No. 18-780

In The

Supreme Court of the United States

LISA MARIE KERR,

Petitioner,

v.

MARSHALL UNIVERSITY
BOARD OF GOVERNORS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this case of a state university that, after a student disclosed she was homosexual, baselessly and permanently refused to issue her fully-earned credential, denied her due process, and spread lies about her, four questions arose:

1. Under the Civil Rights Act, is sexual orientation discrimination unlawful "on the basis of sex," and/or "because of . . . sex," as held by the Second and Seventh Circuits, or does such text impliedly exclude homosexual persons, as the Eleventh Circuit reasoned?

2. Does "academic deference" remain an affirmative due process defense that universities must plead and prove, as this Court and the Fourth Circuit have held, or is it an immunity-like 12(b)(6) presumption that bars all sorts of claims, including unlawful discrimination?

3. When a non-frivolous First Amended Complaint is filed after 12(b)(6) judgment, does the district court abuse its discretion by denying leave to amend, or may it forfeit the action to punish the plaintiff for "delay" she did not cause or control?

4. When a plaintiff files a new action within the forum's savings statute period, and her amended complaint adds no claims or parties, is the district court bound by state precedent, or may it reject state law and forfeit the plaintiff's entire action?

PARTIES TO THE PROCEEDINGS

Plaintiff-petitioner Lisa Marie Kerr earned a West Virginia teaching credential under state-law standards, but was permanently denied the credential under Marshall University's de facto policy of anti-gay discrimination.

Defendant Marshall University Board of Governors was authorized by statute to be sued and accept notice for Marshall University, a West Virginia state institution. The Board promulgated and enforced Marshall's written policies.

Defendant Gene Brett Kuhn, a high school coach and teacher, was hired by Marshall to supervise the last few weeks of Kerr's student teaching. Marshall relied on a Kuhn-signed document as dispositive, but refused to present Kuhn in the "appeal" to explain or defend it.

Defendant Judith Southard, a retired teacher, was hired by Marshall to evaluate Kerr under state classroom criteria. After Southard learned that Kerr was homosexual, she turned in blanks for Kerr's state ratings.

Defendant Sandra Bailey directed Marshall's Master of Arts in Teaching program. Based on her bigoted views known to Marshall, Bailey drove the decision to deny Kerr's credential, and created false evidence as pretext.

PARTIES TO THE PROCEEDINGS – Continued

Defendant Teresa Eagle was Marshall's Dean of Education and Professional Development. Eagle threatened Kerr, published known lies about her as pretext, and conducted a fake "appeal" to cover up anti-gay discrimination.

Defendant Lisa Heaton directed Marshall's Elementary and Secondary Education program. Heaton was proxy for Eagle in the "appeal," and signed off on false pretexts during the cover-up.

Defendant David Pittenger was interim Dean of Marshall's Graduate School. Pittenger issued Marshall's final permanent denial of Kerr's credential, which asserted new false pretexts contradicted by Marshall's own records.

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The judgment of the United States Court of Appeals for the Fourth Circuit in consolidated appeal 17-2243 was a summary affirmance (App. 1-3). Rehearing was denied (App. 68-69).

The rulings substantively at issue are three memoranda of the United States District Court for the Southern District of West Virginia:

a) Denial of post-judgment leave to amend in Kerr's original action 2:14-cv-12333 (App. 4-21).

b) Dismissal of the amended complaint and denial of leave to amend in Kerr's new action 2:16-cv-06589 (App. 22-44).

c) The magistrate's recommendation in support of dismissal (App. 45-67).

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1). The Fourth Circuit's judgment was filed on August 28, 2018 and plaintiff/petitioner's rehearing was denied on October 2, 2018.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1337(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1 of the Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964 (20 U.S.C. § 1681(a)):

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

W. Va. Code § 55-2-18 (2017):

a) For a period of one year from the date of an order dismissing an action or reversing a judgment, a party may refile the action if the initial pleading was timely filed and: (i) The action was involuntarily dismissed for any reason not based upon the merits of the action; or (ii) the judgment was reversed on a ground which does not preclude a filing of new action for the same cause.

STATEMENT OF THE CASE

This case is about bigotry – that deadly poison to our constitutional democratic republic. Marshall's practice of refusing the state teaching credential to homosexual candidates contradicts our defining axioms of equality and meritocracy. It divides America. It shames America. It must not stand.

The claims in Kerr's First Amended Complaint have merit. No court has ruled otherwise. Yet, Kerr's case has been frozen at 12(b)(6) nearly five years. In the district court's reach for any pretext to reject Kerr's claims, it ignored facts, made up law, abused its discretion in disregard of justice, and refused to follow clear controlling precedent – including the Fourth Circuit published opinion in Kerr's own case!

In Kerr's first appeal, when it became clear their immunity gambit would fail, defendants abandoned it and fell back upon a pleading challenge. When the Fourth Circuit affirmed, it published an opinion based on that pleading challenge. And Kerr amended her claims to resolve that pleading challenge. But defendants reasserted their original defenses in a second 12(b)(6) motion, arguing that affirmance *on any ground* re-awakened the district court's entire original decision as preclusive – not only to bar new claims, but to bar amending the old ones. That is contrary to state substantive law, federal precedent and Fed. R. Civ. P. 15.

Remarkably, the district court embraced defendants' ploy, which inflicted so much delay that Kerr fell

into poverty and had to file her appeals and First Amended Complaint *in forma pauperis*. Yet the district court wrongly blamed that delay on Kerr alone. It ignored the fact that Kerr promptly amended her claims to correct every deficiency identified in *Kerr I*. Instead, the district court defied Supreme Court and Fourth Circuit precedent to forfeit Kerr's action, and her second appeal resulted in summary affirmance.

The district and appellate courts thus dodged the immensely-important question: did Title IX of the Civil Rights Act silently legalize what Marshall did to Kerr? Does a tacit go-ahead for bigotry based on same-sex orientation lurk in the texts "on the basis of sex" and "because of . . . sex" – which in any natural reading would bar such discrimination? The circuits are split on that issue.[1] Moreover, does equal protection preclude courts from implying such exclusions, at all? That question also cries out for resolution.

Certiorari is the right course. Such repugnant erasure as Kerr endured at Marshall should not percolate one more day among the States, injuring others. Can jurists of any stripe genuinely believe this is acceptable in a democratic nation? History teaches that America's experiment remains fragile and precious – it cannot survive as a patchwork where the quality of

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[1] *Compare Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (holding that "because of . . . sex" applies to sexual orientation discrimination), *cert. pending*, and *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (same) *with Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (implying a silent anti-gay exception).

moral personhood ebbs and flows at each state line. We cannot claim to operate as a constitutional republic rooting natural sovereignty in its people, if our laws continue to sustain a *sub rosa* caste system. We cannot credibly tout meritocratic virtues on the global stage, if our institutions continue to sort well-qualified, high-performing students into the trash heap based on irrelevant stigma.

And we cannot proclaim equality under law if we do not practice it.

A. Factual Background

Kerr is an attorney in good standing with the bars of California and West Virginia. She became a full-time caregiver during her life partner's five-year ovarian cancer illness. After Gloria died in 2010, Kerr felt called to enter public service. She completed Marshall University's two-year program for a West Virginia teaching credential. Although it is a state-mandated license, evaluated under non-discretionary state criteria, West Virginia issues the credential only through universities. First Amended Complaint ("FAC"), ¶¶ 26, 45-48.

Kerr had excellent evaluations and grades. She fulfilled every state credential requirement. She passed the board exams at such a high level that she was awarded a certificate of merit. Kerr complied with Marshall's handbook. Classroom evaluations unanimously found her well-qualified. But toward the program's end, in the Fall 2013 semester, Kerr mentioned

her homosexual orientation to adjunct instructor Southard, who said she would "have to report" it to the program director. Instantly, Marshall reversed its prior assessment of Kerr – from outstanding candidate to pariah. FAC, ¶¶ 78-97.

After Kerr disclosed her homosexual orientation, Marshall's faculty gave her the silent treatment, denied her support required by its handbook, and refused to issue the state ratings for her classroom performance. Kerr had to resort to communicating through a heterosexual classmate, as a proxy, even to get the evaluator (defendant Southard) to show up at her student-teaching assignments. Kerr strove to overcome this self-evident bias, going far beyond the minimum standards of West Virginia law and Marshall's credential handbook. An optimist, Kerr felt she had won over her evaluator after several visits, based on Southard's positive comments – even though she still gave Kerr blank spaces for state ratings! And although her final classroom supervisor (defendant Kuhn) had a nonstandard approach to teaching, along with a volatile temper and a tendency to vanish for long intervals (FAC, ¶¶101-16), he praised Kerr, denied any problems with her teaching, and told her that he had sent a positive evaluation to Marshall. FAC, ¶¶ 84-93, 122-24, 142-43.

Then the ax fell. The day before Kerr's state credential should have been issued, defendants Eagle (dean of education) and Bailey (credential program director) summoned her to a back-room meeting. They told Kerr that Marshall would never approve a

teaching credential for "someone like you," and ordered her never to set foot on Marshall's campus again. FAC, ¶¶ 146-50.

Eagle and Bailey ambushed Kerr with a narrative and evaluation purportedly authored by Kuhn. It cited fourteen areas of putative failure in which Kuhn had *never* criticized Kerr, and added multiple false, baseless accusations, including the ridiculous lie that Kerr had hacked into a school computer to alter student grades (a federal felony). Kerr had never heard such accusations before that moment. Kuhn had previously offered only praise for Kerr's classroom performance, and had told Kerr that he had written a positive evaluation. However, Kerr recalled that a few days before ending her stint in his classroom, during a brief conversation about how she came to West Virginia, she had disclosed her homosexual orientation to Kuhn. FAC, ¶¶ 43, 147, 169-76.

In the last-minute ambush meeting, Kerr was shouted down when she tried to contest the falsehoods. Bailey and Eagle said that Marshall did not care whether the accusations were true or false – only that they were on a paper signed by Kuhn, and would serve to deny Kerr's credential. At key points, Bailey patted a stack of files she refused to show, claiming she had all the evidence needed to end Kerr's teaching pursuits. When Kerr reached out to view the files, Bailey protected them with her arms. Bailey and Eagle said that the facts were already decided against Kerr, and that she had no recourse. FAC, ¶¶ 144-60.

In short, it was self-evident from defendants' conduct that the baseless last-minute allegations were a pretext for anti-homosexual bias.

When Kerr refused to meekly accept the predetermined outcome, Eagle conceded that Kerr could appeal through Marshall's internal process, but emphasized that "your appeal is to me, I will decide it." Remarkably, Bailey told Kerr that even if she *won* a Marshall appeal, she *still* would not receive the state teaching credential, which Bailey claimed was left to her own unilateral discretion. They insisted that the appeal would change only Kerr's grade on the transcript, not the outcome. Those assertions were so bizarre that Kerr asked to see a program handbook, so that she could check Marshall's process for disciplinary decisions of such consequence. Eagle replied, "you can look at the handbook when you get home." Both defendants badgered Kerr to walk away without her credential or an appeal, until Kerr burst into tears and protested that if she was so awful, why had two schools offered her jobs, based on their personal observation of her performance? Eagle then angrily threatened that if Kerr appealed through Marshall, she would send the document with the false accusations to the very schools Kerr had applied to – "I can do it right here without even leaving this room." FAC, ¶¶ 161-72.

Kerr appealed to Marshall anyway. But defendants refused to follow Marshall's handbook and written discipline/dismissal policies. *See* FAC, ¶¶ 65-77 (policies). Three meetings took place, purporting to be Kerr's "appeal," but she was never permitted to dispute

any element of the decision, never was shown the evidence on which defendants claimed to rely, and never had a neutral arbiter. Quite the opposite – original decision-maker Eagle kept control throughout! Everyone else deferred to her. During each brief session, Kerr asked why Kuhn was not there to explain why his last-minute narrative and evaluation contradicted Kerr's written evaluations by her three prior classroom supervisors, and even contradicted Kuhn's *own* prior consistent praise. But each "appeal" participant (Southard, Bailey, Eagle, Heaton, Pittenger) simply pointed to the Kuhn-signed document, recited that the facts were already decided, and refused to provide Kuhn as a witness. After each sham meeting, defendants re-adopted the Kuhn-signed evaluation with the accusations they knew were false. They added new pretexts they knew were equally-false, because they were contradicted by Marshall's own records, policies, and handbook. Kerr fought back with documents that refuted the original lies, as well as each round of new pretexts. Her evidence and Marshall's written policies were silently ignored. FAC, ¶¶ 178-99.

To summarize: the false accusations against Kerr were conclusively presumed true from start to finish. By ensuring Kuhn's absence, over Kerr's protests, and in violation of Marshall's own written policies, defendants ensured that no factual review could take place, and pre-determined the outcome. There was no basis for that conduct, other than a plan, practice, and de facto policy at Marshall University to bar homosexual

candidates from obtaining the state teaching credential, to cover it up by violating due process, and to paper the trail with false pretexts and defamatory lies.

Kerr's earned teaching credential was permanently denied on January 29, 2014, when defendant Pittenger, as graduate school dean, ordered that Kerr could return to Marshall for a master's degree, but not for the teaching credential, which he refused to approve. Under West Virginia law, at that point, the false defamatory narrative and evaluation became part of Kerr's permanent state teaching record, forever available to school administrators who might consider hiring Kerr. FAC, ¶¶ 59-60, 200-17.

The schools where Kerr had been invited to apply for teaching positions? Now they would not return Kerr's calls. No one would. Kerr was effectively blacklisted from skilled employment – not only in teaching, but in her prior profession of attorney. She could get only low-wage temp jobs, and often found no work at all. Kerr struggled for many months on unemployment benefits and SNAP. The ugly looks of disgust when professional contacts learned Kerr had been permanently barred from teaching inflicted intense shame, and drove Kerr into poverty and seclusion. FAC, ¶¶ 222-27.

In short, Marshall's bigoted smear campaign financially and personally destroyed Kerr's life.

B. Initial Round of Proceedings

After giving statutory notice to Marshall and West Virginia, Kerr filed suit on March 14, 2014 for sexual orientation discrimination, defamation, and denial of due process.[2]

In May 2014, Defendants moved to dismiss Kerr's original complaint under 12(b)(6), relying on a theory of "academic discretion" immunity drawn from dubious unpublished district court cases within the Fourth Circuit. Contrary to well-settled precedent holding "academic discretion" to be an affirmative defense that defendants must plead and prove, those cases misapplied it as an immunity-like presumption, requiring 12(b)(6) dismissal in favor of universities and their personnel. *See, e.g., Zimmeck v. Marshall Univ. Bd. of Governors* (S.D. W. Va. 2013).

Defendants argued that, because Kerr acknowledged Marshall had conducted some sort of "appeal," its outcome must be presumed valid on 12(b)(6) under "academic discretion," and therefore moots all else – including discrimination claims. The district court accepted that position, and relied upon it to dismiss all claims in Kerr's original complaint.

Kerr timely appealed that first dismissal in April 2015. Throughout briefing, defendants argued for academic discretion as quasi-immunity, based on the dubious unpublished cases. Then, in March 2016

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[2] Kerr's original complaint also asserted four other claims, which her First Amended Complaint does not reassert.

argument, under intensive questioning by the Fourth Circuit panel on how broad this "academic discretion" presumption purports to be, defendants withdrew their immunity defense. Instead, defendants switched to a pleading challenge, stating in open court:

> **39:07** BALLARD: If [Plaintiff's complaint] was properly pled, it would survive a 12(b)(6) stage. That is what this case centers upon, is that the allegations were not properly pled. . . . What we have argued in this case is that this Complaint did not survive 12(b)(6) as written.[3]

In rebuttal, Kerr accepted defendants' retreat. She did not request remand and leave to amend in the event the panel found pleading insufficiency. Rather, Kerr planned to make any needed amendments in a freshly-filed action, rather than a remanded one, for reasons not relevant here.[4] Because West Virginia's

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[3] Fourth Circuit audio archive, unofficially transcribed as Exhibit 1 to Kerr's opposition to the second 12(b)(6) motion. The recording may be found at: http://coop.ca4.uscourts.gov/OAarchive/mp3/15-1473-20160322.mp3.

[4] Unique circumstances led Kerr to offer opposing counsel the professional courtesy of an exit, via a fresh filing. During 2016, Kerr learned of evidence that Kuhn's narrative and evaluation had been *forged* (altered from favorable to failing *after* Kuhn submitted it, without his knowledge). That explained why Marshall had omitted Kuhn from the "appeal," even though policy required his presence. The *Kerr I* panel pressed defense counsel Ballard on whether Marshall still asserted the truth of the "Kuhn" document. Ballard's evasion of that question lent weight to the forgery theory, and (coupled with his sudden retreat to a pleading challenge) suggested counsel sought to right their ethical wrong. Quickly, while rising for rebuttal, Kerr had a decision to make. Aware that Ballard was running for Ohio state judge,

savings statute allowed one year to refile, and settled Supreme Court and Fourth Circuit precedent protected post-judgment amendment, that course had rock-solid support.

In accord with Marshall's retreat, the Fourth Circuit panel affirmed dismissal, but only on specific pleading grounds. *Kerr v. Marshall University, et al.*, 824 F.3d 62 (4th Cir. 2016) ("*Kerr I*"). The Fourth Circuit declined to reach Marshall's original "academic discretion" immunity position, relying on the pleading challenge they swapped in at argument. Rehearing was denied in June 2016.[5]

Kerr did not ask for remand. After *Kerr I* affirmed on pleading grounds, Kerr filed the FAC in a fresh action, where Ballard would not yet be under retainer. And she gave Ballard a written heads-up. However, Ballard did not exit. After Kerr sent a courtesy copy of the FAC, Ballard obtained an extension so that Marshall could hire new counsel, used up the time, then jumped back in with the 12(b)(6) arguments he had waived on appeal, which relied on the forgery. After winning election to the bench, Ballard obtained the district court's permission to withdraw, and Hess inherited the case.

[5] Kerr asked for rehearing, in part, to rectify *Kerr I*'s misconstrual of her action as arising from a de minimis, correctable bad grade, rather than from permanent denial of Kerr's teaching credential. This was a premature finding of fact drawn solely from defendants' self-serving, conclusory arguments, and was improper because it contradicted the complaint. After rehearing was denied, the FAC addressed this issue through clarifying amendments.

C. Proceedings Now at Issue

Promptly, in July 2016, Kerr filed a First Amended Complaint that conformed three of her claims to *Kerr I*. Initially, Kerr filed the FAC in a fresh case, before the same federal court and judge. Kerr's FAC acknowledged all prior proceedings, and was comprehensively-revised with specific factual detail that resolved every *Kerr I* issue. It included allegations to support application of West Virginia's one-year statutory savings period.

*The FAC did **not** add new claims.* Rather, it subtracted four.[6] Nor did it add new parties. The claim for sexual orientation discrimination, present in the original complaint, was clarified to recognize Title IX as a statutory basis, along with equal protection under § 1983. Also, the FAC amended Kerr's claims for defamation and due process, to conform to points raised in *Kerr I*. And the FAC amended all claims with an exhaustively-detailed narrative of facts and events that resolved every pleading insufficiency identified in *Kerr I*.[7]

In October 2016, after using up a two-month extension, defendants filed a 12(b)(6) motion ("2nd Mot. to Dismiss") that ignored the published grounds for

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[6] Kerr declined to reassert four of her seven claims. She sought to amend only the claims where she could plead from personal knowledge the missing facts *Kerr I* found essential.

[7] Also, the FAC alleged facts to support a 23(b)(2) injunctive class on due process issues. Kerr planned to consider whether to move forward with certification after reviewing and comparing defendants' answers (which were never filed).

Kerr I – which the FAC resolved. Defendants argued that even if Kerr's amended claims were well-pled, res judicata barred curing 12(b)(6) pleading defects via post-judgment amendment in a new action. Without authority, defendants asserted that the district court's original "academic discretion" immunity rulings had been affirmed and were thus binding – despite defendants' abandonment of immunity during argument, and despite *Kerr I*'s actual rulings based on specific pleading omissions. In short, Marshall made a bid to have their cake and eat it, too.

In opposition, to support her post-judgment curative amendments, Kerr relied upon *Foman v. Davis*, 371 U.S. 178, 182 (1962) (district court abused discretion by denying leave to reopen judgment and amend complaint) and on the Fourth Circuit precedents applying and explaining *Foman*. Kerr also relied on West Virginia's savings statute (W. Va. Code § 55-2-18), which is liberally construed to protect amendment. She did not ask the district court to dig through the lengthy FAC for truffles; rather, Kerr provided the following point-by-point concordance of how the FAC cured each *Kerr I* basis for affirmance (Opp. to 2nd Mot. to Dismiss, at 7-10):

> **1. Amendments to Equal Protection Claim (Title IX and § 1983):**
>
> a. The original complaint did not allege when, or if, each defendant learned of

Kerr's homosexual orientation. *Kerr I* at 37. The FAC remedied that insufficiency.[8]

b. The original complaint did not allege that defendants treated Kerr differently, or with discriminatory animus, after learning of her same-sex orientation.[9] *Kerr I* at 37-38. The FAC remedied that insufficiency.[10]

c. The original complaint did not allege that Title IX covered the discrimination claim. *Kerr I* at 15-16. The FAC remedied that insufficiency.[11]

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[8] FAC, ¶¶ 42-44.

[9] *Doe v. Columbia Univ.*, No. 15-1536 (2d Cir. 2016) (published), adopted the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) in Title IX discrimination claims. This "temporary presumption in a plaintiff's favor reduces the plaintiff's pleading burden, so that the alleged facts need support only a minimal inference of bias." *Id.* at 22.

[10] FAC, ¶¶ 42-43 (reactions of Southard, Bailey and Kuhn); ¶¶ 84-87, 138-41, 183-89, 194-98, 207-08, 214(f) (silent treatment); ¶¶ 89-90 (refusal to provide Handbook-required ratings); ¶¶ 91-94 (hostility and threats); ¶ 95 (Plaintiff's prior positive relationships with Marshall's faculty and adjuncts); ¶¶ 263, 270-79 (no explanation other than de facto anti-gay policy for Defendants' course of conduct). *See also* FAC, Ex. 3 (Plaintiff's unanimous outstanding evaluations prior to disclosing her homosexual orientation); Ex. 6 (the false defamatory evaluation fabricated by Defendants thereafter, which deemed her wholly unqualified for the teaching profession). Neither exhibit was part of the Original Complaint.

[11] Complaint, ¶¶ 7, 37, 96-97, 266-68. Note that the underlying theory of Title IX and §1983 (equal protection) recovery is identical; the only difference is the FAC's express mention of the

d. The original complaint did not refute defendants' false pretext that Kerr abandoned or refused to complete the program. *Kerr I* at 32-33. The FAC remedied that insufficiency.[12]

e. The original complaint did not refute other false, ever-shifting and self-contradictory pretexts asserted by defendants. *Kerr I* at 33-35. The FAC remedied that insufficiency.[13]

2. Amendments to Due Process Claim:

a. The original complaint did not allege that Kerr had fully earned her West Virginia state teaching credential. *Kerr I* at 32-33. The FAC remedied that insufficiency.[14]

b. The original complaint did not allege a protected due process interest in Plaintiff's earned teaching credential. *Kerr I* at 32. The FAC remedied that insufficiency.[15]

c. The original complaint did not allege that Marshall's internal appeal was an empty pretense devoid of factual review or due

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Civil Rights Act. Thus, it is not a new claim (and defendants did not challenge it as such.)

[12] Complaint, ¶¶ 83(b), 125-37, 197(b), 214-16.

[13] Complaint, Ex. 3 (Plaintiff's unanimous outstanding evaluations prior to disclosing her same-sex orientation), and ¶¶ 121-24, 133-35, 142, 197, 214-16, 233-42.

[14] Complaint, ¶¶ 78-83, 125, 142.

[15] Complaint, ¶ 287 (property interest), ¶ 288 (liberty interest).

process. *Kerr I* at 34. The FAC remedied that insufficiency.[16]

3. Amendments to Defamation Claim:

a. The original complaint's summary of the defamatory statements was insufficient to establish that they were provably-false. *Kerr I* at 17-21. The FAC remedied that insufficiency.[17]

b. The original complaint did not refute the applicability of West Virginia's qualified good faith privilege. *Kerr I* at 22-24. The FAC remedied that insufficiency.[18]

To clarify that she was not circumventing any prior decision, Kerr also filed a motion to amend under Fed. R. Civ. P. 15(a), and to reopen the original action and consolidate it with the new one under Fed. R. Civ. P. 42(a)(2) and 60(b)(6) ("First Mot. to Amend").[19]

The magistrate held both motions for eight months, then adopted defendants' arguments in an

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[16] Complaint, ¶¶ 178-218.

[17] Complaint, ¶¶ 233-43 (explaining how statements are provably-false) and Ex. 6 (full evaluation form and narrative, which was not incorporated in the Original Complaint).

[18] Complaint, ¶¶ 59-60, 246, 254 (statements were published outside of Marshall), ¶ 249 (publications within Marshall were made in bad faith), ¶ 250 (reckless disregard for truth or falsity), ¶¶ 251, 280 (bad motive of anti-gay discrimination), ¶ 253 (statements not shielded by FERPA).

[19] Since defendants' second 12(b)(6) showed that counsel did not seek to exit an unethical position, but instead meant to capitalize on the forgery, Kerr's reasons for separating the amended claims in a fresh action had become moot.

opinion that refused to apply West Virginia's savings statute, citing res judicata as the basis. App. 45-67. Using pre-*Foman* reasoning, and ignoring the text, principles and history of Fed. R. Civ. P. 15, the magistrate concluded that because Kerr's curative pre-answer amendments could have been "brought" in the original action, Kerr's FAC (*which added no claims or parties!)* was barred by res judicata. App. 50-59. The magistrate refused to apply West Virginia's savings statute (App. 59-62), and rejected Kerr's motion to consolidate and amend via reopening the judgment (App. 63-65), believing there was nothing to save or amend due to res judicata. The magistrate did not address whether Kerr's claims were meritoriously-pled and non-futile, as amended, and ignored Kerr's point-by-point showing that the FAC cured all grounds for *Kerr I*.

Kerr timely objected to the magistrate's ruling ("Objections"), and filed a companion motion to amend on the original docket ("Companion Mot. to Amend"), relying on Rule 15(a), Rule 60(b)(6), this Court's *Foman* rule and the Fourth Circuit's adoption of it in *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (holding that same liberal 15(a)(2) standard applies after "judgment of dismissal, a summary judgment, or a judgment after a trial on the merits"). In both filings, Kerr again laid out the overlooked concordance, showing how Kerr's FAC cured every basis for *Kerr I*.[20]

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[20] That is how proceedings evolved into two dockets. Because the magistrate's analysis was so wrong, Kerr thought the magistrate had overlooked the action's history. Thus, Kerr filed a companion motion to amend on the original docket. Instead of

By this point, Kerr had *three times* showed the district court how her FAC resolved the basis for affirmance in *Kerr I*. That meticulous showing was never acknowledged, although the court had both cases and all proceedings before it. Instead, the district court issued two final orders:

1. Dismissal of Second Action (App. 22-44). The district court adopted the magistrate's recommendation, based on res judicata. The district court acknowledged that Kerr "needed to plead facts" that conformed her claims to *Kerr I* (App. 31), but despite being spoon-fed that analysis three times, never looked at the FAC to see that Kerr had done exactly what the court asked of her. The district court assumed (citing zero authority) that remand is the *sole* path to amendment after appeal, and restricted *Foman* and *Laber* to cases where dismissal is expressly "without prejudice" – a distinction those cases rejected. App. 33-35.

2. Denial of Companion Motion to Amend (App. 4-21). Five months later, the district court denied Kerr's motion to amend in the original action, to punish Kerr for "delay" because it assumed (again without citing authority) that she was duty-bound to

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resolving the two filings together, the district court entered judgment on the magistrate's decision in September 2017, forcing Kerr to appeal that action separately. It held the companion motion to amend another five months, then in February 2018 denied amendment to punish Kerr for non-existent "delay" and "bad faith." The Court of Appeal ordered the tracks consolidated, relegated Kerr to informal briefing, issued summary affirmance, and denied rehearing.

amend *before* appealing. The district court found Kerr "dilatory" for not amending right after the initial May 2014 motion to dismiss – thus reading the "leave to amend" component of Fed. R. Civ. P. 15 out of the rule. App. 17-18. The district court also failed to grasp that defendants argued "academic discretion" as a categorical immunity until they retreated at argument before *Kerr I*'s panel – thus rendering its demand impossible. (Kerr could not have amended to allege that Marshall was not a university. Her only choice was appeal.) The ruling failed to follow *Foman* and its Fourth Circuit progeny; instead, it distinguished controlling authorities by limiting them to their own specific facts. App. 14-17.

Kerr timely appealed both rulings, which were consolidated and ordered to informal briefing, because Kerr (an attorney) is *pro se* and was then *in forma pauperis*. Kerr filed an informal appellate brief, which preserved all arguments. Defendants filed no response. The Court of Appeals issued summary affirmance. App. 1-3. Kerr's timely petition for rehearing was denied. App. 68-69. This timely petition for certiorari ensued.

REASONS FOR GRANTING THE PETITION

This Court should decide Kerr's case because her claims have merit, and it was unjust for the district court to lock them out at the courthouse door. Kerr's case is also an ideal vehicle to resolve inter-circuit conflict as to whether Civil Rights Act discrimination "on

the basis of sex" or "because of . . . sex" includes discrimination on the basis of sexual orientation. Although the district court dodged the conflict by flouting controlling precedent and ignoring the merits, and the Court of Appeals declined to reverse, this Court should address the conflict to resolve whether dismissal and denial of leave to amend were proper.

Without certiorari, a deserving person will be denied justice for egregious wrongs.

A. Circuit Conflict Requires This Court's Strong Voice To Repudiate Bigotry.

Statutes are not limited to a subjective "principal evil," but are interpreted by their plain language. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998). *See Zarda*, 883 F.3d at 113-15. Under that principle, *Hively* and *Zarda* correctly apply Title VII's "because of . . . sex" text, and their rule should also govern Title IX's "on the basis of sex" text. The Second and Seventh Circuits followed settled lines of anti-discrimination precedent:

1. **Comparative.** When a decision would be different "but for" the person's sex, it discriminates because of sex. *Zarda*, 883 F.3d at 116-19; *Hively*, 853 F.3d at 345.

2. **Gender stereotype.** When a decision relies on gender stereotypes, it discriminates because of sex. *Zarda*, 883 F.3d at 119-23; *Hively*, 853 F.3d at 346-47 ("[T]he line between a gender nonconformity

claim and one based on sexual orientation [is] gossamer-thin; we conclude that it does not exist at all.")

3. **Association.** When a decision relies on the sex of an intimate partner, it discriminates because of sex. *Zarda*, 883 F.3d at 124-28; *Hively*, 853 F.3d at 347-49.

4. **Textual.** When text is clear, courts should not imply unwritten exceptions. *Zarda*, 883 F.3d at 113-15; *Hively*, 853 F.3d at 357-59 (Flaum, J., concurring).

Evans is thus wrongly decided. It followed an implied anti-LGBT exception to "because of . . . sex" that never harmonized logically or practically with that text, or with Title IX's "on the basis of sex" text. The exception is incompatible with well-settled Civil Rights Act jurisprudence, and with equal protection. *Cf. Evans*, 850 F.3d at 1256-57.[21]

Consider a hypothetical similar to those posited in *Zarda*, 883 F.3d at 121-22:

Female Student A, is denied a credential based on traits traditionally identified with the male gender (short haircut, trouser-wearing, absence of makeup, athletic activity, etc.) A's orientation is **homosexual**.

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[21] *See generally* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, Wake Forest L. Rev. (forthcoming 2019) (explaining how exclusions implied by popular expectation are the antithesis of textual originalism). Draft posted at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244473

Female Student B is denied her credential based on the same traits and stereotypes as Student A exhibited. However, B's orientation is **heterosexual**.

Under the problematic precedents relied on in *Evans*, it would be lawful to deny the credential to Student A, but not to Student B. But without asking each student if she prefers the same sex or the opposite sex, how would one distinguish A from B? There is no difference other than their sexual orientation. And that distinction was held in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Obergefell v. Hodges*, 576 U.S. ___ (2015) to deny equal protection – to punish or not punish the same act, honor or not honor the same marriage, depending on whether a person's sex is in correspondence or opposition to the sex of their partner. Hence, *Lawrence* and *Obergefell*, by implication, abrogated the older precedents on which *Evans*'s incorrect view was based.

The alternative would be that stereotypes women fought for years to eradicate would again become legal. For decades, before and after 1965, *heterosexual* women were *also* denied employment, education and advancement if they failed to conform to rigid gender dichotomy, or refused to submit to sexualized roles, with the accusation "You must be a lesbian, or you would accept my sexist views!" The unfair stigma that destroyed Kerr's life was always threateningly-present, even when unspoken or untrue. One thus cannot preserve the protection of anti-discrimination laws for heterosexual women, while denying that protection to homosexual women. This fact is not cited to imply homosexual women (or men) are unworthy of relief on

our own, but to show why Justice Scalia was correct in *Oncale*. Statutes collapse under any attempt to deconstruct their text to some isolated "primary evil" of their formative time.

Zarda and *Hively* used similar reasoning. The analysis Kerr urges is the only principled one. We should not hesitate to correct a wrong, simply because it is old. It is in that ability to correct its own wrongs that the United States of America remains both united, and exceptional. As Daniel T. Rodgers's introduction to *As a City on a Hill: the Story of America's Most Famous Lay Sermon* (2018) explores via Biblical metaphor:

> Above all, to read Winthrop's "city upon a hill" seriously we need to disentangle ourselves from the lure of simple origin stories. Texts live in and through time. A certain kind of nationalism recoils against that assumption. It strains to fix the nation to a foundational moment or proposition or text as if the *idea* of the nation – whatever its actual missteps or temporary disruptions – could be held exempt from history itself. But no words or text can be insulated from time.

B. This Case is an Ideal Vehicle.

Kerr's facts provide a clean crucible for overruling the deprecated precedents that caused the Eleventh Circuit to err in *Evans*:

1) *No religious issue.* The Establishment Clause bars states from imposing religious behavior codes. Hence, these state university defendants cannot assert religious concerns that require balancing.

2) *No Auer deference.* Because Title IX, unlike Title VII, has no administrative body to exhaust, there is no basis to leave the issue dangling by deferring to current guidance.

3) *No service or jurisdiction problems.* Unlike *Evans*, all defendants in Kerr's case have appeared, and are proper parties.

4) *No merits problems.* Kerr's case remains at the 12(b)6) stage, where her amended claims are prima facie sufficient under *Kerr I*. She was a "similarly-situated" student before and after she disclosed her homosexual orientation. Yet Marshall turned upon Kerr, barred her from teaching, and refused to stop until it had made a pariah of her.

5) *Kerr is represented.* Although *pro se*, Kerr is an attorney. She emerged in late 2018 from *in forma pauperis* by mortgaging her home to afford active bar dues, printing and docket costs, and travel for argument.[22] Kerr waives appointment of counsel.

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[22] Kerr was not previously able to mortgage her home to pay litigation costs, because defendants' conduct made her so unemployable, for so long, that her income was too low and too inconsistent to qualify for credit, regardless of her excellent past credit history.

6) *Clear violation of precedent below.* The district court's errors of law were so egregious that they should be viewed as a cry for help. But when the Fourth Circuit declined to act, it effectively sent Kerr's claims up the ladder. It would be terrible to kick that ladder out from under Kerr, who did not deserve one ounce of the treatment she has suffered for five years.

C. The Outcome Conflicts with This Court.

Ever since *Foman*, absent genuine prejudice to her opponent, a plaintiff is granted leave to file a non-frivolous amended complaint that adds no new claims or parties, on the same Fed. R. Civ. P. 15(a) standard pre- and post-judgment. The district court refused to apply *Foman*'s holding as a precedential rule, instead limiting *Foman* to its specific facts.

The district court was required to follow *Foman*. It did not. It substituted its own view.

Furthermore, academic discretion is an affirmative defense, not a quasi-immunity that bars due process claims at the pre-answer stage, with no valid factual finding that the university did in fact base its decision on "academic discretion," rather than on arbitrary, capricious, or bigoted grounds. The quasi-immunity theory is contrary to governing precedent like *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 217 (1985) (claim rejected after "four-day bench trial") and *Board of Curators, Univ. of Mo. v.*

Horowitz, 435 U.S. 78, 80 (1978) (claim rejected after "full trial").[23]

The district court was required to follow *Ewing* and *Horowitz*. It did not. It followed its own *Zimmeck* opinion and other unpublished cases within the Fourth Circuit, which cite one another and contradict principles set by this Court.

D. The Outcome Conflicts with Other Courts.

The Fourth Circuit recognizes two options for post-judgment amendment. "To proceed with a different complaint than that filed originally, a plaintiff can either open the judgment under Rule 60 and then file a motion to amend ***or commence a new action***." *Calvary Christian Ctr. v. City of Fredericksburg*, 710 F.3d 536, 540 (4th Cir. 2013) (emphasis added). Kerr chose Door Number Two. It is as simple as that. She commenced a new action. All hell should not have broken loose for two years thereafter. The district court was required to follow *Calvary*. It did not.

Kerr's choice was equally correct under controlling state law. For more than a century, courts have forcefully held that West Virginia's savings statute should be liberally construed, and is broader than that of other jurisdictions:

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[23] The Court should note that Kerr alleges a classic property interest, because she can prove that she fully earned her credential, yet was denied it. FAC, ¶¶ 78-83. She does not seek "continued enrollment," a concept the district court imported from other students' claims.

> The very object of the (savings) statute is to give further time for a second action when the first action is for any cause abortive, ineffectual for recovery. No matter what was the cause of the first action's failure, no matter how bad the writ, no matter whether you call it void or voidable, it is all sufficient to save the second action. It is just the kind of trouble for which the statute intended to save the second action.

Stare v. Pearcy, 617 F.2d 43, 46 (4th Cir. 1980), *quoting Ketterman v. Dry Fork R. Co.*, 37 S.E. 683, 684 (1900). "W. Va. Code § 55-2-18(a) is a highly remedial statute that should be liberally construed to allow a party who has filed a timely action to have their case decided on the merits." *Cava v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 12-0203 (W. Va. 2013).

E. The Outcome is Wrong.

Absent certiorari, Kerr's claims will be forfeited. That does wrong to Kerr. Marshall University's bigotry and scorn for due process will continue unchecked. That does wrong to students. And rudderless district courts will duck the question of whether Congress created a silent exception for anti-homosexual bigotry when it barred discrimination "because of . . . sex" and "on the basis of sex." That does wrong to all who believe in simple fairness and equality under law.

Moreover, it is awful precedent to uphold denial of amendment where a First Amended Complaint was sufficiently-pled and non-frivolous. To obtain the

unjust outcome challenged here, Marshall tricked the district court into reviving 12(b)(6) defenses they had waived, which the *Kerr I* affirmance did not adjudicate. Kerr did nothing to deserve the rare punishment of claim forfeiture, which violates due process when administered at the 12(b)(6) stage to one who did no wrong.

F. The Questions Presented Are Immensely Important.

It is no coincidence that when hostile anti-democratic powers plot to undermine America's sovereignty, they grab us by our bigotry. It just won't stop.

We cannot delude ourselves that it is cost-free for a privileged majority to tolerate seething undercurrents of bigotry in America's institutions. It is beyond a mere personal matter, although it has been a devastating one for Kerr. The drafters of the Civil Rights Act and its Title IX amendments – toiling in times nearly as troubled as ours – understood that *sub rosa* caste systems based on stigma destroy national cohesion, splinter national identity, and make us vulnerable to the evils of authoritarian rule. Respect for rule of law and precedent are crucial in today's unsettling climate. But respect for our defining principle of equality is paramount.

This Court can guide America back to that ideal "city on a hill" by repudiating past injustices with a clear voice. This does not suggest that we are perfect, but that we will never cease striving to form a more perfect union, never accept past failure as our outer

limit, never again posit that good enough for the few is good enough for all. We know that the world sees our nation's every fault. That knowledge should push us forward, not backward. It should drive us to become better, not worse. It should light a candle inside us. The time is now.

CONCLUSION

For the above reasons, Petitioner requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

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