IN THE
SUPREME COURT OF THE UNITED STATES

Docket No. 21-8289

KYLER PARK

Petitioner,

v.

QUICKSILVER STATE UNIVERSITY

Respondent.

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

BRIEF FOR PETITIONER

Team 10
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether a university violates a student's Fourteenth Amendment and Title IX rights by imposing a disciplinary process that requires an indirect and selective cross-examination approach and allows witnesses to wear face coverings.
2. Whether a party can recover attorney's fees as a part of "costs" under Federal Rule of Civil Procedure 41(d) when the Rule does not explicitly provide for them and the party does not meet the requirements for fee shifting in accordance with the underlying statute.

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The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported and provided in the Decision on Appeal. *See* Record ("R.") at 1a–62a. The decision of the United States District Court for the District of Quicksilver is unreported and set out in the Decision on Appeal. R. at 10a–11a.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Quicksilver had federal question jurisdiction pursuant to 28 U.S.C. § 1331. Following final judgment, the United States Court of Appeals for the Fourteenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL RULES AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the United States Constitution, U.S. const. amend. XIV. It also involves Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). Additionally, it involves Federal Rule of Civil Procedure Rule 41 ("Dismissal of Actions"), Fed. R. Civ. P. 41. The relevant portion of each of the listed provisions is contained in the Appendix.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Quicksilver State University ("QSU" or the "University") expelled Kyler Park ("Mr. Park") after concluding he had violated the school's policies prohibiting sexual misconduct. R. at 1a. The alleged violation arose out of a sexual encounter Mr. Park shared with a female student at QSU, Jane Roe ("Roe"), on March 14, 2020, during QSU's Spring Break. R. at 2a–3a. Mr. Park contended that the encounter was consensual, whereas Roe contended she was too intoxicated to consent. R. at 2a.

During the night in question, Mr. Park and Roe recognized each other at a bar inside a movie theater and sat down to talk. *Id.* Roe was sitting at the bar drinking what appeared to be a clear non-alcoholic beverage. *Id.* Mr. Park legally purchased one alcoholic beverage and gave it to Roe. *Id.* After an hour of talking, Mr. Park and Roe walked back to Roe's dorm room where they engaged in sexual intercourse. *Id.*

Over the next three days, Roe called Mr. Park several times. R. at 3a. Mr. Park claimed that during these calls Roe seemed happy with their encounter and repeatedly expressed an interest in having an ongoing romantic relationship. *Id.* Mr. Park stated that Roe repeatedly referred to Mr. Park as her "boyfriend" and herself as Mr. Park's "girlfriend." *Id.* Mr. Park expressed to Roe that he was not interested in a continued romantic relationship; Roe became angry with his lack of desire for her and threatened to report Mr. Park for sexual assault. *Id.*

Roe's account of these phone calls differed. *Id.* Roe claimed she called Mr. Park to find out what happened the night of March 14, 2020, as she only vaguely

remembered seeing him at the bar and, due to her intoxication, only remembered awakening during intercourse. *Id.* But as far as Mr. Park knew, the only alcoholic beverage Roe consumed that evening was the one he purchased for her. R. at. 2a.

On March 23, 2020, after Spring Break, QSU's Division of Student Affairs notified Mr. Park that Roe accused him of violating the University's Code of Student Conduct ("CSC"), as she alleged that he "committed acts of sexual abuse, unwanted sexual contact, and dating violence." R at 3a. To adjudicate these allegations, the University scheduled a student conduct hearing to take place on May 20, 2020. R. at 4a. Just a few days later, the COVID-19 pandemic forced the University to cancel all in-person classes for the spring semester. *Id.*

QSU assigned an investigator to Mr. Park's case in the two months between the filing of the disciplinary proceeding and the hearing, who found no witnesses to corroborate either Mr. Park's or Roe's accounts of the events. *Id.* Even though QSU canceled all in-person classes for the Spring semester, the University mandated that the Hearing take place in person according to CSC policies that were in place for the school year from which the allegations arose. *Id.*

The Hearing Board (the "Board") consisted of five employees and students appointed by QSU. *Id.* Both Roe and Mr. Park attended the hearing in person, and because of the COVID-19 pandemic, all those in attendance were required to wear face coverings. R. at 5a. Pursuant to the CSC, neither Roe nor Mr. Park were permitted to directly cross-examine one another, either personally or through a

representative. *Id.* Instead, both parties submitted questions to the Board, and the Board asked only the questions it deemed acceptable. *Id.*

While the Board asked most of Mr. Park's initial questions on Roe's claim of intoxication, it refused to inquire into many of his follow-up questions meant to elicit clarifying details to aid the Board's credibility determinations. R. at 6a. For instance, Roe admitted to drinking a clear beverage when approached by Mr. Park but indicated that it was alcoholic. *Id.* She also admitted to consuming other alcoholic beverages prior to Mr. Park's arrival. *Id.* Because Mr. Park believed the only alcoholic beverage Roe consumed was the one he bought for her, he urged the Board to press Roe for details on the clear beverage in question and how she could have purchased other drinks for herself being that she was underage. R. at 7a. He also requested that the Board compel Roe to access her credit-card statement to provide information on her alcohol consumption. R. at 6a. The Board refused to ask Roe any of these questions and also denied Mr. Park's request to compel production of the electronic receipts. R. at 6a–7a. The Board claimed Mr. Park's follow up questions were overly aggressive and irrelevant and would force Roe to implicate herself in possibly criminal conduct. *Id.* It also contended that production of her credit card statement would be invasive of Roe's financial privacy. R. at 7a.

After this series of refusals by the Board, Mr. Park presented security camera footage from outside the bar to demonstrate that Roe did not appear intoxicated and had no difficulty walking. *Id.* Roe responded that she has excellent balance from years of martial-arts training at her father's karate dojo. *Id.* Because it was well known

that Roe's father was a car salesman, Mr. Park requested follow-up questions regarding the dojo. *Id.* The Board yet again refused, deeming these questions irrelevant. *Id.*

Finally, Mr. Park requested that Roe remove her face covering while speaking or answering questions, as the purpose of the Hearing was to give the Board an opportunity to make credibility determinations. R. at 5a. The Board refused this request. *Id.* Mr. Park then requested that the Board require Roe to testify remotely to balance Roe's interest in safety and the Board's interest in viewing her facial expressions in order to assess credibility. R. at 5a, 8a. The Board also refused this request. R. at 5a.

Despite Roe's inconsistent testimony and hidden facial expressions, the Board deemed Roe's testimony more credible and found against Mr. Park. R. at 8a. As a result, Mr. Park was subsequently expelled. *Id.*

II. PROCEDURAL HISTORY

Mr. Park sued QSU in the District Court of Quicksilver on June 12, 2020. R. at 8a. He alleged that QSU violated his civil rights under § 1983 by depriving him of due process. *Id.* He additionally alleged that QSU violated his Title IX rights by reaching an erroneous outcome in his disciplinary proceeding due to sex discrimination. *See* 20 U.S.C. § 1681 et seq. On July 1, 2020, the University filed a motion to dismiss Mr. Park's suit for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). The hearing on this motion was conducted on July 22, 2020. R. at 9a. Judge Kreese presided over the matter and began the motion

proceedings, as that court always does, by asking everyone to sing the QSU fight song, "Hail to Thee, Quicksilver State, and Quicksilver A&M Can Go to Hell." *Id.* After argument, Judge Kreese stated that he would take the matter under advisement. *Id.* As a result of the obvious collegiate allegiance and outspoken social-media presence of the court, Mr. Park filed a voluntary dismissal of the suit pursuant to Federal Rule of Civil Procedure 41(a)(1) later that day. *Id.*

Mr. Park refiled his suit in district court, asserting the same claims as before, on September 21, 2020.[1] *Id.* Judge Demetri Alexopoulos was assigned to the second suit. R. at 10a. QSU again moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Id.* The University also filed a motion under Federal Rule of Civil Procedure 41(d) asking Judge Demetri Alexopoulos to find that Mr. Park acted in bad faith or vexatiously by voluntarily dismissing his first suit and to award QSU costs and attorney's fees of $74,500.00. *Id.* Mr. Park timely responded to the 12(b)(6) motion and tendered affidavits from both himself and his counsel, which denied the allegations of being motivated by bad faith or a desire to engage in vexatious litigation. *Id.* The affidavit of Mr. Park's counsel explained that the dismissal was prompted by his desire to better study the applicable law; specifically, his counsel wanted to ensure Mr. Park's claims were supported by existing law or presented a good-faith basis for extension or modification of existing law. *See* Fed. R. Civ. P. 11(b).

On December 17, 2020, the court heard and granted QSU's motions. *Id.* The court held that Mr. Park did not act in bad faith and reduced QSU's fee award to

[1] The District of Quicksilver permits the refiling of an action to be assigned to a different judge. R. at 9a, n.5.

$28,150.00 pursuant to its interpretation of Rule 41(d). R. at 10a–11a. Subsequently, on October 18, 2021, Mr. Park appealed to the United States Court of Appeals for the Fourteenth Circuit, which upheld the district court's ruling on both issues. R. at 1a; 11a. The court found that Mr. Park did not plausibly plead a violation of his due process or Title IX rights, and that costs and fees were properly awarded. R. at 40a. Mr. Park now appeals the judgment of the Fourteenth Circuit; this Court granted certiorari on October 10, 2022. R. at 1a.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's holding and find that Mr. Park plausibly pleaded that Quicksilver State University violated his due process and Title IX rights and that the lower court improperly awarded attorney's fees under Fed. R. Civ. Pro. 41(d).

With respect to the first issue, Mr. Park plausibly pleaded that QSU violated his due process and Title IX rights. QSU's expulsion of Mr. Park from the University implicates a property interest, namely obtaining his degree. His disciplinary proceeding did not afford him the opportunity to be heard in a meaningful manner, a central tenet of due process protection. By preventing Mr. Park from directly cross-examining his accuser, prohibiting integral questions to be asked of his accuser, and allowing his accuser to keep her face covered for the duration of the proceeding, QSU violated his due process rights. Further, because Mr. Park's proceeding was biased as a result of sex discrimination in violation of Title IX, he was not afforded the due process protection required on his facts.

Regarding the second issue, the Fourteenth Circuit erred by holding that the district court properly awarded QSU attorney's fees under Fed. R. Civ. 41(d) because the text of the Rule is silent with respect to attorney's fees and the Rules have made a meaningful distinction between "costs" and attorney's fees elsewhere. The Fourteenth Circuit acted in contravention of Congress's intent in holding that attorney's fees are awardable under 41(d) because Congress never explicitly authorized an award of attorney's fees as a recoverable cost under the Rule. Even if

this Court decided to award attorney's fees based on the underlying statute, the decision below still must be reversed because QSU does not meet the two statutory requirements. To recover attorney's fees as a defendant under 42 U.S.C. § 1988, the defendant must: (1) be a prevailing party; and (2) show that the plaintiff's action was "frivolous, unreasonable, or without foundation." QSU meets neither requirement for awarding a defendant attorney's fees under § 1988, and therefore the decision of the Fourteenth Circuit should be reversed. As a matter of public policy, reversing the Fourteenth Circuit's decision maintains the high bar required for defendants to receive attorney's fees to avoid chilling the initiation and prosecution of meritorious civil rights actions.

ARGUMENT

I. MR. PARK PLAUSIBLY PLEADED THAT QUICKSILVER STATE UNIVERSITY VIOLATED HIS DUE PROCESS AND TITLE IX RIGHTS.

This Court should reverse the decision of the Fourteenth Circuit and recognize that Mr. Park sufficiently stated a claim that Quicksilver State University violated his due process and Title IX rights. To survive a Rule 12(b)(6) motion, a complaint must plead sufficient nonconclusory facts to set forth a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In reviewing a complaint, the court accepts the truth of all well-pled facts and draws all reasonable inferences therefrom in the pleader's favor. *Zell v. Ricci*, 957 F.3d 1, 7 (1st Cir. 2020). Accordingly, this Court should find that the Fourteenth Circuit erred in upholding the district court's grant of QSU's Rule 12(b)(6) motion and permit the matter to proceed to discovery. R. at 31a.

The Due Process Clause of the Fourteenth Amendment "forbids the State to deprive any person of life, liberty, or property without due process of law." *Goss v. Lopez*, 419 U.S. 565, 572 (1975). This Court has noted that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and *in a meaningful manner*.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted) (emphasis added). The disciplinary process employed by QSU violated Mr. Park's due process rights by denying him the opportunity to be heard in a meaningful manner.

Title IX of the Education Amendments of 1972 states that "[n]o person . . . 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 [f]ederal financial assistance[.]" 20 U.S.C. § 1681(a). QSU violated Mr. Park's Title IX rights by discriminating against him on the basis of sex through a biased disciplinary proceeding.

A. Mr. Park Plausibly Pleaded That QSU Violated His Due Process Rights by Denying Him the Opportunity to be Heard in a Meaningful Manner.

Due process requires some form of hearing before an individual is deprived of a property interest. This Court has identified the opportunity to be heard in a meaningful manner as a fundamental requirement of due process. *See Mathews*, 424 U.S. at 333. But before addressing "what process is due," the threshold question is "whether the requirements of due process in general apply to [higher-education disciplinary decisions]." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). After such a

determination, identifying the process due to any one individual requires a fact-specific inquiry because due process is "flexible and calls for such procedural protections as the particular situation demands." *Id.*

Courts look to three factors in determining the specific dictates of due process: (1) the nature of the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the governmental burden were additional procedures mandated. *Mathews*, 424 U.S. at 335. An analysis of these factors reveals that QSU denied Mr. Park the opportunity to be heard in a meaningful manner. Specifically, QSU prevented Mr. Park from directly cross-examining Roe, either personally or through his attorney, refused to ask Roe integral questions, and allowed Roe to keep her face covered in a hearing where assessing credibility was crucial. Taken together, these procedures violated Mr. Park's due process rights in the most serious of cases and he sufficiently pleaded these claims. Accordingly, this Court should reverse the decision of the Fourteenth Circuit and reinstate Mr. Park's claims.

1. Mr. Park's Expulsion from QSU Implicates a Property Interest.

The Fourteenth Circuit correctly held that Mr. Park's expulsion from QSU implicates a property interest. While this Court has not identified higher-education disciplinary proceedings as a context demanding due process protection, numerous circuits have extended the due process analysis to this context. *See Doe v. Univ. of the Scis.*, 961 F.3d 203, 214–215 (3d Cir. 2020); *Doe v. Univ. of Ark.-Fayetteville*, 974

F.3d 858, 866 (8th Cir. 2020); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 65 (1st Cir. 2019); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987).

This extension flows logically from *Goss v. Lopez*, 419 U.S. 565 (1975), in which this Court held that a student's ten-day suspension from high school implicated both property and liberty interests. *Id.* at 574. The Due Process Clause protected those interests: "[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary." *Id.* at 576. Although this Court did not explicitly extend due process protection to expulsions from higher-education, it endorsed the application when it noted in that same case that "the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion." *Id.* at 576, n. 8.

Mr. Park had just finished his junior year when QSU expelled him for violating the University's policies. R. at 2a. Therefore, his expulsion "clearly implicates a property interest." R. at 13a. Because of this interest, Mr. Park necessitated procedural protection under the Due Process Clause throughout his disciplinary proceeding. QSU violated Mr. Park's due process rights by failing to afford him this protection. Thus, this Court assesses Mr. Park's case through the lens of due process.

2. Mr. Park Plausibly Pleaded that QSU Violated His Due Process Rights by Preventing Him from Directly Cross-Examining Roe.

The Fourteenth Circuit erred in rejecting Mr. Park's due process claims regarding his inability to directly cross-examine Roe, either personally or through his attorney. This Court has acknowledged that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Goss*, 419 U.S. at 584. Lower courts have recognized that such procedures may include providing "*the accused student or his agent* an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral factfinder." *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018) (emphasis added); *see also Norris v. Univ. of Colo.*, 362 F. Supp. 3d 1001, 1020 (D. Colo. 2019) (holding that "the lack of a full hearing with cross-examination provides evidence supporting a claim for a violation of [] due process rights"); *Lopez v. Bay Shore Union Free Sch. Dist.*, 668 F. Supp. 2d 406, 422 (E.D.N.Y. 2009) (finding that "the plaintiffs have stated a claim that the [school] violated the due process rights of [the accused student] by denying him the right to confront his accusers[.]"); *Doe v. University of Oregon*, No. 6:17-CV-01103-AA, 2018 WL 1474531, at *15 (D. Or. Mar. 26, 2018) (acknowledging that the plaintiff "allege[d] significant and pervasive flaws in the procedures used to investigate and adjudicate [the accuser's] allegations, including that the [u]niversity denied him a meaningful opportunity to cross-examine and confront witnesses[.]").

While it is true that student disciplinary proceedings need not "mirror common law trials," the touchstone of due process is that the accused be provided the

opportunity to be heard in a "meaningful manner." *Haidak*, 933 F.3d at 69; *Mathews*, 424 U.S. at 333. Effecting this requisite may involve direct cross-examination when presented with the most serious of cases. *See Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400–401 (6th Cir. 2017) (acknowledging that while the right to cross-examine witnesses has not been considered an essential requirement of due process in school disciplinary proceedings, "general rules have exceptions," and "[t]he more serious the deprivation, the more demanding the process."). Thus, courts consider the relevant private and governmental interests identified in *Mathews* to determine whether direct cross-examination is necessary in any given case. 424 U.S. at 335.

In *Baum*, the Sixth Circuit applied the *Mathews* factors to a university disciplinary process in which a three-member panel reviewed a report prepared by the school's investigator and found in favor of the accuser absent any additional evidence or a hearing. *Baum*, 903 F.3d at 580. After agreeing to withdraw from the university when faced with the possibility of expulsion, the plaintiff challenged the process, alleging that the school was required to give him a hearing with an opportunity to cross-examine his accuser. *Id.* at 581. While the issue in *Baum* was a complete denial of cross-examination, the Sixth Circuit expressly held that when a public university has to choose between competing narratives, it must afford an accused student or his agent an opportunity to cross-examine the accuser in the presence of a neutral factfinder. *Id.* at 578. The Sixth Circuit's assessment of the *Mathews* factors bolstered its holding: the court acknowledged the plaintiff's substantial interest "when it comes to school disciplinary hearings for sexual

misconduct[,]" the "significant risk that the university erroneously deprived [the plaintiff] of his protected interests[,]" and the "minimal burden that the university would bear by allowing cross-examination[.]" *Id.* at 582.

Two years later, the Sixth Circuit once again assessed a university's disciplinary process using the *Mathews* factors in *University of Arkansas-Fayetteville*. 974 F.3d at 867. The process at issue required the plaintiff to submit questions to a hearing panel that had discretion as to whether to pose the questions to witnesses. *Id.* After the hearing, the panel found that it "was more likely than not that [the plaintiff] violated the policy on sexual assault," and ordered the plaintiff to complete Title IX training, ten hours of community service, and an online sexual violence accountability course. *Id.* at 863. The plaintiff challenged the university's process, alleging that the school violated his due process rights by not allowing either him or his agent personally to cross-examine the witnesses. *Id.* at 867.

Balancing the *Mathews* factors, the court acknowledged that "[a] process under which the adjudicating panel poses questions to witnesses is not 'so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.'" *Id.* (citation omitted). The Sixth Circuit importantly noted that this method of questioning "could be insufficient in a given case," but held that the plaintiff in that case failed to identify any material flaws in the proceeding at issue. *Id.* at 868. There, the plaintiff did not identify specific questions that the panel refused but generally argued that the panel omitted important questions and did not ask "pertinent follow up questions[.]" *Id.* Because the plaintiff failed to allege that the panel neglected to

"pursue particular inquiries that were material to the truth-finding process," the court held that he did not adequately state a claim. *Id.* at 868.

By denying Mr. Park the opportunity to directly cross-examine Roe, QSU violated Mr. Park's due process rights, and he adequately stated such a claim. Like the plaintiff in *Baum*, Mr. Park has substantial interests at stake: continuing his education and not being labeled a sex offender by the University. Although the disciplinary process in Mr. Park's case differs from that at issue in *Baum*, the minimal burden that the University would bear by allowing direct cross-examination is the same. In both cases, the "administration already has all the resources it needs to facilitate cross-examination and knows how to oversee the process." *Baum*, 903 F.3d at 582. This was evident in *Baum*, as the university already provided for cross-examination in all misconduct cases other than those involving sexual assault. *Id.* And this is evident in the present case, as QSU already provides for cross-examination, just not the degree to which Mr. Park's case requires given the severity of the charges against him and the deprivation to which he was subjected.

The Fourteenth Circuit cites *Arkansas-Fayetteville* both for an example of a case in which a court upheld the disciplinary process like the one at issue here and to support the assertion that hearing panels are not categorically insufficient. R. at 18a. But Mr. Park does not request a categorical ban on hearing panels; he asserts that his case demands the opportunity for direct cross-examination. R. at 14a. Additionally, the Sixth Circuit expressly acknowledged in *Arkansas-Fayetteville* that

there could be factual scenarios in which hearing panels are insufficient. *Univ. of Ark.-Fayetteville*, 974 F.3d at 868. Mr. Park's case is such a scenario.

Unlike the plaintiff in *Arkansas-Fayetteville*, Mr. Park identified particular inquiries that were material to the truth-finding process. R. at 6a–8a. For example, Mr. Park requested that the Board compel Roe to access her credit-card statement to provide information on her alcohol consumption. R. at 6a. The Board denied Mr. Park's request, reasoning that production of electronic receipts would be invasive of Roe's financial privacy. R. at 7a. Mr. Park also requested follow-up questions regarding the occupation of Roe's father; Mr. Park presented security camera footage from outside the bar to demonstrate that Roe did not appear intoxicated and had no difficulty walking. *Id.* In response, Roe stated that she has excellent balance from years of martial-arts training at her father's dojo despite it being common knowledge that her father is a car salesman. *Id.* The Board deemed these questions irrelevant notwithstanding the fact that these questions would aid the Board's credibility determinations. *Id.* QSU denying Mr. Park the opportunity to directly cross-examine Roe, either personally or through his attorney, prevented important questions from being asked of Roe that spoke both to Mr. Park's knowledge of her intoxication and to her credibility. Because Mr. Park identified specific deficiencies with QSU's hearing process, the Fourteenth Circuit erred by upholding the dismissal of his claim.

3. In Pleading that QSU Violated His Due Process Rights by Refusing to Ask Roe Integral Questions, Mr. Park Plausibly Stated a Claim.

The Fourteenth Circuit also erred in affirming the dismissal of Mr. Park's Complaint related to the Board's selective questioning of Roe. Just as courts use the *Mathews* factors to assess the opportunity, or lack thereof, to directly cross-examine witnesses, courts employ that same assessment to a hearing panel's ability to filter the questions asked of witnesses. *See Haidak*, 933 F.3d at 66.

In *Haidak v. University of Massachusetts-Amherst*, a student accused of assault was afforded the right to be present at his hearing, to hear all evidence against him, to respond himself, and to call witnesses. *Id.* But the student challenged the inquisitorial nature of the hearing, namely that an administrator eliminated twenty of his questions before presenting the question list to the Hearing Board. *Id.* at 70. Although the First Circuit noted that "[a] school cannot both tell the student to forego direct inquiry and then fail to reasonably probe the testimony tendered against that student," it held that the Hearing Board "managed to avoid the pitfalls created by the university." *Id.* The court reasoned that the Board questioned the accuser "at length on the matters central to the charges" and "required her to clarify ambiguities in her responses." *Id.* Further, the court found no probative value in the four additional areas of inquiry the plaintiff requested as these areas were irrelevant to the question of whether he had committed the alleged assault. *Id.* at 71.

The Sixth Circuit dealt with a similar challenge to a university's disciplinary process in *Doe v. Michigan State University*. 989 F.3d 418, 421 (6th Cir. 2021). In

that case, the defendant university expelled a student accused of sexual assault after a three-day hearing in which the student was permitted to testify and, through his attorney, to cross-examine his accusers. *Id.* Because the Resolution Officer overseeing the hearing did not require one of the accusers to answer every question that the student's attorney posed to her, the student brought suit. *Id.* The Sixth Circuit held that the "due process afforded to the student plaintiff throughout his three-day hearing, including extensive in person cross-examination of the claimants by his attorney, was more than sufficient[.]" *Id.* at 430. The court reasoned that "the lengthy hearing, complete with in person cross-examination, gave the [Resolution Officer] ample opportunity to judge credibility and view the witness's demeanor, and any probative value of forcing them to answer every question is outweighed by the university's interests." *Id.* at 432.

In contrast, QSU violated Mr. Park's due process rights by prohibiting pertinent questions that spoke to Roe's credibility. And an analysis of the *Mathews* factors exposes this violation. First, it is undisputed that Mr. Park has significant interests at stake: "completion of his degree, protecting his reputation and personal relationships, and potential harm to future education and employment." *Mich. State. Univ.*, 989 F. 3d at 431. Second, the risk of an erroneous deprivation using the current procedures and the probative value of additional procedures weigh in favor of Mr. Park. Unlike the areas of inquiry refused in *Haidak*, the questions the Board refused to ask Roe were entirely relevant as they spoke to Park's knowledge of Roe's alleged incapacitation and her credibility generally, both of which were at issue in this case.

R. at 6a–7a. Additionally, unlike the questioning in *Haidak*, the questions posed by the Board did not require Roe to clarify ambiguities in her responses. For example, the Board refused to ask questions regarding how Roe, who was underage, could have purchased drinks for herself. R. at 7a. In *Michigan State University*, the university afforded the plaintiff a lengthy hearing in which the plaintiff's attorney directly cross-examined the claimants; thus, the probative value of requiring the claimants to answer two additional categories of questions was minute. *Mich. State Univ.*, 989 F.3d at 431. That is not the case here. Mr. Park's hearing lasted a mere six hours, he was denied the opportunity to directly question Roe, either personally or through his attorney, and the Board failed to ask necessary questions that would speak to Roe's credibility. R. at 7a.

Finally, allowing Mr. Park to ask Roe questions he deems necessary for credibility determinations would not pose a significant administrative burden to QSU. As previously mentioned, given that the procedures for an in-person hearing and cross-examination were already in place, the University's interest in preventing this questioning is minimal in this regard. While it is true that QSU has an interest in preventing harassment, the additional safeguard of unfiltered questioning would have improved the proceeding. R. at 432.

Taken together, the *Mathews* factors demonstrate Mr. Park's need for additional procedural protection in his case. Mr. Park plausibly pleaded facts sufficient to satisfy a due process claim as QSU failed to ask relevant questions considering the length of his hearing and his inability to directly cross-examine Roe.

Accordingly, the Fourteenth Circuit erred by dismissing Mr. Park's due process claim on selective questioning grounds.

4. Mr. Park Plausibly Pleaded that QSU Violated His Due Process Rights by Allowing Roe to Cover Her Face in a Hearing Meant to Assess Credibility.

The Fourteenth Circuit also erred in overruling Mr. Park's claim that QSU violated his due process rights by allowing Roe to cover her face in a disciplinary hearing meant to assess credibility. While it is true that school disciplinary proceedings do not guarantee a constitutional right to confront one's accuser, the purpose of the Confrontation Clause is "to advance a practical concern for the accuracy of the truth-determining process . . . by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]." *Dutton v. Evans*, 400 U.S. 74, 89 (1970). That same concern, a pillar of what this country requires for fairness and justice, should apply in school disciplinary proceedings. This application is a logical outgrowth from the well-recognized requirement that an accused student should have the opportunity to cross-examine adverse witnesses. *See Baum*, 903 F.3d at 578 ("the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."). Thus, not only was it proper for the dissent to reference criminal cases in support of its conclusion, it was also necessary. R. at 53a–54a.

Several courts have cited the inability to assess witness credibility due to face masks as sufficient reason to require alternative solutions to mask wearing. *See United States v. Robertson*, No. 17-CR-02949-MV-1, 2020 WL 6701874, at *1–2

(D.N.M. Nov. 13, 2020) (agreeing that "facemasks [would] . . . meaningfully affect" the "core jury task" of assessing witness credibility and requiring that witnesses substitute face masks for plastic face shields); *see also United States v. Cohn*, No. 19-CR-097 (GRB), 2020 WL 5050945, at *4 (E.D.N.Y. Aug. 26, 2020) (noting that "effective credibility evaluation . . . requires that witnesses testify without traditional masks" and granting the defendant's motion for a nonjury trial).

Even if this Court declines to apply the underlying principles of the Confrontation Clause to school disciplinary proceedings, the due process right to be heard in a meaningful manner independently requires witnesses to either remove face masks or fashion a clear face shield. As noted by the Sixth Circuit, "the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused." *Cincinnati*, 872 F.3d at 401. The Sixth Circuit has further acknowledged that a university's obligation to provide the means for a hearing panel to evaluate witnesses' credibility could include the use of modern technology, including by allowing a witness to be questioned via Skype "without physical presence." *Id.* at 406.

Mr. Park plausibly pleaded that QSU violated his due process rights by allowing Roe to keep her face covered and by denying Mr. Park's request that Roe testify remotely. R. at 26a. To start, by allowing Roe to keep on her face mask, QSU effectively hindered the Board's ability to assess Roe's credibility. *Id.* Roe's facial expressions were a complete mystery to Mr. Park and the Board as her N95 mask fully covered her nose and mouth. CLRF. ANS. # 3. Thus, neither Mr. Park nor the

Board could "observe her demeanor while being questioned" in any meaningful way. *Cincinnati*, 872 F.3d at 401.

Application of the *Mathews* factors once again expose the due process violation present in this case. First, as discussed previously, Mr. Park clearly has a significant property interest at stake, namely completing his degree. Second, the risk of an erroneous deprivation using the current procedures and the probative value of additional procedures weigh in favor of Mr. Park. By allowing Roe's facial expressions to remain shielded behind her mask, the Board could not adequately assess her credibility. Further, the probative value of requiring Roe to wear a clear face shield, as was required in *Robertson*, or requiring Roe to testify remotely through modern technology, as was acknowledged in *Cincinnati*, is high. In fact, implementing either of these two alternatives would have entirely remedied Mr. Park's claim as to mask wearing and assessing credibility. Neither method would pose a significant administrative burden on QSU, as clear face shields were made available during the pandemic. CLRF. ANS. # 4.

This due process violation, both independently and when coupled with the two aforementioned violations, resulted in significant infringement of Mr. Park's rights under the Fourteenth Amendment. This Court should therefore reverse the decision of the Fourteenth Circuit and hold that Mr. Park plausibly pleaded a § 1983 claim that QSU violated his due process rights by denying him the opportunity to directly cross-examine his accuser, prohibiting integral questions to be asked of Roe, and allowing Roe to keep her face covered. His Complaint should therefore be reinstated.

B. Mr. Park Stated a Plausible Claim That by Discriminating Against Him on The Basis of Sex, QSU Violated His Title IX Rights.

The Fourteenth Circuit erred in upholding the district court's determination that Mr. Park failed to state a Title IX claim upon which relief may be granted. R. at 31a. Title IX imposes limitations on the authority of educational institutions that receive federal funds: "[n]o 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 [f]ederal financial assistance[.]" 20 U.S.C. § 1681(a) (emphasis added). The phrase "program or activity" includes "all of the operations of" all schools, including colleges and universities. *Id.* § 1687.

In assessing Title IX sex discrimination claims in the school disciplinary setting, some circuits employ formal doctrinal tests to identify gender bias, while other circuits apply a straightforward pleading standard, which more directly asks the question of whether the alleged facts raise a plausible inference that the university discriminated on the basis of sex. *Compare Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994) and *Doe v. Miami Univ.*, 882 F.3d 579, 589 (6th Cir. 2018) *with Doe v. Purdue Univ.*, 928 F.3d 652, 667-68 (7th Cir. 2019) and *Ark.-Fayetteville*, 974 F.3d at 864. Regardless of the test applied to Mr. Park's Complaint, these allegations raise a plausible inference that QSU discriminated against him on the basis of sex. *Id.*

Mr. Park contends that "QSU adopted a practice of investigation and enforcement that was inherently biased against male students 'to appease the

Department of Education.'" R. at 28a. Mr. Park also points to four specific examples of the Board's evident gender bias in his Complaint. R. at 56a, 57a. Namely, that the Board expressly praised Roe's "bravery" in "stepping forward"; the Board frowned at Park whenever he addressed them—even at the beginning of the hearing—but did not treat Roe with the same skepticism; one of the Board members, without any prompting or request by Roe, grilled Park about "statistics" showing that only "two to ten percent" of rape allegations ultimately prove to be false; and the Board rejected significantly more of Park's requested follow-up questions than Roe's. R. at 57a. Thus, he sufficiently stated a Title IX claim, and the Fourteenth Circuit erred by holding otherwise.

1. Mr. Park's Claim Survives Under the Title IX Doctrinal Framework.

The Fourteenth Circuit erred in holding that Mr. Park's Title IX claim did not satisfy the erroneous outcome standard outlined by the Second Circuit. R. at 28a. Stating a claim under the erroneous outcome standard requires a plaintiff to plead (1) "facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and (2) a "particularized . . . causal connection between the flawed outcome and gender bias." *Yusuf*, 35 F.3d at 715. In essence, the plaintiff must show that he "was innocent and wrongly found to have committed the offense." *Id.* The Second Circuit noted that the pleading burden is "not heavy" and that "some allegations, such as statements reflecting bias by members of the tribunal, may suffice both to cast doubt on the accuracy of the disciplinary adjudication and to relate the error to gender bias." *Id.*

The Sixth Circuit applied this framework in *Doe v. Cummins,* 662 F. App'x 437, 452 (6th Cir. 2016) (unpublished). In that case, the plaintiffs alleged that University of Cincinnati adopted a practice of investigation and enforcement under Title IX that was inherently biased against male students accused of sexual assault in order to appease the Department of Education. *Id.* The Sixth Circuit struck down the plaintiffs' Title IX claim, reasoning that the allegations were "mere conclusory statements, unsupported by sufficient factual allegations to make their claims plausible." *Id.*

In *Baum*, the Sixth Circuit employed the *Yusuf* framework once more, this time finding that the plaintiff met both prongs of the erroneous outcome standard. *Baum*, 903 F.3d at 585. In that case, the plaintiff pointed to circumstances surrounding his disciplinary proceedings that plausibly suggested his university acted with bias based on his sex, namely that the federal government had launched an investigation into the university's process for responding to allegations of sexual misconduct just two years prior. *Id.* at 586. Also relevant in the Sixth Circuit's determination was that the hearing panel credited exclusively female testimony from the alleged victim's sorority sisters but rejected all of the male testimony from the plaintiff's fraternity brothers. *Id.* at 587. The court noted that anti-male bias was not the only plausible explanation for the university's conduct, but "alternative explanations [were] not fatal to [the plaintiff's] ability to survive a Rule 12(b)(6) motion to dismiss." *Id.*

Because Mr. Park's Complaint contains both statements and actions reflecting bias by members of the Board, he sufficiently stated a Title IX claim under the erroneous outcome standard. The Fourteenth Circuit did not decide whether Mr. Park met his burden under the first element and found that he did not meet his burden under the second element. R. at 28a. In striking down his Title IX claim, the Fourteenth Circuit analogized the present case to *Cummins*. R. at 28a. Specifically, the court equated Mr. Park's allegations with those of the plaintiff in *Cummins*. R. at 28a. But this analogy is unfounded as the plaintiff in *Cummins* failed to allege any facts supporting the plausibility of a causal connection between the flawed outcome and gender bias. *Cummins*, 662 F. App'x at 452. By contrast, Mr. Park alleged the type of facts specifically noted by the Second Circuit in *Yusuf* as being sufficient to establish the causal connection: statements reflecting bias by members of the tribunal are sufficient to establish both prongs of the erroneous outcome standard. *Yusuf*, 35 F.3d at 715.

Mr. Park's Complaint points directly to statements and actions by the Board that, when taken together, support a plausible inference that the Board discriminated against him on the basis of his sex. R. at 56a–57a. Mr. Park asserted all of the following as indicative of an inherently biased process in his Complaint: the Board expressly praised Roe's "bravery" in "stepping forward"; the Board frowned at Park whenever he addressed them—even at the beginning of the hearing—but did not treat Roe with the same skepticism; one of the Board members, without any prompting or request by Roe, grilled Park about "statistics" showing that only "two

to ten percent" of rape allegations ultimately prove to be false; and the Board rejected significantly more of Mr. Park's requested follow-up questions than Roe's. R. at 57a. Because reviewing the district court's dismissal of Mr. Park's claims required the Fourteenth Circuit to accept the truth of all well-pled facts, the Fourteenth Circuit needed to at least acknowledge these claims, but failed to do so. *Zell*, 957 F.3d at 7.

The Fourteenth Circuit also failed in differentiating the present case from *Baum.* R. at 28a–30a. The lower court focused on two facts from that case: that the university had been subject to investigation by the federal government and that the Board credited exclusively female testimony. R. at 28a–29a. While QSU was not subject to federal investigation like the university in *Baum*, the Fourteenth Circuit failed to afford any weight to the fact that the Board in the present case ruled for Roe after making a series of gestures and comments indicating bias against Mr. Park. R. at 57a. This is particularly egregious given that the Board never saw Roe's whole face and therefore could not adequately assess her credibility. R. at 26a. Further, in differentiating the facts of *Baum* from the facts of Mr. Park's case, the Fourteenth Circuit curiously cites to *Cummins* for the proposition that the court "cannot reasonably infer that the Board's [decision to credit Roe over Park] resulted from gender bias, as opposed to another 'more innocent' cause." *Cummins*, 662 F. App'x at 453–54. But the Sixth Circuit expressly recognized in *Baum*, the very case the Fourteenth Circuit attempted to differentiate, that "alternative explanations are not fatal to [the plaintiff's] ability to survive a Rule 12(b)(6) motion to dismiss." *Baum*,

903 F.3d at 587. Thus, another more innocent cause of the Board's behavior should not have precluded Mr. Park's claim from proceeding to discovery.

Mr. Park's allegations both cast articulable doubt on the outcome of QSU's proceeding and establish a causal connection between the flawed outcome and gender bias. Accordingly, he sufficiently stated a Title IX claim and the Fourteenth Circuit erred by affirming its dismissal.

2. Because Mr. Park Asserted Allegations Indicative of a Biased Process, He Sufficiently Stated a Title IX Claim under the Straightforward Pleading Standard.

Even if assessed under the straightforward pleading standard of the Seventh Circuit, Mr. Park's Title IX claim survives. The Seventh Circuit expressly rejected the "need to superimpose doctrinal tests on the [Title IX] statute" and instead "ask[ed] the question more directly: do the alleged facts, if true, raise a plausible inference that the university discriminated against [the student] 'on the basis of sex'?" *Purdue Univ.*, 928 F.3d at 667–68. Other circuits have followed suit. *See Univ. of the Scis.*, 961 F.3d at 209 (acknowledging that this standard "hews most closely to the text of Title IX"); *Univ. of Ark.-Fayetteville*, 974 F.3d at 864 (noting that to state a Title IX claim, the student "must allege adequately that the University disciplined him on the basis of sex—that is, because he is a male.")

Under the straightforward pleading standard, stating a Title IX claim requires facts that, if true, support a plausible inference that a federally funded college or university discriminated against a person on the basis of sex. *See Univ. of the Scis.*, 961 F.3d at 209 (citing *Purdue Univ.*, 928 F.3d at 667). In *University of the Sciences*,

USciences expelled the plaintiff after concluding that he had committed sexual assault. *Id.* In his complaint against USciences, the plaintiff alleged that the university yielded to external pressures when implementing and enforcing its misconduct policy and that sex was a motivating factor in the university's investigation and decision to impose discipline. *Id.*

The *USciences* court held that the plaintiff sufficiently stated a Title IX claim. *Id.* In reaching this decision, the Third Circuit acknowledged the impact of the 2011 "Dear Colleague" letter, issued by the Department of Education ("DoED") under President Obama. *See* DEP'T OF EDUC., *Dear Colleague Letter* (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. This letter provided universities with guidance pertaining to Title IX compliance. *Id.* Namely, it required schools "to adopt a lenient 'more likely than not burden of proof' when adjudicating claims against alleged perpetrators" and effectively put a school's funding "at risk if it could not show that it was vigorously investigating and punishing sexual misconduct." *Purdue*, 928 F.3d at 668.

The *USciences* court noted that the "Dear Colleague" letter "ushered in a more rigorous approach to campus sexual misconduct allegations." *Id.* at 210 (quoting *Purdue Univ.*, 928 F.3d at 668). Thus, the Third Circuit followed the lead of three of its sister circuits in finding that "alleged university overreaction to DoED or other public pressure is relevant to alleging a plausible Title IX discrimination claim." *Id.*; *see also Purdue Univ.*, 928 F.3d at 668–69 ("[o]ther circuits have treated the Dear Colleague letter as relevant in evaluating the plausibility of a Title IX claim"); *Baum*,

903 F.3d at 586 (explaining that the pressure from the federal government "support[ed] a reasonable inference of gender discrimination."); *Doe v. Columbia Univ.*, 831 F.3d 46, 58 (2d Cir. 2016) ("There is nothing implausible or unreasonable about the [c]omplaint's suggested inference that the panel adopted a biased stance in favor of the accusing female and against the defending male [] in order to avoid further fanning the criticisms that Columbia turned a blind eye to such assaults."). While such an allegation cannot alone support a Title IX claim, the Third Circuit considered it in combination with other specific facts alleged by the plaintiff in concluding that USciences was improperly motived by sex. *Id.*

Mr. Park alleged facts that supported a plausible inference that QSU discriminated against him because he is a male. Like the plaintiff in *USciences*, Mr. Park contends that QSU employed a practice of investigation and enforcement that was inherently biased on the basis of sex because the University yielded to external pressure from the Department of Education. R. at 28a. And like the plaintiff in *Usciences*, Mr. Park's allegations do not stop there. As noted above, Mr. Park also points to four specific examples indicative of an inherently biased process. R. at 57a. These allegations, coupled with the assertion that QSU's disciplinary practices were an overreaction to DoED, support an inference that QSU discriminated against Mr. Park on the basis of his sex. The dissent aptly notes that Mr. Park's pleadings "are enough to clear the very low pleadings bar." R. at 56a.

Regardless of the test applied to Mr. Park's Complaint, he plausibly pleaded that QSU violated his Title IX rights by discriminating against him on the basis of

sex through a biased disciplinary proceeding. He also plausibly pleaded that QSU violated his due process rights by employing a disciplinary process that denied him the opportunity to be heard in a meaningful manner. Therefore, this Court should reverse the decision of the Fourteenth Circuit and reinstate Mr. Park's claims.

II. QUICKSILVER STATE UNIVERSITY IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(d).

This Court should reverse the Fourteenth Circuit's judgment awarding attorney's fees to QSU because attorney's fees are neither permitted under the text of Rule 41(d) nor are they permitted under the underlying statute. The language of Federal Rule of Civil Procedure 41(d) gives a court the discretion to order the plaintiff to pay the "costs" of a previously dismissed action. The meaning of "costs" is one that has caused division in the circuit courts. The first approach, adopted by the Sixth Circuit, maintains that "costs" do not include attorney's fees and they are never awardable under Rule 41(d). *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). The second approach, adopted by the Second, Eighth, and Tenth Circuits, is that Rule 41(d)'s "costs" always include attorney's fees. *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 24–27 (2d Cir. 2018); *Meredith v. Stovall*, 216 F.3d 1087 (10th Cir. 2000) (unpublished); *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980). The third and final approach, adopted by the Third, Fourth, Fifth and Seventh Circuits, permits attorney's fees only if the underlying statute authorizes them. *Garza v. Citigroup Inc.*, 881 F.3d 277, 282–83 (3d Cir. 2018); *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017); *Andrews v. Am.'s Living Ctrs., LLC*,

827 F.3d 306, 311 (4th Cir. 2016); *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000).

Because the Rule is silent with respect to attorney's fees, and the Rules have made a meaningful distinction between "costs" and attorney's fees elsewhere, this Court should adopt the Sixth Circuit's approach and decline to award attorney's fees under Rule 41(d) in any circumstance. This is especially so considering that Congress never explicitly authorized an award of attorney's fees as a recoverable cost under Rule 41(d). Even if this Court declines to adopt the Sixth Circuit's interpretation that fees are never awardable, the Fourteenth Circuit's decision following the Third, Fourth, Fifth, and Seventh Circuits' approach should still be reversed because the underlying statute—42 U.S.C. § 1988—requires that a defendant must be a prevailing party and show that the plaintiff's action was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 422 (1978). QSU meets neither of the two requirements for awarding a defendant attorney's fees under § 1988; therefore, the decision of the Fourteenth Circuit should be reversed.

A. Attorney's Fees Should Never Be Permitted Under Rule 41(d) Because Attorney's Fees Do Not Constitute "Costs" Within the Explicit Language of the Rule.

The Fourteenth Circuit erred by holding that attorney's fees were properly awarded to QSU because Rule 41(d) does not explicitly provide for attorney's fees within the meaning of the word "costs." "If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the

same defendant," Rule 41(d) permits a court to "order the plaintiff to pay all or part of the *costs* of that previous action" (emphasis added). "Attorney's fees" and "costs" as used in the Federal Rules are distinct concepts, and the Fourteenth Circuit erred by impermissibly conflating the two terms. *See Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000).

In determining whether attorney's fees should be awarded in any given case, the starting point for analysis lies against the backdrop of the "bedrock principle known as the 'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Peter v. NantKwest, Inc.*, 140 S. Ct. 365, 370 (2019). Accordingly, as a general rule, there exists a presumption against shifting attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975). The Court should be able to look to the language of the section at issue and point to a "sufficiently specific and explicit indication of its intent to overcome the American Rule's presumption" that parties bear their own attorney's fees. *See Peter*, 140 S. Ct. at 372 (holding that the statutory language in 35 U.S.C. § 145 referring to "expenses" does not "authorize an award of attorney's fees with sufficient clarity to overcome the American Rule presumption"); *see also Key Tronic Corp v. United States*, 511 U.S. 809, 814–815 (1994) (holding that "attorney's fees generally are not a recoverable cost of litigation '*absent explicit congressional authorization*.'") (emphasis added).

Rule 41(d) does not expressly mention attorney's fees—it speaks only of "costs," which does not clearly convey an intent to encompass attorney's fees therein. Indeed,

the absence of any mention of attorney's fees in Rule 41(d) strongly suggests that the decision *not* to award attorney's fees was deliberate. This is especially apparent when factoring in other Federal Rules of Civil Procedure that explicitly mention attorney's fees when they are meant to be awarded. For example, the Rules *do* explicitly mention that attorney's fees are recoverable for parties that succeed on a motion for an order compelling disclosure or discovery. Fed. R. Civ. P. 37(a)(5)(A). Similarly, Rule 54(d) puts forth two distinct sections of recovery: one regarding costs and one regarding attorney's fees. The former rule establishes that attorney's fees, where recoverable, will be expressly mentioned; the latter rule indicates that costs are meaningfully distinguished from attorney's fees where both may be applicable. This same theme is repeated throughout the Rules: Rule 11(c)(2) specifies that "the court may award to the prevailing party the reasonable expenses, *including attorney's fees*, incurred for the motion"; Rule 26(g)(3) states that "[t]he sanction may include an order to pay the reasonable expenses, *including attorney's fees*, caused by the violation" (emphasis added). Simply put, where attorney's fees were intended to be included throughout the Rules, it was meaningfully distinguished from the term "costs" or "reasonable expenses."

Thus, "we must assume that Congress was aware of the distinction and was careful with its words when it approved Rule 41(d)." *Rogers*, 230 F.3d at 874. In short, if the drafters of the Federal Rules—or Congress, in its approval of them—wanted Rule 41(d) to include an award of attorney's fees, that intent would have been stated expressly. Rule 41(d) says what it means and means what it says: no attorney's fees

should be awarded—only costs. Since a plain reading of the word "costs" in Rule 41(d) does not indicate any intention to include attorney's fees, the Fourteenth Circuit's decision affirming the award of attorney's fees to QSU should be reversed.

Public policy also supports this plain reading of the statute. In other parts of the Federal Rules, attorney's fees are awarded as sanctions against a party that has done something wrong in the eyes of the court. For example, Rule 37(b)(2)(C) orders the "disobedient party" to pay attorney's fees for failing to comply with a court order. Similarly, Rule 11(c)(4) imposes the sanction of attorney's fees when a party violates a rule regarding representations to the court. Finally, Rule 26(g) imposes the sanction of attorney's fees for violating the rule regarding proper certification of disclosures. In each instance, attorney's fees are shifted as means to punish a party for misbehavior such as bad faith or oppressive litigation practices. *See e.g.*, *Alyeska*, 421 U.S. at 275.

Rule 41(d), however, is not used as a punishment or sanction for a party who acts improperly. In sharp contrast to the Rules that impose the shifting of attorney's fees, "costs" are awarded as a routine and expected part of litigation. Throughout the Rules, "costs" traditionally include things like "court fees, printing expenses, and the like." *Marek v. Chesny*, 473 U.S. 1, 14 (1985) (Brennan, J., dissenting). Unlike attorney's fees, costs are not used to penalize parties that have engaged in wrongdoing. Here, Mr. Park acted pursuant to the letter of the Rule when he dismissed his first action. Rule 41(a)(1)(A) expressly permits a plaintiff to dismiss an action "before the opposing party serves … a motion for summary judgment." Thus,

by voluntarily dismissing his suit pursuant to the procedure outlined in the Rules, Mr. Park engaged in no wrongdoing or misbehavior that would warrant the sanction of attorney's fees. Mr. Park, or any plaintiff that voluntarily dismisses pursuant to the procedure outlined in Rule 41(a), should not be penalized for acting well within his rights. Accordingly, this Court should hold that an award of attorney's fees is never permissible under Rule 41(d), both because attorney's fees are not explicitly accounted for within the text of the rule, and because, as a matter of public policy, litigants should not be penalized by acting within their right to dismiss under Rule 41(d).

B. Even if the Court Adopts the Alternative Position that Attorney's Fees May Be Awarded Only if the Underlying Statute Permits, QSU Still Cannot Recover Attorney's Fees Because it does Not Meet the Statutory Requirements.

Even if this Court adopts the Third, Fourth, Fifth, and Seventh Circuits' position that attorney's fees are permitted under Rule 41(d) only if the underlying statute permits, QSU is still not entitled to recover attorney's fees because they were not a prevailing party and Mr. Park's action was not frivolous or without foundation. Although this Court has never determined whether attorney's fees are recoverable under Rule 41(d), this Court has awarded attorney's fees under Rule 68, not because the drafters of Rule 68 intended "costs" to include attorney's fees, but rather because the underlying substantive statute defined "costs" to include attorney's fees. *Marek v. Chesney*, 473 U.S. 1, 7–9 (1985) ("Since Congress expressly included attorney's fees as "costs" available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68.").

Under 42 U.S.C. § 1988(b), a prevailing party can recover a "reasonable attorney's fee," at the court's discretion, in an action or proceeding to enforce provisions of § 1983 and Title IX. Importantly, that statute only permits the awarding of attorney's fees to the *prevailing* party. *Id.* If the plaintiff has voluntarily dismissed the prior action under Rule 41, a defendant is not a prevailing party within the meaning of § 1988 unless the defendant can show that the plaintiff withdrew to avoid an unfavorable judgment on the merits. *Portillo v. Cunningham*, 872 F.3d 728, 740 (5th Cir. 2017). Even so, the court can only award attorney's fees if "the Plaintiff's action was frivolous, unreasonable, or without foundation." *Id.* at 739; *see also Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 422 (1978). Because QSU did not prevail in Mr. Park's first voluntarily dismissed action, and because Mr. Park's action was not frivolous, unreasonable, or without foundation, the Fourteenth Circuit erred in affirming the district court's award of attorneys' fees to the defendants under § 1988.

1. Since QSU Was Not a Prevailing Party, it Cannot Recover Attorney's Fees Under the Substantive Statute.

The Fourteenth Circuit erred in holding that QSU was a "prevailing party" for purposes of 42 U.S.C. § 1988(b) because Mr. Park withdrew due to concerns about potential bias by the first court, not to avoid an unfavorable judgment on the merits. R. at 10a. Under § 1988, attorney's fees can only be recovered by a prevailing party. The term "prevailing party" is a legal term of art, which this Court historically defined as "a party in whose favor judgment is rendered." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001). That definition,

however, has since fallen out of favor; this Court has more recently altered the touchstone of the "prevailing party" inquiry to focus on whether there was a "material alteration of the legal relationship of the parties . . . marked by judicial *imprimatur*." *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 422 (2016) (citations omitted). Because Mr. Park's voluntary dismissal of his own claim neither resulted in a judgment rendered, nor resulted in a material alteration of the parties' legal relationship marked by judicial *imprimatur*, the Fourteenth Circuit erred in its determination that QSU constituted a "prevailing party."

Voluntary dismissal by the plaintiff is, by default, a dismissal without prejudice. Fed. R. Civ. P. 41(a)(1)(B). The Fifth Circuit's rule, relied on below, is that "[a] defendant is not a prevailing party within the meaning of § 1988 when a civil rights plaintiff voluntarily dismisses his claim, unless the defendants can show that the plaintiff withdrew to avoid a disfavorable judgment on the merits." *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001). The Fourteenth Circuit acknowledged that the evidence on this point is "sparse," and it speculated that because Mr. Park dismissed his action and subsequently refiled, it was to avoid an unfavorable judgment. R. at 37a; *see* R. at 61a (Walt, J., dissenting). That, however, is not what happened here.

Mr. Park voluntarily dismissed his own suit, on his own volition, neither to avoid an unfavorable judgment on the merits nor to secure a tactical advantage. Rather, the Record is rich with support for an alternative explanation: that Mr. Park dismissed his action due to concerns about possible bias in the first court. *See* R. at. 9a (explaining that the first judge began the day's proceedings by singing the QSU

fight song). Any reasonable plaintiff would be wary of a judge that outwardly flaunts his deep affection for the defendant in that action. The District of Quicksilver does not prohibit Mr. Park's response to the potential bias—the act of refiling his action in an attempt to be assigned a different judge. *Id.* at n.5. On top of that, there is an even more benign reason that Mr. Park dismissed his suit. That is, "counsel's desire to better study applicable law and ensure Park's claims . . . presented a good-faith basis for extension or modification of existing law." R. at 10a. And significantly, QSU did not provide any affidavit denying these reasons. *Id.*

Finally, a voluntary dismissal without prejudice should also not render the defendant in that action a "prevailing party" for purposes of shifting attorney's fees because it does not materially alter the legal relationship of the parties. Nor, for that matter, is the action marked by judicial *imprimatur*. Because Mr. Park refiled his action against the same defendant, the legal relationship was ultimately not altered by virtue of the Rule 41(d) dismissal. The plaintiff and the defendant existed in the same legal relationship that they did at the inception of the suit upon the voluntary dismissal and subsequent refiling. Furthermore, the requirement of judicial *imprimatur* implicitly requires that the judge affirmatively acted in some way in altering the parties' legal relationship. Thus, a voluntary change in the plaintiff's conduct, even if it consequently brings about a desirable result for the defendant, "lacks the necessary judicial imprimatur on the change." *See Buckhannon*, 532 U.S. at 598–99.

The "prevailing party" inquiry is a lose-lose situation for QSU, because even if the Court somehow determines that Mr. Park's voluntary dismissal altered the parties' legal relationship, that change was certainly not marked by any shred of judicial *imprimatur*. Since Mr. Park dismissed his own action for reasons unmotivated by an attempt to gain a tactical advantage and not to avoid an unfavorable judgment on the merits, and because the decision to voluntarily dismiss was not one that altered the legal relationship or was marked by judicial *imprimatur*, QSU cannot be considered a prevailing party for purposes of awarding attorney's fees under § 1988. Thus, the Fourteenth Circuit's decision affirming the district court's award of attorney's fees to QSU should be reversed on this basis alone.

2. Since Mr. Park's Action Was Not "Frivolous, Unreasonable, or Without Foundation," QSU Cannot Recover Attorney's Fees Under the Substantive Statute.

Even if QSU can establish that they are a prevailing party, which they cannot, QSU still cannot recover attorney's fees from the plaintiff because Mr. Park's action was not "frivolous, unreasonable, or groundless." *Christiansburg,* 434 U.S. at 422; *see also Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (applying the *Christiansburg* standard to a claim under § 1988). In enacting the fee shifting framework in 42 U.S.C. § 1988, Congress sought to protect defendants from burdensome or vexatious litigation that lacks legal or factual basis. *Christiansburg*, 434 U.S. at 420. However, unlike a prevailing plaintiff, who is ordinarily "awarded attorney's fees in all but special circumstances," a prevailing *defendant* is only entitled to attorney's fees upon a finding that the plaintiff's claim was "frivolous, unreasonable, or groundless, or that

the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The higher standard in awarding attorney's fees to defendants helps to "avoid chilling the initiation and prosecution of meritorious civil rights actions." *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 178 (2d Cir. 2006). As such, "it is very rare that victorious defendants in civil rights cases will recover attorneys' fees." *Id.*

In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, this Court imparted guidance to lower courts to be used in applying the stringent criteria governing an award of attorney's fees to defendants. 434 U.S. at 421–22. Importantly, this Court warned that lower courts must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Id.* "Decisive facts may not emerge until discovery or trial . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* That is to say, the mere fact that a plaintiff may ultimately lose their case is not, in itself, a sufficient justification for finding that the action is meritless, groundless, or without foundation. *Hughes,* 449, U.S. at 14. Similarly, just because a claim is weak does not mean that a claim is without foundation. *See Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 229 (2d Cir. 2004).

i. Mr. Park's Action is Not Frivolous.

Attorney's fees should not have been awarded to QSU because Mr. Park's action was not frivolous. When a plaintiff provides sufficient evidence to support their

claim, the case is not frivolous. *Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1189 (11th Cir. 1985). In *Sullivan v. School Board of Pinellas County*, the plaintiff claimed that a school board violated Title VII and § 1983 when she was discharged from her position as superintendent due to the alleged sexist and antisemitic attitudes of her coworkers. *Id.* at 1184. The Eleventh Circuit held that the claims were not frivolous because the plaintiff provided some evidence with respect to both the employment discrimination claim and due process claim; specifically, she introduced evidence of her performance evaluations and treatment at work. *Id.* at 1190. The court also noted that "unless the district court found all of her testimony to be absolutely incredible and pure fabrication, its finding of frivolity cannot be sustained." *Id.* Another example can be found in the Fifth Circuit's decision in *White v. South Park Independent School District*. 693 F.3d. 1163 (5th Cir. 1982). There, the plaintiff brought a § 1983 suit alleging that his employer, a school district, racially discriminated against him and denied him due process. *Id.* at 1165. Even though the plaintiff lost on the merits of his claims, the court of appeals reversed the district court's order awarding attorney's fees to the defendant because, even though the "law or facts may [have] appear[ed] questionable or unfavorable at the outset," it cannot be said that the plaintiff's suit was frivolous. *Id.* at 1170.

In contrast, frivolity can be found in cases where the plaintiff does not introduce any evidence to support their claims, *see e.g.*, *Beard v. Annis*, 730 F.2d 741, 745 (11th Cir. 1984) (finding frivolity where the plaintiff failed to establish any evidence whatsoever regarding his claims); *Church of Scientology v. Cazares*, 638

F.2d 1272, 1290 (5th Cir. 1981) (upholding award of attorney's fees to defendant because "there was no material, admissible evidence to support the [plaintiff's] civil rights claim"), or where an action has no legal basis. *See e.g.*, *Head v. Medford*, 62 F.3d 351, 356 (11th Cir. 1995) (holding that "the assertion of a constitutional claim based knowingly on a nonexistent property interest was legally groundless" as a matter of law); *Limerick v. Greenwald*, 749 F.2d 97, 101 (1st Cir. 1984) (finding frivolity where the plaintiff's conduct involved "the filing of hundreds of pages of irrelevant documents, in citing to dozens of cases unrelated to the real issues in these appeals, in bringing repetitive motions without a shred of rational basis, and in seeking to resurrect matters long since finally concluded.").

In the decision below, the Fourteenth Circuit did not even reach this prong of the fee shifting analysis—it concluded that QSU was a prevailing party, but the court stopped short of determining whether Mr. Park's action was frivolous. R. at 37a. Instead of applying the "frivolous, unreasonable, or without merit" part of the test as required by this Court in *Christiansburg* and *Hughes*, the Fourteenth Circuit affirmed that QSU was entitled to attorney's fees merely because the district court determined that Mr. Park's nonsuit was "motivated by a desire to gain a tactical advantage." R. at 38a. Even if that were true, that alone is not sufficient to shift attorney's fees to QSU.

The Fourteenth Circuit compared the case at hand to a Fourth Circuit case, *Andrews v. America's Living Centers*, which had analogous facts, to find that Mr. Park attempted to gain a tactical advantage. R. at 39a. In *Andrews*, the plaintiff

voluntarily dismissed the first action after a motion to dismiss hearing, then refiled the very same day. R. at 38a (citing *Andrews v. America's Living Ctrs., LLC*, 827 F.3d 306, 312 (2016)). The *Andrews* court held that although it is within a court's discretion to award attorney's fees "where it makes a specific finding that the plaintiff has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons,'" the plaintiff's conduct did not meet that threshold and, therefore, an award of attorney's fees was improper. *Andrews*, 827 F.3d at 311–14 (quoting *Alyeska*, 421 U.S. at 258–59).

Andrews can be meaningfully distinguished from the case at hand. There, the plaintiff dismissed and refiled the same day, whereas here, Mr. Park refiled nearly two months later presumably to give counsel time to better study the applicable law. R. at 9a–10a. Notably, even when the plaintiff refiled the same day, the Fourth Circuit *still determined* that awarding attorney's fees to the defendant was inappropriate. *Andrews*, 827 F.3d at 314. Thus, the Fourteenth Circuit erroneously relied on *Andrews* to support the proposition that a mere attempt to gain a tactical advantage is sufficient to award attorney's fees to a defendant. R. at 39a. That application, for the aforementioned reasons, was severely misguided.[2]

[2] The district court, and Fourteenth Circuit through its affirmance, also misapplied the reasoning of *Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001). There, the Ninth Circuit stated that Rule 11 sanctions could indeed be imposed where an attorney acted with improper purpose to gain a tactical advantage. Here, however, the issue is whether attorney's fees can be shifted under either Rule 41(d) or the underlying statute, 24 U.S.C. § 1988. The lower courts erred by conflating the standard for imposing Rule 11 sanctions with the standard for awarding attorney's fees under 41(d) or § 1988.

Even if this Court determines that QSU was a prevailing party, that should have only a very modest, if any, effect on the second prong of the analysis. *That* prong, whether the action was frivolous, unreasonable, or without foundation, is a much higher hurdle for the defendant to clear. Here, like the plaintiff in *Sullivan* who introduced some evidence to support her claims, Mr. Park has alleged sufficient evidence to support his § 1983 and Title IX claims. Namely, QSU prevented him from directly cross-examining his accuser, QSU refused to ask his accuser integral questions, QSU allowed his accuser to keep her face covered in a hearing meant to assess credibility, and QSU discriminated against him on the basis of sex through a biased disciplinary process. R. at 5a, 8a. Put simply, Mr. Park set forth a sufficient amount of evidence to support his claim that he was denied due process during QSU's disciplinary hearing. *See* Part I, *supra*. Even if this Court considers the evidence weak or unfavorable, that is not enough to find that it was frivolous, which is required to shift attorney's fees to the defendant under § 1988. There is a vast difference between actions that may not ultimately prevail and actions that are frivolous or entirely without merit, and this Court should be particularly wary of any decisions that conflate "unlikely to prevail" with the "frivolous, unreasonable, or without foundation" standard. A court would have to find all of Mr. Park's evidence to be "absolutely incredible and pure fabrication" in order to sustain a finding of frivolity. Indeed, because "[t]he court's findings are supported by evidence," the action is not frivolous. R. at 62a (Walt, J., dissenting).

ii. The High Standard for Awarding Attorney's Fees to Defendants Should be Vehemently Protected to Avoid Chilling Civil Rights Actions.

This Court should maintain the high standard for shifting attorney's fees to defendants as a matter of public policy. In enacting § 1988, Congress sought to award prevailing *plaintiffs* in civil rights actions attorney's fees. "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [this bill] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." H. R. Rep. No. 94-1558, 1 (1976). In essence, the statute was designed to ensure that prevailing plaintiffs who have suffered discrimination or other infringements of their constitutional rights are encouraged to bring "meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel." *Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (quoting *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982)). When a plaintiff succeeds by remedying a civil rights violation, they serve "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 833 (2011) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 204 (1968)).

Recognizing that Congress intended to encourage civil rights plaintiffs to bring meritorious suits by holding violators of federal law accountable, this Court explicitly limited the fee shifting provision when it came to awarding attorney's fees to

defendants.[3] Whereas plaintiffs need only be the prevailing party to be awarded attorney's fees, defendants have the additional burden of showing that the plaintiff's action was frivolous, unreasonable, or without merit. "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of [1983]." *Hughes*, 449 U.S. at 14 (quoting *Christiansburg*, 434 U.S. at 422).

Thus, the reason that defendants must show that the plaintiff's action was frivolous, unreasonable, or groundless to be awarded attorney's fees is to avoid "chilling the initiation and prosecution of meritorious civil rights actions." *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 765, 770 (1998). In the Fourteenth Circuit's decision below, Justice Fernandez's concurring opinion argues that this Court should adopt the Second Circuit's approach in *Horowitz v. 148 S. Emerson Assocs. LLC*, which holds that attorney's fees should be recoverable in all cases arising under Rule 41(d). R. at 41a. That approach should be unequivocally rejected by this Court because, while it may serve to deter forum shopping and vexatious litigation, it will also deter plaintiffs from bringing meritorious actions and deter voluntary dismissals that occur for completely appropriate reasons.[4]

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[3] Congress also contemplated that defendants may seek fees "to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420.

[4] In addition to potentially chilling meritorious litigation, Justice Fernandez's approach is also contrary to the plain language of Rule 41(d) as well as inconsistent with the drafters' use of the word "costs" throughout the Federal Rules of Civil Procedure. *See* Part II.A., *supra*.

If attorney's fees could be shifted to all prevailing defendants in civil rights actions, it would be detrimental to the underlying purpose of those statutes—to ensure that citizens have the opportunity to vindicate violations of their constitutional rights. If the threat of paying a defendant's attorney's fees were to loom, those whose civil rights have been violated would hesitate to bring potentially meritorious actions upon fear of penalty if they are not successful. Enforcing a penalty against non-prevailing defendants makes sense—they are the ones that are accused of violating someone's constitutional rights. But enforcing a penalty against a non-prevailing plaintiff is unreasonable—the only wrong committed by the plaintiff in that circumstance is that they did not prevail, which is not a wrong at all.

This Court should encourage plaintiffs to bring civil rights actions not only because it would remedy the violation suffered individually by that plaintiff, but also because civil rights actions advance the law in new directions. A myriad of ideological positions have ultimately prevailed before this Court, even those actions that did not appear meritorious under existing law. This is especially the case in the civil rights context. *See e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Inventive efforts to expand the law should not be punished—they should be endorsed. Thus, prevailing defendants should only be awarded attorney's fees in the most extreme of circumstances. Otherwise, any civil rights plaintiff who knows they could be penalized with devastating legal fees for asserting a meritorious claim may hesitate to bring it.

The Fourteenth Circuit glossed over the importance of the fee shifting standard for defendants without regard to the grave consequences that softening such a standard might have. Mr. Park brought this action because he suffered a constitutional deprivation—QSU denied Mr. Park procedural protection guaranteed by the Constitution. The district court awarded attorney's fees to QSU because it found that Mr. Park "attempted to gain a tactical advantage," and the Fourteenth Circuit affirmed that decision. R. at 39a. Even if that were true, "attempting to gain a tactical advantage" is not the same as bringing a frivolous lawsuit that completely lacks merit. This Court should emphatically maintain the standard that attorney's fees can only be awarded to defendants upon a showing that the plaintiff's suit was frivolous, unreasonable, or without merit. Anything less will run the risk of chilling civil rights actions in direct contradiction to Congress's purpose underlying § 1988.

Because attorney's fees are not explicitly provided for in Rule 41(d) and they are not contemplated within the meaning of or intent behind the word "costs," this Court should adopt the Sixth Circuit's approach that attorney's fees are never awardable under Rule 41(d). Should this Court instead adopt the alternative approach, that attorney's fees may be awarded if the underlying statute permits, the Fourteenth Circuit's affirmance of the district court's award of attorney's fees should be reversed because QSU does not meet the requirements of 42 U.S.C. § 1988. QSU was not a prevailing party in the first action dismissed pursuant to Rule 41(d) and QSU also did not meet the burden showing that Mr. Park's action was "frivolous, unreasonable, or without merit"; therefore, the award of attorney's fees was improper.

CONCLUSION

Petitioner, Kyler Park, respectfully asks that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit on all grounds.

Respectfully Submitted,

Team 10

Counsel for Petitioner

APPENDIX

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> 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 Act of 1972 provides in pertinent part:

> 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[.]

Federal Rule of Civil Procedure 41 provides in pertinent part:

> (d) **Costs of a Previously Dismissed Action**. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
>
> (2) may stay the proceedings until the plaintiff has complied.