12-2362

To Be Argued By:
JEAN-DAVID BARNEA

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 12-2362

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

(*caption continued on inside cover*)

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

BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

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Defendants-Appellees.

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BRIEF FOR THE FEDERAL DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

Plaintiff-appellant Roy Den Hollander appeals from a final judgment of the United States District Court for the Southern District of New York (Laura Taylor Swain, *J.*), entered on October 31, 2011, dismissing his complaint against defendants-appellees the U.S. Department of Education (the "Department") and Secretary of Education Arne Duncan (together, the "Federal Defendants"), and several State defendants-appellees, including the Members of the Board of Regents of the University of the State of New York (collectively, the "State Defendants"). Plaintiff also appeals from the district court's May 21, 2012, order denying his motions pursuant to Federal Rules of Civil Procedure 15 and 59(e), to vacate the judgment in order to file an amended complaint.

This case represents the second, and third, attempts by plaintiff—an attorney proceeding *pro se*—to pursue a frivolous First Amendment claim against the Federal Defendants. Plaintiff claims that the funding the Department provides to Columbia University ("Columbia"), which like many universities houses a women's studies department, violates the First Amendment's Establishment Clause by promoting "Feminism." Plaintiff maintains that the "Feminism" purportedly espoused by the university constitutes a religious ideology ineligible for federal support.

Plaintiff's first lawsuit asserting a materially identical claim against the Federal Defendants ("*Den Hollander I*") was dismissed by the district court for lack of standing and frivolousness. *See Den Hollander*

v. Inst. for Research on Women & Gender, No. 08 Civ. 7286 (LAK)(KNF), 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009), *adopted by* Order dated Apr. 23, 2009 (JA 68-77, JA 78-79).* This Court upheld the dismissal of *Den Hollander I*, holding that plaintiff had failed adequately to plead standing. Although it did not reach the Establishment Clause issue, the Court indicated that it shared the district court's "grave doubts" about the merits of plaintiff's claim. *See Den Hollander v. Inst. for Research on Women & Gender*, 372 F. App'x 140, 142 (2d Cir. 2010) (JA 91-94).

Despite this Court's order in *Den Hollander I*, plaintiff commenced a new action in an effort to cure the pleading deficiencies that the Court had identified in his earlier complaint. The district court dismissed the new complaint on the ground that the doctrine of issue preclusion (or collateral estoppel) bars plaintiff from relitigating his standing. *See Den Hollander v. Members of Bd. of Regents*, No. 10 Civ. 9277(LTS)(HBP), 2011 WL 5222912 (S.D.N.Y. Oct. 31, 2011) (JA 165-70). After the district court entered judgment dismissing plaintiff's second complaint, plaintiff moved to vacate the judgment and file yet a third complaint, this time adding two new plaintiffs whose standing had not previously been litigated. The district court denied this request. (JA 205-06).

This Court should affirm the district court's judgment and its order denying post-judgment relief. Plaintiff had a full and fair opportunity to litigate his

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* Citations to the Joint Appendix and the Brief for Plaintiff-Appellant Roy Den Hollander appear respectively as "JA __," and "Br. __."

standing to bring an Establishment Clause claim, and the question of his standing was actually and necessarily decided in the *Den Hollander I* litigation. The district court thus correctly determined that plaintiff was precluded from relitigating the issue in a second lawsuit. The district court also acted well within its discretion in rejecting plaintiff's bid to vacate the judgment for the purpose of allowing plaintiff to amend his complaint to add two additional plaintiffs. Plaintiff did not satisfy the strict standard for reopening a judgment; he did not even satisfy the standard for amending a complaint, as his proposed amendment would have been futile. And the patent frivolousness of plaintiff's Establishment Clause claim provides a further, alternative basis for affirmance of the district court's judgment and its decision to deny plaintiff's motions to vacate the judgment and amend his complaint.

STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's complaint pursuant to 28 U.S.C. § 1331. The district court entered an order dismissing plaintiff's complaint on October 31, 2011, and judgment was entered the same day. (JA 165-70, 171). On November 21, 2011, plaintiff moved to vacate the judgment and amend his complaint pursuant to Federal Rules of Civil Procedure 15 and 59(e). (JA 10-11). The district court denied plaintiff's motions on May 21, 2012. (JA 205-13). On June 11, 2012, plaintiff filed a timely notice of appeal. (JA 214). Accordingly, this Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly dismissed plaintiff's complaint based on issue preclusion where in a previous proceeding, after a full and fair opportunity to litigate the issue, the district court and this Court held that plaintiff lacked standing to pursue the only claim asserted in this action.

2. Whether the district court abused its discretion in denying plaintiff's motions to vacate the judgment and amend the complaint to add two additional plaintiffs in an effort to circumvent the district court's ruling on issue preclusion.

3. Whether this Court may affirm the district court's judgment and its order denying plaintiff's post-judgment motions on the alternative ground that plaintiff's Establishment Clause claim is frivolous.

STATEMENT OF THE CASE

Plaintiff filed a complaint on December 10, 2010, alleging that the Federal and State Defendants violated the Establishment Clause by providing funding to Columbia. (JA 95-122). On July 1, 2011, the magistrate judge issued a report recommending that the district court grant summary judgment to the defendants on collateral estoppel grounds because plaintiff previously had filed a materially identical complaint, which was dismissed for lack of standing. (JA 126-64). On October 31, 2011, the district court adopted the magistrate judge's report and recommendation and granted summary judgment to the defendants. (JA 165-70). Judgment was entered on October 31, 2011. (JA 171). On November 21, 2011, plaintiff filed motions to vacate

the judgment and amend his complaint to add two additional plaintiffs. (JA 10, Dkt. Nos. 33-35). The district court denied plaintiff's motions by order dated May 21, 2012. (JA 205-06). This appeal followed.

STATEMENT OF FACTS

A. Plaintiff's First Lawsuit—*Den Hollander I*

On August 18, 2008, plaintiff, an alumnus of Columbia's business school, filed a purported class-action complaint asserting various claims related to Columbia's Institute for Research on Women and Gender (the "Institute") and the state and federal funding received by the university. One of the claims asserted by plaintiff was that Columbia and the Institute, in their course offerings and campus activities, "propagate[] Feminism," which plaintiff considers to be a "modern-day religion." (JA 15). According to plaintiff, the "religion" of "Feminism" is not "theistic in nature," but "stem[s] from moral, ethical or even malevolent tenets that are held with the strength of traditional religious convictions" (JA 15), including "historical revisionism, propagandizing, unanimity of thought labeled 'politically correct,' a pantheon of idols such as Mary Wollstonecraft, [and] *de facto* disciples and apostles." (JA 15).

Plaintiff asserted, as relevant here, that any federal or state support for Columbia violated the First Amendment's Establishment Clause. (JA 15-17). In particular, plaintiff alleged that the Federal Defendants "provide[] grants, direct loans of federal funds, guarantees for loans from private lenders, and work-study programs," as well as student loans, to Columbia, the Institute, and their students. (JA 17).

Plaintiff claimed that these forms of assistance violate the First Amendment's proscription against "favor[ing] . . . or adopt[ing] programs or practices that aid any religion." (JA 17). Plaintiff also asserted an Equal Protection claim against the Federal Defendants, founded on the allegation that while Columbia taught women's studies, it did not have a men's studies department. (JA 17-21).

With respect to plaintiff's asserted injury, the complaint in *Den Hollander I* alleged that he is a "resident of New York County [and] an alumnus of Columbia University's Graduate School of Business." (JA 29). Plaintiff alleged that as an alumnus, he is entitled to enroll in certain continuing-education courses at Columbia, but he could not find any courses in which he wished to enroll because Columbia did not offer courses in the field of "Men's Studies." (JA 29).

On April 15, 2009, after plaintiff had amended his complaint to add a second named plaintiff, the magistrate judge (Kevin Nathaniel Fox, *M.J.*) issued a report recommending that the district court dismiss the plaintiffs' claims against all defendants for lack of standing. (JA 68-77).* The magistrate judge noted that "plaintiffs d[id] 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

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* In *Den Hollander I*, the Federal Defendants did not move to dismiss plaintiff's Establishment Clause claim for lack of standing, but rather for failure to state a claim on which relief could be granted. (*Den Hollander I*, No. 08 Civ. 7286(LAK)(KNF), S.D.N.Y. Dkt. Entry No. 13 (filed Oct. 24, 2008), at 5-10).

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." (JA 75-76). "At most," the magistrate judge concluded, "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,'" and "[s]uch an 'injury' is not an 'injury in fact.'" (JA 76 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972))).

Plaintiffs objected to the magistrate judge's report and recommendation. (*Den Hollander I*, No. 08 Civ. 7286(LAK)(KNF), S.D.N.Y. Dkt. Entry No. 34 (filed Apr. 21, 2009)). Their standing argument focused entirely on whether the allegations in their complaint, regarding the supposedly deleterious effects of Columbia's women's studies program on its male students and alumni, amounted to an injury in fact sufficient to confer standing. (*Id.* at 6-13). Plaintiffs made no mention of their supposed taxpayer standing.

On April 23, 2009, the district court adopted the conclusions of the magistrate judge's report and recommendation and dismissed plaintiffs' claims in their entirety based on plaintiffs' lack of standing. (JA 78-79). The district court also considered the merits of plaintiffs' Establishment Clause and found it to be frivolous:

> [A]lthough 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 of the First Amendment. Feminism is no more a religion than physics, and at least the core of the complaint is therefore frivolous.

(JA 79). The district court thus dismissed "the Establishment Clause claim[] . . . also on the alternative ground that [it is] absurd and utterly without merit." (JA 79).

Plaintiff appealed the district court's judgment, though his co-plaintiff withdrew from the suit. (*Den Hollander I*, No. 09-1910-cv, 2d Cir. Dkt. Entry dated Aug. 25, 2009 (plaintiff's opening brief), at 1). In his brief to this Court, plaintiff argued that he had standing to pursue his Establishment Clause claim because he had been injured by his purported "direct contacts with Columbia's practice of propagating Feminism through its Women's Studies Program," which plaintiff now referred to as his "non-economic injury." (*Id.* at 26; *see also id.* at 25-36). Plaintiff also argued, for the first time, that he had taxpayer standing to pursue an Establishment Clause claim. (*See id.* at 20-21 (citing *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007)); *see also id.* at 13-24).*

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* On appeal, the Federal Defendants sought affirmance based on the district court's alternative holding that the Establishment Clause claim was frivolous. (*See Den Hollander I*, No. 09-1910-cv, 2d Cir. Dkt. Entry dated Dec. 14, 2009 (Federal Defendants' brief), at 15 n.*).

On April 16, 2010, this Court issued a summary order affirming the district court's judgment on standing grounds. (JA 91-94). The Court explained that "'[t]he party seeking judicial review bears the burden of alleging facts that demonstrate its standing.'" (JA 93 (quoting (*Green Island Power Auth. v. Fed. Energy Regulatory Comm'n*, 577 F.3d 148, 159 (2d Cir. 2009)) (additional quotation marks and brackets omitted)). With respect to the Establishment Clause claim, the Court held that plaintiff had not "made out the requirements for taxpayer standing." (JA 93-94 (citing *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001)). The Court further noted that although it had "no occasion to reach any of plaintiffs' further arguments on appeal," the Court "share[d], in any event, the district court's grave doubts" about those arguments. (JA 94). The Court then affirmed the dismissal of the action "for substantially the reasons stated in [the magistrate judge's] thorough Report and Recommendation as adopted by the district court." (JA 94). The Court also affirmed the district court's dismissal of plaintiff's Equal Protection claim for lack of standing. (JA 94). This Court's mandate issued on May 25, 2010. (*Den Hollander I*, No. 09-1910-cv, 2d Cir. Dkt. Entry dated May 25, 2010).

B. This Lawsuit

1. Plaintiff's Complaint

Plaintiff commenced this action on December 10, 2010. (JA 95-122). His complaint in this case essentially reiterates the Establishment Clause claim against the Federal (and State) Defendants from his complaint in *Den Hollander I*. (JA 111-21). The only new element in

this complaint is a standing section, which includes allegations relating to plaintiff's purported taxpayer standing to bring an Establishment Clause claim, in addition to his alleged standing based on the "non-economic" injuries he supposedly suffered as a Columbia alumnus as a result of exposure to allegedly "Feminist" information on Columbia's website and through unspecified university mailings. (JA 106-11). Plaintiff's new complaint listed various Department student-loan and grant programs that he alleged might provide some funding to Columbia. (JA 108).

2. The Magistrate Judge's Report and Recommendation

On July 1, 2011, the magistrate judge (Henry B. Pitman, *M.J.*) issued a detailed report recommending that the district court grant summary judgment to the defendants because the doctrine of issue preclusion bars plaintiff from relitigating his standing to bring an Establishment Clause claim. (JA 126-64).* The magistrate judge determined that "the issue of taxpayer standing was raised previously and was actually litigated and decided" in the *Den Hollander I* litigation, and that plaintiff "had a full and fair opportunity to litigate the taxpayer standing issue, and the resolution

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* The magistrate judge previously had converted the defendants' motions to dismiss into motions for summary judgment because they relied on materials outside the pleadings (the pleadings and court decisions from the *Den Hollander I* litigation), and offered the parties an opportunity to submit any additional evidence they possessed regarding this matter. (JA 123-25).

of this issue was necessary to a valid and final judgment on the issue of standing." (JA 154). The magistrate judge further concluded that plaintiff's "pleading of facts that were previously available at the time of the [*Den Hollander I* litigation] does not defeat collateral estoppel," because "a plaintiff is collaterally estopped from relitigating the standing issue with facts that were available to him at the time of the first action." (JA 154-55).

3. The District Court's Decision and Entry of Judgment

On October 31, 2011, the district court adopted the magistrate judge's report and recommendation in its entirety. (JA 165-70). The district court held that "Plaintiff's attempt to litigate alternate grounds for standing in this lawsuit is improper and unavailing" because "[t]he issue of Plaintiff's standing to litigate his Establishment Clause and related claims regarding the University's Women's Studies program was decided against him in *Den Hollander I*." (JA 169). The court explained that issue preclusion "'promotes judicial economy by reducing the burdens associated with revisiting an issue already decided.'" (JA 169 (quoting *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 303 (2d Cir. 1999))). Although a dismissal for lack of standing is one for lack of subject matter jurisdiction and therefore is without prejudice, the district court relied on the principle that "'a dismissal for lack of subject matter jurisdiction retains *some* preclusive effect [and] bars those matters that have been actually litigated—typically, the specific jurisdictional issue(s) that mandated the initial dismissal.'" (JA 169-70 (emphasis in original) (quoting *Lowe v. United States*, 79 Fed. Cl.

218, 229 (2007), which in turn cited *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) ("the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action"))). The district court entered judgment dismissing plaintiff's complaint the same day, on October 31, 2011. (JA 171).

4. Plaintiff's Motions to Vacate the Judgment and Amend the Complaint

On November 21, 2011, plaintiff filed motions, pursuant to Federal Rules of Civil Procedure 15 and 59(e), seeking to vacate the judgment and seeking leave to submit yet another version of his complaint. (JA 10-11, Dkt. No. 35). Specifically, plaintiff sought leave to add two "newly discovered plaintiffs"—whose standing had not previously been litigated—to the complaint. (JA 10-11, Dkt. No. 35, at 1). The proposed amended complaint again reiterated plaintiff's Establishment Clause claim, although it added allegations as to Hofstra University, the alma mater of one of the putative additional plaintiffs. (JA 172-201 (proposed amended complaint)). The district court denied plaintiff's motions on May 21, 2012, on the grounds that plaintiff failed to meet the standard for vacating a judgment under Rule 59(e) because additional plaintiffs do not constitute new evidence, and that plaintiff's proposed amendment did not cure his lack of standing. (JA 205-06 (adopting arguments in defendants' briefs at JA 207-13)).

SUMMARY OF ARGUMENT

This Court should affirm the district court's judgment dismissing this action because plaintiff is precluded from relitigating his standing to assert an Establishment Clause claim based on the Federal Defendants' provision of funding to Columbia. Plaintiff had a full and fair opportunity to litigate his standing in the *Den Hollander I* litigation, and each of the three judicial opinions in that case decided the standing issue explicitly. *See* Point I, *infra*.

The district court did not abuse its discretion in denying plaintiff's motions to vacate the judgment and amend his complaint. Plaintiff did not satisfy the standard for vacating a judgment under Rule 59(e), as he offered no newly discovered evidence to support his claim and failed to establish any other basis for post-judgment relief. And plaintiff's proposed amended complaint did not cure the defect in his pleading, making amendment futile. *See* Point II, *infra*.

This Court may also affirm the district court's judgment and its denial of plaintiff's post-judgment motions on the alternative ground that plaintiff's Establishment Clause claim is frivolous. Plaintiff's claim that feminism is a religion is patently meritless, and his argument ignores well-settled First Amendment law governing the scope of permissible federal support for private schools. *See* Point III, *infra*.

ARGUMENT

Standards of Review

This Court "review[s] a district court's application of the doctrine of collateral estoppel *de novo*, accepting all factual findings of the district court unless clearly erroneous." *Chartier v. Marlin Mgmt., LLC*, 202 F.3d 89, 93 (2d Cir. 2000). A district court's denial of a motion to vacate a judgment under Federal Rule of Civil Procedure 59(e) is reviewed for abuse of discretion. *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 150 (2d Cir. 2008). Similarly, this Court "appl[ies] a deferential, 'abuse of discretion' standard of review to [a] district court's informed discretion" in making a "decision whether to grant or deny leave to amend" a pleading. *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009), *on remand from* 556 U.S. 662 (2009).

POINT I

THE DISTRICT COURT CORRECTLY DISMISSED THIS ACTION BECAUSE THE DOCTRINE OF ISSUE PRECLUSION BARS RELITIGATION OF PLAINTIFF'S STANDING TO BRING AN ESTABLISHMENT CLAUSE CLAIM

"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." *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 689 F.3d 263, 284 (2d Cir. 2012) (quotation marks omitted). "Issue preclusion applies 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) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 918 (2d Cir. 2010) (quotation marks omitted).

In his complaint and amended complaint in *Den Hollander I*, plaintiff alleged that he was injured as a result of Columbia's failure to offer continuing-education courses in the field of "Men's Studies." (JA 29 ¶¶ 128-31 (complaint); *Den Hollander I*, No. 08 Civ. 7286(LAK)(KNF), S.D.N.Y. Dkt. Entry No. 17 (filed Dec. 1, 2008), ¶¶ 207-74 (amended complaint)).* The magistrate judge in that case recommended dismissal of the action for lack of standing because such an injury was too speculative to give rise to Article III standing. (JA 74-76). In his objection to the magistrate judge's report and recommendation, plaintiff had every opportunity to argue to the district court that he had taxpayer standing to bring an Establishment Clause claim, but he made no such argument. (*See Den Hollander I*, No. 08 Civ. 7286 (LAK)(KNF), S.D.N.Y. Dkt. Entry No. 34 (filed Apr. 21, 2009), at 6-13). The district court adopted the magistrate judge's analysis and held that plaintiff lacked standing to pursue the

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* This Court may take judicial notice of records from the docket of the *Den Hollander I* litigation in determining whether the decision in that case has preclusive effect in this litigation. *See AmBase Corp. v. City Investing Co. Liquidating Trust*, 326 F.3d 63, 72 (2d Cir. 2003).

Establishment Clause claim (and that it was frivolous). (JA 78-79). On appeal, plaintiff argued for the first time that he had taxpayer standing to pursue the Establishment Clause claim, and also argued that he had standing due to the injury he allegedly suffered as a result of his exposure to Columbia's women's studies program through university mailings and the like. (*Den Hollander I*, No. 09-1910-cv, 2d Cir. Dkt. Entry dated Aug. 25, 2009 (plaintiff's opening brief), at 13-24). This Court held that plaintiff had not pled sufficient allegations to establish taxpayer standing and also adopted the standing analysis of the magistrate judge and the district court, which held that plaintiff had not established an injury in fact sufficient to support standing. (JA 93-94).

The four elements of issue preclusion are thus met here. First, the "identical" issue was raised in the *Den Hollander I* litigation: plaintiff's standing to assert an Establishment Clause claim against the Federal Defendants based on the provision of federal funding to Columbia and its supposed espousal of the religion of feminism. *See Bank of N.Y.*, 607 F.3d at 918. Contrary to plaintiff's contention, *see* Br. 35-44, it is immaterial that he did not make a consistent set of arguments in support of his standing during the various phases of that lawsuit. The issue that plaintiff is collaterally estopped from litigating is his standing to assert an Establishment Clause violation, not any particular argument he may have made or failed to make regarding his standing in the prior action. To hold otherwise would encourage parties to litigate piecemeal, holding back facts or arguments for a second bite at the apple, the very circumstance the doctrine of issue preclusion was designed to avoid. As the district

court recognized, "'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 [he] finally satisfies the jurisdictional requirements [for standing].'" (JA 151-52 (quoting *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000)).

The cases cited by plaintiff are inapposite. This is not a case where the Court "cannot ascertain what was litigated" in the prior action. *Monarch Funding*, 192 F.3d at 309, *cited in* Br. 37. Nor are the "issues presented in this matter . . . different from those before the . . . court in the [prior] action." *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1399 (9th Cir. 1992) (litigations concerned two separate agency actions), *cited in* Br. 33. Nor is it "unclear whether the [first court] decided [a particular issue], or whether it simply concluded that it had no need to reach the issue." *NextWave Pers. Commc'ns, Inc. v. FCC*, 254 F.3d 130, 148-49 (D.C. Cir. 2001), *cited in* Br. 39. At each stage of the *Den Hollander I* litigation, the court (if not plaintiff) addressed plaintiff's standing to pursue the Establishment Clause claim. That is the identical issue presented in this case. (JA 106-11 (allegations in complaint regarding plaintiff's alleged standing)).

Furthermore, it is clear that plaintiff's standing to pursue an Establishment Clause claim was "actually litigated and decided in the previous proceeding," and that plaintiff had a "a full and fair opportunity to litigate the issue." *Bank of N.Y.*, 607 F.3d at 918. The district court and this Court explicitly ruled on plaintiff's standing in their respective decisions. The magistrate judge analyzed the allegations of plaintiff's

complaint and concluded that they could not support Article III standing. (JA 74-76). The district court adopted the magistrate judge's report and recommendation on the issue of standing. (JA 78-79). And this Court upheld the district court's judgment on standing grounds. (JA 93-94). 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, and thus it is not surprising that the magistrate judge and the district court did not anticipate the argument or address it *sua sponte*. *See, e.g.*, *United States v. Marcus*, 628 F.3d 36, 45 n.12 (2d Cir. 2010) (district court did not err in not addressing argument raised by defendant for the first time on appeal).

Plaintiff also finds fault in this Court's supposed failure to separately discuss his "non-economic standing" theory, Br. 40-41, based on his unspecified "direct contacts with Columbia's practice of propagating Feminism through its Women's Studies Program," *Den Hollander I*, No. 09-1910-cv, 2d Cir. Dkt. Entry dated Aug. 25, 2009 (plaintiff's opening brief), at 26. Again, plaintiff's argument is misplaced. This Court squarely held that plaintiff lacked standing to bring his Establishment Clause claim. In addition to briefly addressing plaintiff's taxpayer standing theory, the Court adopted the magistrate judge's report in full and the district court's decision with respect to standing, both of which held that plaintiff did not suffer an injury in fact sufficient to confer standing. (JA 94). This Court thus necessarily rejected all of plaintiff's standing

arguments in reaching its decision, even if it did not discuss them separately in its brief summary order.

Plaintiff curiously contends that because he raised taxpayer standing and the latest incarnation of his injury-in-fact argument (his alleged "non-economic injury") for the first time on appeal, this Court should have refused to consider them, and therefore this Court's previous determination cannot have preclusive effect in this case. *See* Br. 42-44. It is not clear how plaintiff's "non-economic injury" argument differed from the arguments he made in the district court regarding his alleged injury from contacts with Columbia and the Institute. But, in any event, "[b]ecause of their jurisdictional nature, [this Court] may . . . address standing arguments, even where . . . they were not raised in the district court." *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 93 (2d Cir. 2003); *see also Fabrikant v. French*, 691 F.3d 193, 212 (2d Cir. 2012) ("That we generally ignore arguments advanced for the first time on appeal (or, as here, at oral argument) is a prudential rule, not a jurisdictional one: We have discretion to consider waived arguments." (brackets and quotation marks omitted)). The Court committed no error in considering (and rejecting) plaintiff's new standing theories in the *Den Hollander I* appeal.*

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* It is also immaterial that the Federal Defendants did not seek to defend the district court's standing ruling on appeal in *Den Hollander I*. (*Den Hollander I*, No. 09-1910-cv, 2d Cir. Dkt. Entry dated Dec. 14, 2009 (Federal Defendants' brief), at 15 n.*). This Court was well within its authority to decide the appeal on this

Finally, the resolution of plaintiff's standing was unquestionably "necessary to support a valid and final judgment on the merits." *Bank of N.Y.*, 607 F.3d at 918. In the *Den Hollander I* litigation, the district court dismissed plaintiff's claim for lack of standing, while citing the claim's frivolousness as an alternative ground for the dismissal. (JA 78-79). But this Court's resolution of plaintiff's appeal was predicated exclusively on standing grounds. (JA 93-94).

Because plaintiff's standing to bring his Establishment Clause claim was fully and fairly litigated and actually and necessarily decided in the *Den Hollander I* litigation, the district court correctly held that plaintiff is collaterally estopped from relitigating that issue in this case. *See Mrazek v. Suffolk Cnty. Bd. of Elections*, 630 F.2d 890, 898 n.10 (2d Cir. 1980) ("the issue of [certain plaintiffs'] standing . . . has been determined adversely to them in the state courts and that decision is binding upon us under principles of res judicata"); *see also Coll. Sports Council v. Dep't of Educ.*, 465 F.3d 20, 22-23 (D.C. Cir. 2006) (upholding dismissal of challenge to agency policy because same plaintiffs had brought similar challenge a few years earlier, which had been dismissed for lack of standing).

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ground, which both was raised in the district court and is jurisdictional.

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTIONS TO VACATE THE JUDGMENT AND AMEND THE COMPLAINT TO ADD NEW PLAINTIFFS

The district court acted well within its discretion in denying plaintiff's post-judgment motions. Plaintiff's application did not satisfy the strict standard for vacating a judgment under Federal Rule of Civil Procedure 59(e), and his proposed amended pleading did not cure the jurisdictional defect in his original complaint: plaintiff's own lack of standing to maintain his Establishment Clause claim.

A court may grant a motion to alter or amend a judgment where there is an intervening change in the controlling law, new evidence previously not available comes to light, or it is necessary to remedy a clear error of law or to prevent manifest injustice. *See Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (standard for reconsideration motion), *cited in Peterson v. Syracuse Police Dep't*, 467 F. App'x 31, 34 (2d Cir. 2012) (applying standard to Rule 59(e) motion).

Plaintiff's argument that the two new plaintiffs who wished to join his complaint somehow constituted "newly discovered evidence," Br. 14-15, is without merit. The burden to establish that newly discovered evidence warrants vacating a judgment is "onerous." *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001). "[T]he movant must demonstrate that (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive

proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching." *Id.* (quotation marks omitted). Additional parties do not satisfy this standard: they are not "facts" or "evidence." Plaintiff also failed to establish justifiable ignorance or due diligence. That plaintiff was able to "f[i]nd two New York State residents willing to add their names as plaintiffs to this suit" after the district court's judgment was entered, Br. 9, falls well short of satisfying the exacting standard for vacating a judgment.*

Nor did plaintiff establish that vacating the judgment was necessary to avoid "manifest injustice." Plaintiff claims that the district court has placed the putative additional plaintiffs in a Catch-22 because

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* Contrary to plaintiff's suggestion, Judge Straub did not "criticize" plaintiff during oral argument in the *Den Hollander I* case "for not trying to amend the complaint post-judgment in that case." Br. 1 (citing JA 80). Rather, Judge Straub asked plaintiff to explain why he had not attempted to amend his complaint to add allegations supporting his new theory of taxpayer standing after the magistrate judge and the district court concluded that he lacked Article III standing to pursue his Establishment Clause claim. (JA 80). Certainly, Judge Straub did not suggest that plaintiff should file an entirely new litigation to remedy his failure to seek amendment of his complaint in *Den Hollander I*.

they were not permitted to join plaintiff's lawsuit, but might nevertheless be precluded from instituting their own action on account of their failed attempt to participate in this case. *See* Br. 16-17. But the district court acknowledged, in adopting the reasoning of the State Defendants' brief, that "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." (JA 210, *cited in* JA 206).* In light of this, plaintiff's concern appears to be unfounded.**

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* It was not improper, as plaintiff suggests, *see* Br. 6, for the district court to have adopted particular arguments made by defendants' counsel (JA 206), rather than separately analyzing the issue in its own opinion. *See, e.g.*, *Clanton v. United States*, 284 F.3d 420, 428 (2d Cir. 2002).

** Plaintiff claims that, despite the district court's adoption of this reasoning, it would deny his putative co-plaintiffs the right to proceed with a separate lawsuit because they would be in "privity" with plaintiff if he served as their counsel in such an action. Br. 16 (citing *Fulani v. Bentsen*, 862 F. Supp. 1140 (S.D.N.Y. 1994), and *Conte v. Justice*, 996 F.2d 1398, 1402 (2d Cir. 1993)). As this Court explained in *Conte*, however, whether two parties are in privity is determined based on the "totality of the circumstances." 996 F.2d at 1402. Although employment of the same counsel is one factor to be considered in this inquiry, *see id.*, it is not the only factor, and plaintiff in any event does not purport to serve as counsel to the putative co-plaintiffs in this

As plaintiff did not make a showing of newly discovered evidence, manifest injustice or any other basis to vacate the judgment, the district court did not abuse its discretion in denying plaintiffs' Rule 59(e) motion. Plaintiff's inability to satisfy the Rule 59(e) standard is itself a sufficient basis to uphold the district court's determination. *See Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011) ("[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)." (quotation marks and brackets omitted)).

Here, moreover, the district court's determination may also be affirmed on the ground that plaintiff's proposed amended complaint did not cure the defect that prompted dismissal of his complaint in the first place. *See id.* (while district court has discretion to vacate a judgment to permit amendment of a complaint, it should "place significant emphasis on the value of finality and repose" and "take into account the nature of the proposed amendment" (quotation marks omitted)). "Leave to amend may properly be denied if the amendment would be futile, as when the proposed new pleading fails to state a claim on which relief can be granted. The adequacy of a proposed amended complaint to state a claim is to be judged by the same standards as those governing the adequacy of a filed pleading." *Anderson News, LLC v. Am. Media, Inc.*, 680

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case. Of course, a new action by the putative co-plaintiffs may well be subject to dismissal on another ground, such as frivolousness. *See infra* Point III.

F.3d 162, 185 (2d Cir. 2012) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962) (additional citation omitted)).

Plaintiff's proposed amendment was futile. Plaintiff attempted to circumvent the district court's collateral estoppel ruling by adding two new plaintiffs who had not previously litigated their standing to bring an Establishment Clause claim. But adding two new plaintiffs to the action, even if they had standing, would not change the analysis as to plaintiff himself. *See, e.g.*, *Smith v. Silverman* (*In re Smith*), 645 F.3d 186, 189 n.2 (2d Cir. 2011) (analyzing the standing of each plaintiff separately). The cases on which plaintiff relies, *see* Br. 19-26, all involved the *substitution* of parties (*e.g.*, the substitution of a named plaintiff in a class-action suit). *See, e.g.*, *Sheldon v. PHH Corp.*, No. 96 Civ. 1666(LAK), 1997 WL 91280, at *2-3 (S.D.N.Y. Mar. 4, 1997) (discussing potential substitution of named defendant, which was not liable to plaintiff, with different entity that may have been liable), *aff'd*, 135 F.3d 848 (2d Cir. 1998), *cited in* Br. 19-20. Plaintiff did not attempt to substitute the new plaintiffs; he sought to add them as plaintiffs while remaining a plaintiff himself. (JA 172 (proposed amended complaint listing plaintiff as a party)).*

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* Even if plaintiff had sought to substitute the two new plaintiffs for himself in the action, the district court would have been well within its discretion to deny the motion, given the late stage of the proceedings, after the entry of judgment. *Cf. Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 160-61 (2d Cir. 2012) (where court lacks jurisdiction because of plaintiff's lack of standing, it

The proposed amendment therefore would not have cured plaintiff's own lack of standing to pursue the Establishment Clause claim (as established in *Den Hollander I*), and the district court was well within its discretion to refuse to allow the amendment. *Cf. Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153 (10th Cir. 2011) (dismissing appeal by plaintiffs, who lacked standing, of district court decision denying request to add additional plaintiffs who may have had standing).

POINT III

THE COURT MAY AFFIRM ON THE ALTERNATIVE GROUND THAT PLAINTIFF'S ESTABLISHMENT CLAUSE CLAIM IS FRIVOLOUS

The judgment and the district court's order denying plaintiff's post-judgment motions may also be affirmed on the alternative ground that the Establishment Clause claim fails as a matter of law and, indeed, is frivolous. *See Gallop v. Cheney*, 642 F.3d 364, 368-70 (2d Cir. 2011) (affirming dismissal of complaint as frivolous (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))). The district court in *Den Hollander I* determined that the claim is "utterly without merit" (JA 79 ("Feminism is no more a religion than physics, and at least the core of the complaint is therefore frivolous.")), and this Court indicated that it "share[d] . . . the district court's grave doubts" about the merits of

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may nevertheless treat pleading of intervenor with standing as separate action if proposed intervention comes early enough in the litigation to avoid prejudice to the defendant (citing *Hackner v. Guar. Trust Co. of N.Y.*, 117 F.2d 95, 98 (2d Cir. 1941))).

plaintiff's claim, though it did not decide the issue (JA 94). While the district court in this case did not reach the merits of plaintiff's claim, both the judgment and the district court's order denying plaintiff's motion to vacate the judgment can be affirmed on any basis supported by the record. *See AmBase*, 326 F.3d at 72 (affirming dismissal of a complaint); *Francis v. City of New York*, 235 F.3d 763, 766 (2d Cir. 2000) (affirming order denying motion to vacate judgment).

"The Establishment Clause of the First Amendment . . . prevents [the government] from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. 639, 648 (2002). Plaintiff does not allege that the Department funds the programs he identifies for a religious "purpose."* Thus, the relevant question under the Establishment Clause if whether the Department's funding "has the forbidden 'effect' of advancing or

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* Even if plaintiff did make such an allegation, the relevant inquiry is whether the government's intent, as determined from the perspective of a reasonable observer, is to establish the particular religion in question. *See Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir. 2001). Here, the complaint does not contain any factual allegations supporting an inference that a reasonable observer could conclude that the purpose of federal support for Columbia is to promote or inhibit feminism as a religion. The complaint does not even allege that plaintiff himself believes the intention behind the federal funding at issue is to promote feminism, much less allege facts to show why a reasonable observer would think so.

inhibiting religion." *Id.* Plaintiff fails to satisfy this standard in at least three respects.

First, as the district court concluded in *Den Hollander I* (JA 79), feminism is not a religion for purposes of the First Amendment. The Establishment Clause "does indeed distinguish" between religious and secular philosophies. *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972)). The Supreme Court has instructed that "a 'religious' belief or practice entitled to constitutional protection" is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 215-16; *see also United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996) (religious beliefs are generally characterized by, *inter alia*, "ultimate ideas," "metaphysical beliefs," a "moral or ethical system," and the "accoutrements of religion" (capitalization altered)). Indeed, courts have cautioned that defining "religion" too broadly for Establishment Clause purposes is "unworkable" because it would subject nearly any "governmental activit[y]" to potential "censure." *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 (9th Cir. 1996); *cf. United States v. Allen*, 760 F.2d 447, 450-52 (2d Cir. 1985) (noting that definition of religion is much narrower for Establishment Clause than for Free Exercise Clause).

Courts have rejected similar attempts by plaintiffs to define religion expansively for purposes of asserting an Establishment Clause claim. *See Altman*, 245 F.3d at 75-79 (public high school's Earth Day ceremony did not unconstitutionally promote the "Gaia" religion);

Alvarado, 94 F.3d at 1229-31 (city's statue of an Aztec serpent-god did not violate the Establishment Clause even though some New Age spiritualists and Mormons ascribed religious significance to the ancient deity); *Allen*, 760 F.2d at 451 (criminal law prohibiting destruction of government property, including nuclear facilities, did not establish religion of "nuclearism"). Feminism may "invoke ultimate concerns," but "fail[s] to demonstrate any shared or comprehensive doctrine or to display any of the structural characteristics or formal signs associated with traditional religions." *Alvarado*, 94 F.3d at 1230 (quotation marks omitted).

Second, with respect to federal student-aid programs, even if feminism were considered a religion, such programs do not "advance religion" for Establishment Clause purposes; they simply provide students with funds that the students in turn may use to pursue any course of study (religious or non-religious) at a participating institution. The Establishment Clause of the First Amendment does not prohibit the government from providing funds to defray tuition costs for students who choose to use the funds to pursue religious education. To the contrary, in the context of government funding for education, the Supreme Court has distinguished between impermissible "government programs that provide aid directly to religious schools" and permissible "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. "[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result

of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Id.* at 652. Thus, even if Columbia students used federal funds to enroll in "religious" courses—and, indeed, there is every reason to believe that an institution such as Columbia offers courses in religious studies and the like—there would be nothing unconstitutional about such funding.

Third, with respect to grants or other support provided to Columbia, plaintiff does not identify any Department funding that is specifically designed to promote feminism, as opposed to university studies generally. To challenge government funding for schools under the Establishment Clause, a plaintiff must identify "a measurable appropriation or loss of revenue attributable to the challenged activities at those schools." *Altman*, 245 F.3d at 74. Plaintiff's complaint contains no factual allegations that meet this standard; he simply identifies several general-purpose Department programs that fund various types of grants to universities (JA 75), without explaining how such grant programs promote feminism to any measurable extent. Plaintiff's failure to identify any particular Department programs that actually promote his would-be religion is fatal to his Establishment Clause claim.

For all of these reasons, plaintiff's Establishment Clause claim is frivolous, as the district court in *Den Hollander I* concluded. (JA 79; *see also* JA 94). Accordingly, this Court may affirm the district court's judgment, and its order denying plaintiff's post-judgment motions, on this alternative ground.

CONCLUSION

The district court's judgment, and its order denying plaintiff's motions to vacate the judgment and amend his complaint, should be affirmed.

Dated: New York, New York
October 18, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 7,572 words in this brief.

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