ORIGINAL

No. 21-907

In The
SUPREME COURT OF THE UNITED STATES OF AMERICA

KENDA KIRBY,
Plaintiff

v.

STATE OF NORTH CAROLINA,
Defendant

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Kenda R. Kirby
Pro Se
7493 County Road 73
Coyle, Oklahoma 73027
202-271-7331
KendaKirby@aol.com

QUESTIONS PRESENTED FOR REVIEW

1. Broadly, questions raised by the case include whether Plaintiff has a right to redress (both for discrimination and retaliation) under Title IX of the Educational Amendments Act of 1972 or other policies and statutes,

2. Whether Title IX and other civil rights/ non-discrimination statutes should be interpreted to encompass the full range of sex based physical characteristics.

PARTIES TO THE PROCEEDING

Plaintiff

Kenda R. Kirby, *Pro Se*

Defendants:

State of North Carolina: North Carolina State University, North Carolina Office of the State Attorney General, North Carolina State Education Assistance Authority, North Carolina Office of the Governor; specifically

Dr. Ida Washington Smoak,

Dr. James E. Smallwood,

Dr. Jack Britt,

Dean Debra Stewart,

Dr. Robert Sowell,

Shawn C. Troxler,

Alexander McClure Peters,

Wayne Johnson

Roy Cooper

CORPORATE DISCLOSURE STATEMENT

A Corporate Disclosure statement is not applicable because Plaintiff is a single person and is not a party to, nor has any interest in any other suit in this or any other court.

TABLE OF CONTENTS

Table of Authorities

Americans with Disabilities Act	4, 13, 14, 24
Civil Rights Act of 1964, Titles VI & VII	4, 6, 8, 10, 24, 50, 51, 58
Conspiracy to Violate Civil Rights pursuant to 42 U.S.C. § 1985, and 18 U.S. Code Chapter 13, Civil Rights sections 241 & 242	4, 13
Department of Education Organization Act (Public Law 96-88 of October 1979) Mission: "Strengthen the Federal commitment to assuring access to equal opportunity for every individual;..."	4, 24, 54

Videckis & White V. Pepperdine University, Case 2:15-cv-00298-DDP-JC Document 41 Filed 12/15/15 Page ID #: 476; "This Court, in its prior order dismissing in part Plaintiffs' FAC, stated that 'the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best," …."After further briefing and argument, the Court concludes that the distinction is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination." "The line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct." (Focus on the alleged victims) "asks the wrong question and compounds the harm," because their "actual" sexual orientation is irrelevant. "It is the biased mind of the alleged discriminator that is the focus of the analysis," https://assets.documentcloud.org/documents/2648492/Pepperdine-Title-IX-Ruling.pdf	8, 9, 51, 52

The United State Equal Opportunity Commission has upheld Gender Identity as being covered under the protected category of "sex", "Discrimination against an individual because that person is transgender is discrimination because of sex in violation of Title VII. This is also known as gender identity discrimination. In addition, lesbian, gay, and bisexual individuals may bring sex discrimination claims. These may include, for example, allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's non-conformance with sex-stereotypes." http://www.eeoc.gov/laws/types/sex.cfm	50

The United States Equal Opportunity Commission "While Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity in its list of protected bases, the Commission, consistent with case law from the Supreme Court and other courts, interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity." http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm	50
Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII; https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm	50
Justice Department guidance: Title IX of the Educational Amendments of 1972 Legal Manual; justice.gov	42, 43, 49
State Statutes	

North Carolina General Statute of Limitations, Article 5 § 1-52, Three years; Within three years an action (1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding section or in G.S. 1-53 (1).	4, 37, 38
North Carolina General Statutes, Chapter 25, Contract, especially 25-1-201 Definitions, 43 Writing, 25-1-304, Obligation of good faith, 25-1-305 Remedies to be liberally administered	4, 11

North Carolina General Statutes, Chapter 99, Slander and Libel: North Carolina's definition of libel is considered rather broad, covering statements so offensive they are automatically classified as defamatory, and assumed to damage plaintiff's reputation. Proving that harm was actually done when the statements were issued is not required. Under the statute, a statement is considered libelous is it does any of these things: maintains that an individual is guilty of a serious crime; claims that an individual has an infectious disease; attempts to discredit a person in their profession or industry; or in some other way subjects and individual to public disgrace, contempt or ridicule. Although generally related to media publications, the published grades for plaintiff, along with false statements about HIV+ status could fall under this statute.	4, 11
State Case Law	
Groves v. Travelers Insurance Company, NC Court of Appeals, No. COA99-831, August 29, 2000 "Intentional Infliction of Emotional Distress"	11

North Carolina State University Policy	
NCSU POL 04.25.05- Equal Opportunity and Non-Discrimination Policy, Definitions Section 2.1 Discrimination is unfavorable treatment with regard to a term or condition of employment, or participation in an academic program or activity based upon age (40 or older), color, disability, gender identity, genetic information, national origin, race, religion, sex (including pregnancy), sexual orientation, or veteran status. Discrimination includes the denial of a request for a reasonable accommodation based upon disability or religion.	4, 16, 17, 25

NCSU POL 04.25.05- Equal Opportunity and Non-Discrimination Policy, Definitions Section 2.2 Hostile Environment Harassment occurs when unwelcome conduct based upon an individuals age (40 or older), color, disability, gender identity, genetic information, national origin, race, religion, sex (including pregnancy), sexual orientation or veteran status is sufficiently severe or pervasive to: (For Students): deny or limit a student's ability to participate in or benefit from NC State's programs or activities; or create an intimidating, threatening or abusive educational environment.	4,16, 17, 25

NCSU POL 04.25.05- Equal Opportunity and Non-Discrimination Policy, Section 31, Policy Statement; It is the policy of the State of North Carolina to provide equality of opportunity in education and employment for all students and employees. Educational and employment decisions should be based on factors that are germane to academic abilities or job performance. North Carolina State University ("NC State") strives to build and maintain an environment that supports and rewards individuals on the basis of relevant factors such as ability, merit, and performance. Accordingly, NC State engages in equal opportunity and affirmative action efforts, and prohibits discrimination, harassment, and retaliation, as defined by this policy.	4, 15, 24
Scientific Research	
Aristotle, transcribed as "In certain cases we find a double set of generative organs (one male and the other female.)	44
CK-12 Flexbook, High School Biology, CK12.org	44

Curr Oncol. 2013 Apr; 20(2): 85–87. doi: 10.3747/co.20.1449 PMCID: PMC3615857 Many mosaic mutations W.D. Foulkes, MBBS PhD and F.X. Real, MD PhD https://www.ncbi.nlm.nih.gov/pmc/articles/	45, 46
10 million American adults identify as LGBT (4.1%), LGBT millennials up from 5.8% in 2012 to 7.3% in 2016; "In U.S., More Adults Identifying as LGBT", Gary J. Gates, JANUARY 11, 2017, Gallup News Organization, https://news.gallup.com/poll/201731/lgbtidentification-rises.aspx	8
"Is Sexuality Hardwired? Gender Identity Linked With dozens of Genes" Jeanie Lerche Davis, WebMDHealth News October 20, 2003 http://www.webmd.com/sex-relationships/news/20031020/is-sexuality-hardwired	46
Judge: Gender Laws Are at Odds With Science by Noël Wise, Mar 08, 2017 TIME Magazine; http://time.com/4679726/judge-biological-sex-laws-marriagebathrooms/	45, 46

"Sex, Intersex, and the Making of 'Normal'", Elizabeth Reis, June 25, 2010, George Mason University, History News Network, http://historynewsnetwork.org/article/129443	45, 46, 47
"Sexual Differentiation of the human brain: relevance for gender identity, transsexualism, and sexual orientation" Gynecological Endocrinology Volume 19, Issue 6, 2004	46, 47
"Ten Intersex Gods and Goddesses" Lusmerlin's BLog, August 16, 2013, https://lusmerlin.wordpress.com/2013/08/16/ten-intersex-gods-and-goddesses/	46
"The Theory of the Free-Martin", Frank R. Lillie, Science, April 28, 1916, Vol. 43, no. 1113 pp. 611-613, DOI: 10.1126/science.43.1113.611	46, 47
"Timeline: Transgender through History" http://www.cbc.ca/doczone/features/timeline-transgender-through-history	46

"Two Spirit: The Trials and Tribulations of Gender Identity in the 21st Century" Samanth Mesa-Miles, January 13, 2015, Indian Country Today Media Network, "In early Native American society, those who identified as Two Spirited were respected as spiritual leaders within the tribe. They dressed in both men's and women's clothing, and they often served special roles such as storytellers, counselors, and healers." http://indiancountrytodaymedianetwork.com/2015/01/13/two-spirit-trials-and-tribulations-gender-identity-21st-century-158686"	46
U.S. National Library of Medicine, Klinefelter's Syndrome, http://ghr.nlm.nih.gov/condition/klinefelter-syndrome	47
U.S. National Library of Medicine, Turner Syndrome, http://ghr.nlm.nih.gov/condition/turner-syndrome	47
The Williams Institute, April 2011, "Approximately 9 million Americans—roughly the population of New Jersey—identify as LGBT"; "3.5% of the adult population" williamsinstitute.law.ucla.edu	58, 59

Advocacy Organizations	
"Homophobia and Human Rights in North Carolina", North Carolina Coalition for Gay & Lesbian Equality, National Coalition of Anti-Violence Programs, and National Gay and Lesbian Task Force	47
International Commission of Jurists and International Service for Human Rights, Yogyakarta Principles. yogyakartaprinciples.org	53, 54
Think Progress; Federal Judge Explains Why 'Sexual Orientation' Discrimination Is 'Sex' Discrimination BY ZACK FORD DEC 18, 2015 8:00 AM; http://thinkprogress.org/lgbt/2015/12/18/3733584/sexual-orientation-sex-title-ix-pepperdine/	50, 51
The United Nations Educational, Scientific, and Cultural Organization, the Right to Education, United Nations, right2education, unesco.org	53, 54

"Yogyakarta Principles", Drafted, developed and discussed by a group of human rights experts. Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia; www.yogyakartaprinciples.org/	53
Media Publications	
CNN; "Justice Anthony Kennedy to retire from Supreme Court" by Ariane de Vogue; updated 5:30pm EDT Wednesday, June 27, 2018	58
Cracking Windsor's Code: The Unusual Judicial Review Standard of United States v. Windsor and Its Potential Impact on Future Plaintiffs, by Caitlin Ingram, January 2, 2014, https://uclawreview.org/2014/01/02/cracking-windsors-code-the-unusual-judicial-review-standard-of-united-states-v-windsor-and-its-potential-impact-on-future-plaintiffs/	34
In 2012, a federal court jury in Michigan awarded a $4.5 million judgment to an openly gay university student who was the target of defamation and intentional emotional distress. http://www.cnn.com/2012/08/17/justice/michigan	62

"Dozens of Christian schools win Title IX waivers to ban LGBT students" by Andy Birkey December 1, 2015; http:// thecolu.mn/21270/dozens-christian-schools-win-title-ix-waivers-ban-lgbt-students	46
Gender Identity was considered a disability in 1994. "December 5, 2012.... the Board of the American Psychiatric Association (APA) approved changed to the newest addition of the Diagnostic & Statistical Manual on Mental Disorders (DSM), including changes to the diagnostic criteria for Gender Identity Disorder (GID)." http://m.huffpost.com/us/entry/2247081, Debating 'Gender Identity Disorder' and Justice for Trans People	45
Harvard Business Review, "The Right Way to Hold People Accountable" by Peter Bregman, esp. #5 "Clear Consequences", https://hbr.org/2016/01/the-rightway-to-hold-people-accountable;	59
In 2013 ten discrimination settlements averaged $63.8 million dollars each. http://www.insidecounsel.com/2014/07/08/top-10-most-expensivediscrimination-settlements-o	62

From LGBPTTQQIIAA+ — How We Got Here from Gay, October 1, 2013 by Emily Zak. http://msmagazine.com/blog/2013/10/01/lgbpttqqiiaa-how-we-got-here-from-gay/	47
National Lesbian and Gay Journalists Association, stylebook, term index, nlgja.org	47
POLITICS 04/19/2016 05:07 pm ET Anti-LGBT Law Is Costing North Carolina MillionsCharlotte tourism officials project the city could lose over $86 million through 2020. By Sam Levine http://www.huffingtonpost.com/entry/north-carolina-lgbtdiscrimination-tourism_us_571687fae4b0018f9cbb66bc	59
National Public Radio, "After Supreme Court Decision, What's Next for Gay Rights Groups?" July 1, 2015; "For Poland's Gay Community, A Shift in Public Attitudes, If Not Laws" June 25, 2015; "Radio Connects North Dakota Residents Divided on Gay Rights" April 15, 2015; etc. npr.org	47

North Carolina's LGBT law may have impact on women, minorities BY ANNA DOUGLAS http://www.mcclatchydc.com/news/politics-government/article69527867.html#storylink=cpy	59
trans_americans_are_under_attack_why_north_carolinas_draconian_anti_discrimination_repeal_is_just_the_tip_of_the_iceberg/ http://www.salon.com/2016/04/08	59
https://www.usnews.com/news/national-news/articles/2017-02-23/devos-pledges-to-protect-lgbt-students-after-nixing-transgender-bathroom-protections	48, 49
"In three years, LGBT Americans have gone from triumph to backlash" Alyssa Rosenberg, January 25, 2018, The Washington Post https://www.washingtonpost.com/news/act-four/wp/2018/01/25/in-three-years-lgbt-americans-have-gone-from-triumphto-backlash-blame-trump/?noredirect=on&utm_term=.,	8
Wikipedia: "gay community"	47

Wikipedia: "Within US law, public accommodations are generally defined as entities, both public and private.... That are used by the public. (Examples include retail stores, rental establishments, and service establishments, as well as educational institutions, recreation facilities, and service centers." http://en.m.wikipedi.org/wiki/Public accommodations

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

No.

Kenda R. Kirby	)	
7493 County Road 73	)	
Coyle, Oklahoma 73027	)	
	)	
Plaintiff	)	
Pro Se	)	
	)	
v.	)	**On Appeal**
	)	**from Fourth**
	)	**Circuit Civil**
State of North Carolina	)	**Action No.**
N.C. Department of Justice	)	**21-1173**
PO Box 629	)	
Raleigh, North Carolina	)	
27602-0629	)	
	)	
Defendant	)	

PETITION FOR WRIT OF CERTIORARI

1. Plaintiff, Kenda R. Kirby, hereby petitions the Court for Writ of Certiorari to review and reverse the following **opinions**: Fourth Circuit Federal Court of Appeals September 13, 2021, No. 21-1173, unpublished, Appendix G; Federal District Court No. 5:20-CV-344-BO, unpublished, Appendix F; Fourth Circuit No. 18-1289, unpublished, Appendix E; Federal District Court 5:17-cv-00371-BO, Feb. 9, 2018, unpublished, Appendix D; Fourth Circuit Federal Court of Appeals September 2, 2015 ruling regarding Civil Action Number 15-1333, unpublished, Appendix A; the March, 2015 Decision by the United States District Court of the Eastern District of North Carolina, Western Division, Civil Action No. 5:13-cv-00850-FL, unpublished, Appendix B; the Memorandum and Recommendation by United States Magistrate Judge Gates issued January 23, 2015, unpublished, Appendix C; and the Determination

of the North Carolina State University Board of Trustees on or around October 13, 1994, denying the Grievance of Kenda R. Kirby, as well as lower level University decisions, unpublished, Exhibit A (case record.) Also reference, SCOTUS 18-305 and 15-8399 and Plaintiff's September 2021 Petition for En Banc Rehearing. Plaintiff sought relief based on subject matter and diversity jurisdiction. All were dismissed without prejudice.

Basis for Jurisdiction:

2. Jurisdiction is invoked in reference to the September 13, 2021 Decision of the Fourth Circuit Federal Court of Appeals.

3. The statutory provision conferring jurisdiction to review on a writ of certiorari the judgement in question is the United States Constitution, Article III, Section 2: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made..."

4. **Constitutional provisions, treaties, etc.** include the First, Eleventh, and Fourteenth Amendments to the United States Constitution, Civil Rights Act of 1964, Titles VI & VII, Conspiracy to Violate Civil Rights pursuant to 42 U.S.C. § 1985, and 18 U.S. Code Chapter 13, Civil Rights sections 241 & 242, Department of Education Organization Act (Public Law 96-88 of October 1979) Mission: "... assuring access to equal opportunity for every individual;...", Educational Amendments Act of 1972, Title IX, Higher Education Act, 2008 Re-Authorization, Section 104, Rehabilitation Act of 1973, Section 504, and Americans with Disabilities Act; North Carolina General Statute of Limitations: Article 5 § 1-52, and N.C. General Statues, Chapters 25 and 99; Also, North Carolina State University Policy 04.25.05.

5. Federal Case law includes United States Supreme Court rulings in *Bostock v. Clayton County 17-1618,* also *Zarda v. Altitude Express,* and *R.G. & G. R HarrisFuneral Homes Inc. v EEOC.* Fourth Circuit case law includes *Grimm v. Gloucester County School Board, 19-1952.*

Considerations pertaining to Review:

6. A. The Circuit's opinion conflicts with another opinion in the same court, specifically *Grimm v. Gloucester County School Board, 19-1952.*

B. The Circuit's opinion conflicts with the United States Supreme Court opinion in *Bostock v. Clayton County 17-1618*, also *Zarda v. Altitude Express*, and *R.G. & G. R Harris Funeral Homes Inc. v EEOC.*

C. A matter of material fact that substantially prejudiced Plaintiff's rights was misinterpreted. Specifically, in the second "new cause of action", the court mis-read a student loan document's margin notes that had been added by North Carolina Education Authority staff around 2017 as original notes from the 1990s. When understood for what they are, the original documents support Plaintiff's case and verify a portion of the discrimination targeting Plaintiff.

D. Discriminatory intent and acts related to Defendant's sex-based stereotypes around sex, sexual orientation, gender, gender identity, which was

admitted by Defendants in writing and also verbally, acknowledged by Defendants' original counsel, and found by the original district judge, were determined to not be "sex-based" under Title IX and were completely overlooked as part of the larger pattern and practice of discrimination

E. The United State Supreme Court has found that the plain language of Title VII, upon which Title IX is based, encompasses both sexual orientation and gender identity. At the same time the above-cited cases were moving through the courts, Plaintiff's case was also on the docket, yet the conflicts of opinion were not addressed.

F. Plaintiff also deserves remedies for the years of discrimination targeting her by Defendants.

7. During this case, Defendants mischaracterized some information, but did not dispute Plaintiff's statement of facts, nor interpretation of the rule of law. This case is virtually void of factual disputes, making it a clean vehicle for the Court to decide important federal questions.

8. At issue is whether Plaintiff is entitled to redress, either under gender-non-conformance / sex-based stereotypes as granted under other Title IX decisions, under perception of sexual orientation, &/or Plaintiff's non-conforming gender identity in alignment with the Supreme Court's above-cited cases, the *Obergefell* decision, also the Title IX decision in *Videckis & White v. Pepperdine* that discrimination based on sexual orientation is sex-based discrimination, and more recent decisions in the Seventh and Second Circuits. And more broadly, whether the courts should interpret non-discrimination statutes to cover all sex-based physical characteristics.

9. The lower courts did not consider the broad bias regarding sex-based stereotypes previously determined to be covered under Title IX, narrowly determining use of the word "gay" to mean same-sex attraction only and failing to consider it as the all-encompassing term it was at that time. Standing was denied due to Plaintiff's presumed status as a lesbian. The lower courts did not consider the issue of retaliation which did not require the same burden of proof. The lower

courts declined to consider *Obergefell* even though requested. In reviewing the newest cause of action, the lower courts reversed precedent and established an entirely new and erroneous legal principle, prejudicing Plaintiff's substantial rights and leading to ruling on an important federal question in apparent violation of the Court's earlier opinions in *Windsor* and *Masterpiece Cakeshop* and in failing to rule in line with more recent opinions for cases that were in the courts at the same time (*Bostock* et al and *Grimm*).

10. University professors stated to the grievance committee both verbally and in writing that their actions were based on bias. The state's counsel notes that case documents "suggest discrimination for political viewpoint or for actual or perceived sexual orientation". The initial Federal District Court agreed, but did not find them to be illegal at that time. However, in *Bostock* et al, the U. S. Supreme Court determined that the same types of biased treatment would have been illegal under Title VII since its inception, and since Title IX uses the

same language, it stands to reason that the discriminatory treatment targeting Plaintiff was illegal since the adoption of Title IX in 1972—well before this case began.

11. Issues raised by this case are important to every family and directly impact the lives of 10 million American adults (4.1% of the population.)[1] Consistently for several years, 79% of Non-LGBT[2] Americans tell pollsters they support equal rights for LGBTs.[3] This case is likely more palatable to the public than the more heated, politically

1. 10 million American adults identify as LGBT (4.1%), LGBT millennials up from 5.8% in 2012 to 7.3% in 2016; "In U.S., More Adults Identifying as LGBT", Gary J. Gates, JANUARY 11, 2017, Gallup News Organization, https://news.gallup.com/poll/201731/lgbt-identification-rises.aspx
2. LGBT means Lesbian, Gay, Bisexual, and Transgender
3. "In three years, LGBT Americans have gone from triumph to backlash" Alyssa Rosenberg, January 25, 2018, The Washington Post, https://www.washingtonpost.com/news/act-four/wp/2018/01/25/in-three-years-lgbt-americans-have-gone-from-triumph-to-backlash-blame-trump/?noredirect=on&utm_term=.9f2981a11c80

divisive Title IX LGBT rights cases, yet it could add clarity to the same federal questions. Since numerous LGBT civil rights cases have percolated through the system, the time is surely ripe for a more definitive ruling in this matter. If, however, the Court finds its Title VII *Bostock* et al decision to be sufficiently definitive for Title IX, Plaintiff requests the Court remand to the Fourth Circuit to issue findings in line with current case law.

Statement of Case / Question I

Does Plaintiff have a right to redress (both for discrimination and retaliation) under Title IX of the Educational Amendments Act of 1972 or other policies and statutes?

12. In 1992, Plaintiff was admitted to a Ph.D. program at North Carolina State University

College of Veterinary Medicine (NCSU CVM) in Cell Biology/Morphology. At that time, she had already completed a terminal graduate degree at the Medical College of Georgia. Her transcripts at the time of admission show over 400 credit hours, approximately 220 of them graduate level. Both undergraduate and graduate grade point averages were solidly above a 3.0 on a 4.0 scale at the time of her admission to NCSU's Ph.D. program. Plaintiff was a student in good standing at NCSU throughout her studies.

13. On Sunday, April 25, 1993, Plaintiff attended an LGBT event. She took final exams during the week that followed, earning enough points to maintain her passing grades and good standing at the university (3.0 for Graduate students.)

14. Within about two weeks, Plaintiff received her grade reports in the mail, showing multiple failing grades. When Plaintiff contacted her major professors at CVM about the incorrect grades, Dr. Ida Washington Smoak stated to Plaintiff that she and Dr. James E. Smallwood had intentionally changed her grades because

they were angry that she "was an avid Clinton supporter" and that she "attended a gay rights rally at an inconvenient time."

15. Plaintiff later shared this information with the grievance committee and preserved it in evidence (case record, Pages 86 and 178.) Dr. Smoak, in her testimony before the grievance committee, stated verbatim, "She was an avid Clinton supporter" and "she attended a gay rights rally at an inconvenient time." Smoak also refers to this in written notes provided to the committee. Although the grievance committee noted this bias, they declined to consider it. This underlying motive of discrimination has never been denied, until university counsel's letter of 2013.

16. Shortly thereafter and continuing throughout Plaintiff's studies, these CVM professors invented numerous hurdles. Although Plaintiff struggled with these hurdles, she remained a student in good standing according to university policy.

Defendants violated several statutes. These include, but are not limited to: Title IX of the Educational Amendments Act of 1972, Americans with Disabilities Act; First Amendment; Equal Protection and Due Process Clauses of Fourteenth Amendment; Conspiracy to Violate Civil Rights pursuant to 42 U.S.C. § 1985; Breach of Contract; Defamation; and Intentional Infliction of Emotional Distress.

17. Dr. Smoak's unapologetic statements about Plaintiff's "attending a gay rights rally" and being "an avid Clinton supporter", along with frequent discussions about her fears of getting HIV/AIDS indicate her bias. On at least three occasions, Dr. Smoak told Plaintiff that she was afraid of getting AIDS from Plaintiff. Dr. Smoak told Plaintiff that she did not want Plaintiff to work in her lab due to fear of transmission of the disease.

18. Plaintiff informed Dr. Smoak more than once that she was not HIV+, but Dr. Smoak persisted in her assertions, based on her

perceptions that all who did not abide by her stereotypes of femaleness must be not only, "gay", but also HIV+. This violated Plaintiff's rights under Title IX and also the Americans with Disabilities Act.

19. Dr. Smallwood concurred with Dr. Smoak in falsifying grades and terminating Plaintiff's program of study indicating that he shared her strong bias against perceived gender non-conformance.

Defendants exhibited strong bias and discriminated against Plaintiff (disparate treatment, disparate impact, and retaliation).

20. These professor's altering passing grades to failing "because of" plaintiff's attendance at the "rally" demonstrate intent to discriminate on the basis of gender non-conformity. CVM professors did not note nor remark about what other students did in their free time, nor "when they skipped class to go to taco bell" as one classmate said. Neither did other students have their grades docked for outside activities. (Plaintiff's

primary "outside activity" was teaching full time community college classes.)

21. Dr. Smoak did not frown on outside activities per se, because she informed Plaintiff that during pursuit of her PhD, she stole a human head from the anatomy lab and then deposited it into a trash bin, and that she and her boyfriend often got high and rode his motorcycle throughout the Durham area. Such bragging about criminal activity struck Plaintiff as odd, especially in light of Dr. Smoak's apparent moral judgment of Plaintiff. The immediate falsification of grades suggests strong biased intent by Drs. Smoak and Smallwood.

22. NCSU professors not only abridged Plaintiff's rights to have correct grades filed, attend classes, access laboratories, and receive her Ph.D. diploma, they did so in retaliation for her using First Amendment rights of freedom of expression and assembly in advocating for equal civil rights around gender .

23. The legislative intent of Title IX was two-fold; to avoid use of federal resources to support

discriminatory practices in education and to provide individual citizens effective procedures against those practices. Title IX and possibly other statutes are applicable to this situation.

Defendants exhibited a pattern and practice of harassment and hostile environment towards Plaintiff.

24. CVM professors abused their power over Plaintiff by devising a series of academic "hoops" for her to jump through that no one else was subjected to. CVM professors attempted to physically intimidate Plaintiff by posting an armed guard to prevent her from attending classes. Both instances show forms of harassment and contribute to the pattern and practice of discrimination that created a hostile environment for Plaintiff.

NCSU violated its own non-discrimination policy.

25. Title IX is aimed at protecting the less-represented gender in education. While applying to females, shouldn't it also be applicable to those perceived as inter-gender? NCSU's current non-discrimination policy spells out inclusion on the basis of disability, sex, sexual orientation, genetic information, and gender identity. While breached, no entity thus far has reviewed plaintiff's claims in light of this policy

26. Apparently, Plaintiff's tenacity in pursuing her studies frustrated CVM professors: in early January of 1994, Dean Jack Britt of NCSU CVM intercepted Plaintiff's student loan funds, returning them to the lender. These funds were designated to pay for the tuition erroneously billed in 2013 and at issue again now.

27. On January 27, 1994, Dean Britt issued a letter to Plaintiff, terminating her Ph.D. program. This, in spite of Plaintiff's original research which received accolades at CVM's research day event, and her official 3.23 GPA even with the falsely filed failing grades. Of the 3 reasons for program termination according to university policy, one was for "poor research

potential", and another for dropping below a 3.0 GPA. The only other recognized reason for program termination was misconduct, which was never alleged against Plaintiff.

28. According to university policy, Plaintiff attended classes while pursuing a formal grievance through the administrative process. On Saturday, March 5, 1994, a letter was delivered to Plaintiff's CVM mailbox threatening arrest if she continued attending classes. (Plaintiff later learned that an armed guard had been posted to prevent her from attending at least one class. Such actions were not warranted and only intended to intimidate plaintiff.)

29. The one course Plaintiff was enrolled in on main campus was Biochemistry. Its status was questionable. Between termination of her Ph.D. program, threats of arrest for class attendance, and loss of student financial aid, Plaintiff was unable to concentrate on her studies. With support of the course professors, Plaintiff attempted to drop the course. This was not allowed and the "I" filed by course professors was later changed to an "F". Plaintiff raised the

issues as known at that time to the grievance committee, but they were not considered.

30. Nearly a month after initiating the course drop process for Biochemistry, and numerous requests for a meeting with NCSU graduate school dean, Debra Stewart, the meeting occurred. On May 2, 1994, in a recorded conversation, Dean Stewart first stated that no graduate courses could be dropped that late in the semester. Then, she stated that the course could be dropped if the department supported it. Plaintiff stated that the department did support it (signatures and a supporting letter are contained in the case record, pages 207-215.) Dean Stewart asked whether the Counseling Center supported Plaintiff's dropping the course and Plaintiff responded in the affirmative. Dean Stewart then said, "I'll have Dr. Sowell take care of it." (Case record, pages 47 and 204.)

31. Also discussed in this conversation with Dean Stewart was Plaintiff's right to face her accusers. The Dean first denied this right, but eventually directed legal counsel and the

grievance committee to allow it (as outlined in the graduate school handbook.)

32. It seemed reasonable to Plaintiff that Dean Stewart would also uphold her promise to have Dr. Sowell ensure the Biochemistry course was dropped. If the course had been dropped, there would be no billing now.

33. First drafted in May 5, 1994 and modified February 8, 1995, the record shows a letter from Dean Stewart to the Counseling center recommending cancellation of spring 1994 registration (case record, pages 203, 205-206.) Had this directive been carried through, it would have effectively dropped the Biochemistry course and removed all billing now directed toward Plaintiff. Why was this directive not followed? Or, if it was implemented, as indicated in the margin's hand-written notes, why was Plaintiff not informed? And, why is Plaintiff being billed for spring 1994 tuition now?

34. Plaintiff was subjected to overt bias and discriminatory actions by NCSU CVM professors, breaching her contract and violating procedural

due process. Further, Plaintiff suffered defamation of character, loss of status, loss of income and future earnings, damage to credit rating and associated financial harm, emotional trauma, pain and suffering, and financial and emotional distress that impacted her family and friends. These damages were compounded by NCSU's actions of 2013 (and later.)

35. In 2013, when Plaintiff interviewed for a faculty position at her undergraduate alma matter (where she had served as President of Presidents' Club—the most respected student on campus.) The interviewing department chair requested a copy of her NCSU transcript and in attempting to produce it, Plaintiff received notice of an erroneous billing by NCSU and an additional grade changed to "F" after the fact.

36. On June 17, 2013, NCSU's financial records office informed Plaintiff in a telephone call, the university would continue to bill her and "ruin your credit" if she did not pay the erroneous billing --for tuition and fees from spring semester of 1994 (Exhibit B. Please note that the letter on letterhead and dated 5-17, 2013, was not

delivered until it was attached to an e-mail on June 17, 2013.) Now, Plaintiff has been denied a college faculty position for which she was deemed well-qualified, due to the delay in the transcript and credibility issues raised by the false grades filed maliciously on her transcript by NCSU CVM professors. Additionally, during the employment interview, Plaintiff was informed that the lack of a Ph.D. degree (previously denied by NCSU) would forever prevent her from gaining full-time, salaried employment or any type of benefits, such as medical insurance or retirement pay.The grade change issue is significant in part, because main campus course professors filed an "I" that was later changed to an "F". Prior to this event, even with other falsely filed failing grades (for courses passed by Plaintiff), her transcript showed a 3.23 grade point average (GPA) on a 4.0 scale. Because university policy states that termination on academic grounds could only occur if a graduate student dropped below a 3.0, any careful observer would notice that there must be more to the story when viewing Plaintiff's academic transcript showing that her Ph.D.

program had been terminated. Now, the additional false failing grade causes the GPA to show 2.62, making it appear that the termination was justifiable. Plaintiff's actual earned GPA from NCSU courses is approximately 3.47.

37. On September 5, 2013, attorney Chris Graebe sent a letter on behalf of Plaintiff to NCSU Legal Counsel requesting correction of the erroneous billing (Case record, pages 1-3.) Plaintiff presumed the billing must have been due to a computer glitch, since there had been no billing in all those years.

The allegation of Discrimination was preserved.

38. In the September 11, 2013 response letter, NCSU states, "at no point did Ms. Kirby allege any form of discrimination." Upon first blush, one might assume that the authoring counsel did not review the case file. However, since he earlier states that the "office has reviewed and investigated the allegations...", one wonders, "at which point did he lie?— that he had reviewed

the file? or that Plaintiff did not allege discrimination? Do intentional false statements in official state legal correspondence rise to the level of perjury?" One can only interpret Defendant's actions as intending to prolong the damages to Plaintiff and perpetuate the false pretenses under which Plaintiff's Ph.D. program was terminated; false pretenses that were motivated by bias against Plaintiff's perceived gender non-conformity.

39. The grievance committee's official Hearing Notes contain a specific section where Plaintiff noted and preserved in evidence the underlying motive by CVM professors of anti-LGBT discrimination (case record pages 86 & 178.) This is also preserved in hand-written notes by individual committee members (case record pages 137 & 161.)

40. While the original grievance focuses on NCSU's breach of contract and violations of procedural due process, it was clear throughout the proceedings that the actions taken by CVM professors seemed at odds with Plaintiff's undisputed academic performance and could only

be explained by some other motive. Plaintiff stated this motive when asked by the committee. CVM professors did not deny this motive and openly referenced it in their written notes and Hearing testimony.

The 2013 Billing is Erroneous and Discriminatory.

41. Plaintiff was subjected to defamation and disparate treatment through delay of her transcript and the falsely filed failing grades. Moreover, she has been subjected to further discrimination, disparate impact in the form of lost earnings, and a hostile environment. This violates the University Equal Opportunity and Non-Discrimination Policy, federal laws barring discrimination and defamation of students at institutions receiving federal funds, and federal equal opportunity laws in education as well as those pertaining to public accommodations.

42. NCSU counsel's September 11, 2013 (Case record, pages 4-5) response to Graebe's letter makes clear that the billing was intentional.

NCSU's refusal to correct the billing in a timely manner indicates their intention to inflict further damage upon Plaintiff and as such, qualifies as a new cause of action under Plaintiff's previously filed grievance.

43. Any attempt by NCSU to bill or collect funds from Plaintiff in light of prima facie discrimination and the surrounding circumstances is just plain wrong! In spite of efforts to the contrary, NCSU simply cannot "have it both ways." Either Plaintiff was a student with class attendance privileges (and owing tuition that should have come from the rejected student loan proceeds), or, she wasn't. The sequence of events from spring 1994 shows that Plaintiff was not allowed basic privileges associated with student status and does not owe any funds. Dean Stewart's letter of 1995 states that it was "unreasonable to have expected her to continue in the program in spring 1994."... "the graduate school supports her request and believes that cancellation of her registration will be in the best interest of the university and the student." (Case record, page 203.)

2017 Refusal to refund overpayment perpetuates harm

44. On January 31, 2017, Plaintiff received a document from the U.S. Department of Education showing overpayment of student loans to North Carolina. Plaintiff contacted the Department via telephone the following day, to ensure her correct understanding of the situation. On February 5th, Plaintiff e-mailed a request to the US Department of Education requesting corrections to be made. In part,

> A. "The GSL total approved for my use during my time at NCSU was also $15,000, however, in January of 1994, my graduate school dean informed me that he had returned the spring semester loan installment to the lender. The loan proceeds I received for use was the one year installment of $7,500, plus one-half of the second year's amount ($3,750), which totals only $11,250. The limited disbursement amount to me is confirmed on

Ed.Gov and also in conversation with your office today.

B. My consolidation application shows the NCSU balance on that date as $12,364.71. The consolidation statement shows the amount paid to NCSU as $15,736.67. Your office informed me in a call today that **the amount paid to NCSU by the consolidation loan <u>does</u> include the spring semester of 1994 proceeds that I NEVER received.** The US Department of Education overpaid NCSU. Of course, I paid off that consolidation loan in full. This means I overpaid NCSU because of the Department's error." (Bold added.)

45. Plaintiff contacted the NC Attorney General's office soon thereafter to alert them and request resolution of the new issue along with the earlier issues. During the 12 minute conversation which began at 3:45pm central time, the Attorney General's special assistant, Candy Finley, seemed confused, so Plaintiff followed with an e-mail February 5, 2017 (Exhibit C.). After that, the Attorney General's office declined

to engage in dialogue to resolve the situation, referring Plaintiff to the North Carolina State Education Assistance Authority (NCSEAA.)

46. Plaintiff contacted NCSEAA within a few days both by telephone and e-mail. This agency (under a different name) was the entity that had made the final determination in terminating Plaintiff's Ph.D. program in the 1990s. At that time, the agency took the further discriminatory action of barring Plaintiff from attending all universities within the North Carolina system completely disregarding the fact that Plaintiff was a student in "good standing" and a tax-paying citizen of the state.

47. The representative said their records are not kept that long and had been destroyed, that Plaintiff needed to make request in writing. Plaintiff said she had already e-mailed and would that be sufficient? The representative said, "Yes."

48. On February 27, Wayne Johnson of NCSEAA responded in writing, citing information from the ed.gov website records for Plaintiff, and stating that Plaintiff's loans totaled

$12,000+ (including interest and fees) at the time they were paid off. This aligns with Plaintiff's student loan consolidation application (Exhibit C.). Mr. Johnson also stated that North Carolina had purged its records in 2003, and that the state owed Plaintiff nothing.

49. However, as shown above, the amount actually paid to North Carolina through consolidation was over $15,000, thus approximately $3,000 was overpaid to the state.

50. The tuition amount in the 2013 erroneous billing (for Spring of 1994, when Plaintiff's PhD program was terminated) was essentially the same $3,000+. As verified by the US Department of Education, the loan proceeds from Spring 1994 that were never received by Plaintiff, but sent back to the loan holder (NCSEAA), apparently caused confusion at the US Department of Education who later paid NCSEAA for that same loan. Since Plaintiff has paid off the consolidated loan, the refund for overpayment is owed to her. The U.S. Department of Education also stated that because the William D. Ford Federal

Student Loan Consolidation Program closed in 2013, NCSEAA is the only source for records.

51. Plaintiff responded to Mr. Johnson's email that the state does owe and referenced the document she had received from the federal agency showing the state was paid $15,000+ (Exhibit C.). On February 28, Mr. Johnson email requested a copy of the document. Plaintiff responded saying she was working extra long hours and that she would forward the document over the weekend, which she did on March 4th. Plaintiff forwarded the e-mail with attached document again on March 9th since she had received no response from Mr. Johnson. Finally, a co-worker of Mr. Johnson forwarded his e-mail with documents showing the NCSEAA records for Plaintiff which confirm the total loan amounts at the time they were paid off as $12,000+.

52. Mr. Johnson first stated that the $12,000 amount was correct, but when he realized that North Carolina had actually been paid $15,000, he flip-flopped stating that the higher amount was correct. Mr. Johnson stated there were no records pertaining to Plaintiff's loans. This was

confirmed by another NCSEAA staffer via telephone on March 15, 2017 at 9:08 am central time. Mr. Johnson later produced records.

53. Even with the records, there is no evidence to support Mr. Johnson's statement that the $15,000+ amount was correct. While Mr. Johnson's' statements of the facts changed, the facts did not. All evidence instead supports the $12,000 amount (Exhibit C.)

54. Mr. Johnson has written in the margins additional figures. Apparently, he was attempting to calculate how the amounts could be off by $3,000 and added in additional interest and newly created fees, trying to pass them off as factual basis for overcharging Plaintiff. The surmised figures are not supported by the evidence. The electronic records printout instead shows that the interest had already been included in the $12,000 total and the assessed fees were "0". Mr. Johnson may have committed fraud. A later document produced by Mr. Johnson's co-worker, Sharon Grubb notes that her figures (based on Mr. Johnson's) are "approximate" and "projected".

55. Plaintiff appealed to the NCSEAA agency Director, its Board of Directors, and the Governor (who, himself was named in earlier legal documents.) None have resolved the issue.

56. The overpayment raises several questions of why/how this occurred? Did North Carolina submit the wrong amount to the William D. Ford consolidation program? If so, who did it? Was this also intended by North Carolina to discriminate? Even if U.S. Department of Education erred, why did North Carolina accept the wrong amount? Why didn't North Carolina return the overpayment? Was this neglect? Incompetence? Malfeasance or fraud?

57. The 1994 student loan proceeds denied to Plaintiff and returned to NCSEAA by Dean Britt are the same funds that were intended for 1994 tuition billed to Plaintiff in 2013, even though she was not allowed student status for that 1994 semester. These are the same funds overpaid to NCSEAA via the U.S. Department of Education.

58. Even if the overpayment was a simple error, the financial damage to Plaintiff is

significant. Denial of the refund owed to Plaintiff perpetuates financial hardship caused by the earlier discrimination, contributing to disparate negative impact and compounding damages. It serves no legitimate, and certainly no compelling state purpose. **The state's continued actions to both bill for these funds and also refuse to refund their overpayment can only be interpreted as further evidence of the pattern and practice of discrimination.**

Plaintiff needs relief from ongoing discrimination!

59. The harm to Plaintiff would never have occurred but for the acted-upon bias of NCSU professors. The current financial mess evolving from Spring 1994 would not have occurred, had there not been cascading discriminatory events. The tuition for Spring 1994 would not have been erroneously billed in 2013, nor the refund for overpayment of the same loan funds refused in 2017. These events did not occur in a vacuum, they are inextricably linked—they are all part of

the same pattern and practice of adverse treatment directed at Plaintiff. North Carolina agencies unabashedly perpetrated discrimination against Plaintiff for over two decades!

STANDARD OF REVIEW

60. In *Windsor*, the Court applied a "discrimination of an unusual character"/"careful consideration" standard.[4] In 2014, the 9th Circuit held that sexual orientation requires heightened scrutiny.[5] In *Masterpiece Cakeshop*, the Court found,

> C. "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others **must be given great weight** and respect by the courts...."

61. In contrast to heightened scrutiny called for in cases involving LGBT rights, the recent lower court dispensed with all evidence of earlier discrimination *res judicata sua sponte.* Judge Boyle established an entirely new and erroneous legal principle when he dismissed the longstanding pattern and practice of discrimination by Defendants, leading him to improperly invoke the statute of limitations for some portions of the evidence, wrongly rule that Plaintiff had failed to state a claim upon which

4. Cracking Windsor's Code: The Unusual Judicial Review Standard of United States v. Windsor and Its Potential Impact on Future Plaintiffs, by Caitlin Ingram, January 2, 2014, https://uclawreview.org/2014/01/02/cracking-windsors-code-the-unusual-judicial-review-standard-of-united-states-v-windsor-and-its-potential-impact-on-future-plaintiffs/

5. Smithkline Beecham Corp. v. Abbott Laboratories, 2014 U.S. App. LEXIS 1128, 2014 WL 211807 (January 21, 2014; "9th Circuit Holds Sexual Orientation Requires Heightened Scrutiny in Gay Juror Case", LGBT Bar Association of Greater New York, https://lgbtbarny.org/9th-circuit-holds-sexual-orientation-requires-heightened-scrutiny-gay-juror-case/

relief can be granted, and wrongly apply 11th Amendment Immunity.

62. Additionally, Boyle reversed legal precedent which states, "In evaluating the Complaint, the 'court accepts all well-plead facts as true and construes these facts in the light most favorable to plaintiff.'" Instead, he mis-stated the dollar figure, using the unsupported assertion by Defendants in contradiction to the evidence. The correct information and circumstances around the actual dollar amount are what caused this claim to be brought in court now. Meanwhile Judge Boyle's "fact" was the underpinning of his erroneous findings that no refund was owed to Plaintiff, that there was no discrimination nor adverse treatment, and that a state employee did not commit fraud. These errors were not harmless, but prejudiced Plaintiff's substantial rights.

63. NCSU must demonstrate that Plaintiff was a student with all associated benefits throughout the spring semester of 1994 in order to persist in billing. If this is proven, NCSU must show that the North Carolina Statute of

Limitations does not apply and that continued billing serves a compelling government function. Additionally, NCSU must show that university personnel did not subject Plaintiff to discriminatory or bias-related treatment. It has failed on all counts.

64. Moreover, the state must submit actual evidence confirming their assertion that a refund is not owed. NCSEAA must show that it used the actual recorded data to determine student loan balances, including that owed to Plaintiff. Additionally, NCSEAA, the NC Office of the Attorney General, and the Governor's Office must show that their agencies did not grant approval of Plaintiff's Ph.D. program termination, and were not involved in the later circumstances of disparate treatment. The evidence points otherwise.

Plaintiff is entitled to protection under Title IX of the Educational Amendments of 1972

65. Title IX's purpose is to ensure that public funds derived from all of the people are not used in ways that encourage, subsidize, permit, or result in discrimination against some of the people. It broadly prohibits conduct by a recipient of federal financial assistance that results in a person being excluded from participation in, denied the benefits of, or subjected to discrimination under a federally assisted program or activity.

66. While specifically applying to sex based discrimination, the US Department of Education Office of Civil Rights issued guidance on April 29, 2014, "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypic notions of masculinity or femininity..." In December of that year, the Department issued guidance on Title IX in single-sex classes and activities stating, "All students, including transgender students, who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX."

67. Plaintiff opted not to disclose her status in terms of gender conformance, gender identity, or sexual orientation in the earlier court documents, believing it irrelevant. What is relevant is the defendants' perception of plaintiff's gender non-conformity with regard to traditional stereotypes of femaleness, and that their actions and discriminatory treatment of plaintiff due to those perceptions, fall easily within the scope of Title IX.

68. The test is essentially, did Plaintiff (perceived as gender-non-conforming) receive the same treatment as one who was considered as conforming. The answer is "NO!" To plaintiff's knowledge, no other College of Veterinary Medicine graduate student was required to earn grades higher than those stated in the course syllabus, no one else had their grades falsely filed as failing, or their degree denied, and no one else was perceived as gender non-conforming or non-stereotypical for their body sex.

Plaintiff is entitled to remedies.

69. Recognized discriminatory treatment under the law includes disparate treatment, disparate impact, and retaliation. Plaintiff meets all legal tests for a prima facie case in all three categories. Plaintiff is considered gender non-conforming in terms of legally assigned / birth sex, biological physical characteristics, brain sex/ gender identity, mode of dress, advocacy for LGBT civil rights, and certainly in the perceptions and actions of CVM professors. Plaintiff applied for and was admitted to her PhD program in cell biology/morphology, and despite being eligible, her passing grades were falsified as failing, program terminated, and degree denied, while others perceived as gender conforming were allowed to remain in their programs of study and their grades were not falsified. NCSU had no legitimate reason for their actions, only pretext. Moreover, the timing and frequency of NCSU's actions against Plaintiff evidence a pattern and practice of discrimination and created a hostile environment.

Plaintiff was Retaliated against in initial case, in 2013, and ongoing.

70. CVM professors retaliated against Plaintiff for exercising her constitutional rights. And, NCSU legal counsel retaliated when, instead of correcting an obvious billing error, he intentionally perpetuated the discrimination. This is evident in that refusing to correct the known error serves no important public purpose and ultimately costs more in government resources by prolonging the issue. NCSU's refusal to correct the error forced Plaintiff to file in federal court as the only available option to correct the situation and prevent further harassment by the university.

71. A party need not prove a claim of discrimination in order to prevail in the instance of retaliation. According to the Department of Justice legal guidance on Title IX, "retaliation protections are designed to preserve the integrity and effectiveness of the enforcement process itself. Because of this purpose, the merits of any underlying complaint of sex discrimination are irrelevant in assessing a retaliation complaint.

The prohibited conduct is the act of retaliation itself."

72. Legal tests for retaliation include assertion of rights or engaging in activities protected under Title IX. Plaintiff's pursuit of corrected grades and the initial grievance falls into this category as do attempts to correct the erroneous billing and overpayment. Defendant knew of plaintiff's attempts to gain justice and attempted to thwart her efforts by terminating her PhD program and now by forcing a federal court case. A causal connection between the events and the state's actions is demonstrated while no clear justification exists.

73. Congressman Birch Bayh said that discrimination leads to economic inequities, "because education provides access to jobs and financial security, discrimination here is doubly destructive." These observations have proven true. Plaintiff has lost at least $1.5 million in outright earnings, in addition to lost retirement wages and other benefits, along with extensive associated damages due to the denial of her PhD degree. When NCSU opted to press forward with

the erroneous billing, rather than simply correct it, they perpetuated the earlier discrimination and added discrimination in the forms of disparate impact and retaliation. The serious implications of "ruining your credit", on top of the lost income, in the Congressman's words, "is doubly destructive." The burden of being denied refund for overpayment and forced to fight a federal court battle in order to prevent further harm exponentially increases the damage.

Question II:

Should Title IX and other civil rights/ non-discrimination statutes be interpreted to encompass the full range of sex based physical characteristics?

74. While courts have long viewed "sex" in binary terms of male or female, biology defies this oversimplification.

> "A regularly cited 1991 study of nearly 35,000 newborn children found that 1 in 426 did not have strictly XX or XY chromosomes. In addition, the World Health Organization reports that 1 in every 2,000 births worldwide are visibly intersex, because the child's genitals are either incomplete or ambiguous, which equates to five newborn Americans a day."[6]

75. For thousands of years, humans have recognized intersex persons, often those presenting both male and female external genitalia, while two-spirit or multi gender identifying persons have also existed for thousands of years. Research into less externally obvious intersex biological traits is also not new. For decades, scientists have known about gonadal mosaicism[7], where an individual's gonads possess both male and female reproductive tissue: "Ovotestis". And, in April of 1916, Frank R. Lillie, a noted embryologist, published a scientific paper on the "Free-Martin" in cattle.

76. Medical research has long shown that in addition to sex-based chromosome combinations

of "XX" and "XY", there can be variations that correspond with intersex presentation, such as "XXY", "XXXY", "XO", etc. Klinefelter's and Turner's syndromes are linked to these genetic combinations. Newer research is linking specific genes to sex, sexual orientation, gender, and gender identity.

77. Importantly, Lillie's studies demonstrated that genetics are not the only influencing factor in sex and gender determination. Hormones, especially those in the womb, play an enormous role. For example, in the free-martin, a female calf's sexual development is influenced by hormones from her male co-twin. At least fifty years of medical research shows that humans are also influenced by in vivo hormones, and among

6. Judge: Gender Laws Are at Odds With Science by Noël Wise, Mar 08, 2017 TIME Magazine; http://time.com/4679726/judge-biological-sex-laws-marriage-bathrooms/

7. Curr Oncol. 2013 Apr; 20(2): 85–87. doi: 10.3747/co.20.1449 PMCID: PMC3615857 Many mosaic mutations W.D. Foulkes, MBBS PhD and F.X. Real, MD PhD https://www.ncbi.nlm.nih.gov/pmc/articles/

other things, can result in the brain sex being different from one's body sex (body sex being physical presentation of external genitalia and corresponding with legally assigned sex at birth.) Non-aligned brain sex is often associated with clinical gender identity disorder, and also with gender non-conforming presentation.

78. In conservative North Carolina during the early 1990s delineations of "Gay", "Lesbian", "Bisexual", and "Transgender" were essentially non-existent, as was any separation of HIV positive status from perceived non-heterosexuality. Instead, the terms "damn queer", "gay", and "homosexual" were used by many as catch-alls to lump everyone together who did not conform to stereotypic gender norms.

79. The earlier courts' decision hinges on previous case law that narrowly defines who is eligible for redress, while failing to allow redress for others targeted with the same bias. If Lesbian, Gay, Bisexual, and Transgender people are lumped together for nearly every other purpose, including discrimination, why should only one segment be allowed legal recourse?

80. In *Oncale*, a Title VII case finding that same sex sexual harassment was "because of sex", Justice Scalia wrote for the unanimous Court, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."

81. Plaintiff should not be denied legal recourse for discrimination based on her biology. Plaintiff respectfully suggests that courts interpret Title IX and other non-discrimination statutes to encompass the full range of sex-based physical characteristics, along with sex, sex-based stereotypes, gender identity and gender non-conformance, as that would more realistically reflect medical research and human experience. **Nonetheless, discrimination against plaintiff falls squarely within current reach and judicial interpretation of the law.**

82. Dr. Smoak obviously didn't think plaintiff was a gay man, but used the generic term, "gay" as all-encompassing. Openly categorizing Plaintiff with a larger group of gender non-conforming people evidences that Dr. Smoak's bias was based on her perceptions of stereotypic

gender roles and puts this case squarely under current case law.

88. The earlier court's interpretation that Plaintiff's perceived sexual orientation precludes her from Title IX protections lacks merit (see *Romer V. Evans*, 517 U.S. 620, 633 (1996),

> "disqualification of a class [lesbian, gay, and bisexual] persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."

89. The U.S. Department of Education, Office of Civil Rights has expressly instructed schools, "the fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment." (OCR, Oct. 26, 2010 Dear Colleague Letter at 7-8.) Even in un-doing Obama era guidance that supported LGBT students, U.S. Secretary of Education, Betsy DeVos, has vowed protection stating, "We have a responsibility to protect every student in America and ensure that

they have the freedom to learn and thrive in a safe and trusted environment," she said. "This is not merely a federal mandate, but a moral obligation no individual, school, district or state can abdicate."[8]

90. The Supreme Court has stated that the courts should accord Title IX, "a sweep as broad as its language" referring to Congressional language, "no person shall be subjected to discrimination." Since Titles VI, VII, and IX are similarly drafted, the following Justice Department guidance[9] may be useful, "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike the spectrum of disparate treatment of men and women resulting from sex stereotyping." Title VII legal theories suggest that sex stereotyping violates Title IXs prohibition of

8. https://www.usnews.com/news/national-news/articles/2017-02-23/devos-pledges-to-protect-lgbt-students-after-nixing-transgender-bathroom-protections

9. Title IX of the Educational Amendments of 1972 Legal Manual; justice.gov

discrimination on the basis of sex. In *Macy v. Holder*, it was found that Title VII was violated when a transgender / gender non-conforming person was subjected to discrimination. More recent EEOC interpretations of the law hold that discrimination on the basis of sexual orientation is a form of sex-based discrimination and illegal. See *David Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015).*[10] In December of 2015, U.S. District Judge Dean Pregerson found,

> "Therefore, the Court finds that sexual orientation discrimination is a form of sex or gender discrimination, and that the "actual" orientation of the victim is irrelevant. It is impossible to categorically separate "sexual orientation discrimination" from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice. Simply put, to allege discrimination on the basis of sexuality is to

10. See also, Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII; https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm

state a Title IX claim on the basis of sex or gender."[11]

91. In 2017, the Second and Seventh Circuit courts made similar findings.[12]

Is equal access to public education (and protection from discrimination in public education) guaranteed regardless of sexual orientation or gender identity under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in light of the U.S. Supreme Court's Obergefell decision?

92. In *Obergefell*, the U.S. Supreme Court recognized marriage as a fundamental right to be

11. VIDECKIS & WHITE v. PEPPERDINE UNIVERSITY, Case 2:15-cv-00298-DDP-JC Document 41 Filed 12/15/15 Page ID #:476; https://assets.documentcloud.org/documents/2648492/Pepperdine-Title-IX-Ruling.pdf

12. Christianson v. Omnicom Group, 16-748; 2d Cir. 2017, March 27, 2017; Hively v. Ivy Tech Community College, No. 15-1720 (7th Cir. Apr. 4, 2017)

guaranteed equal access, specifically extending that right to gay and lesbian couples. Marital rights are essentially rights to engage in contracts and fully participate in major institutions of American society. Founding father, Thomas Jefferson, wrote extensively that public education is absolutely essential for democracy. Because the Court, in *Obergefell*, indicated that to bar someone from fully participating in major institutions of American life based on their sexual orientation is illegal, it stands to reason that barring someone from fully participating in public education based on perceptions of that person's sexuality would also be illegal. Following this reasoning, shouldn't LGBT persons now be guaranteed equal access to other basic rights, including housing and public accommodations?

93. Perhaps even more relevant is the collective decision in *Bostock*, *Zarda*, and *Harris* where Title VII's interpretation of "sex-based" unambiguously included both sexual orientation and gender identity.

94. The United Nations Educational, Scientific, and Cultural Organization recognizes,

"Education is a fundamental human right and essential for the exercise of all other human rights." The international Yogyakarta Principles affirm "States' obligation to ensure effective protection of all persons from discrimination based on sexual orientation or gender identity," including in education. The U.S. Department of Education lists "assuring access to equal opportunity for every individual;..." as part of its mission statement. In the 2008 re-authorization of the Higher Education Act, Congress made clear its intention of equal access to a higher education. Section 104, states, "(D) students should not be intimidated, harassed, discouraged from speaking out, or discriminated against; (E) students should be treated equally and fairly:"

95. Although the discrimination in this case was based on defendants' perceptions of Plaintiff in light of their stereotypic notions of what a woman ought to be, the lower courts' dismissal presumed that the focus of the case was sexual orientation, making *Obergefell* instructive to the case at hand. *Obergefell* completely nullifies the earlier court's rational for dismissal.

CONCLUSION

96. The state abrogated its Eleventh Amendment immunity when it accepted federal funds under Title IX.

97. Evidence shows Title IX discrimination based on perceptions of plaintiff's gender. Defendants admitted discrimination. What the defendants' counsel does not acknowledge and the lower courts failed to grasp was the fact that the defendants (and most North Carolinians in 1994) did not distinguish between sexual orientation, gender identity, HIV status, or a myriad of other non-stereotypical gender presentations (such as strong, independent women wearing sensible shoes.)

98. While strictly adhering to the letter of earlier case law, the earlier court erred in its failure to attend to the spirit of Title IX. Reading the quotes of NCSU professors with a 2015

worldview, as opposed to the 1992-94 context in which they were spoken, the earlier court artificially narrowed "gay" to mean only those attracted to the same sex. They missed its early 1990's generic use that included lesbian, gay, bisexual, and transgender persons, i.e., sexual orientation AND gender identity, and, when used disparagingly to mean anyone perceived as non-stereotypic in terms of gender.

99. NCSU professors had no knowledge of whom plaintiff was attracted to, only that they perceived her as not conforming to their stereotypic notion of what a woman should be. Their use of the word "gay" encompassed anyone who dared to breach gender norms.

100. **Because the gender-based discrimination targeting plaintiff falls squarely within Title IX, subject matter jurisdiction is demonstrated and the lower courts' dismissal ought to be reversed.** Even if the initial discrimination did not fall under Title IX, the acts of retaliation do. Taking into consideration natural history (medical knowledge and human experience) leads to the conclusion

that sexual orientation, gender, gender-based stereotypes, and gender identity are inextricably linked in terms of bias and discrimination. Moreover, any bias against perceived sexual orientation does not negate bias around gender-based stereotypes, but rather, further evidences the bias and intent to discriminate.

96. Both Defendants and earlier case findings have acknowledged discrimination targeting Plaintiff. **This pervasive pattern has been demonstrated in every circumstance in which these parties have interacted for over twenty years.** The evidence demonstrates liability well across the line from conceivable to plausible to acknowledged. Plaintiff needs and deserves relief

101. As the Seventh Circuit recently concluded, "[t]he logic of the Supreme Court's decisions, as well as the common-sense reality that it is

actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."[13]

102. In *Bostock, Zarda,* and *Harris*' three cases (6-3 decision), Justice Gorsuch penned that discrimination on the basis of sexual orientation or gender identity is also discrimination "because of sex" as prohibited by Title VII. Should this not also apply to equal protection from discrimination under Title IX?

103. Holding North Carolina accountable for discrimination is important because it affects every family[14], every North Carolinian[15], and ultimately, every American[16].

13. https://www.natlawreview.com/article/seventh-circuit-court-rules-sexual-orientation-protected-class-kimberly-hively-v-ivy

14. "Approximately 9 million Americans—roughly the population of New Jersey—identify as LGBT" ; The Williams Institute, April 2011, williamsinstitute.law.ucla.edu;

15. POLITICS 04/19/2016 05:07 pm ET, Anti-LGBT Law Is Costing North Carolina MillionsCharlotte tourism officials project the city could lose over $86 million through 2020. By Sam Levine http://www.huffingtonpost.com/entry/north-carolina-lgbt-discrimination-tourism_us_571687fae4b0018f9cbb66bc

16. Harvard Business Review, "The Right Way to Hold People Accountable" by Peter Bregman, esp. #5 "Clear Consequences", https://hbr.org/2016/01/the-right-way-to-hold-people-accountable; See also, North Carolina's LGBT law may have impact on women, minorities BY ANNA DOUGLAS

http://www.mcclatchydc.com/news/politics-government/article69527867.html#storylink=cpy; Also, http://www.salon.com/2016/04/08 trans_americans_are_under_attack_why_north_carolinas_draconian_anti_discrimination_repeal_is_just_the_tip_of_the_iceberg/

Plaintiff requests the following to remedy the situation:

96.

a. NCSU corrects all grades on Plaintiff's transcript to those that were actually earned in the courses. The spring of 1994 Biochemistry grade is changed to read "WP" or "W". These corrected grades are reflected in her GPA. Instead of reading "program terminated," transcript reads, "in good standing" and "Ph.D. granted." Ten official copies of the corrected transcript are sent to Plaintiff without cost.

b. Plaintiff's Ph.D. degree in Cell Biology and Morphology is conferred through College of Veterinary Medicine and North Carolina State University. Two copies of her official diploma are provided to Plaintiff at no cost.

c. NCSU cancel any actions to bill or collect funds from Plaintiff. NCSU notify all collections agencies and credit reporting organizations that any such billing was in error and that Plaintiff owes no debt nor obligation to NCSU. NCSU provide to Plaintiff copies of all such notifications.

d. North Carolina promptly refund the overpaid portions of Plaintiff's student loans with fees and interest.

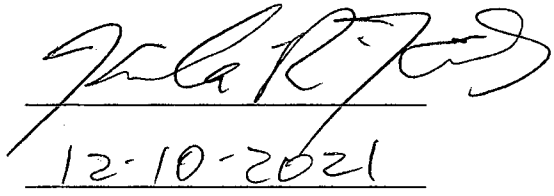
e. The North Carolina Education Authority, state Attorney General's Office, Governor, NCSU, and CVM each issue to Plaintiff a formal letter of apology.

f. North Carolina pay Plaintiff no less than $13 million[17] in compensatory damages.

g. North Carolina pay all legal costs associated with this case and earlier attempts to resolve these issues.

104. For the above-stated reasons, and in light of the complete case record, Plaintiff respectfully requests this Petition be granted, the lower court's rulings reversed, full consideration of the merits, and appropriate remedies.

17. In 2012, a federal court jury in Michigan awarded a $4.5 million judgment to an openly gay university student who was the target of defamation and intentional emotional distress. http://www.cnn.com/2012/08/17/justice/michigan; In 2013 ten discrimination settlements averaged $63.8 million dollars each. http://www.insidecounsel.com/2014/07/08/top-10-most-expensive-discrimination-settlements-o



12-10-2021

Kenda R. Kirby, Plaintiff
Pro Se

Plaintiff Address:
7493 County Road 73
Coyle, Oklahoma 73027
E-mail: KendaKirby@aol.com
Telephone: 202-271-7331