011 (State Defs.' Mem.) (Docket Item 9), at I). By letter motion dated April 1, 2011, the Federal Defendants move to dismiss on the grounds of collateral estoppel. In support of their motion, the Federal Defendants argue that Hollander's standing to bring this action was previously determined and cannot be relitigated, and that Hollander pleads no facts with respect to taxpayer standing that were not

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[3] In a supplemental submission, Hollander attached what he describes as 1099 tax forms from 2010 and 2011. Actually, these documents appear to be pay stubs that detail New York State and federal tax withholdings (Hollander Decl. at ¶ 7 and Ex. F).

known to him at the time of the first action (Letter from Jean-David Barnea to undersigned, dated April 1, 2011, at 2).

In opposition, Hollander makes the following arguments: (1) because the Underlying Action was dismissed for lack of standing, the judgment was not on the merits and, thus, claim preclusion does not apply; (2) issue preclusion does not apply because the Underlying Action was dismissed for failure to allege a jurisdictional fact, while the current action alleges that fact; (3) the plausibility pleading standard applies to both Fed.R.Civ.P. 12(b)(1) and 12(b)(6); (4) the complaint plausibly alleges that the class representative satisfies both the taxpayer and non-economic standing requirements, and (5) the complaint plausibly alleges Feminism is a religion and that the State Defendants and U.S. Department of Education aid it in violation of the Establishment Clause (Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Complaint, dated March 8, 2011 ("Pl.'s Mem.") (Docket Item 11)).

By Order dated June 3, 2011, I announced my intention to convert the motions to a motion for summary judgment pursuant to Fed.R.Civ.P. 12(d) and directed the parties to submit additional materials, if they wished to do so, no later than June 30, 2011 (Docket Item 17). On June 20, 2011, I received a letter from the Federal Defendants requesting that their motion to dismiss not be converted to a motion for summary judgment (Letter from Jean-David Barnea to undersigned, dated June 20, 2011, at 2). On June 23, 2011, I received a letter from the State Defendants that "concur[red] with,

and adopt[ed], the views expressed" in the Federal Defendants's letter (Letter from Clement J. Colucci to undersigned, dated June 24, 2011, at 1). Because I conclude that the motions should be granted, defendants are not prejudiced by the conversion, and I decline their request to reconsider. Moreover, Hollander did not object to the conversion in his subsequent submission, which I received on June 27, 2011 and which consisted of a Statement of Material Facts, Declaration, Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and a proposed Second Amended Complaint.

III. Analysis

A. Summary Judgment Standard

The standards applicable to a motion for summary judgment are well-settled and require only brief review.

> Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). This form of relief is appropriate when, after discovery, the party . . . against whom summary judgment is sought has not shown that evidence of an essential element of her case -- one on which she has the burden of proof -- exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This form of remedy is inappropriate when the issue to be resolved is both genuine and related to a disputed material fact. An alleged factual dispute regarding immaterial or minor

> facts between the parties will not defeat an otherwise properly supported motion for summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990). Moreover, the existence of a mere scintilla of evidence in support of nonmovant's position is insufficient to defeat the motion; there must be evidence on which a jury could reasonably find for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).
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> If the movant demonstrates an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must "demonstrate more than some metaphysical doubt as to the material facts," and come forward with "specific facts showing that there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993). If the non-movant fails to meet this burden, summary judgment will be granted against it.

Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004); accord Binder & Binder PC v. Barnhart, 481 F.3d 141, 148 (2d Cir. 2007); Jeffreys v. City of N.Y., 426 F.3d 549, 553-54 (2d Cir. 2005); Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223-24 (2d Cir. 1994); see also McPherson v. N.Y.C. Dep't of Educ., 457 F.3d 211, 215 n.4 (2d Cir. 2006) ("[S]peculation alone is insufficient to defeat a motion for summary judgment.").

"In determining whether a genuine issue of

material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant . . . . Stated more succinctly, '[t]he evidence of the non-movant is to be believed.'" Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 253-54 (2d Cir. 2002), quoting Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 255; accord Jeffreys v. City of New York, supra, 426 F.3d at 553 ("Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment.") (citation and internal quotations omitted); see also Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 142 (2d Cir. 2004); Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003).

"Material facts are those which 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Coppola v. Bear Stearns & Co., 499 F.3d 144, 148 (2d Cir. 2007), quoting Andersonv. Liberty Lobby, Inc., supra, 477 U.S. at 248; accord McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007). "'[I]n ruling on a motion for summary judgment, a judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-movant] on the evidence presented[.]'" Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 788 (2d Cir. 2007), quoting Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 298 (2d Cir. 1996).

B. Constitutional Standing Requirements

The Constitutional standing requirements have been comprehensively set forth by the Honorable Kenneth M. Karas, United States District Judge, in Access 4 All, Inc. v. Trump Int'l Hotel and Tower Condo., 458 F. Supp. 2d 160, 167 (S.D.N.Y. 2006):

> Standing is an essential and unchanging component of the case-or-controversy requirement of Article III. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). There are three well-settled constitutional standing requirements: (1) injury in fact, which must be (a) concrete and particularized, and (b) actual or imminent; (2) a causal connection between the injury and the defendant's conduct; and (3) the injury must be likely to be redressed by a favorable decision. See Field Day, LLC v. County of Suffolk, 463 F.3d 167, 175 (2d Cir. 2006) (citing Lujan, 504 U.S. at 560, 112 S.Ct. 2130). A plaintiff's standing is evaluated at the time the complaint is filed. See Robidoux v. Celani, 987 F.2d 931, 938 (2d Cir. 1993). As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing standing. See Field Day, 463 F.3d 167, 176. To defeat a motion for summary judgment, Plaintiffs "must set forth by affidavit or other evidence specific facts which for purposes of the summary judgment motion will be taken to be true." Lewis v. Casey, 518 U.S. 343, 358, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (citing Lujan, 504 U.S. at 561, 112 S.Ct. 2130). Each

element must be proven with the "manner and degree of evidence required" at the given stage of litigation. See Bldg. & Constr. Trades Council v. Downtown Dev., Inc., 448 F.3d 138, 144 (2d Cir. 2006).

A plaintiff cannot base standing merely on his status as a taxpayer unless there are "special circumstances." Ariz. Christian Sch. Tuition Org. v. Winn, _____U.S.__, 131 S. Ct. 1436, 1442 (2011). The United States Supreme Court "has rejected the general proposition that an individual who has paid taxes has a 'continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution.'" Ariz. Christian Sch. Tuition Org. v. Winn, supra, 131 S. Ct. at 1442, quoting Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 599 (2007) (plurality opinion).

In Flast v. Cohen, 392 U.S. 83 (1968), the Supreme Court carved out a "narrow exception" to the rule against taxpayer standing. Ariz. Christian Sch. Tuition Org. v. Winn, supra, 131 S. Ct. at 1445, quoting Bowen v. Kendrick, 487 U.S. 589, 618 (1988). Under Flast v. Cohen, supra, a taxpayer will have standing when two conditions are met. "The first condition is that there must be a 'logical link' between the plaintiff's taxpayer status 'and the type of legislative enactment attacked.'" Ariz. Christian Sch. Tuition Org. v. Winn, supra, 131 S. Ct. at 1445, quoting Flast v. Cohen, supra, 392 U.S. at 102. The other condition "is that there must be 'a nexus' between the plaintiff's taxpayer status and 'the precise nature of the constitutional infringement alleged.'" Ariz. Christian Sch. Tuition Org. v. Winn,

supra, 131 S. Ct. at 1445, quoting Flast v. Cohen, supra, 392 U.S. at 102. A plaintiff's allegation of taxpayer standing based on "an abstract injury shared by the public" will not suffice, as "a concrete injury" is required. Bd. of Educ. v. N.Y. State Teachers Ret. Sys., 60 F.3d 106, 110 (2d Cir. 1995) (citations omitted); see also Woods v. Empire Health Choice, Inc., 574 F.3d 92, 96 (2d Cir. 2009) ("Standing has been rejected in [taxpayer standing] cases because the alleged injury is . . . a grievance the taxpayer suffers in some indefinite way in common with people generally." (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344 (2006) (internal quotation marks omitted)).

C. Res Judicata and Collateral Estoppel

The common law doctrines of res judicata and collateral estoppel are "related but distinct [and] operate to prevent parties from contesting matters that they have had a full and fair opportunity to litigate, thereby conserving judicial resources and protecting parties from the expense and vexation of multiple lawsuits." Marvel Characters, Inc. v. Simon, 310 F.3d 280, 286 (2d Cir. 2002). Federal law determines the preclusive effect of a federal judgment. PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896 n.1 (2d Cir. 1983).

"Res judicata [or claim preclusion][4] precludes parties from litigating issues 'that were or could

[4] Some more modern authorities refer to the doctrines of res judicata and collateral estoppel by the more descriptive terms of claim preclusion and issue preclusion, respectively. See Allen v. McCurry, 449 U.S. 90, 94 n.5 (1980).

have been raised' in a prior proceeding." Perez v. Danbury Hosp., 347 F.3d 419, 426 (2d Cir. 2003), quoting Monahan v. N.Y.C. Dep't of Corr., 214 F.3d 275, 284-85 (2d Cir. 2000); accord Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir. 1998). "To prove that a claim is precluded under this doctrine, 'a party must show that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the [parties] or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.'" Pike v. Freeman, 266 F.3d 78, 91 (2d Cir. 2001), quoting Monahan v. N.Y.C. Dep't of Corr., supra, 214 F.3d at 284-85; see also Allen v. McCurry, supra, 449 U.S. at 94; Burgos v. Hopkins, 14 F.3d 787, 789 (2d Cir. 1994); Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343, 345-46 (2d Cir. 1995); Henik v. Labranche, 433 F. Supp. 2d 372, 378 (S.D.N.Y. 2006) (Sweet, D.J.); Word v. Croce, 230 F. Supp. 2d 504, 508-09 (S.D.N.Y. 2002)(Swain, D.J.).

"Collateral estoppel, or issue preclusion, prevents parties or their privies from relitigating in a subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding." Marvel Characters, Inc. v. Simon, supra, 310 F.3d at 288; see Boguslavsky v. Kaplan, 159 F.3d 715, 719-20 (2d Cir. 1998); see also Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 598 (1948) ("Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel."). To assert a defense of collateral estoppel successfully, a party must establish four elements: "'(1) the identical issue was raised in a previous proceeding;

(2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.'" Ball v. A.O. Smith Corp., 451 F.3d 66, 69 (2d Cir. 2006), quoting Purdy v. Zeldes, 337 F.3d 253, 258 & n.5 (2d Cir. 2003); accord Uzdavines v. Weeks Marine, Inc., 418 F.3d 138, 146 (2d Cir. 2005); Marvel Characters, Inc. v. Simon, supra, 310 F.3d at 288-89. However, collateral estoppel will not be applied where it would lead to an unfair result. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979) (application of collateral estoppel may be unfair where prior litigations have yielded inconsistent results); Bear, Stearns & Co. v. 1109850 Ontario, Inc., 409 F.3d 87, 91 (2d Cir. 2005) (same).

The granting of a motion to dismiss on substantive grounds is considered a judgment on the merits. See Overview Books, LLC v. United States, 755 F. Supp. 2d 409, 415-16 (E.D.N.Y. Dec. 13, 2010), quoting Ramirez v. Brooklyn Aids Task Force, 175 F.R.D. 423, 426 (E.D.N.Y. 1997) ("It is well-established that '[f]or res judicata purposes, a Rule 12(b)(6) dismissal is deemed to be a judgment on the merits.'"). However, the preclusive effect of a dismissal for lack of standing is not as clear in the Second Circuit.

A dismissal for lack of standing "is a dismissal for lack of subject matter jurisdiction." St. Pierre v. Dyer, 208 F.3d 394, 400 (2d Cir. 2000) (citations omitted). Courts in the Second Circuit have held that "a dismissal for lack of subject matter jurisdiction is not an adjudication of the merits, and hence has no

res judicata effect." St. Pierre v. Dyer, supra, 208 F.3d at 400; Thompson v. Cnty. of Franklin, 15 F.3d 245, 253 (2d Cir. 1994), citing Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976); Fiero v. Fin. Indus. Regulatory Auth., Inc., 606 F. Supp. 2d 500, 510 (S.D.N.Y. 2009) (Marrero, D.J.). However, courts in this Circuit have also held that determinations of standing and other jurisdictional issues do give rise to binding res judicata consequences. Mrazek v. Suffolk Cnty. Bd. of Elections, 630 F.2d 890, 896 n.10 (2d Cir. 1980) ("We note only that the issue of [plaintiffs'] standing, by all accounts, has been determined adversely to them in the state courts and that decision is binding upon us under principles of res judicata" (citation omitted); Ripperger v. A.C. Allyn & Co., 113 F.2d 332, 333-34 (2d Cir. 1940) ("The appellant concedes, as he necessarily must on the authorities, that a decision in favor of jurisdiction is res judicata and invulnerable to collateral attack" (citations omitted)); Barclay's Ice Cream Co., Ltd. v. Local No. 757 of Ice Cream Drivers and Emp'rs Union, 79 Civ. 1611 (RWS), 1979 WL 1710 at *2 (S.D.N.Y. Sept. 7, 1979) (Sweet, D.J.) ("[A] finding of lack of subject matter jurisdiction is res judicata as to that particular issue in subsequent actions between the parties."); Loucke v. United States, 21 F.R.D. 305, 309-10 (S.D.N.Y. 1957) (Herlands, D.J.) ("[A] decision on the issue of jurisdiction or venue is res judicata with respect to those issues.").

While these authorities appear to be conflicting, the ambiguous use of the term "res judicata" may be one reason for the apparently

inconsistent holdings.

> [T]he term 'res judicata' has historically been used interchangeably to mean either res judicata (also known as claim preclusion) or collateral estoppel (also known as issue preclusion), see Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) (noting the older practice of using res judicata to describe both res judicata and collateral estoppel, and noting a more recent tendency to apply the label of res judicata only to matters of claim preclusion) . . . .

Wells Fargo Bank, N.A. v. Diamond Point Plaza Ltd. P'ship, 971 A.2d 360, 365 (Md. Ct. Spec. App. 2009). In any event, the weight of authority outside of this Circuit holds that a dismissal for lack of standing collaterally estops subsequent suits which present the precise standing issue that was actually determined. Brereton v. Bountiful City Corp., 434 F.3d 1213, 1218-19 (10th Cir. 2006); Ammex, Inc. v. United States, 384 F.3d 1368, 1372 (Fed. Cir. 2004); In re V & M Mgmt., Inc., 321 F.3d 6, 8-9 (1st Cir. 2003); Harley v. Minn. Mining & Mfg. Co., 284 F.3d 901, 909 (8th Cir. 2002); Hooker v. Federal Election Comm'n, 21 F. App'x 402, 405-06 (6th Cir. 2001) (per curiam); Dresser v. Backus, 229 F.3d 1142, 2000 WL 1086852 at *1 (4th Cir. Aug. 4, 2000) (unpublished) (per curiam); Perry v. Sheahan, 222 F.3d 309, 317-18 (7th Cir. 2000); Cutler v. Hayes, 818 F.2d 879, 889 (D.C. Cir. 1987). See also People of Bikini, ex rel. Kili/Bikini/Ejit Local Gov. Council v. United States, 77 Fed. Cl. 744, 776 (Fed. Cl. 2007) ("Dismissal of a suit for want of federal subject-matter jurisdiction,

for example, should not bar an action on the same claim in a court that does have subject matter jurisdiction, but ordinarily should preclude relitigation of the same issue of subject-matter jurisdiction in a second federal suit on the same claim." (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4402 at 20 (2d ed. 2007) (emphasis added)).

"It is clear that a dismissal for want of jurisdiction does not preclude a second action where subsequent events cure the jurisdictional deficiency in the first suit." Bui v. IBP, Inc., 205 F. Supp. 2d 1181, 1188 (D. Kan. 2002), citing Costello v. United States, 365 U.S. 265, 284-88 (1961); Perry v. Sheahan, supra, 222 F.3d at 318; Dozier v. Ford Motor Co., 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, Cir. J.). However, a number of Circuits have held that, following a dismissal for lack of standing, a plaintiff is collaterally estopped from relitigating the standing issue with facts that were available to him at the time of the first action. In re V & M Mgmt., Inc., supra, 321 F.3d at 8-9 (affirming bankruptcy court's dismissal of claims of fraud, professional malpractice and breach of fiduciary duty on issue preclusion grounds and holding that an appellant's "allegations could have been raised in the prior bankruptcy proceedings where [his] standing was adjudicated"); Dresser v. Backus, supra, 2000 WL 1086852 at *1 (rejecting appellant's contention that a prior action presented "different issues than the case at bar" where the prior action addressed his standing to bring state law tort claims and the case at bar only raised the issue of his

standing to pursue RICO claims, concluding that the two actions "clearly involve common factual issues"); Perry v. Sheahan, supra, 222 F.3d at 317-18 (dismissing Section 1983 action).[5] See also Hooker v. Federal Election Comm'n, 21 F. App'x at 405-06 ("In sum, issue preclusion applies in the present case, because the plaintiff is attempting to reassert the same claim with unchanged facts supporting his standing. Federal courts have used preclusion to bar litigants who had been found to lack standing in a prior suit from reasserting the same claim in a

[5] Other Circuits have held that a party is collaterally estopped from relitigating other jurisdictional issues with facts that were available at the time of the first action. Citizens Elecs. Co. v. OSRAM GmBH, 225 F. App'x 890, 893 (Fed. Cir. 2007) ("[A] plaintiff cannot relitigate a jurisdictional dismissal [for failure to plead an actual controversy] by relying upon those facts that existed at the time of the first dismissal" (citations omitted)); Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agric., 378 F.3d 1132, 1137 (10th Cir. 2004) (affirming dismissal on issue preclusion grounds following prior action's dismissal on the grounds that claim was not ripe and holding that "[w]e do not think that these additional factual allegations should preclude the operation of res judicata when these facts were available to [the plaintiff] at the time it filed its complaint in [the prior litigation],") quoting Magnus Elecs., Inc. v. La Republica Argentina, 830 F.2d 1396, 1401 (7th Cir. 1987); Dozier v. Ford Motor Co., supra, 702 F.2d at 1192 & n.4 (affirming dismissal on res judicata grounds following prior suit's dismissal for inadequate amount-in-controversy and concluding that "proper application of res judicata should require some demonstration that the plaintiff is relying upon a new fact or occurrence, and not merely relying upon those that existed at the time of the first dismissal."). See also DaCosta v. United States, No. 09-558 T, 2010 WL 537572 at *5-*6 (Fed. Cl. Feb. 16, 2010) ("[T]he newly alleged facts must have arisen after the court's dismissal of the first complaint." (citation omitted)).

subsequent suit if the facts presented by the litigants to support standing had not changed." (citations omitted)).

In Perry v. Sheahan, supra, 222 F.3d at 317-18, the Seventh Circuit affirmed the dismissal of a Section 1983 action on the grounds of issue preclusion where a prior action had been dismissed for lack of standing. There, the plaintiff "conceded at oral argument that the factual allegations included in Perry II did not represent a change in circumstances between Perry I and Perry II. Instead, they were facts known when Perry I was brought, but that were never included in the complaint." Perry v. Sheahan, supra, 222 F.3d at 318.

The Court stressed that

> [u]nder a system such as that established by the Federal Rules of Civil Procedure, which permits liberal amendment of pleadings, it does not make sense to allow a plaintiff to begin the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of from the beginning of the suit, until it finally satisfies the jurisdictional requirements.

Perry v. Sheahan, supra, 222 F.3d at 318, quoting Magnus Elecs., Inc. v. La Republica Argentina, supra, 830 F.2d at 1401.

D. Application of the Foregoing Principles to the Present Case

Judged by the standards set forth above, I conclude that summary judgment should be granted dismissing Hollander's claims for lack of subject

matter jurisdiction. I need not address the dubious merits of his claims, because I conclude – based on the weight of authority discussed above – that his action is barred on the grounds of collateral estoppel. The Underlying Action was dismissed for lack of standing (see Report and Recommendation in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286 (Docket Item 33); Order in Hollander v. Inst. for Research on Women & Gender at Columbia University, 08 Civ. 7286 (Docket Item 36); Hollander v. Inst. for Research on Women & Gender at Columbia Univ., supra, 372 F. App'x 140, 2010 WL 1508269 at *1), an issue that Hollander attempts to relitigate here.

As discussed in Section III.C., defendants must establish collateral estoppel through a four-part test, showing that "'(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.'" Ball v. A.O. Smith Corp., supra, 451 F.3d at 69, quoting Purdy v. Zeldes, supra, 337 F.3d at 258 & n.5.

Hollander's Establishment Clause claims are identical to those raised in the Underlying Action, with one distinction: in his complaint here, Hollander has expressly alleged his standing as a taxpayer as an alternative basis for standing. However, when Hollander appealed the Underlying Action to the Second Circuit, he raised the issue of taxpayer standing. At oral argument, the Second Circuit discussed this issue at length with Hollander

and defendants. Although Hollander conceded there that he never expressly alleged taxpayer standing in the complaint in the Underlying Action, he argued that this basis of standing should have been implied. The Court of Appeals rejected Hollander's assertion of taxpayer standing, holding that Hollander had not "made out the requirements for taxpayer standing for his Establishment Clause claim." Hollander v. Inst. for Research on Women & Gender at Columbia Univ., supra, 372 F. App'x 140, 2010 WL 1508269 at *1. The foregoing demonstrates that the issue of taxpayer standing was raised previously and was actually litigated and decided. Hollander had a full and fair opportunity to litigate the taxpayer standing issue, and the resolution of this issue was necessary to a valid and final judgment on the issue of standing. Although not technically "on the merits," the Second Circuit's judgment has preclusive effect with respect to the specific issue of standing. Mrazek v. Suffolk Cnty. Bd. of Elections, supra, 630 F.2d at 896 n.10 (citation omitted). See also Brereton v. Bountiful City Corp., supra, 434 F.3d at 1218-19; Ammex, Inc. v. United States, supra, 384 F.3d at 1372; In re V & M Mgmt., Inc., supra, 321 F.3d at 8-9; Harley v. Minn. Mining & Mfg. Co., supra, 284 F.3d at 909; Hooker v. Federal Election Comm'n, supra, 21 F. App'x at 405-06; Dresser v. Backus, supra, 229 F.3d 1142, 2000 WL 1086852 at *1; Perry v. Sheahan, supra, 222 F.3d at 317-18; Cutler v. Hayes, supra, 818 F.2d at 889.

Hollander's pleading of facts that were previously available at the time of the Underlying Action does not defeat collateral estoppel. Hollander puts forth no evidence that his taxpayer standing is

a new development that has occurred subsequent to the dismissal of the Underlying Action. On the contrary, he claimed during his appeal of the Underlying Action that he had taxpayer standing, and he is merely claiming to allege a jurisdictional fact here that he omitted from his prior complaint (Pl.'s Mem. at 7). As the weight of authority shows, a plaintiff is collaterally estopped from relitigating the standing issue with facts that were available to him at the time of the first action. In re V & M Mgmt., Inc., supra, 321 F.3d at 8-9; Dresser v. Backus, supra, 2000 WL 1086852 at *1; Perry v. Sheahan, supra, 222 F.3d at 317-18.

Hollander's subsequent submission of pay stubs from 2010 and 2011, which indicate New York State and federal tax withholdings, does not change the foregoing analysis. Hollander submitted this evidence in his declaration in opposition to the motions to dismiss, after he filed his complaint. In the Second Circuit, a plaintiff's standing is evaluated "at the time the complaint was filed." Robidoux v. Celani, supra, 987 F.2d at 938. Even if I were to ignore this rule, Hollander asserted that he was a New York State and federal taxpayer at the time of the first action, as already discussed above. Therefore, these subsequent pay stubs do not constitute a "change in circumstances" with respect to Hollander's taxpayer standing. Perry v. Sheahan, supra, 222 F.3d at 318. Hollander is not alleging that he only became a New York State or federal taxpayer following the dismissal of the Underlying Action. He could have pleaded similar facts at the time of the first complaint, albeit with pay stubs from previous years.

Hollander argues that a "failure to allege a jurisdictional fact will not prevent a subsequent action in which the jurisdictional fact is alleged" (Pl.'s Mem. at 6 (citation omitted)). But the cases he cites in support of his position do not change the foregoing analysis (see Pl.'s Mem. at 5-6). He cites Smith v. McNeal, 109 U.S. 426, 431 (1883), for the proposition that a failure to allege a jurisdictional prerequisite is no bar where the defect was cured in a subsequent pleading. However, in Dozier v. Ford Motor Co., supra, 702 F.2d at 1192-93, the D.C. Circuit concluded that Smith v. McNeal, supra, and similar cases that suggested that "any 'defect in pleading' may be remedied" should be regarded as "superseded, expressing a rule that made sense only in a system where liberal amendment of pleading was not permitted." The Court of Appeals further noted that Smith v. McNeal had "not been cited by the Supreme Court in the century since its issuance." Dozier v. Ford Motor Co., supra, 702 F.2d at 1193. This analysis is consistent with the holdings from other Circuits, already discussed above, limiting relitigation of jurisdictional defects to situations where new facts arise subsequent to a prior action's dismissal.

Next, Hollander cites Ripperger v. A.C. Allyn & Co., supra, 113 F.2d at 333-34, for the proposition that failure to allege a jurisdictional fact will not prevent a subsequent action in which the jurisdictional fact is alleged. I conclude the holding in this case actually undercuts his position. As already noted above, the Second Circuit stated in Ripperger v. A.C. Allyn & Co., supra, 113 F.2d at 333 "that a decision in favor of jurisdiction is res judicata

and invulnerable to collateral attack" (citations omitted). While the Second Circuit cites Smith v. McNeal, supra, in Ripperger, it distinguishes the case. Ripperger involved an action against two out-of-state corporations for conspiracy to use corporate assets for private profit, and a prior action had been dismissed for improper venue. In the second action, the plaintiff appealed a district court dismissal on the grounds of res judicata. 113 F.2d at 332-33. In the second action, the plaintiff alleged that the corporations had designated agents for service of process in New York, a fact that existed prior to the dismissal of the first action. 113 F.2d at 333. The Second Circuit held that because the designation of the agents "antedated the first suit," there was "no change in the facts upon which the venue privilege depends." 113 F.2d at 334. The Court of Appeals concluded that the legal effect of the designation of agents "was a question necessarily involved in the controversy presented by the motions to dismiss the first complaint" and that appellant could have proved the fact of the designations by affidavit at that time. 113 F.2d at 334. Thus, the prior dismissal for improper venue was "a conclusive determination of that issue between the parties." 113 F.2d at 334. This holding is entirely consistent with the aforementioned cases that hold that jurisdictional defects can only be cured with new facts that post-date the prior action's dismissal. Therefore, I conclude that this holding actually supports defendants' position.

Next, Hollander cites a footnote in York v. Guaranty Tr. Co. of N.Y., 143 F.2d 503, 519 n.21 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99

(1945), which states:

> As appears from Ripperger v. A. C. Allyn & Co., 2 Cir., 113 F.2d 332, and Smith v. McNeal, 100 U.S. 426, 3 S.Ct. 319, 27 L.Ed. 986, a prior decision dismissing a suit on the mere pleadings for lack of jurisdiction is not a bar to a second suit alleging sufficient jurisdictional facts which existed when the first suit was pending but which were not therein alleged. Cf. Wiggins Ferry Co. v. Ohio & M.R. Co., 142 U.S. 396, 410, 2 S.Ct. 188, 35 L.Ed. 1055; Sylvan Beach v. Koch, 8 Cir., 140 F.2d 852, 860; Dennison Mfg. Co. v. Scharf Tag, Label & Box Co., 6 Cir., 121 F. 313, 318.

I conclude that this footnote is not controlling authority, but rather dicta. "Dictum generally refers to an observation which appears in the opinion of a court which was unnecessary to the disposition of the case before it." Hormel Foods Corp. v. Jim Henson Productions, Inc., 73 F.3d 497, 508 (2d Cir. 1996) (citations and internal quotation marks omitted). "Dicta of course have no precedential value." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 17 (2003) (citation omitted). The footnote qualifies as an observation which was unnecessary to the disposition of that case. The United States Supreme Court, before reversing York v. Guaranty Tr. Co. of N.Y., supra, on other grounds, stated that the Second Circuit's holding was that "in a suit brought on the equity side of a federal district court[,] that court is not required to apply the State statute of limitations that would govern like suits in the courts of a State where the federal court is sitting even though the exclusive basis of federal jurisdiction is

diversity of citizenship." Guaranty Tr. Co. of N.Y. v. York, supra, 326 U.S. at 101.

Additionally, I have not found any subsequent case citing the footnote in York. Moreover, as already discussed, the cases relied upon in the York footnote are of questionable help to Hollander. The Ripperger appellant was unable to avoid res judicata because his only purportedly new allegation with respect to venue "antedated the first suit." Ripperger v. A.C. Allyn & Co., supra, 113 F.2d at 334. And at least one Circuit regards Smith v. McNeal, supra, as superceded. See Dozier v. Ford Motor Co., supra, 702 F.2d at 1192-93.

Finally, the overwhelming majority of Circuits that have addressed this issue since York have concluded that a plaintiff is collaterally estopped from relitigating a jurisdictional defect -- including standing -- with facts that were available to him at the time of the first action. Citizens Elecs. Co. v. OSRAM GmBH, supra, 225 F. App'x at 893; Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agric., supra, 378 F.3d at 1137; In re V & M Mgmt., Inc., supra, 321 F.3d at 8-9; Dresser v. Backus, supra, 229 F.3d 1142, 2000 WL 1086852 at *1; Perry v. Sheahan, supra, 222 F.3d at 317-18; Dozier v. Ford Motor Co., supra, 702 F.2d at 1192 & n.4.[6] For these reasons, I

[6] It appears that only one Circuit has held that a jurisdictional defect may be cured by restating facts which existed prior to dismissal of the initial case. In Mann v. Merrill Lynch, Pierce, Fenner & Smith, 488 F.2d 75, 76 (5th Cir. 1973) (per curiam), the district court dismissed a complaint "alleging wrongs sounding in contract" for failure to properly allege diversity jurisdiction. The Fifth Circuit held that this dismissal did not preclude a new suit where allegations of diversity jurisdiction

decline to adopt the reasoning from this footnote. Thus, Hollander's taxpayer standing argument fails.

In addition to his taxpayer standing argument, Hollander also alleges non-economic standing – which he previously alleged in the Underlying Action Complaint. This ground for standing was previously litigated and decided in the Underlying Action by Judge Kaplan, who adopted Judge Fox's Report and Recommendation and dismissed for lack of standing. Judge Fox held that there was no "injury in fact" since the plaintiffs there were neither enrolled in the Women's Studies program nor denied an opportunity to enroll, and he also held that any alleged injury stemming from the absence of a Men's Studies program was not concrete and particularized (Report and Recommendation at 8-9). The Second Circuit affirmed the dismissal "for substantially the reasons stated in Judge Fox's thorough Report and Recommendation as adopted by

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were properly pled, as the original suit was dismissed "basically because requisite jurisdictional allegations were missing." Mann v. Merrill Lynch, Pierce, Fenner& Smith, supra, 488 F.2d at 76. Two Circuits have subsequently examined the holding in Mann and declined to adopt its reasoning. Dozier v. Ford Motor Co., supra, 702 F.2d at 1193 n.7 (concluding that the requirement of a showing that facts occurred subsequent to the original dismissal in order to cure a jurisdictional defect "makes more sense"); Magnus Elecs., Inc. v. La Republica Argentina, supra, 830 F.2d at 1401 (comparing Dozier and Mann and concluding that "Dozier [was] the better reasoned result"). See also 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4436 at 159 n.18 (2d ed. 2007) ("The treatment of the problem in the Mann case is not so thorough that it can be relied upon as the final word.").

the district court." Hollander v. Inst. for Research on Women & Gender at Columbia Univ., supra, 372 F. App'x 140, 2010 WL 1508269 at *1. Hollander had a full and fair opportunity to litigate the non- economic standing issue, and the resolution of this issue was also necessary to a valid and final judgment on the issue of standing. As already discussed, a judgment on the issue of standing has preclusive effect with respect to that issue.

Therefore, I conclude that plaintiff's lack of standing is established by the judgment in the Underlying Action and that the doctrine of collateral estoppel precludes plaintiff from relitigating the issue here. Because I reach this conclusion, I need not address the other arguments Hollander raised in his opposition memo with respect to the plausibility standard of pleading. There are no genuine issues of material fact, and defendants are entitled to summary judgment as a matter of law.

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that defendants' motions for summary judgment be granted.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also Fed. R. Civ. P. 6(a). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Laura Taylor Swain, United States

District Judge, 500 Pearl Street, Room 755 and to the Chambers of the undersigned 5 00 Pearl Street, Room 750 New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Swain. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson/ 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd. , 838 F.2d 55,57-59 (2d Cir. 1988); McCarthy v. Manson,714 F.2d 234, 237-38 (2d Cir. 1983) (per curiam).

Dated: New York, New York
July 1, 2011

Respectfully submitted/

HENRY PITMAN
United States Magistrate Judge

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

----------X

ROY DEN HOLLANDER,

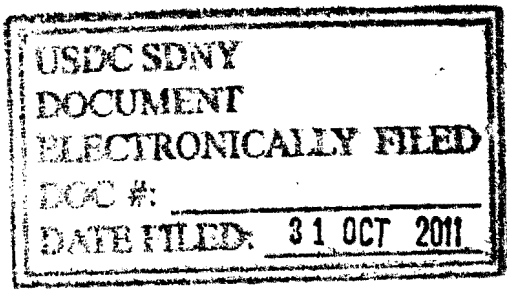
Plaintiff,

-v-

MEMBERS OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK , in their official and individual capacities, et al.

Defendants.

----------X



No . 10 Civ. 9277 (LTS)(HBP)

ORDER

Plaintiff Roy Den Hollander ("Plaintiff"), a Columbia University (the "University") alumnus, seeks declaratory and injunctive relief against the Members of the Board of Regents of the State of New

York, Chancellor of the Board of Regents Merry] H. Tisch, New York State Commissioner of the Department of Education David M. Steiner, Acting President of the New York State Higher Education Services Corporation Elsa Magee, and United States Secretary of Education Arne Duncan, in their official and individual capacities, and the United States Department of Education (collectively, "Defendants"). Plaintiff asserts that it is unconstitutional for Defendants to provide the University with public funding because the University's Women's Studies program promotes a religion of feminism in violation of the Establishment Clause of the First Amendment.

Plaintiff commenced a similar action against Defendants (or their predecessors) and the University in 2008 alleging, among other things, that Defendants violated the Establishment Clause "by aiding the establishment of the religion Feminism" by funding the University's Women's Studies Program. Den Hollander v. Inst. for Research on Women & Gender at Columbia Univ. ("Den Hollander I"), No. 08 Civ. 7286 (S.D.N.Y. filed Dec. 1, 2008). The District Court dismissed Den Hollander I for lack of standing, and the Second Circuit affirmed the dismissal. Order, Den Hollander I, No. 08 Civ. 7286 (S.D.N.Y. Apr. 24, 2009), ECF No. 36, aff'd, 372 Fed. Appx. 140 (2d Cir. 2010).) In Den Hollander I the issue of Plaintiffs standing thus was litigated at the District Court level and on appeal. See, e.g., Report and Recommendation, Den Hollander I, 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009), adopted by, Order, No. 08 Civ. 7286 (S.D.N.Y. Apr. 24, 2009), ECF No. 36, aff'd, 372 Fed. Appx.

140(2d Cir. 2010).

Defendants moved to dismiss Plaintiff's Complaint in this case. Magistrate Judge Harry B. Pitman, to whom the matter was referred for a Report and Recommendation, converted Defendants' motions to dismiss into a motion for summary judgment in accordance with Federal Rule of Civil Procedure l2(d). (Order, June 3, 2011, ECF No. 17; see also Fed. R. Civ. P. l2(d).) On July 1, 2011, Judge Pitman issued a Report and Recommendation ("Report") recommending that summary judgment be granted in favor of Defendants on the ground that collateral estoppel precludes this action because Plaintiff previously litigated the issue of his standing to bring such a claim. (Report, July 1, 2011, ECF No. 24.) Plaintiff filed timely objections. Familiarity with the Report and Den Hollander I is assumed.

In reviewing the Report, the Court "may accept reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.A. 636(b)(1)(C) (West 2006 & Supp. 2011). The Court is required to make a de novo determination as to the aspects of the Report to which specific objections are made. United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997). When a party makes only conclusory or general objections, or simply reiterates original arguments, the Court reviews the Report only for clear error. See Camardo v. Gen. Motors Hourly-Rate Emp. Pension Plan, 806 F. Supp. 380, 382 (W.D.N.Y. 1 992) (court need not consider objections which are frivolous, conclusory, or general, and which constitute a rehashing of the same arguments and positions taken in original pleadings); Schoolfield v. Dep't of Corr., No. 91 Civ.

1691, 1994 WL 119740, at *2 (S.D.N.Y. Apr. 6, 1994) (objections stating that magistrate judge's decisions are wrong and unjust and which restate facts upon which complaint was grounded are conclusory and do not form specific basis for not adopting report and recommendation). Objections to a Report must be specific and clearly aimed at particular findings in the magistrate judge's proposal, such that no party be allowed a "second bite at the apple" by simply re-litigating a prior argument. Camardo, 806 F. Supp. at 381-82 .

Plaintiff raises five objections to the Report. He asserts that the Report: (1) is flawed by reliance on "factual inaccuracies"; (2) that Judge Pitman's failure to address res judicata was improper; (3) that Judge Pitman erred in holding that collateral estoppel bars Plaintiff from asserting taxpayer standing in relation to his Establishment Clause claim because the issue of standing was resolved against Plaintiff in Den Hollander I; (4) that Plaintiff s "non- economic" standing argument is not barred by collateral estoppel and that Judge Pitman 's contrary conclusion is marred by reliance on "false facts"; and (5) that Judge Pitman "inappropriately relies on cases outside the Second Circuit to override the authority of the Second Circuit and U.S. Supreme Court preceden[ts] on the issue of collateral estoppel." (Obj., July 11, 2011, ECF No. 25.)

The Court has reviewed de novo the aspects of the Report to which Plaintiff's objections are non-conclusory and not simply reiterations of arguments previously directed to Judge Pitman. The Court has reviewed the remainder of the Report for clear error.

Plaintiffs first objection, that Judge Pitman relied on factual inaccuracies in the Report, is unsupported by the record. Plaintiffs second objection, that Judge Pitman did not rule whether res judicata applies, is unavailing. When one issue is dispositive of a matter, there is no need for the Court to address alternate grounds for disposition. See. e.g., Stachelberg v. Ponce, 128 U.S. 686, 691 (U.S. 1888) ("This conclusion is sufficient to dispose of the case, and renders it unnecessary to consider other grounds upon which, it is insisted, the decree below should be sustained."). Here, the Report unambiguously recommends dismissal of the entire Complaint on the ground of collateral estoppel, making a ruling on res judicata unnecessary. (See Report 37, July 1, 2011, ECF No. 24.)

Plaintiffs third and fourth objections, that collateral estoppel does not apply because taxpayer standing and non-economic standing were not previously litigated, arc similarly without merit. Collateral estoppel bars relitigation of an issue when: (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) resolution of the issue was necessary to support a valid and final judgment on the merits of the issue. Ba ll v. A.O. Smith Corp., 451 F.3d 66, 69-70 (2d Cir. 2006). This Court has previously applied collateral estoppel to the issue of standing. See Fulani v. Bentsen, 862 F. Supp. 1140 (S .D.N.Y. 1994).

Plaintiff describes the instant case as "a continuation of [his previous] men's rights case."

(Obj. ¶ 6 July 11, 2011, ECF No. 25.) Plaintiff 's standing to bring an Establishment Clause claim based on government funding of the University, including the Women's Studies program, was litigated in Den Hollander I. See, e.g., Report and Recommendation, Den Hollander I, 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009), adopted by, Order, No. 08 Civ. 7286 (S.D.N.Y. Apr. 24, 2009), ECF No. 36, affd, 372 Fed . App 'x 140 (2d Cir. 2010). Both the District Court and the Second Circuit necessarily decided the issue of Plaintiff's standing in Den Holl and er I. See Order, Den Hollander I, 08 Civ. 7286 (S.D.N.Y. Apr. 24, 2009), ECF No . 36, aff'd. 372 Fed. App'x 140 (2d Cir. 20 10)). The issue of Plaintiff's standing to litigate hi s Establishment Clause and related claim s regarding the University 's Women 's Studies program was decided against him in Den Hollander I. Plaintiff's attempt to litigate alternate ground s for standing in this lawsuit is improper and unavailing. As the Second Circuit has stated, "[t]he principal virtue of collateral estoppel is self-evident: it promotes judicial economy by reducing the burdens associated with revisiting an issue already decided." Securities Exch. Comm'n v. Monarch Funding Corp., 192 F.2 d 295, 303 (2d Cir. 1999) (citing Parklane Hosierv Co. v. Shore, 439 U.S. 322, 326 (1979); Gelb v . Royal G lobe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986)). Additionally, "when the claims in two separate act ion s between the same parties are the same or are closely related[. . .] it is unfair to the w inning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy ." United States v . Stauffer Chem. Co., 464 U .S. 165,

171 (1984) (quoting Restatement (Second) of Judgments 28, comment b (1982)); Fulani, 862 F. Supp. at 1151. In sum, "a dismissal for lack of subject matter retains *some* preclusive effect [and] bars those matters that have been actually litigated - typically, the specific jurisdictional issue(s) that mandated the initial dismissal." Lowe v. United States, 79 Fed. Cl. 218, 229 (original emphasis) (citing Parklane Hosiery, 439 U.S. at 326 n.5 ("the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action")). Thus, collateral estoppel bars Plaintiff's attempt re-litigate his standing to bring an Establishment Clause claim based on government funding of the University.

Finally, Plaintiff misreads the case law when he objects that the Report relies on non-binding decisions "to override the Second Circuit and the U.S. Supreme Court" by applying collateral estoppel to his claim. The authorities upon which Plaintiff relies are inapposite to the standing question at issue here. The Court has thoroughly reviewed and considered de novo the relevant aspects of the Report and concurs in Judge Pitman's conclusions regarding the scope and application of the collateral estoppel doctrine.

The Court has reviewed the remaining aspects of the Report and finds Judge Pitman's analysis free of clear error. The Court adopts the Report in its entirety, and, for the reasons stated therein and for the foregoing reasons, summary judgment is granted in favor of Defendants. The Clerk of the Court is respectfully requested to enter judgment accordingly and to close this case.

This Order resolves docket entry no. 7.

SO ORDERED.

Dated: New York, New York
October 31, 2011

LAURA TAYLOR SWAIN
United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

----------X

ROY DEN HOLLANDER,

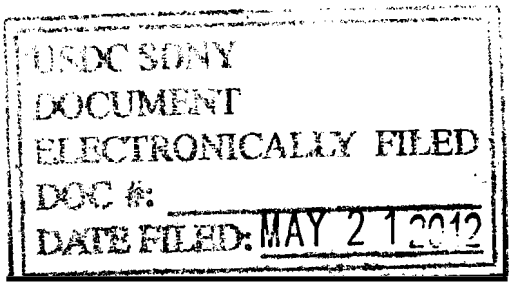
Plaintiff,

-v-

MEMBERS of the BOARD of REGENTS of the UNIVERSITY of the STATE of NEW YORK, in their official and individual capacities, et al.,

Defendants.

----------X



No. 10 Civ. 9277 (LTS)(HBP)

MEMORANDUM ORDER

On August 18, 2008, Plaintiff Roy Den Hollander ("Plaintiff' or "Den Hollander") commenced an action in this district ("Den Hollander I"), asserting that he was a New York State resident and an alumnus of Columbia University, but that he was deterred from attending

continuing education courses at Columbia because he would be exposed to "Feminist dogma" from the university. See Den Hollander v. Institute of Research on Women and Gender at Columbia University, et al., 08 Civ. 7286 (LAK). He additionally contended that Columbia University's Institute for Research on Women and Gender Studies promotes the "Religion of Feminism," in violation of the Establishment Clause.

On April 15, 2009, Magistrate Judge Kevin Nathaniel Fox issued a Report and Recommendation recommending dismissal of Den Hollander I for lack of standing. See Den Hollander I, 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009). On April 24, 2009, District Judge Lewis Kaplan adopted the Report and Recommendation and, on April 16, 2010, the United States Court of Appeals for the Second Circuit affirmed Judge Kaplan's decision, based entirely on Plaintiffs failure to establish standing.

Plaintiff subsequently filed the present action ("Den Hollander II"), which was referred to Magistrate Judge Henry Pitman for general pre-trial management. Defendants moved to dismiss the complaint, and Judge Pitman converted those motions to summary judgment motions. Judge Pitman ultimately issued a Report and Recommendation recommending that summary judgment be granted on the ground that collateral estoppel precluded Plaintiff from re-litigating the question of standing. After considering the Report and Recommendation and Plaintiffs objections, this Court adopted the Report and Recommendation in its entirety on October 31, 2011 and entered

judgment closing the case that same day.

Now before the Court is Plaintiff's motion to vacate the October 31, 2011, judgment and to amend his complaint , principally by adding two new plaintiffs who assert that they have taxpayer standing. The Court has considered carefully all the parties' submissions and, for substantially the reasons set forth in pages 5-8 of the State Defendants' Opposition Memorandum of Law and pages 1-2 of the Federal Defendants' opposition letter, Plaintiffs motion is denied.

SO ORDERED.

Dated: New York, New York
May 21, 2012

/S/
LAURA TAYLOR SWAIN
United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

----------X

ROY DEN HOLLANDER,

Plaintiff,

-against-

MEMBERS OF THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, in their official and individual capacities, *et al.*,

Defendants.

----------X

10 Civ. 9277 (LTS) (HBP)

ORIGINAL FILED BY E.C.F.

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

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Attornev for State Defendants
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CLEMENT J. COLUCCI
Assistant Attorney General
Of Counsel

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

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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)

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. MIT Stolt 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.RD. 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).

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[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).

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. etal* . 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 plaintiffs *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, 20 11 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- 19 I 0-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 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).

U.S. Department of Justice

United States Attorney
Southern District of
New York

86 Chambers
Street, 3n1 Floor
New York, New
York 10007.

December 5, 2011

BY FACSIMILE (212) 805-0426
Hon. Laura Taylor
Swain United States
District Judge United
States District Court
500 Pearl Street, Suite
755 New York, New
York 10007

Re: *Den Hollander v. Members of the Board of Regents,* 10 Civ. 9277 (LTS) (HBP)

Dear Judge Swain:

I write on behalf of the United States Department of Education and the Secretary of Education (collectively, "the Federal Defendants") to oppose plaintiff Roy Den Hollander's motion to vacate the judgment and amend the complaint [Docket No. 34]. The Federal Defendants respectfully request that the Court accept this letter in lieu of a formal opposition to plaintiff's motion, and enter this letter on the docket.

This is plaintiff's now-third attempt to craft a complaint that survives the pleadings stage, and it is no more successful than his previous attempts. As the Court will recall, Plaintiff believes that federal (and state) funding provided for students at Columbia University violates the First Amendment's Establishment Clause because the university has a women's studies department, which teaches about feminism, and feminism – in plaintiff's singular view – is a religion. In Plaintiff's first action *("Hollander I"),* the district court dismissed this action on the grounds that Plaintiff lacked standing to prosecute it, and because it was frivolous. *See Hollander v. Inst. for Research on Women & Gender.,* No. 08 Civ. 7286 (LAK) (KNF), 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009) (report and recommendation), *approved by* Order (LAK) (S.D.N.Y. Apr. 24, 2009) (unpublished).[1] The Second Circuit upheld the district court's decision on standing alone, and thus did not reach the frivolousness issue, though the Circuit indicated that it shared the district court's skepticism on the merits of Plaintiff's bizarre theory. *Hollander v. Inst. for Research on Women & Gender.,* 372 F. App'x 140, 142 (2d Cir. 2010).

Plaintiff then filed the second, instant action *("Hollander II"),* which added further allegations regarding his standing. This Court held, however, that the determination of his standing in the earlier

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[1] A copy of Judge Kaplan's unpublished order was previously provided to this Court in connection with the Government's briefing of its motion to dismiss. An additional copy can be provided to the Court upon request.

case was *res judicata* and could not be relitigated upon new allegations in a second action. *See* [Docket No. 24] (report and recommendation), *approved by* 2011 WL 5222912 (S.D.N.Y. Oct. 31, 2011). Judgment was entered dismissing this second action on October 31, 2011. [Docket No. 30].

Plaintiff now seeks to vacate the judgment, pursuant to Federal Rules of Civil Procedure 59 and 60, so that he can have a third crack at this complaint, by adding two additional plaintiffs. This request should be rejected for several reasons. Plaintiffs request does not satisfy the strict requirements for reopening a judgment, which are based on the important interest in finality. Even if Plaintiffs request were timely, his proposed complaint cannot be accepted because his claims plainly would not survive a motion to dismiss, because the addition of new plaintiffs does nothing to affect Plaintiffs own standing to bring this action nor does it cure the frivolous nature of the allegations themselves.

As Plaintiff notes, "[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b)." *Williams v. Citigroup Inc.,* 659 F.3d 208, 213 (2d Cir. 2011) (internal quotation marks and brackets omitted). "[C]onsiderations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of judgment. . . . [I]n view of the provision in [Federal Rule of Civil Procedure] 15(a) that leave to amend [a complaint] shall be freely given when justice so requires, it might be appropriate in a proper case to take into

account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment." *!d.* (citations and internal quotation marks omitted). Thus, a determination of whether to permit Plaintiff to vacate the judgment requires an examination of how the Court would consider a timely motion to amend his complaint. Here, such a motion, as discussed below, would be doomed.

As numerous courts have held, "Rule 15 does not permit a plaintiff [to] amend[] its complaint to substitute a new plaintiff in order to cure the lack of subject matter jurisdiction." *United States ex rel. Fed. Recovery Servs., Inc. v. Crescent City E.M.S., Inc.,* 72 F.3d 447,453 (5th Cir. 1995); *accord Wright v. Dougherty County,* 358 F.3d 1352, 1356 (11th Cir. 2004) ("Where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action." (internal quotation marks omitted)); *In re Enron Corp. Secs., Derivative & ERISA Litig.,* Nos. H-01-3624, H-04-4520, 2011 WL 5967239, 12 n.19 (S.D. Tex. Nov. 29, 2011) ("The general rule is that a plaintiff who lacks standing may not amend a complaint to substitute a new plaintiff to cure a lack of jurisdiction because a plaintiff may not create jurisdiction by amendment where none exists."); *Zangara v. Travelers Indem. Co. of Am.,* No. 1:05CV731, 2006 WL 825231, at *3 (N.D. Ohio Mar. 30, 2006) (citing *Zurich Ins. Co. v. Logitrans, Inc.,* 297 F.3d 528 (6th Cir. 2002)) ("[Plaintiffs] lack of standing precludes him from amending the complaint to substitute new plaintiffs and join a new defendant.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

Roy Den Hollander, Lt. Col. (Ret.) Michael G. Leventhal, and Michael P. Schmitt, Esq.,

Plaintiffs,

-against-

Members of the Board of Regents of the University of the State of New York, in their official and individual capacities; Chancellor of the Board of Regents, Merryl H. Tisch, in her official and individual capacity; New York State Commissioner of the Department of Education, John B. King Jr., in his official and individual capacity; Acting President of the New York State Higher Education Services Corp., Elsa Magee, in her official and individual capacity; U.S. Department of Education; and U.S. Secretary of Education, Arne Duncan, in his official capacity;

Defendants.

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Docket No. 10 CV 9277 (LTS)(HBP)(ECF)

ESTABLISHMENT CLAUSE AMENDED COMPLAINT

Jury Demand

I. Introduction

1. This action seeks declaratory and injunctive relief against the New York State defendants, pursuant to the 14th Amendment and 42 U.S.C. § 1983, and the United States defendants for their ongoing violation of the Establishment Clause of the First Amendment to the U.S. Constitution by aiding the modern-day religion Feminism in public and private higher educational institutions in New York State, such as Columbia University ("Columbia") and its Institute for Research on Women and Gender Studies ("IRWG") and Hofstra University ("Hofstra") and its Women's Studies program.

2. The Chancellor and Members of New York State's Board of Regents ("Regents") and the Commissioner and the New York State Department of Education ("SED") require that higher education institutions, such as Columbia and Hofstra, adhere to the religious doctrine of Feminism.

3. Funds appropriated and mandated by the New York State Legislature are used by the Regents and SED to carry out their educational policy of inculcating Feminism into New York's higher educational.

4. The Secretary and the U.S. Department of Education (USDOE) violate the Establishment Clause by providing funds to the Regents and SED that are used to enforce the State's Feminist requirements, such as those stated in *Equity for Women in the 1990s, Regents Policy and Action Plan, Background Paper* (1993)(the document contains two papers separately cited as *Equity for Women,*

Regents Policy and Action Plan and *Equity for Women, Background Paper*).

5. The Regents and SED expend non-student aid, in particular "Bundy" funds under N.Y. Educ. Law § 6401 in support of the inculcation of Feminism by Columbia's IRWG and Hofstra's Women's Studies program. The funds are appropriated by the New York State Legislature and mandated for higher education.

6. USDOE expends public funds on non-student aid in the form of awards, contracts, and research grants that directly or indirectly support the inculcation of Feminism at Columbia's IRWG and Hofstra's Women's Studies program. The funds are appropriated by the U.S. Congress and mandated for higher education.

7. Columbia's IRWG and Hofstra's Women Studies program avowed purposes are to bring the doctrine of Feminism to the colleges' students and the members of their communities.

II. Jurisdiction and Venue

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action raises federal questions under the First and 14th Amendments to the U.S. Constitution.

9. This Court has personal jurisdiction over the defendants in accordance with Fed. R. Civ. P. 4(e)(2)(C), 4(i)(2), 4(j)(2)(B) and New York C.P.L.R. § 307(1) & (2)(2).

10. This Court has venue under 28 U.S.C. 1391(b)(2), (e)(2) & (3)

III. Parties

11. Plaintiff Roy Den Hollander is a resident of New York County, N.Y., a citizen of the United States, a New York State and federal taxpayer, a member of the Columbia Community as an alumnus of the Columbia University Business School, and an attorney admitted to practice before this Court.

12. Den Hollander uses the facilities and services he is entitled to as an alumnus of Columbia and is directly affected by the New York State defendants requiring Columbia to comply with Feminist precepts and by the State defendants and USDOE using tax dollars to directly or indirectly support the propagation of the Feminist doctrine at IRWG.

13. Plaintiff Michael P. Schmitt is a resident of Port Washington, New York, a citizen of the United States, a New York State and federal taxpayer, a member of the Hofstra Community as an alumnus of the Hofstra Law School, and an attorney admitted to practice in New York State.

14. Schmitt uses the facilities and services he is entitled to as an alumnus of Hofstra Law School and is directly affected by the New York State defendants requiring Hofstra to comply with Feminist precepts and by the State defendants and USDOE using tax dollars to directly or indirectly support the propagation of the Feminist doctrine at Hofstra's Women's Studies program.

15. Lieutenant Colonel (Retired) Michael G. Leventhal is a resident of Brooklyn, New York, a citizen of the United States who served his country in the military, a New York State and federal

taxpayer and graduate of the City University of New York Hunter College.

16. The Regents are responsible within New York State for the supervision of educational activities, chartering and controlling higher educational institutions, and presiding over the University of the State of New York and New York's Department of Education, which contains within it the Higher Education Services Corporation ("HESC"). N.Y. Educ. Law §§ 101, 207, 214, 215, 216, 219, 226(4) & 652; NYSED/Board of Regents, http://www.regents.nysed.gov/.

17. The University of the State of New York is America's most comprehensive and unified educational system, which encompasses all the institutions, both public and private, offering education in the State. NYSED/Board of Regents, http://www.regents.nysed.gov/.

18. The University of the State of New York's mission is to provide educational programs and related services to the residents of the State. N.Y. Educ. Law § 201.

19. The Regents exercise legislative functions concerning the higher educational system in New York State, determine higher education policies, and establish the rules for carrying those policies into effect throughout the higher educational institutions of the State. N.Y. Educ. Law § 207.

20. Columbia and Hofstra are part of the University of the State of New York.

21. Through the Regents' power to suspend the charters of higher educational institutions, N.Y.

Educ. Law §§ 210 & 215, and its power to register degree granting educational programs and curricula, Regents Rule § 13.1, which includes the courses and all of a school's facilities, 8 N.Y.C.R.R. §§ 3.47(a), 50.1(i), 52.1, 52.2, 126.1(d), the Regents control what is taught in colleges and universities in the State, the environment in which it is taught, and limit which educational programs receive accreditation, and, therefore, non-student State and federal funding.

22. Every four years the Regents develop or update their master plan for higher education in New York called the Statewide Plan for Higher Education and review the plan's implementation by higher educational institutions. N.Y. Educ. Law § 237.

23. In formulating the plan for higher education, the Regents take into consideration the master plan of the Commission on Independent Colleges and Universities of New York, which is a non-governmental body chartered by the Regents and representing the policy interests of New York's private colleges, such as Columbia and Hofstra.

24. On information and belief, the Commission has and continues to advocate the institutionalization of Feminism in higher education.

25. The Regents' Statewide Plans, under N.Y. Educ. Law § 237:

a. define the missions and objectives of higher education;

b. set goals, describe the time for meeting those goals, identify the resources needed,

and establish priorities; and

c. evaluate the effectiveness of educational programs.

26. The Regents also periodically issue policy statements to supplement or modify the direction that higher educational institutions should take in their programs. NYSED website, http://www.highered.nysed.gov/ocue/lrp/; *see* N.Y. Educ. Law § 207.

27. The Regents preside over SED, which functions as the Regents' administrative arm in carrying out the Regents' mandates, policies, and plans. N.Y. Educ. Law § 101.

28. The Regents must approve or authorize all SED's regulations for effecting the Regents' mandates, policies, and plans. N.Y. Educ. Law § 207.

29. SED evaluates and monitors higher educational programs in New York colleges and universities, such as Columbia's IRWG and Hofstra's Women's Studies program, in order to assure the programs are consistent with the Statewide Plan and Policy Statements formulated by the Regents. 8 N.Y.C.R.R. § 52.1(c).

30. On behalf of the Regents, SED provides direct financial aid to colleges and universities under N.Y. Education Law § 6401, known as "Bundy Aid," which is paid based on the number of degrees awarded by a higher educational institution in order to support the operation of that institution. It is a "program of direct State aid to qualifying" institutions of higher education. McKinney's 1968 Session Laws, *Gov.*

Rockefeller Statement p. 2380.

31. "No portion" of "Bundy Aid" can "be used for the religious instruction … or for the advancement or inhibition of religion." 8 N.Y.C.R.R. § 150.2; *see also* N.Y. Educ. Law § 6401(2)(a)(iv).

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

33. USDOE regulates the operation of all parties involved in the financing process, distributes and monitors federal funds, and enforces equal access to education. USDOE website, http://www2.ed.gov/about/what-we-do.html.

34. On information and belief, USDOE provides awards, contracts, and research grants to higher educational institutions.

35. USDOE delegated to the Regents and SED the responsibility for determining which higher educational institutions in New York State are eligible for federal programs providing institutions federal awards, contracts, and research grants.

36. On information and belief, USDOE also provides funding to the Regents and SED that supports their turning higher education into a Feminist construct.

IV. Feminism as a Religion

37. A belief system need not be theistic in nature to be a religion but rather can stem from moral or ethical tenets that are held with the strength of traditional religious convictions.

38. The U.S. Supreme Court has rejected the view that religion is defined solely in terms of a Supreme Being by noting that "Buddhism, Taoism, Ethical Culture, Secular Humanism," and other non-theistic belief-systems are religions.

39. The Equal Employment Opportunity Act, 42 U.S.C. § 2000e(j), defines the term "religion" as including "all aspects of religious observance and practice, as well as belief."

40. Title VII of the Civil Rights Act of 1964 definition of religion under 29 C.F.R. § 1605.1 "define[s] religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."

41. Religious beliefs are generally characterized by, among other traits, ultimate ideas; metaphysical beliefs; a moral or ethical system; a shared and comprehensive doctrine; and the accoutrements of religion, such as founders, prophets, teachers, important writings, keepers of knowledge, structure or organization, holidays, and proselytizing.

42. Five U.S. Courts of Appeals and the U.S. Southern District Court for New York have used the following criteria to determine whether a belief system is a religion for purposes of the Establishment Clause: (a) most importantly is the nature of the ideas, do they address fundamental and ultimate questions having to do with deep and imponderable matters (a court must, at least to a degree, examine the content of the supposed religion to determine whether the subject matter it comprehends is consistent with the assertion that it

is, or is not, a religion); (b) do the ideas have a broader scope that lay claim to definitive and comprehensive truths; (c) least important, does the belief system have formal and external signs such as structure, organization, efforts at propagation, and observance of holidays similar to traditional religions.

43. The Feminist doctrine advanced and aided by the defendants in higher educational institutions, such as Columbia and Hofstra:

a. Provides followers with a faith-based certainty that they are the sole possessors of the highest form of truth to the answers of life's persistent questions even though those truths cannot be proven empirically.

b. Shapes the entirety of its followers' lives with thought patterns that make possible the description of realities, the formulation of beliefs, and the experiencing of inner attitudes, feelings, and sentiments.

c. Provides a conscious push toward an ultimacy and transcendence that provide norms and power throughout life.

d. Indoctrinates theories as to the place in the order of nature for males and females.

e. Propagates basic attitudes to the fundamental problems of life.

f. Provides answers on how to deal with certain situations that arise throughout life.

g. Defines the fundamental concerns for

humans in modern day society.

h. Proselytizes moral codes of right and wrong.

i. Inculcates comprehensive beliefs on matters ranging from the insignificant through the ordinary to the material which are accepted as true, such as the difference between right and wrong, good and evil, how to live one's life and die one's death.

j. Advocates a theory of humanity as believed it should be, purged of the evil elements which retard its progress toward the knowledge, love, and practice of the right.

k, Organizes beliefs into a holistic system of a Feminist worldview with tenets for comprehension and commandments for conduct.

l. Mandates a lifestyle that requires a broad system for conduct in all spheres of existence, including appropriate acts of volition; correct thinking; and acceptable language, such as "issues" for "problems," and "gender" for "sex" (unless it involves accusations of "sexual abuse" against a male).

m. Advocates beliefs that are based upon a faith to which all else is subordinate and which all else is ultimately dependent.

n. Is shared by an organized group.

o. Combines Feminist research on various topics into a comprehensive belief system.

p. Validates the spirit of its followers with importance, meaning, purpose, and security.

q. Inculcates beliefs based on the teachings of certain prophet-like individuals, such as Mary Wollstonecraft.

44. The core of Columbia's Feminist apple is IRWG with 75 teachers of which only four are male and the core of Hofstra's Feminist fruit is its Women's Studies Program with 33 faculty members of which only two are male.

45. Under Columbia University Statutes §§ 350 and 351, IRWG is an institute within Columbia University that conforms to the policies of appropriate faculty bodies as designated by the University President. Institutes have budgets for research expenses, clerical and technician help and receive allocations from departmental budgets for other research expenses or salaries. The direction of each institute is assigned to a coordinating committee or an administrative committee of the University.

46. IRWG offers a Bachelor of Arts degree in Women's Studies and a graduate certification in Feminist Scholarship.

47. Hofstra's Women Studies is an interdisciplinary program in the College of Liberal Arts and Sciences with a designated faculty, employees, and budget. It offers a bachelor of arts degree in Women's Studies, internships with approved Feminist organizations, such as the Feminist Majority and National Organization of

Women, and consciousness raising through various events and speeches,

48. Columbia's IRWG exists to specifically bring Feminism to the Columbia Community:

a. IRWG is a well-organized institution with its own budget, mission, goals, and structure that places the director on top, followed by administrative officers, instructors, and lastly the budding followers.

b. IRWG's administrators and teachers preserve and teach Feminist precepts.

c. IRWG, as it admits, propagates Feminism through its Women's Studies program with lectures, seminars, consciousness indoctrination sessions, publications, career preparations, counseling, historical revisionism, propagandizing, and unanimity of thought labeled "politically correct."

d. IRWG's website states it "is the locus of interdisciplinary feminist scholarship and [feminist] teaching at Columbia University" and "[t]he [Women's Studies] program is intended to introduce students to the long arc of feminist discourse about the cultural and historical representation of nature, power, and the social construction of difference. It encourages them to engage the debates regarding the ethical and political issues of equality and justice that emerge in such discussions.

And it links the questions of gender and sexuality to those of racial, ethnic, and other kinds of hierarchical difference."

e. IRWG exalts certain Feminists to apostle-like status and celebrates certain days of the year as important to Feminism.

49. Hofstra's Women's Studies mission is to spread Feminism to the Hofstra Community:

a. "The mission of women's studies is . . . to study women and gender from feminist perspectives,"

b. "[T]o create an academic community supportive of feminist scholarship and to nurture subsequent generations of feminist scholars and activists . . . ."

c. "To this end, the Women's Studies Program at Hofstra University seeks to educate our campus community about the experiences of women in particular . . . through our undergraduate curriculum and co-curricular events."

50. In the Feminism inculcated at Columbia's IRWG and Hofstra's Women's Studies, scientific differences between the sexes are replaced with the faith-based premise that such differences are socially constructed; that is, they result from social programming.

51. The Regents began promoting this doctrine of socially programmed sex differences before the creation of IRWG and Women's Studies by declaring that "[b]oys and girls learn very early in life from their toys, their games, what they see on TV, and the

way adults treat them to conform to what is considered typical of their sex," which is reinforced by education. *Equal Opportunity for Women-A Statement of Policy and Proposed Action,* Position Paper No. 14, p. 6 (1972).

52. Such a disregard for neuroscience, evolution, biology, and physics makes the belief incomprehensible and incorrect—a characteristic of religion, but essential for the Regents and SED to justify the continuing imposition of Feminism as the dominant belief system in the State's higher education.

53. Feminism and the Regents' policies avoid the scientific method in that their precepts are not the result of knowledge gained by testing hypotheses to develop understanding through the elucidation of facts or evaluation by experiments.

54. Unlike scientific knowledge, Feminism and the Regents' Feminist policies ignore later refinement in the face of new information. The Regents, as did the Catholic Church in the Middle Ages, decide which scientific evidence is acceptable and which unacceptable depending on whether it supports Feminist doctrine.

55. For example, the Regents claim that females "do not get the same economic return on their education as men." *Equity for Women, Regents Policy and Action Plan.*

56. Females, however, earn more per unit of time worked than males. The average man spends 44% more time working or doing work related activities than the average woman, U.S. Department of Labor,

Bureau of Labor Statistics, *Time Use Survey 2007*, Table A-1, while the average woman makes around 77% that of the average man. If the two were paid equally for their time actually worked, then the pay for the average woman should be 69.5% that of the average man—not 77%. Or put another way, if the two worked the same amount of time, for every dollar a male earns, a female makes $1.10.

57. Feminism and the Regents' policies claim as unfair that "[t]he percentage of women in leadership positions … continues to reflect a lack of access" to the "Glass Ceiling." *Equity for Women, Regents Policy and Action Plan* p. 2.

58. Feminism and the Regents' policies, however, fail to note the countervailing fact that the 25 most dangerous occupations in America are 90% occupied by men; males are 20 times more likely to be killed or injured on the job; and over all occupations, men suffer 92% of the job related deaths while making up less than 50% of the work force. U.S. Department of Labor, Bureau of Labor Statistics, Current Population Survey, *Employment and Fatalities by Gender of Worker* (2006). It's called the "Tombstone Basement."

59. Since men bear greater risks and burdens, fairness requires them to enjoy more of the benefits, but the Regents and Feminism ignore this logical principle in order to enforce Feminist precepts that provide females with preferential treatment throughout society.

60. Feminism and the Regents' policies claim that "[w]hen women and men have comparable education and experience, men are often paid more." *Equity for*

Women, Regents Policy and Action Plan pp. 2-3. Once again, this Feminist belief on which New York's higher education has been partly modeled is merely dogma lacking in empirical data.

61. Never married, college educated males who work full-time make only 85% of what comparable females earn. John Leo, *Of Men, Women, and Money*, (contributing editor U.S. News & World Report, citing Dr. Warren Farrell, *Why Men Earn More*). In 1960 it was 94%. *1960 U.S. Census of Population.*

62. Feminism and the Regents' policies foist the belief that "[w]omen in mid-life see a greater disparity in their earning." *Equity for Women, Regents Policy and Action Plan* p. 3.

63. Data from the *National Longitudinal Survey*, however, reveal that females between the ages of 18 and 34 have been out of the labor force 27 percent of the time, in contrast to 11 percent for men, and females ages 45 to 54 who have recently re-entered the workforce after a five or 10-year break are competing against men who have had 20 years of continuous experience. Denise Venable, *Wage Gap Myth*.

64. Feminism and the Regents' policies assert that female faculty have "mean salaries lower than their male counterparts," *Equity for Women, Regents Policy and Action Plan* p. 4, while ignoring that among professors who produce an equal number of journal articles, men are likely to be paid the same or just slightly less than females. Dr. Warren Farrell, *Why Men Earn More*.

65. These are just some of the Feminist beliefs

adopted by the Regents as reasons for injecting Feminism into their higher education policies and requiring colleges and universities to operate in accordance with the Feminist creed.

V. Standing

66. History reveals that the Establishment Clause was intended to protect both against the kind of governmental encroachment that might lead to the establishment of a national religion and against the taxation of citizens in order to support religion.

Taxpayer Standing

67. One of the injuries asserted in this action is the use of the three plaintiffs' New York State and U.S. tax dollars for expenditures that violate the Establishment Clause.

68. The State Legislature was mandated by the State Constitution to create and by implication fund the "corporation" named the University of the State of New York. *N.Y. Constitution*, Art. XI § 2.

69. The State Legislature annually appropriates specific sums to the University of the State of New York that the legislative mandate of N.Y. Educ. Law § 237 requires be spent, in part, on the formulation and execution of Regent Statewide Plans and policy statements, such as the major policy statement *Equity for Women, Regents Policy and Action Plan.*

70. The master plans and policy statements are also mandated by N.Y. Educ. Law § 237(1)(d)(3) to list resources for the execution of the University of the State of New York's plans and policies, including *Equity for Women, Regents Policy and Action Plan.*

71. Such resources are provided out of the specific appropriations for the University of the State of New York,[1] and SED serves as the Regents administrative arm expending the designated resources to carry out the University of the State of New York's policies, which includes its *Equity for Women, Regents Policy and Action Plan* that promotes Feminism in higher education.

72. The plaintiffs challenge the constitutionality of these expenditures.

73. The plaintiffs also challenge the constitutionality of funds provided by USDOE to the Regents and SED that are spent on carrying out the Regents Feminist policies, such as the *Equity for Women, Regents Policy and Action Plan.*

74. The plaintiffs challenge the constitutionality of State expenditures under N.Y. Education Law § 6401 or "Bundy Aid" that directly or indirectly benefit Columbia's IRWG and Hofstra's Women's Studies.

75. Bundy Aid is provided pursuant to statutory mandate from specific legislative appropriations and disbursements of New York State taxpayer dollars. These are <u>not</u> general appropriations for day-to-day

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[1] From a different perspective, the Regents act as the legislature for higher education. N.Y. Educ. Law § 207. Funds from State taxpayers are provided to the University of the State of New York by the State Legislature. The Regents, acting as a legislature, specifically appropriate some of those funds for the implementation of its policy *Equity for Women, Regents Policy and Action Plan* and its Feminist tenets and SED expends those funds to enforce that policy at Columbia and Hofstra.

governmental operations.

76. In addition, the plaintiffs challenge the constitutionality of expenditures that directly or indirectly benefit Columbia's IRWG and Hofstra's Women's Studies that are made by USDOE pursuant to statutory mandate from specifically authorized appropriations of federal taxpayer dollars spent, on information and belief, for various awards, contracts, and research grants.

77. The State and U.S. statutes involved are not challenged on their face but that the funds authorized by the New York Legislature and Congress are being disbursed in a manner that advances the religion Feminism in higher education in New York and benefit, directly or indirectly, Columbia's IRWG and Hofstra's Women's Studies, both of which are pervasively sectarian.

78. It does not matter that the funding authorized by the State Legislature and Congress flows through and is administered by executive agencies because the funds come from programs of specific disbursement by the State Legislature and Congress using their taxing and spending powers.

Non-economic Standing

79. Plaintiffs Den Hollander and Schmitt also assert non-economic standing under the Establishment Clause.

80. For Den Hollander, the inculcation, manifestation, and exposure of Feminism at Columbia is offensive to him and makes him very uncomfortable with the result of interfering with his use and enjoyment of Columbia as a member of the

Columbia Community.

81. As one pre-discovery indication of the pervasiveness of Feminism at Columbia, the following searches by plaintiff Den Hollander on Columbia's website, http://www.columbia.edu/, provided the following results:

a. "Feminist" yields 6020 references;

b. "Feminism" yields 1440 references;

c. "Masculinity" yields 613 references;

d. "Masculine" yields 586 references;

e. "Women's issues" yields 1620 references; and

f. "Men's issues" yields 454 references.

82. Plaintiff Den Hollander uses Columbia for library resources, career networking, e-mail services, discussion groups, career support, access to Columbia publications, attending various events, discounts and special offers, electronic learning, and pod-casts to listen to the newest ideas on campus.

83. Plaintiff Den Hollander receives communications from Columbia that enter his home through the Internet and U.S. Post which disseminate the offensive orthodoxy of Feminism.

84. For example, the Fall issue of *Columbia Magazine* carries the cover story "Stolen Souls" about human trafficking. The cover shows two females in silhouette and expounds on the horrors of female sex-trafficking with only an oblique reference to trafficking in slave labor for construction and agriculture, which primarily affects adult males and

young boys. Never mentioned, depicted, or even inferred in the seven-page article is the fact that most human trafficking is of males for hard labor. Roberts, Carey, *Half-Truths About Human Trafficking*, ifeminists.net, July 11, 2006. Further, the article did not even hint that frequently the alleged female sex-victims are ambitious ladies who volitionally migrate for the money. O'Neil, Brendan, *The Myth of Trafficking*, http://www.newstatesman.com/200803270046, March 27, 2008.

85. As an alumnus, plaintiff Den Hollander may also take courses in Columbia's Continuing Education auditing program without meeting the qualifications required of the general public and prepare for further graduate work through Columbia's Post Baccalaureate Studies.

86. Such programs, courses, and studies, however, due to the Regents and SED's requirement that all higher education activities conform to the doctrine of Feminism, assure that the plaintiff will encounter and be confronted with unwelcome and offensive Feminist dogma from the Columbia administration, professors, counselors, materials, and school activities.

87. For example, during one seminar at Columbia's School of International and Public Affairs, plaintiff Den Hollander stated that females in underdeveloped countries often view their children as human capital to help provide money for the family. The admitted Feminists in the seminar immediately engaged in a loudmouth barrage of obloquy and calumny against the plaintiff for

criticizing mothers. During the Feminist rant, the assistant professor turned away—intimidated. He later apologized to the plaintiff for failing to intervene to keep the discussion on a civil level.

88. Plaintiff Schmitt while attending Hofstra Law School agreed to be President of a campus right-to-life organization. Within a week, campus security detained him for questioning. A Feminist pro-choice organization falsely accused him of harassing and stalking its members. The charges were subsequently dropped when Schmitt counterclaimed against the Feminist accusers for filing false charges.

89. The intimidation for not adhering to Feminist tenets at Hofstra did not stop there. Due to the machinations of the dean of the law school, the dean of the entire University demanded that Schmitt immediately resign his position with the right-to-life group or be expelled because right-to-life was considered hostile to women's rights as defined by Feminism.

90. As one pre-discovery indication of the pervasiveness of Feminism at Hofstra, the following searches on Hofstra's website, http://www.hofstra.edu/home/index.html had the following results:

g. "Feminist" yields 438 references;

h. "Feminism" yields 264 references;

i. "Masculinity" yields 90 references;

j. "Masculine" yields 62 references;

k. "Women's issues" yields 64 references; and

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

91. The alleged injuries to plaintiffs Den Hollander and Schmitt are not simply noncognizable, psychological consequences produced by a fleeting observation of personally disagreeable conduct.

92. Plaintiffs Den Hollander and Schmitt repeatedly come into direct contact with Feminism at their alma maters and the unwelcome observation of the manifestations of Feminism that would require them to alter their behavior in order to avoid such.

93. Plaintiffs Den Hollander and Schmitt are also made to feel that they are unwilling participants in a faith not their own when they enter a space dedicated to two separate functions, education and inculcating Feminism.

94. The prevalence of Feminism at Columbia and Hofstra make plaintiffs Den Hollander and Schmitt feel as nonadherents, outsiders, and not full members of their respective college communities.

95. For example, when plaintiff Den Hollander brought the *Den Hollander I* case in 2008, Columbia's student newspaper, the Spectator, requested he write an opinion piece about why he filed the case. The Spectator, however, refused to publish the piece stating that it was "hard" on females.

96. Neither Columbia nor Hofstra have a Men's Studies program, which illustrates preferential treatment for the majority, females, without similar assistance to the minority, males, which is consistent

with Feminist tenets.

97. For both taxpayer and noneconomic standing, the plaintiffs allege injuries that are both "fairly traceable" to the allegedly unlawful conduct of the defendants and "likely to be redressed by the requested relief," since the relief sought is the cessation of the specifically identified and alleged unconstitutional conduct.

VI. The Regents, SED, and USDOE Aid the Religion Feminism

The Regents and SED's higher education policies on their face promote and favor the religion Feminism while inhibiting other contradictory viewpoints.

98. Since at least 1984, the Regents and SED have abandoned neutrality and acted with the intent of endorsing, utilizing, and promoting a particular orthodoxy in higher education—that of Feminism.

99. The Regents and SED in 1984 started to remake higher education in accordance with Feminist doctrine that calls for the preferential treatment of females in areas where females were already leading males. The Regents required the adoption of Feminist beliefs and policies for higher education through their Statewide Plans and Policy Statements.

100. Previously in 1972, the Regents required that higher education take the lead in advancing affirmative action for females in admission to colleges and degrees earned. *Equal Opportunity for Women-A Statement of Policy and Proposed Action,* Position Paper No. 14, pp. 6-8 (1972).

101. The Regents' purpose in 1972 was to balance the number of males and females gaining the benefits of higher education, *see Regents Statewide Plan* 1972, p. 103-04, since females only made up 44% of all New York college students, *Regents Statewide Plan* 1972, p. 103, so in 1972 the Regents' policy had a secular purpose.

102. In 1984, however, when there were already more females attending and graduating from New York colleges and universities than males, the Regents' Statewide Plan still had as a top priority increasing the number of females who attended and completed college programs. *Regents Statewide Plan 1984*.

103. The *Regents Major Policy Statement for 1984* also required enhancing the college opportunities for females to not only attend college but to give them added assistance at ensuring their successful completion even though they were already graduating in higher numbers than males.

104. In 1988, the Regents Statewide Plan continued the Feminist policy of preferential treatment for females by calling for the increased participation of females in underrepresented fields even though it would further decrease the number of males receiving college degrees. *Regents Statewide Plan for 1988*.

105. In 1993, when over 55% of New York State's college students were female, SED *ORIS,* and females earned 60% of the associate degrees, 54% of the bachelor degrees, and 58% of the master's degrees, *New York Annual Educational Summary 1990-91,* Table 42, p. 50, the Regents published their

major policy statement that made Feminism the official doctrine for higher education: *Equity for Women in the 1990s, Regents Policy and Action Plan, Background Paper* (1993). The policy is still in effect today.

106. *Equity for Women* requires establishing specific goals, indicators of progress, and a timetable for action to provide females with additional benefits and more preferential treatment in State public and private colleges and universities. It amounts to a "super affirmative action," which is consistent with Feminist doctrine.

107. *Equity for Women* creates a "comprehensive plan" and a "plan of action" for which "the entire educational community is accountable." *Equity for Women, Regents Policy and Action Plan* pp. 1, 6.

108. The *Equity for Women, Regents Policy and Action Plan* made Feminism the criterion for governing educational content, operations, monitoring, and decision making by the Regents, SED, HESC, and institutions of higher learning.

109. The Regents and SED lead and support the continuing execution of the plan, *Equity for Women, Regents Policy and Action Plan* p. 6, which requires "the cooperation of members of faculties, boards of trustees …, administrations of … colleges …, as well as … employers, and community members." *Id.* p. 6.

110. *Equity for Women* guides the SED's actions with educators, educational institutions, and cultural institutions across the State, *Equity for Women, Regents Policy and Action Plan* p. *v.*, and requires SED to give significant weight to the advice

provided by the Commissioner's Statewide Advisory Council on Equal Opportunity for Women and Girls, *id.* p. 6. (There is no Council on Equal Opportunity for Men and Boys, which is consistent with Feminist precepts.)

111. The Regents' *Equity for Women, Regents Policy and Action Plan* requires the following conformity with Feminist doctrine:

a. Super affirmative action to increase the number of degrees received by females in those areas where they already receive well over 52%. *Equity for Women, Regents Policy and Action Plan* p. 3.

b. "[C]hang[ing] the way [educators] think and act [including speech] in order to achieve" super affirmative action goals for females. *See id.* p. 5.

c. "Major changes in curriculum and teaching" to accord with "[c]urrent studies about learning patterns and the intellectual development of women" that ends up promoting female friendly strategies over those helpful to males. *Id.* p. 2.

d. The SED staff to re-train faculty in the Feminist view of appropriate sex roles and provide "regular monitoring and reinforcement [of that view] in educational settings." *Id.* p. 6.

e. The SED staff to conduct "academic program reviews at colleges and universities" in order to determine whether

gender specific patterns (traditional sex roles that resulted from six million years of evolution) have disappeared. *Id.* p. 7.

f. "Appropriate non-traditional role models" to increase the number of females enrolled in subjects such as mathematics, science, engineering, and computer technology with the quota numbers reported to Higher Education Data Systems, *id.* p. 7, which will further decrease the overall number of males graduating college.

g. "Practices that support, recruit, and promote women will be identified and replicated" while all others will be "eliminated," as determined by SED's Affirmative Action Officer *Id. p.* 9.

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

i. Developing, supporting, and promoting research on current issues facing females, but not males, that will be incorporated into teacher training by SED. *Id.* p. 10.

112. The Regents' *Equity for Women, Regents Policy and Action Plan* assigned SED the "responsibility to monitor progress toward the [above] stated goals," *id.* p. 11, which causes an excessive entanglement with the religion Feminism.

113. In 2004, the Regents' Statewide Plan recognized that a super-majority of all college

students were female, that females earned 63% of the Master's degrees and a majority of the Doctoral degrees in the State, yet consistent with Feminist doctrine, the Regents showed no concern for rebalancing the numbers to achieve equity for men. *2004 Statewide Plan* pp. 70, 72 chart 17.

114. As a result of the Regents' enforcing Feminist precepts, today, females make up 58% of all New York's college students, females receive over 55% of the Bachelor degrees, over 63% of the Master's degrees, and over a majority of the Doctoral degrees. SED*, ORIS*.

115. By 2016, females will receive 64% of the Associate's degrees, over 60% of the Bachelor's degrees, 53% of the Professional degrees, and 66% of the Doctoral degrees. National Center for Educational Statistics, *Digest of Educational Statistics*, Table 258.

116. The Regents and SED, however, continue to enforce the same Feminist policies from 27 years ago of ginning up the number of female graduates even though males are now the overwhelming minority in higher education in the State.

117. So why is this happening? Because the secular purpose that initially drove equal opportunity between the sexes in 1972 has turned into Feminist dogma—a religion that preaches females are the chosen ones deserving of preferential treatment with the result that the educational system will continue to focus on providing females benefits while ignoring males.

118. There's no other way to explain it. It's no

longer equality, since the results have gone far beyond equal treatment by the Regents and SED's own measures.

119. Since at least 1984, the Regents and SED have adopted Feminist beliefs in determining their educational policies for higher education, and then employed Feminist action plans based on those beliefs to create a higher educational system that operates consistent with and acceptable to Feminist doctrine while other contrary viewpoints are eliminated.

120. The Regents and SED have demonstrated a preference for the particular creed Feminism and created an impermissible entwinement of religious and civic authority that advances Feminism through SED's comprehensive, discriminating, and continuing surveillance of higher educational institutions to assure that administrators and teachers think, speak, and act appropriately—the way the Feminists demand.

121. The power and authority of the Regents and SED have been placed on the side of one particular set of believers—Feminists, which in effect forces others to conform to the establishment of Feminism or keep silent for fear of reprisals.

122. This establishment of a State religion in higher education risks the inevitable result of government incurring the hatred, disrespect, and even contempt of those who hold contrary beliefs.

123. USDOE, by delegating its college accrediting responsibilities to the Regents, knowingly facilitates and aids the Regents and SED's purpose and

divisiveness in advancing Feminism.

The Regents, SED, and USDOE's financing has an as applied aiding of the religion Feminism at Columbia's IRWG and Hofstra's Women's Studies.

124. Columbia's IRWG is considered an educational institution under 20 U.S.C. § 1681(c)(Title IX) while Hofstra's Women Studies program is considered an education program under 20 U.S.C. § 1687; 34 C.F.R. § 106.

125. The Regents, SED, and USDOE are responsible for and knowingly provide financing to Columbia's IRWG and Hofstra's Women's Studies both of which are subsumed in the Feminist mission.

126. IRWG's website, under "History of the Institute," states the "Institute faculty provide feminist instruction … leading to an undergraduate major, concentrations of several varieties, and a graduate certification program" in Feminism while providing a lecture series titled "Feminist Intervention." IRWG website, http://www.columbia.edu/cu/irwag/index.html.

127. IRWG's website, under "Programs of Study," states the Institute provides a "theoretically diverse understanding" of Feminism through "courses in feminist theory, inquiry, and method…." *Id*.

128. The "Undergraduate and Graduate Programs" at IRWG center on courses in "feminist texts, theory, inquiry, perspectives, thought, and scholarship." *Id*.

129. IRWG's website, under "Calendar of Events," lists events centered on Feminism. *Id*.

130. According to the IRWG course guide, the Institute's "[p]rimary courses focus on women, gender, and/or feminist or [lesbian] perspectives." *Id*.

131. By its own admission, IRWG is the "locus" of Feminist instruction at Columbia. *Id.*

132. Hofstra's Women Studies program under its "Mission Statement" asserts "The mission of women's studies is . . . to study women and gender from feminist perspectives . . . to create an academic community supportive of feminist scholarship and to nurture subsequent generations of feminist scholars and activists . . . . To this end, the Women's Studies Program at Hofstra University seeks to educate our campus community about the experiences of women in particular . . . through our undergraduate curriculum and co-curricular events." Women's Studies website, www.hofstra.edu/Academics/colleges/HCLAS/WOMEN/women_mission.html.

133. All of the functions of Columbia's IRWG and Hofstra's Women's Studies serve the Feminist mission by advocating, instructing, promoting, inculcating, supporting, and providing training in Feminist doctrine.

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

135. Consistent with Feminist precepts, Columbia's IRWG and Hofstra's Women's Studies advocate that the civil rights of today's males be minimized or eliminated not just as punishment for

the alleged wrongs of their forefathers but to assure the preferential treatment of modern-day females in determining the occupants of the prestigious and influential positions in current American society and into the indefinite future.

136. Columbia's IRWG and Hofstra's Women's Studies instruct, train, support, further, cultivate, and advocate strategies and tactics for demeaning and abridging the rights of men in accordance with Feminist doctrine.

137. Columbia's IRWG and Hofstra's Women's Studies propagate false Feminist myths about males.

138. Columbia's IRWG and Hofstra's Women's Studies, in accordance with Feminism, stereotype males as the primary cause for most, if not all, the world's ills throughout history. Females, on the other hand are credited with inherent goodness. As Dr. Warren Farrell said, "Feminists call it sexism to refer to God as He; they don't call it sexism to refer to the Devil as He."

139. Columbia's IRWG and Hofstra's Women's Studies instill the Feminist beliefs that males are oppressors and females the victims, and males reap the rewards of society while females shoulder the burdens.

140. Columbia's IRWG and Hofstra's Women's Studies ignored that many more males are trafficked for use at hard labor than females are trafficked for sexual activities even when assuming the females do not voluntarily travel to obtain high paying sex jobs. Moxon, Steve, *The Woman Racket: The new science explaining how the sexes relate at work, at play and*

in society, p. 226, Imprint Academic Philosophy Documentation Center, 2008

141. Columbia's IRWG and Hofstra's Women's Studies propagate the Feminist belief that males are responsible for most of the battering between the sexes when females batter males to the same extent or more. Martin Fiebert, *Annotated Bibliography Assaults by Women*, Department of Psychology, California State University, www.csulb.edu/~mfiebert/assault.htm.

142. Columbia's IRWG and Hofstra's Women's Studies follow the Feminist line that hides inconvenient facts, such as among the elderly, caretaker wives are most likely to abuse their older, sicker husbands, and females worldwide commit more dating violence than their male counterparts.

143. Columbia's IRWG and Hofstra's Women's Studies propagate the Feminist illusion that only females sacrifice for others when it is more likely for a man to sacrifice for someone else. For instance, all the firefighters and police who died on 9/11 were men, and only 20% of the male passengers survived the Titanic while 74% of the females lived.

144. Columbia's IRWG and Hofstra's Women's Studies advocate the Feminist precept that females should receive preferential treatment at the expense of the violation of men's rights because men are the disposal sex.

145. Columbia's IRWG and Hofstra's Women's Studies, as does Feminism, justify paternity and maturity fraud as well as parental alienation when it benefits a female.

146. Columbia's IRWG and Hofstra's Women's Studies propagandize the Feminist notion that when men are disadvantaged it is solely their fault, such as dying sooner than females, doing worse in almost everything in school, being less likely to attend college, paying for children their ex-wives have turned against them, being sentenced to more time for the same crime, having to register for the draft, or comprising more of the homeless.

147. Columbia's IRWG and Hofstra's Women's Studies, as does Feminism, advocate the punishment of men for speaking as they will and acting as they chose even when such actions do not violate any laws.

148. Columbia's IRWG and Hofstra's Women's Studies cultivate the preconceived Feminist judgment that children raised by single mothers do better in comparison to children raised by single fathers.

149. Columbia's IRWG and Hofstra's Women's Studies provide information consistent with Feminist doctrine on how females can engage in violence against males, even premeditated murder, and escape just punishment by falsely accusing the male of abuse.

150. Columbia's IRWG and Hofstra's Women's Studies offer only a Feminist curriculum that is deficient of texts and instruction providing a countervailing masculine view.

151. Columbia's IRWG and Hofstra's Women's Studies, consistent with Feminist doctrine, exalt females over males in most endeavors except for

example dying to defend this country.

152. Columbia's IRWG and Hofstra's Women's Studies have a catalogue of Feminist activities that permeate them and whatever secular teaching may exist cannot be separate from their Feminist missions.

153. Columbia's IRWG and Hofstra's Women's Studies are pervasively sectarian Feminist operations that are partially funded by the State and USDOE.

154. Since SED has approved and periodically re-approves Columbia's IRWG and Hofstra's Women's Studies operations and offerings of degrees, 8 N.Y.C.R.R. §§ 52.1 & 52.2, Columbia and Hofstra receive "Bundy Aid" under N.Y. Educ. Law § 6401 for each Women's Studies degree conferred.

155. Bundy aid benefits both Columbia's IRWG and Hofstra's Women's Studies.

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

157. From 1996 to 2009, SED has paid to Columbia well over $40 million in Bundy Aid, a portion of which benefited IRWG.

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

159. On information and belief, Columbia's IRWG and Hofstra's Women's Studies also receive from USDOE financial awards, contracts, and research

grants appropriated and mandated by Congress for higher education.

160. Whenever government funding flows to an institution in which a substantial portion of its functions are subsumed in a religious mission, here Feminism at Columbia's IRWG and Hofstra's Women's Studies, the aid is considered to have a principal or primary effect of advancing religion even though the Legislature and Congress designated the funds for secular purposes.

161. Columbia's IRWG and Hofstra's Women's Studies administrators and teachers indoctrinate Feminism by supporting and instructing persons in a body of Feminist doctrine or principles, initiating persons by means of Feminist doctrinal instruction, imbuing persons with a Feminist partisan or ideological point of view, and inculcating Feminism.

162. On information and belief, State and federal funds that directly or indirectly benefit Columbia's IRWG and Hofstra's Women's Studies help indoctrinate Feminism by financing the materials used at both and the salaries of employees who administer and daily preside over Feminist courses, meetings, lectures, seminars, consciousness raising sessions, publications, counseling, and career advising for which the goals are to convince persons to turn their will and their lives over to the care of Feminism.

163. Such governmentally funded activities result in the impermissible governmental indoctrination of religion.

164. Total federal awards to Columbia University

in fiscal 2009 were $686,700,000. "Awards include all federal assistance entered into directly between the University and the federal government" and "pass-throughs, which are not student loans." Columbia University, *Notes to Summary Schedule of Expenditures of Federal Awards Year Ended June 30, 2009*.

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

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

167. On information and belief, Columbia University invests significant amounts in IRWG from the above sources, as does Hofstra with respect to Women's Studies, which their managerial accounting practices will reveal through discovery.

168. The Regents and SED's educational policies and funding and USDOE's funding directly enable and endorse the inculcating of Feminism at Columbia and Hofstra.

VII. Relief Sought

169. Declare unconstitutional for violating the Establishment Clause and enjoin the State defendants' policies and plans that require the institutionalization of Feminism in higher educational institutions, such as Columbia and Hofstra.

170. Declare that the use of New York State and federal funds to aid Feminism at Columbia's IRWG

and Hofstra's Women Studies violate the Establishment Clause.

171. Enjoin the State and federal defendants from expending governmental funds that benefit Feminism in higher education.

172. Such other relief as this Court deems just and proper.

173. The plaintiffs request a jury trial.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2011 in New York, N.Y.

/S/

_____

Roy Den Hollander (RDH 1957)
Plaintiff and attorney
East 14 Street, 10D
New York, N.Y. 10009
(917) 687-0652

09-1910-cv
Hollander v. Institute for Research on Women & Gender at Columbia University

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of April, two thousand ten.

Present:

GUIDO CALABRESI,
CHESTER J. STRAUB,
Circuit Judges.[*]

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

Plaintiffs-Appellants,

v.

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, also known as COLUMBIA UNIVERSITY, U.S. DEPARTMENT OF EDUCATION, RICHARD P. MILLS, in his individual capacity, COMMISSIONER RICHARD P. MILLS, NEW YORK STATE COMMISSIONER OF THE DEPARTMENT OF EDUCATION, in his official capacity, MARGARET SPELLINGS, U.S. SECRETARY OF EDUCATION, in her official

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[*] The Honorable Robert A. Katzmann, originally assigned to this panel, recused himself before oral argument. The remaining two members of the panel, who are in agreement, have determined this matter. *See* Second Circuit Internal Operating Procedure E(b); 28 U.S.C. § 46(d); *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998).

capacity, PRESIDENT JAMES C. ROSS, PRESIDENT OF THE NEW YORK STATE HIGHER EDUCATION SERVICES CORP., in his official capacity, JAMES C. ROSS, in his individual capacity, CHANCELLOR ROBERT M. BENNETT, CHANCELLOR OF THE BOARD OF REGENTS, in his official capacity, ROBERT M. BENNETT, in his individual capacity, BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE, in his or her individual or official capacity,

Defendants-Appellees.[**]

No. 09-1910-cv

For Plaintiffs-Appellants:	ROY DEN HOLLANDER, New York, NY
For Columbia University Defendants-Appellees:	ROBERT D. KAPLAN, Friedman Kaplan Seiler & Adelman LLP, New York, NY
For Federal Defendants-Appellees:	JEAN-DAVID BARNEA, Assistant United States Attorney (Ross E. Morrison, Assistant United States Attorney, *of counsel*), *for* Preet Bharara, United

[**] The Clerk of Court is instructed to amend the official caption in this case to conform to the listing of the parties above.

	States Attorney for the Southern District of New York, New York,
For State Defendants-Appellees:	PATRICK J. WALSH, Assistant Solicitor General, (Barbara D. Underwood, Solicitor General, Peter Karanjia, Special Counsel to the Solicitor General, *of counsel*), *for* Andrew M. Cuomo, Attorney General of the State of New York, New York

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Appeal from the United States District Court for the Southern District of New York (Kaplan, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the order of the district court be and hereby is **AFFIRMED**.

Plaintiff-Appellant Roy Den Hollander[1] appeals from the judgment of the district court dated April 30, 2009 (Kaplan, *J.*), adopting the Report and Recommendation dated April 15, 2009 by United States Magistrate Judge Kevin Nathaniel Fox, and granting defendants' motions to dismiss for lack of standing. We assume the parties' familiarity with the facts and specification of issues on appeal.

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[1] William A. Nosal was a Class Representative when the case was before the district court and as of the filing of the appeal at bar, but has since withdrawn.

"The party seeking judicial review bears the burden of alleging facts that demonstrate its standing." *Green Island Power Auth. v. Fed. Energy Regulatory Comm'n*, 577 F.3d 148, 159 (2d Cir. 2009) (internal quotation marks and brackets omitted). Plaintiff alleges that the existence of Columbia University's Women's Studies Program and the corresponding lack of an equivalent "Men's Studies Program" inflicts harm on certain men as a class by, *inter alia*, promoting "misandry-feminism," promoting feminism as a religion, and robbing men of an equivalent educational experience. As to the plaintiff's discrimination-based claims, the district court properly dismissed the action for lack of standing as to all defendants because the plaintiff's claims of harm amount to the kind of speculative harm for which courts cannot confer standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating that "the plaintiff must 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") (internal quotation marks, citations, and footnote omitted); *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 160 (2d Cir. 2003) (same). Nor has plaintiff made out the requirements for taxpayer standing for his Establishment Clause claim. *See DeStefano v. Emergency HousingGroup, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001). Thus, with no occasion to reach any of plaintiffs' further arguments on appeal—about which we share, in any event, the district court's grave doubts—we **AFFIRM** the dismissal of the action for substantially the reasons stated in Judge Fox's thorough Report and

Recommendation as adopted by the district court.

FOR THE COURT: CATHERINE O'HAGAN WOLFE, CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
ROY DEN HOLLANDER, WILLIAM A. NOSAL,

Plaintiffs,

-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, MARGARET SPELLINGS, CHANCELLOR ROBERT M. BENNETT, COMMISSIONER RICHARD P. MILLS, RICHARD P. MILLS, PRESIDENT JAMES C. ROSS, JAMES C. ROSS, ROBERT M. BENNETT, BOARD OF REGENTS OF THE UNIVERSITY OF NEW YORK,

Defendants.
----------X

REPORT and RECOMMENDATION
(LAK)(KNF)
08 Civ. 7286

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE LEWIS A. KAPLAN,
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

In August 2008, Roy Den Hollander ("Den Hollander") and William A. Nosal ("Nosal")(collectively, "the plaintiffs"), proceeding pro se, commenced this action, pursuant to 42 U.S.C. § 1983 ("§ 1983"), against the Institute for Research on Women and Gender at Columbia University ("IRWG"); the School of Continuing Education at Columbia University ("SCE"); the Trustees of Columbia University in the City of New York ("Trustees"); the United States Department of Education ("USDOE"); Margaret Spellings ("Spellings"), the United States Secretary of Education, in her official capacity; the Board of Regents of the University of the State of New York ("BOR"); Robert M. Bennett ("Bennett"), the Chancellor of the Board of Regents, in his individual and official capacities; Richard P. Mills ("Mills"), the Commissioner of the New York State Department of Education, in his individual and official capacities; and James C. Ross ("Ross"), the President of the New York State Higher Education Services Corporation, in his individual and official capacities. The plaintiffs allege that: (1) USDOE and Spellings ("the Federal defendants"), and BOR, Bennett, Mills and Ross ("the State defendants"), violated the First Amendment's Establishment Clause, by "aiding the establishment of the religion of Feminism at Columbia University through the University's Women's Studies program"; (2) USDOE and Spellings violated the Fifth Amendment's Equal Protection Clause, by "aiding the intentional discriminatory impact against men by Columbia

University's Women's Studies program"; (3) the State defendants violated the Fourteenth Amendment's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. ("Title IX"), by "fostering, supporting and assisting the intentional discriminatory impact against men by Columbia University's Women's Studies program"; and (4) "Columbia University," IRWG and SCE violated the Fourteenth Amendment's Equal Protection Clause, Title IX and New York Civil Rights Law § 40-c, by "carry[ing] out the intentional discriminatory impact against men of the Women's Studies program."

Before the Court are the defendants' motions to dismiss the plaintiffs' amended complaint, made pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In their motion, IRWG, SCE and Trustees contend they are entitled to the relief they seek because: (1) the plaintiffs lack standing to sue; (2) Columbia University ("Columbia") is not a "state actor," within the meaning of 42 U.S.C. § 1983; and (3) the plaintiffs do not state an actionable claim of discrimination. For their part, the State defendants assert they are entitled to the relief they seek because: (1) "feminism" is not a religion, as contemplated by the First Amendment; (2) the "laws and regulations governing registration and funding of degree programs are . . . gender-neutral," and are not administered in an unequal way; and (3) Title IX does not require Columbia to offer "men's studies programs." The Federal defendants contend they are entitled to the relief they seek because: (1) the financial assistance provided to Columbia, by the federal government, does not violate the

Establishment Clause, and IRWG's courses are not "religious," as contemplated by the Establishment Clause; and (2) the plaintiffs lack standing to assert a due process claim, against the Federal defendants.

In opposition to the motions, the plaintiffs reiterate the assertions made in the amended complaint. In addition, the plaintiffs contend they possess standing, since they "allege injury to themselves (such injury may be indirect), [and] the injuries are ongoing and traceable to the defendants' conduct."

The defendants' motions are analyzed below.

II. BACKGROUND

In the amended complaint, the plaintiffs style the litigation a "class action," for which the putative class consists of:

> all males who were students, full or part time, at some point in time during the three years prior to the filing of this action [in August 2008] or all males who currently maintain the status of student or alumni, or all males who will in the future acquire the status of student or alumni and would have taken advantage of a Men's Studies program had one existed by enrolling in the program, taking courses in the program, participating in the program's networking, receiving support from the program, pursuing career and academic opportunities provide[d] by the program, gaining a male perspective on modern day issues, or furthering their knowledge and understanding of mankind and society.

According to the complaint, in 2007, Den Hollander wished to "offset the advantage of counterfeit scholarship provided by Women's Studies programs, [by] formulat[ing] a definite plan to attend Columbia as an alumnus to educate himself with scholarly research in Men's Studies for use in [] lawsuits and general enlightenment. . . ." Den Hollander discovered Columbia had neither Men's Studies course offerings nor programs of study; however, Den Hollander alleges he "intends to enroll in a Men's Studies program the moment one is offered." Nosal graduated from Columbia College in 2008, intended to enroll in Men's Studies while he was a student, but was prevented from doing so because no such program existed at Columbia. Nosal "continues to intend to participate in a Men's Studies program if one is provided."

The amended complaint states that the Women's Studies program at Columbia, inter alia: (1) "instructs, trains, supports, furthers, cultivates and advocates strategies, and tactics for demeaning and abridging the rights of men"; (2) advocates "that the civil rights of males be diminished or eliminated"; and (3) "stereotype[s] males as the primary cause for most, if not all, the world's ills throughout history," while crediting females "with inherent goodness." No allegations are made in the amended complaint that Nosal or Den Hollander enrolled, or attempted to enroll, in any Women's Studies courses offered at Columbia; however, that pleading asserts the following:

> [t]he few Columbia University male students or alumni who do participate in the Women's Studies program are denigrate[d], silenced,

> ignored, chastised for being "machismo," treated as second class citizens, treated as the disposable sex, graded more harshly, prevented from expressing their points of view if contrary to Feminist tenets, frozen out of the advantages the program provides to females, and [are] all around treated negatively and differently than females in the program, as though they were capitalists attending Moscow State University in the former Soviet Union.

As a result of the defendants' promotion of Columbia's Women's Studies program, the plaintiffs maintain that "members of the plaintiff class [are denied] the opportunity to take Men's Studies courses that will prepare and assist them for dealing with, defending against, and fighting the anti-male climate that is pervasive in America today."In addition, the plaintiffs allege that, "[b]ecause of the defendants' policies and practices[,] in advocating and furthering Feminism and training Feminist 'storm-troopers' through the Women's Studies program at Columbia University, the plaintiffs face obstacles to educational access and career opportunities solely as the result of an accident of nature that made them men."

The plaintiffs contend a Men's Studies program would, inter alia: (1) "use[] facts rather than propaganda to describe the truth about the differences and similarities of the sexes"; (2) train[] males to recognize and handle the power females often use to manipulate them, such as the male-paralyzing power of beauty, sexual power, verbal skills, victim power, and the male biological instinct to protect females at the price of harm to himself";

(3) offer[] both a factual perspective and solutions for the problems unique to fathers," including the "transformation of their marriages into alimony payments," the "alienation of their children by ex-wives" and the "connivance of domestic relations courts with Feminist groups to violate their rights"; (4) "counter[] the historic belief in America . . . that females have a cart blanche to do whatever they want regardless of ethics or law"; (5) "expose[] the self-serving, schizoid paradigm of Feminist doctrine that females are strong and independent when they want something, but victims when they violate the law"; and (6) "counter[] the training in Women's Studies that sends forth Feminists to pervert American ideals, ignore the rule of law, selectively enforce the Constitution, and destroy men with impunity."

The plaintiffs request declaratory and injunctive relief, as well as nominal damages. Specifically, the plaintiffs request that the defendants be enjoined from providing further support to "Women's Studies programs such as the one at Columbia University," that the court declare the defendants have violated the plaintiffs' rights, as alleged in the amended complaint, and "level the playing field by either instituting a Men's Studies program or eliminating the Women's Studies program at Columbia University. . . ."

III. DISCUSSION

"A court presented with a motion to dismiss under both Rule 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on

the merits, and therefore, an exercise of jurisdiction." Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495, 500 (S.D.N.Y. 2005) (internal quotations and citations omitted).

An action may be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, "when [a] district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). In determining a motion made pursuant to Fed. R. Civ. P. 12(b)(1), a "court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of [the] plaintiff." Raila v. United States, 355 F.3d 118, 119 (2d Cir. 2004). The plaintiff bears the burden of showing, by a preponderance of the evidence, that subject matter jurisdiction exists. See Makarova, 201 F.3d at 113. Where, as here, a plaintiff(s) is proceeding pro se, the Court must construe the complaint liberally and "interpret [it] to raise the strongest arguments it suggests." Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007).

Standing

Article III of the United States Constitution "restricts federal courts to deciding 'Cases' and 'Controversies' and thus imposes what the Supreme Court has described as the 'irreducible constitutional minimum of standing,' –injury-in-fact, causation, and redressability." Baur v. Veneman, 352 F.3d 625, 631-32 (2d Cir. 2003) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 [1992]). "[An] injury-in-fact, [] is a concrete and particularized harm to a legally protected interest."

W.R. Huff Asset Mgmt. Co., LLC v. DeLoitte & Touche, LLP, 549 F.3d 100, 106-07 (2d Cir. 2008) (internal citations, emphasis, and quotations omitted). "[C]ausation [is established by showing] a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant." Id. "[R]edressability [is] a non-speculative likelihood that the injury can be remedied by the requested relief." Id. In a circumstance such as this, where some, but not all, defendants in an action move to dismiss a complaint for lack of standing, "the Court must consider whether [the] plaintiff has standing sua sponte" as to all defendants. Ocean View Capital, Inc. v. Sumitomo Corp. of Am., No. 98 Civ. 4067, 1999 WL 1201701, at *8, 1999 U.S. Dist. LEXIS 19194, at *23 Dec. 15, 1999); see also Evac, LLC v. Pataki, 89 F. Supp. 2d 250, 261 n.4 (N.D.N.Y. 2000) ("Standing is an element of subject matter jurisdiction that the Court is required to raise sua sponte. . . . [and, therefore,] [b]ecause [the plaintiff] lacks standing . . . , the Court must dismiss [the plaintiff's] claims against all Defendants rather than only the moving Defendants . . . .").

I. Injury in Fact

An "injury in fact" involves "an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical." Gully v Nat'l Credit Union Admin. Bd., 341 F.3d 155, 160 (2d Cir. 2003). To establish an "injury in fact," a plaintiff must show that he has "suffered 'a distinct and palpable injury to himself,'" and such an injury must normally be one "peculiar to [the plaintiff] or to a

distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'" Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100, 99 S. Ct. 1601, 1608 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 499, 501, 95 S. Ct. 2197, 2205-06 [1975]). The plaintiff must establish that he "has sustained or is immediately in danger of sustaining some direct injury . . . [that] must be both real and immediate." City of Los Angeles v. Lyons, 461 U.S. 95, 101-02, 103 S. Ct. 1660, 1665 (1983) (internal quotations and citations omitted). "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm. . . ." Laird v. Tatum, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 2325-26 (1972).

The amended complaint alleges the plaintiffs have been harmed by: (1) the existence of the Women's Studies program at Columbia, as it discriminates against male students and causes harm to males by propagating negative information regarding males; and (2) the absence of a Men's Studies program at Columbia that would focus on issues relevant to males and "counter" the information taught through Columbia's Women's Studies program.

The plaintiffs' alleged injury, which is purportedly based upon the content of, or the discriminatory impact flowing from, the Women's Studies program at Columbia, is not an "injury in fact," since the plaintiffs do not allege they enrolled in a Women's Studies course(s) at Columbia that caused them to suffer a direct injury occasioned by firsthand exposure to the content of the Women's

Studies course(s), or that they were discriminated against, by being denied the opportunity to participate in Columbia's Women's Studies program. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 167, 92 S. Ct. 1965, 1968 (1972)(finding that the plaintiff lacked standing to challenge the Moose Lodge's racially discriminatory membership policy, because he never applied for membership). At most, the "injury" suffered by the plaintiffs, attributed by them to the existence of Columbia's Women's Studies program, is no more than a "subjective 'chill,'" and not an "objective harm." Such an "injury" is not an "injury in fact." Laird, 408 U.S. at 13-14, 92 S. Ct. at 2325-26. Consequently, exercising judicial authority over this case would "convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders," and would ignore "a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." Valley Forge ChristianCollege v. Americans United for Separation of Church and State, 454 U.S. 464, 473, 102 S. Ct. 752, 759 (1982) (internal quotations and citations omitted).

To the extent the plaintiffs allege injury based upon the absence of a Men's Studies program at Columbia, their injury is not "concrete and particularized"; rather, it is "conjectural or hypothetical." See Gully, 341 F.3d at 160.

Although the plaintiffs style this litigation a "class action," this designation "adds nothing to the standing inquiry, since the named plaintiffs 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they

belong and which they purport to represent.'" Doe v. Blum, 729 F.2d 186, 190 n.4 (2d Cir. 1984)(quoting Warth, 422 U.S. at 502, 95. S. Ct. at 2207).

IV. RECOMMENDATION

For the reasons set forth above, the defendants' motions to dismiss the amended complaint, Docket Entry Nos. 21, 23, and 25, should be granted.

V. FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(l) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service ofthis Report to file written objections. See also Fed. R. Civ. P. 6. Such objections, and any responses to objections, shall be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan, 500 Pearl Street, Room 1310, New York, New York, 10007, and to the chambers of the undersigned, 40 Foley Square, Room 540, New York, New York, 10007. Any requests for an extension oftime for filing objections must be directed to Judge Kaplan. FAILURE TO FILE OBJECTIONS WITHIN TEN (10) DAYS WILL RESULT IN A WANER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. See Thomas v. Am, 474 U.S. 140 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
April 15, 2009

Respectfully submitted:

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

US Dist SDNY Document
Electronically Filed 4/24/09

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ROY DEN HOLLANDER, et ano.,

Plaintiffs,

-against-

INSTITUTE FOR RESEARCH ON WOMEN & GENDER AT COLUMBIA UNIVERSITY, et al.,

Defendants.

----------X

08 Civ. 7286 (LAK)

ORDER

LEWIS A. KAPLAN, *District Judge.*

Plaintiffs object to the report and recommendation of Magistrate Judge Kevin Nathaniel Fox, which recommended the dismissal of this action for lack of standing. Having reviewed the amended complaint, the report and recommendation, and plaintiffs' objections, I have concluded that there was no error and that the action should be and hereby is dismissed for lack of standing. I write only to address a few points raised by the objections.

First, plaintiffs contend that the Magistrate Judge should have recused himself because he is an alumnus of Columbia University. As an initial matter, plaintiffs were obliged to raise any such objection at the earliest possible moment,[1] but there has been no showing that they did so, *as* they have not disclosed when they learned the fact upon which they rely. The point therefore has been waived. Even if that were not the case, however, recusal would have been warranted only if "an objective, disinterested observer fully informed of the underlying facts [would] entertain significant doubt that justice would be done absent recusal."[2] I am satisfied that a disinterested observer fully informed of the fact that the Magistrate Judge once attended Columbia University would not entertain significant doubt that justice would be done here. In any case, as it is my obligation to review the decision on this motion *de novo,* any failure to recuse by the Magistrate Judge would have been harmless.

Second, plaintiffs argue that the Magistrate Judge erred in believing that the action is brought *prose.* In fact, Roy Den Hollander is both the attorney of record for the plaintiffs and a plaintiff

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[1] *See, e.g.,Apple v. Jewish Hosp. and Medical Center,* 829 F.2d 326, 333 (2d Cir.I987) ("It is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.").

[2] *In reAguinda,* 241 F.3d 194,201 (2d Cir.2001) (quoting *United States v. Lovaglia,* 954 F.2d 811, 815 (2d Cir.l992) (internal quotation marks omitted)).

himself. Thus, as a purely technical matter, it might be said that the action is not brought *prose* insofar as it is brought on the second plaintiff although it undeniably is brought *prose* to the extent that Mr. Hollander represents himself as a party plaintiff. But plaintiffs' argument betrays a remarkable instinct for the capillaries. By characterizing the case as having been brought *prose,* the Magistrate Judge gave the plaintiffs the benefit of the greater liberality afforded to *pro se* litigants and thus afforded them a benefit to which at least the second plaintiff and possibly also Mr. Hollander, who is a member of the Bar, were not entitled. Certainly neither plaintiff was prejudiced by any error that might have been committed in their favor. At the end of the day, moreover, the result here would be the same regardless of whether the plaintiffs or either of them is proceeding *pro se*.

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

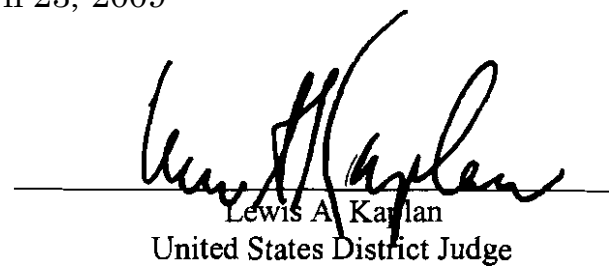
I have considered plaintiffs' other objections and concluded that they lack merit.

Accordingly, the motions to dismiss all are granted and the case dismissed for lack of

standing. The Establishment Clause claims are dismissed also on the alternative ground that they are absurd and utterly without merit. The Clerk shall enter final judgment of dismissal and terminate all open motions.

SO ORDERED.

Dated: April 23, 2009



Lewis A. Kaplan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Roy Den Hollander,

Plaintiff on behalf of himself and all others similarly situated,

-against-

Members of the Board of Regents of the University of the State of New York, in their official and individual capacities; 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 M. Steiner, in his official and individual capacity; Acting President of the New York State Higher Education Services Corp., Elsa Magee, in her official and individual capacity; U.S. Department of Education; and U.S. Secretary of Education, Arne Duncan, in his official capacity;

Defendants.

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Docket No.
10 CV 9277
(LTS)(HBP)

Transcription of oral argument before the U.S. Court of Appeals for the Second Circuit in *Den Hollander v. Inst. for Research on Women & Gender at Columbia University*, 372 Fed. App'x. 140 (2d Cir. 2010), which occurred on April 8, 2010 before Judges CALABRESI and STRAUB.

Judge Calabresi:

Good morning. We will hear *Hollander vs Institute of Research et al.* Judge Katzman is recused in this case. Under the rules we are permitted to hear it.

Den Hollander:

Good morning your honors my name is Roy Den Hollander. I am the class representative and the attorney for the punitive plaintive class. Behind me is Chairman of Foundation for Male Studies. If this case continues, he will be joining as another class representative.

This case, I think the key issue here, is that it opposed the use of tax dollars for supporting the new age religion of post-modern feminism, or some may call it ideological feminism.

The district court characterized the central claim in this case, or the "court claim" of this case, as the violation of the Establishment Clause. Since I, the class representative, did not have standing, that was the finding of the court, I did not have standing to oppose the use of taxpayer funds to support post-modern feminism.

Judge Calabresi:

Did you in the trial court make a statement of a taxpayer standing for an Establishment case?

Den Hollander:

No I did not, your honor.

The lower court made, I wouldn't call it a fact finding, I would call it more of a decree, that feminism is as much as a religion as physics and that the allegation of feminism as a religion was "absurd and utterly without merit."

Judge Calabresi:

That wasn't my question. My question was did you in your complaint allege taxpayer standing to challenge an establishment of religion under *Flast*? Did you make that claim of standing?

Den Hollander:

In my complaint was an Establishment Clause claim, and I stated that I was a resident in Manhattan. I think when you read complaints for standing purposes, you are supposed to draw, or should draw, inferences in favor the complaint. I think the fact that I had an Establishment Clause claim in the complaint, that it was clear I was alleging feminism as a religion, that I am a resident of Manhattan, I think the inference is a reasonable one that I am a taxpayer and when the court then…

Judge Calabresi:

How do I know that, if you didn't…

Den Hollander:

Is there anybody who has been admitted to this court who is a lawyer, who is a resident of Manhattan, who doesn't have taxpayer status. It's taxpayer status your honor.

Judge Calabresi:

I don't know, I don't know. I am just curious.

Den Hollander:

No. That is as close, that is close I got it. If the court decides to dismiss on the fact that I didn't go into specific detail, that I am assuming alleging standing on taxpayer status, then I obviously, I would request a remand in which I am allowed to basically, to put in that sentence. That is all that it would be a sentence: I am a taxpayer in New York and the federal government.

Judge Calabresi:

Generally taxpayers do not have standing to bring claims. They do have standing to bring limited time, limiting *Flasts* do have standing to bring claims with respect to Establishment that has been.

Now in bringing such a claim, does one have to have a plausible Establishment claim, or can one just come in as a taxpayer and say Establishment and then get standing?

Den Hollander:

I think it would depend upon whether you are looking at standing. So that is 12(b)(1). I don't believe the plausible standard that applies to 12(b)(6) applies to 12(b)(1). So I believe all that is

necessary under the 12(b)(1) standing, which is what was district court dismissed on, is the allegation, is that you are bringing in an Establishment Clause. They didn't you go into the requirements of [taxpayer] standing and the require…

Judge Calabresi:

We have any number, in any number of cases in order for someone to make a claim to get, they have to have a claim that is plausible on it. See, I am not reaching, I am not talking about the whole other set of claims that you are making with respect to Women's Studies.

I am just asking about standing, taxpayer standing as against individual standing with respect to Establishment. Whether a person can create jurisdiction simply, by using the words Establishment and taxpayer, or whether you need something. And my problem is that we have the *Allen* case in this circuit, which suggests that what is a religion is fairly narrowly defined for Establishment purposes.

Den Hollander:

Could I just address the Allen case?

In the Allen case, which was a criminal case, the court did not make a finding of "nuclearism" as a religion. The court dismissed that case based upon the fact that the statute, which was destruction of government property, did not aid religion. In other words, so was the aiding, if you look at the *Lemon* test, it was which was the aiding of religion. That was the court's decision in *U.S. v. Allen*. It was not that "nuclearism" reached the level of being a

religion as defined by the earlier Supreme Court cases *Seeger* and *Welch*.

Now if you go in and you just make a conclusory statement that, if I went in as a conclusory statement that feminism is a religion, that is not enough. For standing purposes, you have to come up with some basic allegations of basic facts.

You look at the amended complaint, and I believe in its pages 13 through 15, there's plenty of allegations of basic facts. And you then assume those allegations true and the inferences of feminism are religion. But once again, this is all allegation. And there's been no facts yet in this case despite what the lower court said.

That's one of my main arguments here, that the lower court made a finding of fact on a 12(b)(1) dismissal motion. There is no evidence, there is no judicial notice. And then, after making that finding of fact that feminism was not a religion, it then went on to use the backup of the 12(b)(6), which I couldn't understand because if the court didn't have jurisdiction under 12(b)(1), how could it make a 12(b)(6) finding. Now you can do that, but I don't think the district court can do it.

Judge Calabresi:

Thank you, you reserved 2 minutes.

Den Hollander:

Yes I did thank you.

Judge Calabresi:

We will hear from a variety of other people.

Columbia University's Attorney:

May it please the court that the complaint against Columbia University obviously is not an Establishment Clause claim but that the claim that the teaching of women's studies constitutes sex discrimination.

The dismissal of the complaint was appropriate both because the plaintiff lacks standing and also because he failed to state a claim for relief with respect to standing.

The plaintiff has not alleged any injury. In fact the simple and essential point here is that he never took any Women's Studies class, so whatever harm might be inflicted in such a class was not inflicted on him. As to this plaintiff, the concrete and particularized harm that would confer standing simply is not present.

The plaintiff also complained of some kind of anti-male animus that emanates across the university as a result of the teaching of Women's Studies. But that is precisely the non-specific and non-particularized harm that would not confer standing.

He also complains that there are no classes denominated Men's Studies. But again, there is no concrete allegation of injury to him. He is not alleging any job any degree or any other opportunity that he didn't receive. All he is alleging is that nobody at Columbia is teaching what he wants to hear: that America is truly a matriarchy, that men are at risk of paternity fraud, and so on. That is not an injury that would confer standing with respect to

the failure to state a claim.

Clearly men are not excluded from Women's Studies courses, and there are no fact allegations in the complaint suggesting that men who do take such courses are treated any differently than women.

The plaintiff alleges that if Women's Studies is to be taught at all, it is necessary that there be some Men's Studies curriculum. But even putting aside the fact that there are thousands and thousands of courses at Columbia that do deal with the issues relevant to men and that are taught by men, there's simply no legal requirement that each course or department be offset by some contrasting or opposite course or department. An African studies department for example does not require a white studies department.

The complaint in the case really is not a allegation of any kind of discriminatory conduct. It is an attack on a body of ideas, and that does not state a claim for discrimination.

Finally, if I may, I think it is important to my client to mention the First Amendment implications of this case. The plaintiff asked the district court to make a judgment with respect to the validity and legitimacy of ideas. He asked for judicial finding that even teaching Women's Studies is discriminatory, and for an order that would either ban the teaching of Women's Studies or mandate a contrary curriculum.

The Supreme Court has recognized the right of academic freedom that derives from the First Amendment and a judicial determination of which

ideas are permissible and which impermissible of what may be taught and what may not be taught and what must be taught would strike at the very heart of that freedom. Thank you.

U.S. Attorney:

Good afternoon, your honors,.

May it may please the court, Jean-David Barnea from the U.S. Attorney's office for the U.S. Department of Education.

The district court properly dismissed the plaintiff's constitutional claims against the federal defendants as frivolous and for lack of standing. As to the Establishment Clause claim, the most obvious reason why the district court dismissed the case was because feminism is not a religion based on it's common sense abilities to review the allegations complaint under Twombly and Iqbal while….

Judge Calabresi:

Let me explore that a moment.

We can't decide the merits under Justice Scalia's opinions and *Steele* I believe without first deciding whether there is standing. So how do we decide standing with respect to an Establishment claim without looking at the merits, you are saying, of whether feminism is a establishment of religion. Or do we look to whether a plausible, that is he has to allege a plausible religion in order to get into taxpayer standing.

U.S. Attorney:

Your honor, in the federal government's brief, we did not contest that plaintiff had taxpayer standing

to bring his Establishment Clause claim. I haven't researched this extensively for this case…

Judge Calabresi:

Well, I know you haven't, but that's a problem that you didn't do that because that's the first question, that's a question of jurisdiction. The Supreme Court tells us that we have to look at that question first. So it is all very well for the government to say we don't need to worry about whether you have standing or not, we don't fight it. We will give him standing and then get to the merits, but we can't do that. We have to decide whether there is standing.

U.S. Attorney:

Well your honor in the govern…

Judge Calabresi:

Is it the position of the United States government that despite the fact there is no allegation that this individual is a taxpayer; he nevertheless satisfies the requirement of class and his progeny—that's extraordinary.

U.S. Attorney:

Well, your honor, I believe there is case law that doesn't…

Judge Calabresi:

And furthermore I take it, it is the position of the United State government that an Establishment Clause challenge by a taxpayer status need not recite all the statutes, which you then add in your brief over two or three pages, but that they need not

be set forth in the complaint. Do you realize the enormity of that?

Based on that position and that concession, taxpayer status is granted to anyone based upon whatever it is they want to say in some general fashion, and that the cases are meaningless.

U.S. Attorney:

Your honor this complaint was filed pro se and so the government believe…

Judge Calabresi:

I don't care if it was filed pro se.

We have to decide jurisdiction and you're standing here and telling us that somebody can come in and get taxpayer standing with no allegations of any sort and that we as a court have jurisdiction to decide the merit. Somebody comes in and says bananas are a religion, therefore, I was injured in something or other, and I have standing as a taxpayer to claim that that some wrong was done. That's just what you conceded.

U.S. Attorney:

Well, your honor, that's what the ability of a court to dismiss for frivolousness.

Judge Calabresi:

I'm sorry.

U.S. Attorney:

That those kinds of allegations are properly dismissed as frivolous. But once a person who appears to be a taxpayer from the face of the

complaint raises an Establishment Clause claim, it doesn't appear that the proper basis for dismissal is lack of standing…

Judge Calabresi:

The bottom line nevertheless is he does not have to say he is a taxpayer according to you, and he does not have to set forth the federal statutes which are part of the *Flast* analysis.

U.S. Attorney:

If he is a pro se plaintiff, the court can sort of read those into his complaint for him.

Judge Calabresi:

Can read anything? Ok thank you.

New York State Attorney:

Good morning may it please the court my name is Patrick Walsh on behalf of the state defendants

Judge Calabresi:

Good to see you again Mr. Walsh.

New York State Attorney:

Thank you your honor.

With respect to the taxpayer standing question, I think the Supreme Court's decision in *Hein* as well as this court's decision in *Altman* makes it clear that this is exactly the type of case for which taxpayer standing should not be expanded. And I'll note that in the plurality decision in *Hein*, two of the justices that signed the decision were of the opinion that they were in effect overruling *Flast*. Now…

Judge Calabresi:

Only two.

New York State Attorney:

I understand but I just…

Judge Calabresi:

That's not enough to undercut our cases, I mean our cases stand unless the Supreme Court does away with them.

New York State Attorney:

I understand your honor. I am only underscoring the point that the court and this court has long believed that *Flast* is a very narrow exception. So certainly the notion that you can simply allege whether it be plausible or implausible in Establishment Clause claim.

Judge Calabresi:

Is your argument that in an establishment clause claim, the assertion that it is an establishment has to be plausible in order to create taxpayer standing?

New York State Attorney:

Yes your honor, I think it is built into the second requirement of Flast itself.

Judge Calabresi:

And do you also say that a taxpayer has to assert that he is a taxpayer and assert the various things that *Flast* statutes and so on requires?

New York State Attorney:

I do your honor.

We defended the taxpayer standing question on the merits of taxpayer standing in deference to the fact that it might be possible to read into the complaint. But I do agree with the court that ordinarily it should be alleged explicitly. So I am in complete agreement. So I don't think there is taxpayer standing here.

There's no plausible allegation due to the *Allen* case that there's actually a religion of feminism. On that basis, as the court noted, there has to be a limitation within taxpayer standing and establishment clause cases based on plausibility of your alleged infringement. That hasn't been satisfied here.

In my brief time remaining unless the court has further issues with regard to standing, I'll note that even if there were standing in this case and even if feminism were a religion, none of the state's religious neutral secular activity amounts to a violation of the Establishment Clause. The granting of what's colloquial known as Bundy aid based on the number of degrees is completely neutral with regard to religion substance of class content et al. Similarly, the approval of degree programs is done on the basis of secular criteria the …

Judge Straub:

But your friend here alleges ad nauseam the involvement of the state in setting forth absolute and strictly defined feminism requirements, and he's attacking feminism as a religion, and he says you are responsible for requiring it.

New York State Attorney:

Well I think the only allegation he makes that ties the state to requiring women's studies at Columbia is his claim that a 1993 Regent's report, which in very general terms, calls for in essence diversity and opportunity within education amounts to the state requiring feminism in the form of women's studies program at Columbia.

I see no link whatsoever between that 1993 Regents report and any academic decisions made by universities within the state system. Certainly nothing in the Regents report, nothing in any statute, regulation or state policy explicitly or implicitly requires the establishment of women's studies programs at universities.

Den Hollander:

Just in the last part by Attorney Walsh

First of all, *Hein* specifically said it was not overruling *Flast*.

Second, if you look at that 1990, it's the 1990 *Equity for Women's Report*, it is the policy statement by the Regents. The Regents are the legislature. They decide what goes on in higher education. If you look through it it's very specific. I am not going to bother reading it through because you have the sites to it in the complaint.

It's very specific, such things as change in thought patterns to female friendly strategies.

Back to, I think this is very interesting, whether the allegations in the complaint have to be plausible, I think the allegations for standing in a complaint

are generally accepted as true and then reasonable inferences are made from then. I believe that as far as the fact that I brought an Establishment Clause action, I believe the complaint complies to that.

Did I specifically say that I was a taxpayer in that complaint, no I did not. Then I would request the court to send me back to the district court, so I can add that one sentence…

Judge Straub:

How many times did you amend?

Den Hollander:

Once.

Judge Straub:

Once, so did you ask for a further amendment?

Den Hollander:

No it was as of right as I recall.

Judge Straub:

No, one amendment you have is of right.

Den Hollander:

That was the amendment I did.

Judge Straub:

Did you ask you a further amendment after the court said there was no standing?

Den Hollander:

No at that point, the moment that I learned about the standing was the decision of the court. I was thinking of 59(e) reconsideration but…

Judge Straub:

But did you ask?

Den Hollander:

No, I did not your honor.

Judge Straub:

Yes, but you first had the Magistrate judge's report.

Den Hollander:

That's correct your honor

Judge Straub:

You objected to that but you didn't ask therein to leave to amend should the district court hold against you.

Den Hollander:

No I did not I objected to…

Judge Straub:

The second time after he did hold against, you didn't come back and say give me a chance to amend.

Den Hollander:

That's correct your honor may I clarify? Magistrate's report didn't touch…

Judge Straub:

Are you a lawyer, are you?

Den Hollander:

I am your honor.

The magistrate report did not touch upon the

Establishment Clause. In my objections, I specifically objected that the magistrate's report did not address the Establishment Clause claims. The first time the establishment clause claims were addressed by the lower court were addressed by the district judge in his decision.

Judge Straub:

Wasn't there one case that you brought where you were denied leave to amend?

Den Hollander:

Not that I am aware of but there…

Judge Calabresi:

Why should the magistrate judge have addressed the Establishment Clause if you didn't allege that you were a taxpayer?

Den Hollander:

I would normally think that when a judge…

Judge Calabresi:

No, I mean if it is necessary to Establishment Clause to be a taxpayer and you didn't make that allegation. Why should the magistrate have discussed it. Then given he didn't discuss it for that reason, you could have asked for an amendment so that it would have to be.

Den Hollander:

No, had the magistrate put in that he was dismissing it because I did not allege that I was a taxpayer, that I did not specifically put those words in there, then of course I'd request an amendment.

Obviously and once again, you can't read what a judge's mind says.

But I think this is kind of interesting in that you may end up taking the plausibility standard for the 12(b)(6), which is *Ashcroft v. Iqbal* and applying it to standing, which my understanding has not yet been done in order to determine whether a complaint satisfies a requirement.

Judge Calabresi:

Thank you very much I have enjoyed hearing from all of you and we stand adjourned.