12-2362-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiff-Appellant,

--against--

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

Defendants-Appellees.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

(Counsel on inside)

Attorney for Defendants-Appellees

Board of Regents of the University of the State of New York, Chancellor Merryl H. Tisch; New York State Dep't of Education, Commissioner David M. Steiner; New York State Higher Education Service Corp., Acting President Elsa Magee,

Laura R. Johnson, Asst. Solicitor Gen.
New York State Office of the Attorney Gen.
120 Broadway
New York, N.Y. 10271
(212) 416-6184

Attorneys for Defendants-Appellees

U.S. Department of Education, Secretary Arne Duncan,

Jean-David Barnea, Asst. U.S. Attorney
United States Attorney's Office
Southern District of New York
86 Chambers Street, 3rd Floor
New York, N.Y., 10007
(212) 637-2679

Sarah Sheive Normand, Asst. U.S. Attorney
United States Attorney's Office
Southern District of New York
86 Chambers Street, 3rd Floor
New York, N.Y., 10007
(212) 637- 2709

Attorney for Plaintiff-Appellant

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

Roy Den Hollander, Esq.
Attorney at Law
545 East 14th Street, 10D
New York, N.Y. 10009
(917) 687-0652

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PRELIMINARY STATEMENT

Justice Scalia recently contrasted his style of legal interpretation with that of a colleague who tries to be true to the values of the Constitution as she applies them to a changing world. This imaginary justice goes home for dinner and tells her partner what a wonderful day she had. This imaginary justice, Scalia said, announces that it turns out "'the Constitution means exactly what I think it ought to mean! No kidding.'" Associated Press, October 5, 2012.

Such "activist" employees of the federal judiciary firmly believe all federal laws, including the Rules of Civil Procedure, should serve their own sanctimonious beliefs in Feminism and Political Correctionalism.

The same is clearly true of the State's attorney who in her Preliminary Statement, *State Brf.* pp. 1-2, harps that Feminism is a not a religion and uses as authority for such, statements by the powerful made without any reliance on the traditional procedure for reaching a decision. It's the medieval rationale of the nobility: "I think so—therefore it is right."

The State's attorney also uses the all too typical Feminist tactic of trying to discredit someone's arguments by pegging him as "disgruntled" and pursuing an "antifeminist agenda." What's wrong with an "antifeminist agenda," "anticommunist agenda," "antifascist agenda," or "anti-1984 agenda" by a "disgruntled" American citizen so long as he fights for the unalienable rights of

human beings—even men. Many disgruntled men, including Den Hollander, fought in the streets against the Vietnam War. Disgruntled men have fought against the abuses of the powerful in the name of justice and human rights throughout the history of this country. Such is not a vice and neutrality in the face of injustice is not a virtue.

FACT CORRECTIONS

The allegations in the *Den Hollander II* original complaint, App.14-31, about State and USDOE student-aid programs violating the Establishment Clause have been withdrawn. (Notice Motion to Vacate-Amend, Docket 33, App.10).

The State's attorney admits the *Den Hollander I* complaint did not allege taxpayer injury, but then asserts it "could be inferred from his allegations about the various forms of financial aid that Columbia … received." (*State Brf*. p.5). Magistrate Fox and Judge Kaplan, however, did not infer such, since neither ever addressed taxpayer injury nor non-economic injury, and the Court of Appeals refused to accept that inference. (Transcript, pp.2 3, 5-8, 10 App.81-82, 84-87, 89).

USDOE misstates that Magistrate Pitman in *Den Hollander II* granted summary judgment on collateral estoppel "because plaintiff had previously filed a materially identical complaint." (*USDOE Brf.* p.5). Magistrate Pitman actually concluded "that plaintiff's lack of standing is established by the judgment in the

Underlying Action [*Den Hollander I*] and that the doctrine of collateral estoppel precludes plaintiff from relitigating the issue here." (Pitman's *Report*, p.37, App.162).

USDOE's take on the original Complaint in *Den Hollander II* tries to minimize Den Hollander's contact with the ubiquitous belief system "Feminism" that Columbia's Women's Studies program has spread throughout the Columbia Community. (*USDOE Brf.* p.11). Feminism's prevalence in the Columbia Community and Den Hollander's direct contacts with it are stated in the Complaint at App.109-110.

The State's attorney asserts that Den Hollander "makes the remarkable assertion that his earlier lawsuit did not result in any adverse standing rulings that bind him today." (*State Brf.* p.11). That is remarkably false, since Den Hollander's Brief at p.46 states "collateral estoppel would apply to standing under Title IX and Equal Protection."

In the State's Brief at p. 7, the cite should be "J.A. 153-154 and 161-162."

STANDARDS OF REVIEW

Rule 59(e) motion that seeks review of a grant of summary judgment has a *de novo* standard of review. *Moore's Federal Practice*, §59.54[4][e], 3rd ed. (2012).

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

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

Rule 15 motion relies on *Foman v. Davis*, 371 U.S. 178 (1962), for determining whether a district court properly denied leave for a post-judgment amendment. *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002). Denial must be based on a justifying reason and be consistent with the liberal amendment policy. *United States on behalf of Maritime Admin. v. Continental Illinois Nat'l Bank & Trust Co.*, 889 F.2d 1248, 1254 (2d Cir. 1989). USDOE's Brief at p.15 ignores that "[o]utright refusal to grant the leave without any justifying reason for the denial is an abuse of discretion." *Jin* at 101 (citing *Foman* at 182). Den Hollander's Brief pp.26-32 argues the district court failed to provide a justifying reason.

ARGUMENTS

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

Motion to Vacate under Rule 59(e)

> "When a trial court grants a motion to alter or amend a judgment [Rule 59(e)], and the alteration or amendment is substantive, a new judgment results; the previous judgment no longer exists." *Moore's Fed. Prac.* §59.35

I. Newly discovered evidence

Rule 59(e) requires that newly discovered evidence "must have become available only after judgment (with the exercise of due diligence) …." *Moore's Fed. Prac.* §59.30[5][a]. USDOE now, for the first time, accuses Den Hollander of lying about using due diligence to find the testimony of two new plaintiffs of which he was unaware until after Judge Swain's *Order* in *Den Hollander II*.

(*USDOE Brf.* p.23). USDOE, of course, offers only its speculation that Den Hollander is a liar. If this Court wishes, the two plaintiffs will provide affidavits that expound on their verified, proposed Amended Complaint about what they will testify to and when Den Hollander discovered their willingness to testify.

II. Manifest injustice

Despite USDOE's arguments to the contrary, *USDOE Brf.* p. 24 n.**, the modern-day mantra of "choice" will be denied the two new plaintiffs if they bring a plenary action with Den Hollander as their counsel. If "choice" allows females to kill incipient human beings—over 50 million since *Roe v. Wade*—then these two men should at least have the right to their choice of counsel in bringing a subsequent suit. However, *Fulani v. Bentsen*, 862 F.Supp. 1140 (S.D.N.Y. 1994), and the "activist" judges of the Second Circuit will undoubtedly use collateral estoppel to prevent the new plaintiffs from filing a subsequent suit.

Motion to Amend the Complaint Post-Judgment

III. Power to amend post-judgment

> "There is a division of authority among the circuits concerning the allowance of amendments which involve the adding of parties. However, we believe the philosophy underlying the federal rules [has been] well expressed by the Supreme Court … and is controlling: 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' This purpose is not furthered by giving Rule 15 lip service rather than full fealty. Nor is the purpose of the federal rules furthered by denying the addition of a party who has a

> close identity of interest with the old party when … [there will be no prejudice]. The ends of justice are not served when forfeiture of just claims because of technical rules is allowed."

Travelers Indem. Co. v. U.S. ex rel. Construction Specialties Co., 382 F.2d 103, 105-06 (10th Cir. 1967)(quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

The State's attorney, consistent with the ends of injustice toward men, tries to distinguish the seminal case in the Second Circuit for substituting parties—*Hackner v. Guaranty Trust Co. Of New York*, 117 F.2d 95, 98 (2d Cir. 1941), *cert. denied*, 313 U.S. 559 (1941). She first re-labels "substitute[d] parties," the words used by *Hackner*, with the label "intervenor[s]." *State Brf.* p.24. She then asserts that because Den Hollander made no "motion to intervene," *Hackner* does not apply. To her it is irrelevant that Den Hollander made a motion to amend, and rather fickle of her considering that the State conceded a motion to amend was the correct procedure for adding parties. (*See State Opposition Motions to Vacate and Amend*, pp.5-7, Docket 36, App.11).

Inconsistency of positions is an old political trick while re-labeling is a common Feminist tactic to alter the perception of reality by changing the words used to describe it. *Hackner* is about substituting parties, specifically plaintiffs—just as is the proposed amendment in this case.

USDOE argues that the proposed amendment would not cure Den Hollander's standing; therefore, it is futile. (*USDOE Brf.* pp.25-27). In *Hackner*,

the initial plaintiffs' amended complaint, which was rejected by the district court, did not cure their jurisdictional standing either. The Court of Appeals, however, allowed the amendment because it substituted a new plaintiff who met the jurisdictional amount:

> Since [the new plaintiff] alleges grounds of suit in the federal court, the only question is whether or not she must begin a new suit again by herself. Defendants' claim that one cannot amend a nonexistent action is purely formal, in the light of the wide and flexible content given to the concept of action under the new rules. Actually she has a claim for relief, an action in that sense; as the Supreme Court has pointed out, there is no particular magic in the way it is instituted. *Chisholm v. Gilmer*, 299 U.S. 99, 102 (1936).

Hackner at 98.

USDOE also argues semantics in that Den Hollander's proposed Amended Complaint does not "substitute" parties, but "adds" them. (*USDOE Brf.* p.26). Although Rule 15(c)(1)(C) refers only to an amendment that "changes the party," courts and commentators agree that the word "changes" must be interpreted sensibly and pragmatically to include the addition of parties. *Andujar v. Rogowski*, 113 F.R.D. 151, 154 n.4 (S.D.N.Y. 1986). As for Rule 21, it specifically states a court may "add or drop a party." So even under USDOE's Clintonesque linguistics, the district court could add the two new plaintiffs and then drop Den Hollander with the end result being one of substitution. Therefore, all those cases that USDOE alleges as not applying do apply. (*USDOE Brf.* p.26).

Whether substituting or adding parties, the proposed Amended Complaint is not futile as USDOE wrongly asserts, *USDOE Brf.* p.25-26, because, as in *Hackner*, the case will continue. Such will avoid the delay, expenses, and judicial inefficiency of the two new plaintiffs filing the case again, and will not prejudice USDOE or the State, since the same policies of both will be at issue.

IV. The district court abused its discretion under *Foman* by failing to provide a "justifying reason" for not allowing amendment of the Complaint.

The State's attorney and USDOE argue that a justifying reason not to permit the amendment is that the taxpayer allegations in the proposed Amended Complaint fail because the State and USDOE funds in question are provided students who choose how to use those funds. It is called student-aid. (*State Brf.* pp.15-17; *USDOE Brf.* pp.30-31). The State's attorney and USDOE got the law right but the facts wrong. The proposed Amended Complaint does <u>not</u> allege that student-aid violates the Establishment Clause. If the State's attorney had exercised a little more diligence, she would have seen that the proposed Amended Complaint alleges the provision of "non-student aid" violates the Establishment Clause. (Proposed Amended Complaint, p.2, App.173). USDOE also overlooked this fact.

The State's attorney argues that another justifying reason is that the non-economic injury allegations are "meritless." Her lack of diligence is showing again because she cites to the original Complaint—not the proposed Amended Complaint. (*State Brf.* p.18). In dealing with post-judgment motions to vacate and

amend "it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previous judgment." *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011). The State's attorney took into account the wrong complaint.

The State's attorney also argues that granting the amendment would be futile because the proposed Amended Complaint would be dismissed on the merits anyway, since Feminism is not a religion. (*State Brf.* p.24). The problem here is that she confuses her personal views with the legal requirements of the Supreme Court and five other Courts of Appeals.

Despite her proclamation, *State Brf.* p. 21, the Supreme Court has rejected the view that religion is defined in terms of a Supreme Being by noting that "Buddhism, Taoism, Ethical Culture, Secular Humanism," and other non-theistic belief-systems are religions. *Torasco v. Watkins*, 367 U.S. 488, 495 n. 11, (1961). In two cases, the Supreme Court found that secular beliefs of a purely ethical or moral source and content which impose a duty of conscience can function as a religion. *Welsh v. U.S.*, 398 U.S. 333, 340 (1970); *U.S. v. Seeger*, 380 U.S. 163, 184-85 (1965).

Altman v. Bedford Cent. School Dist., 45 F.Supp.2d 368, 378, (S.D.N.Y. 1999), *rev'd on other grounds*, 245 F.3d 49 (2d Cir. 2001), determined whether a belief-system was religion for Establishment Clause proposes by using the analysis

from *Malnak v. Yogi*, 592 F.2d 197, 208-210 (3d Cir. 1979)(Adams, J. concurring). Judge Adams's guidelines have been adopted by the Third, Fourth, Eighth, Ninth, and Tenth Circuit Courts of Appeals. The State's attorney ignores this analysis.

The *Malnak* test looks at three indicia: whether the belief-system (1) addresses fundamental and ultimate questions having to do with deep and imponderable matters, (2) is comprehensive in nature, (3) has formal and external signs such as structure, organization, efforts at propagation, and observance of holidays. Not all of the indicia need be satisfied for a belief-system to be a religion, but in the case of the Feminism inculcated by the State and practiced at Columbia and Hofstra—all three are. (Proposed Amended Complaint ¶¶37-65, App.178-184).

USDOE also argues that under Rule 12(b)(6) the proposed Amended Complaint would be dismissed and it is frivolous. (*USDOE Brf.* p.27). USDOE, however, fails to provide the required analysis for dismissing a complaint on the merits under 12(b)(6) as proscribed by *Ashcroft v. Iqbal*, 556 U.S. 662, 679-81 (2009) and *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). For that analysis, please see *Den Hollander Brf.* pp.28-29.

The closest that USDOE comes to the required analysis is its assertion that the proposed Amended Complaint provides "no factual allegations" of funds provided by Congress for specific USDOE programs that are applied so as to aid

the inculcation of Feminism in New York's higher education. That is simply false as the proposed Amended Complaint alleges at ¶¶32-36, 76-78, 123, 125, 159-160, 162-168, App.177-178, 185-186, 194-195, 199-201.[1]

As for "frivolity," "[a] court may dismiss a claim as 'factually frivolous' if the sufficiently well-pleaded facts are 'clearly baseless'—that is, if they are 'fanciful,' 'fantastic,' or 'delusional.'" *Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011)(citing *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992)).

USDOE relies on Judge Kaplan's statement in *Den Hollander I* that "Feminism is no more a religion than physics . . . ." (*USDOE Brf.* pp.27, 29). Whether that statement is fanciful, fantastic, or delusional, this Court can decide.

USDOE also relies on a number of cases but to no avail. (*USDOE Brf.* pp.29-30).

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972), stated religion is not merely a matter of personal preference, but is shared by an organized group, and intimately related to daily living. *Yoder* cited to Justice Harlan's concurring opinion in *Welsh v. U.S.*, 398 U.S. 333, 353 (1970), that religion is more than devotion "to individual principles acquired on an individualized basis"; that it involves "shared beliefs by a recognizable and cohesive group." The Feminism

[1] Some of the allegations are "on information and belief," which are allowed when the facts are within the defendants' knowledge or control as here. *Luce v. Edelstein*, 802 F.2d 49, 54 n.1 (2d Cir. 1986).

propagated at Columbia's IRWG, Hofstra's Women's Studies program, and by the State is a well organized, far reaching belief system of widely accepted tenets that mandate daily activities in how to live, work and relate to others. (Proposed Amended Complaint ¶¶43-65, App.179-184).

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

The proposed Amended Complaint alleges for IRWG, Hofstra's Women's Studies program and the State's *Equity for Women in the 1990s* policy statement and its other policy statements, the characteristics cited in *Meyers* and *Alvarado*. (Proposed Amended Complaint ¶¶43-65, 99-113, App.179-184, 190-193). Therefore, by USDOE's own cited criteria, the proposed Amended Complaint alleges the Feminism promoted and financed by the State and financed by USDOE

satisfies the requirements of a religion. Of course, USDOE's cited criteria may be frivolous, which is also for this Court to decide.

In ruling on a frivolity issue, courts need to discern the distinction between the "novel"' and the "frivolous." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). In making that distinction, courts should remember that "the law is hardly static—and a federal court has jurisdiction to hear claims on the margins of reasonable possibility." *Id*.

Collateral Estoppel

V. Don't let the facts get in the way of a good argument.

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

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

Magistrate Fox's *Report* and Judge Kaplan's *Order* that they actually considered and decided non-economic injury when they did not.

When divination is insufficient, she simply re-writes the words. For example, she says the district court found nothing more than "feelings of offense" and "subjective offense." (*State Brf.* pp.9, 12) The words "feelings" and "offense" are not in Magistrate Fox's *Report*, and he actually found a "subjective 'chill'." There's a big difference and the State's attorney knows it. She is intentionally trying to mislead by creating the impression that the district court reached a decision on Establishment Clause non-economic injury when it did not.

The "subjective chill" quote actually comes from *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972): "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 …." This is part of the injury analysis of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which the Court of Appeals used for the discrimination based claims. (Second Circuit *Summary Order*, pp.3-4, App.93-94). It is not part of the non-economic injury claim under the Establishment Clause, *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101, 1108 (2d Cir. 1992), nor does it deal with taxpayer injury under *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001), which the Court of Appeals separately cited at p.4, App.94.

The State's attorney argues that she knows what Den Hollander really meant despite the words he used. She decrees the taxpayer and non-economic injury allegations in the *Den Hollander I* Amended Complaint are "indistinguishable" from those in the *Den Hollander II* Complaint. (*State Brf.* p.10). This despite that Judge Calabresi emphasized during oral argument in *Den Hollander I* that there were no allegations of taxpayer standing in the Amended Complaint. (Transcript, pp.2- 3, 5-8, 10 App.81-82, 84-87, 89). And despite the fact that non-economic injury was never mentioned in oral argument or this Court's *Summary Order*—only silence.

Relying on the maxim that anything can be true when the facts are ignored, the State's attorney also says the "Non-economic Standing" section in the *Den Hollander II* Complaint, App.109-111, is "nearly identical" to the non-economic injuries alleged in the *Den Hollander I* Amended Complaint. (*State Brf.* p.13). It does not matter to her that there is no "Non-economic Standing" section in the *Den Hollander I* Amended Complaint. It does not matter to her that in the *Den Hollander I* Amended Complaint the legally crucial words "offensive," "offense," "very uncomfortable," and "discomfort" are not used—but she knows best. She knows what Den Hollander really meant despite the words he used because re-writing the factual history of *Den Hollander I* is her only chance to have this Court uphold a collateral estoppel decision when the courts in *Den Hollander I* never

litigated nor decided the Establishment Clause non-economic injury, and taxpayer injury was only considered in the Court of Appeals—but improperly so.

Further, if the State believed that the issues of non-economic and taxpayer injuries were raised and litigated in the district court in *Den Hollander I*, then why did it fail to address those issues in its motion to dismiss before Magistrate Fox. If the State believed the issue of non-economic injury was raised and litigated in the Court of Appeals, then why did it fail to address that issue in its Brief? To now claim that those issues were raised and litigated throughout the *Den Hollander I* proceedings but the State failed to address them makes no sense, unless the State is engaged in the type of revisionist history reminiscent of Orwell's 1984. [2]

The State attorney's zealotry in defending the faithful drive her to illogically declare that the district court must have decided the non-economic and taxpayer issues; otherwise, the decisions "make[] no sense." In the real world, court decisions do not always make sense, such as *Plessy v. Ferguson*, 163 U.S. 537 (1896) or *Citizens United v. FEC*, 558 U.S. 310 (2010). Still, the State's attorney shrilly proclaims she is right because Magistrate Fox in *Den Hollander I* cited to *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982).

[2] USDOE also asserts that the non-economic injury allegations in *Den Hollander II* were somehow included in the *Den Hollander I* Amended Complaint. If that were so, then why did USDOE fail to address such a material issue in its motion to dismiss? Because the allegations are not there.

The *Valley Forge* cite does not deal with taxpayer or non-economic injury and quotes, in part, from the secular case *U.S. v. SCRAP*, 412 U.S. 669, 687 (1973). The cited part of the *Valley Forge* opinion reviews the general requirements for Article III standing, as Supreme Court cases often do when expounding on the law. The cite basically states that general grievances over the unconstitutional acts of government do not provide standing, which is how Magistrate Fox used it in denying Equal Protection and Title IX standing. The part of *Valley Forge* that applies to taxpayer standing is at 479—not 473 that Magistrate Fox cited. True to her dissembling, the State's attorney willingly ignores this.

While Magistrate Fox and Judge Kaplan may have thought that Den Hollander had Establishment Clause standing, we do not know whether they did or not and there's the rub. Ambiguity is insufficient for collateral estoppel to apply. (*Den Hollander Brf.* pp.37-38). The State's attorney, therefore, tries to spin the pleadings and decisions in *Den Hollander I* to say the tea leaves reveal that non-economic and taxpayer injury were litigated and decided and properly so from the Magistrate to the Court of Appeals. Such irrationality is more befitting séances than briefs in the Court of Appeals.

Another reason the State's attorney found it necessary to re-write the record in *Den Hollander I* was so she could assert that the Court of Appeals could

properly make a decision on taxpayer injury. (*State Brf.* p.11). Of course, the Court could not because the record on appeal does not address taxpayer or non-economic injury. Not the Amended Complaint, not the three motions to dismiss, not the opposition to the motions to dismiss, not the Magistrate's *Report*, and not the Judge's *Order* ever touch upon non-economic or taxpayer injury. They are all silent as to those two fact issues, so the record on appeal provides no basis for a decision on them by the Court of Appeals.

USDOE's collateral estoppel argument has two themes: (1) Den Hollander's failure to plead non-economic and taxpayer injuries in *Den Hollander I* cannot stop collateral estoppel from applying, and (2) when the courts in *Den Hollander I* used the term "standing" they specifically meant non-economic and taxpayer standing under the Establishment clause.

Theme (1): True, Den Hollander had the opportunity in *Den Hollander I* to allege taxpayer and non-economic injuries, but thanks to the peculiar condition of being human, he did not, despite that he is a lawyer, which some may argue means he is not human. To deal with this problem of human fallibility, the Federal Rules of Civil Procedure were adopted in 1938:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley v. Gibson, 355 U.S. 41, 48 (1957).

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

> That the magistrate judge and the district court did not address plaintiff's specific theory of taxpayer standing, see Br. 35-40, does not defeat the application of issue preclusion. Plaintiff could have, but did not, make that argument until the *Den Hollander I* case reached this Court [Court of Appeals], and thus it is not surprising that the magistrate judge and the district court did not anticipate the argument or address it *sua sponte*.

(*USDOE Brf.* p.19).

Actually, it does matter because whether a fact issue is raised and litigated means there is a fight over it in court, and the way parties fight in court is with arguments. No argument—no fight, and a fact issue goes uncontroverted. As USDOE states, this raises a problem that the unscrupulous will manipulate an advantage through piecemeal litigation. Whether or not Den Hollander is ethical, it is unlikely he intended this case to carry on for over four years.

Theme (2): While admitting above that the fact issues of taxpayer and non-economic injuries were not raised or litigated before Magistrate Fox and Judge Kaplan in *Den Hollander I*, USDOE contradictorily uses semantics to infer they were. USDOE's semantics are that usage of the word "standing" is sufficient to satisfy the collateral estoppel requirement that the "precise" and "identical" issues of non-economic and taxpayer injuries were previously litigated. "At each stage of

the Den Hollander I litigation, the court (if not plaintiff) addressed plaintiff's standing to pursue the Establishment Clause claim." (*USDOE Brf.* p.18).

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

While an issue that is distinctly presented in the pleadings and necessarily resolved may be reflected in a decision that includes that point, although it may not be expressly mentioned in that decision, *See Grubb v. Public Utilities Comm'n*, 281 U.S. 470, 477-478 (1930), non-economic and taxpayer injuries were never distinctly presented in the *Den Hollander I* Amended Complaint.

USDOE also relies on the rule that when the court below has not passed on the issue of standing, an appeals court may examine that issue. *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994). The case here is distinguishable in that Magistrate Fox and Judge Kaplan did pass on the issue of

standing for Equal Protection and Title IX—they just failed to address non-economic and taxpayer standing.

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

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

VI. A fact in existence but not pleaded in a prior case can be used to cure standing in a subsequent case.

Magistrate Pitman held that (1) "a dismissal for lack of standing collaterally estops subsequent suits which present the precise standing issue that was actually determined" and (2) the "weight of authority" from other "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." (Pitman's *Report* pp.23-27, App.148-149 (emphasis added)).

Magistrate Pitman applied point (2) to hold that since Den Hollander was a taxpayer at the time of filing *Den Hollander I* and the facts underlying non-economic injuries existed at that time, his failure to plead them in *Den Hollander I* means he is collaterally estopped from pleading them in *Den Hollander II*. (Pitman's *Report* p.29, App.154).

The problem with this analysis is fourfold.

First, point (1) is not satisfied. The "precise standing issue" of non-economic injury was never "actually determined" by any judge in *Den Hollander I* and the issue of taxpayer injury was never determined in the district court and improperly determined in the Court of Appeals. (*Den Hollander Brf.* pp.35-40).

The following cases used by Magistrate Pitman, unlike here, had the precise standing issue decided in an earlier case: *Dresser v. Backus*, 2000 WL 1086852 (4th Cir. 2000)(unpublished); *Hooker v. Federal Election Comm'n*, 21 F. App'x 402 (6th Cir. 2001)(per curiam); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396 (7th Cir. 1987); *Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agric.*, 378 F.3d 1132 (10th Cir. 2004); *DaCosta v. United States*, 2010 WL 537572 at *4 (Fed. Cl. 2010).

Second, the following cases used by Magistrate Pitman do not involve the absence of a jurisdictional fact in a prior pleading that existed at the time the first pleading was filed: *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948**)**; *Ball v. A.O. Smith Corp.*, 451 F.3d 66 (2d Cir. 2006); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138 (2d Cir. 2005); *Bear, Stearns & Co. v. 1109580 Ont., Inc.*, 409 F.3d 87 (2d Cir. 2005); *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003); *Marvel Characters v. Simon*, 310 F.3d 280 (2d Cir. 2002); *Boguslavsky v. Kaplan*, 159 F.3d 715 (2d Cir. 1998); *Mrazek v. Suffolk Cnty. Bd. of Elections*, 630 F.2d 890 (2d Cir. 1980); *Harley v. Minnesota Mining and Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002); *Brereton v. Bountiful City Corp.*, 434 F.3d 1213 (10th Cir. 2006); *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987); *Ammex, Inc. v. U.S.*, 384 F.3d 1368 (Fed. Cir. 2004); *People of Bikini v. United States*, 77 Fed. Cl. 744 (Fed. Ct. Cl. 2007); *Bui v. IBP, Inc.*, 205 F. Supp. 2d 1181(D. Kansas 2002).

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

The cases are *Smith v. McNeal*, 109 U.S. 426 (1883); *Ripperger v. A. C. Allyn & Co.*, 113 F.2d 332 (2d Cir. 1940), *cert. denied*, 311 U.S. 695; Y*ork v. Guaranty Trust Co.*, 143 F.2d 503 (1944), *overruled on other grounds*, 326 U.S. 99

(this Supreme Court case was later abandoned in *Hanna v. Plumer*, 380 U.S. 460 (1965); and *Lowe v. U.S.*, 79 Fed. Cl. 218 (Fed. Ct. Cl. 2007)).

Smith at 431 held that adding a jurisdictional fact that existed when the first suit was filed was sufficient for the second suit:

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

Magistrate Pitman held that *Dozier v. Ford Motor Co*., 702 F.2d 1189 (D.C. Cir. 1983) overruled *Smith* because *Smith* was decided before the Federal Rules of Civil Procedure allowed for the liberal amendment of pleadings. (Pitman's *Report* p.31, App.156). That reasoning is faulty because since 1938 two Second Circuit cases have relied on *Smith* in upholding the defect in pleading cure. *York*, 143 F.2d at 518-19 and n.21; *Ripperger*, 113 F.2d at 333-334. Further, *Smith* continues to be cited as good law by the courts of the Fourth, Sixth, and Seventh Circuits and by the Federal Court of Claims.

Magistrate Pitman re-writes *Ripperger* to mean "that jurisdictional defects can only be cured with new facts that post-date the prior action's dismissal." (Pitman's *Report* p.33, App.158). *Ripperger* relied on *Smith* stating that when "the first suit was dismissed because the complaint did not allege the requisite jurisdictional facts … the dismissal was held to be no bar to a second suit in the

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

The following authorities disagree with Magistrate Pitman's re-writing of *Ripperger*: *Kendall v. Overseas Dev. Corp.*, 700 F.2d 536, 539 (9th Cir. 1983); *Josephson's Nat'l Bar Review Centers, Inc. v. Nexus Corp.*, 359 F. Supp. 1144, 1146 (N.D. Ill. 1973); *Panaview Door & Window Co. v. Van Ness*, 135 F. Supp. 253, 260 (D. Cal. 1955).

Magistrate Pitman also wrongly declares the following statement in *York* to be *dicta*:

> "This too should be noted: As appears from *Ripperger v. A.C. Allyn & Co.* and *Smith v. McNeal*, a prior decision dismissing a suit on the mere pleadings for lack of jurisdiction is not a bar to a second suit alleging sufficient jurisdictional facts which existed when the first suit was pending but which were not therein alleged. *Cf. Wiggins Ferry Co. v. Ohio & M.R. Co.*, 142 U.S. 396, 410 (1892); *Sylvan Beach v. Koch*, 140 F.2d 852, 860 (8th Cir. 1944); *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 121 F. 313, 318 (6th Cir. 1903)."

York, 143 F.2d at 519 n.21.

Footnote 21 in *York* is used to support this Court's decision that the jurisdictional holding in a prior case in which the diversity amount was not reached would not be used to collaterally estop that issue in *York*.

Further, *Steele v. Guaranty Trust Co.*, 164 F.2d 387, 388-89 (2d Cir, 1947), and *In re Soya Products Co.*, 112 F. Supp. 94, 97 (S.D.N.Y. 1993), do not treat footnote 21 as *dicta*.

Magistrate Pitman also ignored *Lowe v. U.S.*, 79 Fed. Cl. 218, which was cited by Den Hollander in the district court. *Lowe* held that collateral estoppel will not prevent a subsequent suit based on the same facts if the cure "repair[s] the prior jurisdictional defect." *Lowe* at 229-30. In *Lowe* the curable defect exception did not apply because the additional fact was irrelevant to the issue of whether the court had subject matter jurisdiction.

Fourth, cases from other circuits allow curing a jurisdictional defect by stating facts that existed prior to dismissal of the first action. *Mann v. Merrill Lynch, Pierce, Fenner & Smith*, 488 F.2d 75, 76 (5th Cir. 1973), has been followed by two other circuits: *Johnson v. Boyd-Richardson Co.*, 650 F.2d 147, 149 (8th Cir. 1981)("[t]he issue here is indistinguishable" from the *Mann* decision) and *Trujillo v. Colorado*, 649 F.2d 823, 825 (10th Cir. 1981)(this is "[a] case factually close" to *Mann*). In addition, *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3rd Cir. 1972), held "jurisdictional dismissals do not bar further litigation of the cause of action when the subsequent complaint cures the jurisdictional defect."

The only cases that might support Magistrate Pitman and Judge Swain's position are *In re V&M Mgmt., Inc.*, 321 F.3d 6 (1st Cir. 2003); *Perry v. Sheahan*,

222 F.3d 309 (7th Cir. 2000), and *Citizens Elecs. Co. v. OSRAM GmBH*, 225 F. App'x 890, 893 (Fed. Cir. 2007), which cannot not be cited for precedential value. So at best, the lower court has two and a half cases from three circuits.

Den Hollander, however, has eleven cases: two Supreme Court, two Second Circuit, one Third Circuit, one Fifth Circuit, one Sixth Circuit, two Eighth Circuit, one Tenth Circuit and one Court of Claims. Looks like the weight of authority is in Den Hollander's favor.

State's summary judgment request

The State now requests summary judgment on the issue that Feminism is not a religion. (*State Brf.* pp.19-22).

Talk about changing one's mind and wanting another bite of the apple. The State had its chance for summary judgment on whether Feminism is a religion when Magistrate Pitman converted its motion to dismiss to one for summary judgment. (Pitman *Order*, pp.1-2, App.123-124). The State opposed the conversion and refused to submit additional material. (Letter from Clement Colucci to Judge Pitman, June 24, 2011). As a result, the State has no affidavits, verified pleadings, authenticated documents, expert opinions, or other evidence in the record.

Lacking evidence, the State's attorney tries to rely on the criminal case *U.S. v. Allen*, 760 F.2d 447 (2d Cir. 1985), to argue that this Court can take judicial

notice that Feminism is not a religion, since "'the conventional, majority view'" holds such. (*State Brf.* p.19). The problem with this proposition from *Allen* for defining religion is that it is *dicta*. The *Allen* Court held there was no aiding of religion. It never ruled on whether "nuclearism" was a religion. "[E]ven if 'nuclearism' could be classified as a religion," the statute in question did not aid "nuclearism" because it had a secular purpose and did not have the effect of advancing such. *Allen*, at 451-52.

In addition, to establish an adjudicative fact by judicial notice requires a "high degree of indisputability…." Advisory Committee Note, *Fed. R. Evid.* 201, subdivision (a). That "high degree" does not exist in this case, since both sides are in dispute over the core issue of whether Feminism is a religion.

CONCLUSION

Both the State's attorney and USDOE complain that this men's rights case does not deserve another bite at the "apple." (*State Brf.* p.15; *USDOE Brf.* p.17). Why not? The National Organization of Women and other Feminists advocates of abortion had numerous bites at the "apple" in *NOW v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). Just because a man did not offer the apple, does not mean he's limited to one bite while the offeror has as many as she wishes.

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New York, N.Y.

/S/ Roy Den Hollander
Roy Den Hollander, Esq.

Attorney for plaintiffs-appellants
545 East 14 Street, 10D
New York, N.Y. 10009
(917) 687 0652

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) by containing 6,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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