

No. 21-8289

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

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 THE PETITIONER

NOVEMBER 21, 2022

TEAM NUMBER 11
Counsel for Petitioner

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

- I. Do the dictates of due process require that a student accused of misconduct in a university disciplinary proceeding be afforded the right to direct and unfettered cross-examination, and to request that adverse witnesses testify without face masks when the university's decision to expel the accused student was based on a credibility determination?
- II. Can Federal Rule of Civil Procedure 41(d) be interpreted to categorically prohibit the award of attorney's fees as costs when the text of the rule omits any express reference to such fees and when the award of such fees conflicts with established precedent?

TABLE OF CONTENTS

<u>QUESTIONS PRESENTED</u>	i
<u>TABLE OF CONTENTS</u>	ii
<u>TABLE OF AUTHORITIES</u>	iv
<u>OPINIONS BELOW</u>	1
<u>STATEMENT OF JURISDICTION</u>	1
<u>CONSTITUTIONAL AND STATUTES INVOLVED</u>	1
<u>FACTS OF THE CASE</u>	2
<u>SUMMARY OF THE ARGUMENT</u>	7
<u>ARGUMENT</u>	8
I. DUE PROCESS REQUIRES THAT A STUDENT ACCUSED OF MISCONDUCT IN A UNIVERSITY DISCIPLINARY PROCEEDING BE AFFORDED A RIGHT TO DIRECT AND UNFETTERED CROSS-EXAMINATION TO ENSURE THE MOST ROBUST PROTECTION OF COMPELLING INTERESTS.....	8
A. Park's Compelling Liberty Interest in His Continued Education and the Maintenance of His Reputation Mandate that the Refusal of an Opportunity to Directly Cross-Examine His Accuser, Where the Determination Turns on Credibility, Be Considered a Breach of Park's Due Process Rights.	11
i. <i>The private interest at stake as a result of Park's expulsion is compelling....</i>	12
ii. <i>Absent an opportunity to directly cross-examine accusing or adverse witnesses, the risk of an erroneous deprivation of Park's serious private interest compels inclusion of the procedure.....</i>	15
iii. <i>QSU's interest in meaningful disciplinary hearings justifies providing an opportunity for direct cross-examination and outweighs the incremental cost of the procedure.....</i>	21

B.	Without requiring witnesses to remove their face masks while testifying, the Board could not reliably assess witness credibility to make its credibility determination consistent with the dictates of due process.....	26
II.	THE FOURTEENTH CIRCUIT ERRED BY INTERPRETING THE TERM “COSTS” AS USED IN FEDERAL RULE OF CIVIL PROCEDURE 41(d) TO INCLUDE ATTORNEY’S FEES IN CONTRAVENTION OF ESTABLISHED PRECEDENT AND THE RULE’S PURPOSE.	35
A.	This Court’s Precedent and Canons of Statutory Interpretation Compel a Finding that Attorney’s Fees Should Be Categorically Excluded from “Costs” Under Rule 41(d).....	37
B.	A Categorical Rule that Always Permits Collection of Attorney’s Fees as Costs Under Rule 41(d) Is Overbroad..	42
C.	Even If This Court Adopts the Hybrid Approach to Permit Collection of Attorney’s Fees as Costs Under Rule 41(d), Such Fees Would Not Be Recoverable Because QSU Cannot Make the Requisite Factual Findings.....	44
<u>CONCLUSION</u>		49

TABLE OF AUTHORITIES

United States Supreme Court Cases

<i>Alyeska Pipeline Services Co. v. Wilderness Society</i> , 421 U.S. 420 (1975)	44, 48
<i>California v. Green</i> , 399 U.S. 149 (1970)	35
<i>Coy v. Iowa</i> , 487 U.S. 1012 (1988)	34, 35, 38
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	34, 37, 38, 41
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975)	17, 20
<i>Grannis v. Ordean</i> , 234 U.S. 385 (1914)	14, 29
<i>Key Tronic Corp. v. United States</i> , 511 U.S. 809 (1994)	Passim
<i>Marek v. Chesny</i> , 473 U.S. 1 (1985)	44, 51
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990)	36, 38, 39
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	15, 17, 18
<i>Mattox v. United States</i> , 156 U.S. 237 (1895)	34, 38
<i>Rogers v. Wal-Mart Stores, Inc.</i> , 230 F.3d 868 (6th Cir. 2000)	46, 47
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	43
<i>Rusello v. United States</i> , 464 U.S. 16 (1983)	45
<i>United States v. Raddatz</i> , 447 U.S. 667 (1980)	34, 37
<i>Watkins v. Sowders</i> , 449 U.S. 341 (1981)	17

Federal Court of Appeals Cases

<i>Andrews v. America's Living Centers, LLC</i> , 827 F.3d 306 (4th Cir. 2016)	Passim
<i>Doe v. Baum</i> , 903 F.3d 575 (6th Cir. 2018)	Passim

<i>Doe v. Michigan State University</i> , 989 F.3d 418 (6th Cir. 2021)	18, 28, 31, 32
<i>Doe v. University of Cincinnati</i> , 872 F.3d 393 (6th Cir. 2017)	Passim
<i>Esposito v. Piatrowski</i> , 223 F.3d 497 (7th Cir. 2000)	51, 52, 53, 54
<i>Evans v. Safeway Stores, Inc.</i> , 623 F.2d 121 (8th Cir. 1980)	42, 49
<i>Flaim v. Medical College of Ohio</i> , 418 F.3d 629 (6th Cir. 2005)	15, 16, 22
<i>Gorman v. University of Rhode Island</i> , 837 F.2d 7 (1st Cir. 1988)	19, 24
<i>Haidak v. University of Massachusetts-Amherst</i> , 933 F.3d 56 (1st Cir. 2019)	Passim
<i>Horowitz v. 148 South Emerson Associates LLC</i> , 888 F.3d 13 (2d Cir. 2018)	42, 48, 49, 50
<i>Pinares v. United Technologies Corp.</i> , 973 F.3d 1254 (11th Cir. 2020)	45, 50
<i>Portillo v. Cunningham</i> , 872 F.3d 728 (5th Cir. 2017)	Passim
<i>Tonkovich v. Kansas Board of Regents</i> , 159 F.3d 504 (10th Cir. 1998)	23
<i>Walsh v. Hodge</i> , 975 F.3d 4755 (5th Cir. 2020)	23, 26
<i>Winnick v. Manning</i> , 460 F.2d 545 (2d Cir. 1972)	18

Federal District Court Cases

<i>United States v. Cohn</i> , 481 F. Supp. 3d 122 (E.D.N.Y. 2020)	33, 37
<i>United States v. Robertson</i> , 2020 WL 6701874 (D.N.M. Nov. 13, 2020)	34
<i>United States v. Sheikh</i> , 493 F. Supp. 3d 883 (E.D. Cal. 2020)	35, 40
<i>United States v. Young</i> , 2020 WL 3963715 (D. Colo. July 13, 2020)	35

Statutes

20 U.S.C. § 1681	7, 11, 59
28 U.S.C. § 1254(1)	7
28 U.S.C. § 1291	7
28 U.S.C. §§ 1331 and 1343(a)	7

42 U.S.C. § 1983	7, 11, 59
42 U.S.C. § 1988(b)	7, 53, 59, 60

Constitutional Provisions

U.S. Const. amend XIV	7, 14
-----------------------------	-------

Rules

Fed. R. Civ. P. 37(c)(1)	47
Fed. R. Civ. P. 41(d)(1)	60
Fed. R. Civ. P. 11(b)	12
Fed. R. Civ. P. 41(a)(1)	11, 12
Fed. R. Civ. P. Procedure 41(d)	Passim

Regulations

Nondiscrimination on the Basis of Sex in Education, 85 Fed. Reg. 30,311	30, 31
--	--------

Other Authorities

Naomi M. Mann, <i>Taming Title IX Tensions</i> , 20 U. Pa. J. Const. L. 631 (2018)	20
---	----

OPINIONS BELOW

The judgment of the United States District Court for the District of Quicksilver dismissing Park's claims and awarding QSU costs and attorney's fees is unreported, but it is available at No. 20-cv-7615 and discussed in the Record. R. at 11a. The judgment of the United States Court of Appeals for the Fourteenth Circuit affirming the district court is also unreported but can be found at No. 21-4601 and in the Record. R. at 1a–62a.

STATEMENT OF JURISDICTION

The United States District Court for the District of Quicksilver had original jurisdiction of this federal civil rights action under 28 U.S.C. §§ 1331 and 1343(a) and entered judgment on December 17, 2020. The United States Court of Appeals for the Fourteenth Circuit had jurisdiction under 28 U.S.C. § 1291 and affirmed the district court's judgment on October 18, 2021. R. at 1a–2a. Park timely petitioned for writ of certiorari, which this Court granted on October 10, 2022. R. at 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case primarily involves a claim under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. amend XIV. Additionally, this case involves provisions of Title IX (20 U.S.C. § 1681), as well as the interpretation and application of Federal Rule of Civil Procedure 41(d) and 42 U.S.C. § 1988(b). Each of these constitutional and statutory provisions is reproduced in relevant part in Appendix A.

STATEMENT OF THE CASE

A. Park and Roe's Spring Break

Kyler Park and Jane Roe were both enrolled students at Quicksilver State University (QSU) in the spring of 2020. R. at 2a. One evening over spring break, on March 14, 2020, they recognized each other at a movie theater, and despite having been only acquaintances until that point, spent the evening together. *Id.* Park, who was a junior in college and of legal age, bought Roe an alcoholic beverage. *Id.* The two of them spent about an hour talking, and then returned to Roe's dorm room and had sexual intercourse. *Id.* Roe called Park multiple times over the next three days. R. at 3a. On the fourth day, Park was notified by the QSU Division of Student Affairs that he had been accused of violating QSU's Code of Student Conduct (CSC) for "committ[ing] acts of sexual abuse, unwanted sexual contact, and dating violence." R. at 3a–4a. An adjudication hearing (the Hearing) was scheduled for May 20, 2020. R. at 4a.

Roe alleges that her phone calls were made because she only vaguely remembered, due to her intoxication level, what had happened on the evening Park and her met and had intercourse. R. at 3a. Her recollection included seeing him at the movie theater and then awakening to find Park engaging in sexual intercourse with her. *Id.* Park, however, recounts that Roe made the phone calls to her expressing interest in a romantic relationship with him. *Id.* He recalls that she sounded happy on the phone, referring to the two of them as "boyfriend" and "girlfriend." *Id.* When Park explained to her that he considered their time together a one time "hookup," she

responded in anger and threatened to report him for assault. *Id.* Because it was Spring Break at QSU, the campus was relatively empty, and the other people in attendance at the movie theater that evening were unknown to Roe and Park. *Id.* There were therefore no witnesses to the event besides Park and Roe. *Id.*

B. The Masked Hearing With No Opportunity for the Parties to Cross-Examine Each Other

By the time of the Hearing, QSU had canceled all in-person classes for the semester due to the Covid-19 pandemic. R. at 4a. The Hearing nevertheless was held in person, *id.*, with an additional mask requirement, R. at 5a. Both Roe and Park attended the Hearing in person, R. at 4a, and Park brought his attorney, R. at 5a. Park requested that Roe be required to remove her mask during her testimony, but the Board refused. R. at 5a. His following request, that she testify unmasked remotely to assuage her health concerns, was also denied, since Roe insisted on being present at the hearing. *Id.*

The Hearing was conducted in accordance with the CSC, which denies each party the right to directly cross-examine the other. *Id.* This denial includes cross-examination by either party's attorney. *Id.* Instead, the Board allows each party to submit questions to the Board which it will ask the parties, using its discretion to determine which questions are acceptable. *Id.* In executing those duties, the Board complies with the QSU policy, which "prioritizes student comfort at the expense of rigorous examination," *id.*, and avoids pursuing lines of questions out of concern that they might be "pressing a traumatized student for too many details" which can be "adversarial and can increase the risk of trauma to the student," *id.* The policy

excused the Board from having to “observe the rules of evidence usually followed by the courts” and provided that the Board could exclude “unduly repetitious or irrelevant evidence.” R. at 5a–6a.

C. Park’s Unanswered Questions and Expulsion from QSU

In accordance with QSU’s policy, the Board refused to ask many of Park’s requested follow up questions aimed at clarifying or impeaching Roe’s statements. R. at 6a. Specifically, the Board refused to ask follow-up questions about the specific kind of alcohol Roe had been drinking, since Park had only been aware of the one drink she had consumed. *Id.* The Board also refused to request receipts or credit card statements from Roe that would evince how many alcoholic drinks she had consumed before meeting Park and engaging in intercourse with him. R. at 7a. It also refused to ask other questions which might have clarified how an underage girl would have acquired alcohol, out of concern that by answering she might implicate herself in criminal conduct. *Id.* When Park produced security camera footage from outside the bar that depicted Roe walking without difficulty and showing no other evidence of intoxication, Roe responded that it was due to her good sense of balance from her martial arts training. *Id.* Park’s initial follow-up question on whether she had credit card receipts for such training was asked and answered in the negative. *Id.* Roe responded that she received lessons from her father’s karate dojo, so there were no receipts. *Id.* An additional follow-up question was denied by the Board and considered irrelevant, even though Park argued that it was impossible that Roe had received lessons there because Roe’s father owned a car dealership, not a karate dojo. *Id.*

At the end of the Hearing, the Board's credibility determination between Roe and Park's testimonies resulted in a finding against Park. R. at 8a. Park was expelled on the basis that he had "likely" committed the acts of sexual misconduct prohibited by the CSC. *Id.* At the time of his expulsion, Park was a few months shy of his final year at QSU. *Id.*

D. Park Files Suit to Defend His Due Process and Title IX Rights

In response to the Board's actions, Park filed suit against QSU in the United States District Court of Quicksilver. R. at 8a. Arguing that QSU infringed upon his civil rights by depriving him of due process, Park sought relief under 42 U.S.C. § 1983. *Id.* He also sought relief under 20 U.S.C. § 1681 (Title IX), or Title IX, stating that the Board reached an erroneous outcome based on his sex. *Id.* Park's suit was assigned to Judge John Kreese—an avid QSU fan, alumnus, and "outspoken supporter of QSU's football team." R. at 9a. Indeed, Judge Kreese always asks those in his courtroom to join him in singing the QSU fight song at the beginning of each day's proceedings. *Id.*

QSU responded to Park's suit by moving to dismiss both claims under Federal Rule of Civil Procedure 12(b)(6). *Id.* The district court held a hearing on QSU's motion on the morning of July 22, 2020, but did not rule on the motion at the hearing. *Id.* Rather, Judge Kreese concluded the hearing by stating that "he would take the matter under advisement." *Id.* Park filed a voluntary dismissal of his suit under Federal Rule of Civil Procedure 41(a)(1) that afternoon. *Id.*

Approximately two months later, Park—alleging the same claims against QSU—refiled his suit in the District Court of Quicksilver. *Id.* Notably, “the District of Quicksilver does not prohibit the refiling of an action in an attempt to get a different judge.” *Id.* Thus, a different judge was assigned to the suit. *Id.* QSU again responded by moving to dismiss both claims under Rule 12(b)(6). R. at 10a. But this time, QSU also moved for costs and \$74,500 in attorney’s fees under Federal Rule of Civil Procedure 41(d), alleging that Park “acted in bad faith and/or vexatiously.” *Id.* To refute QSU’s allegations, Park and his counsel submitted affidavits denying that Park acted in bad faith or vexatiously by dismissing and refiling the suit. *Id.* The affidavits respectfully explained that Park dismissed and refiled due to concerns about potential bias in Judge Kreese’s court. *Id.* Moreover, in line with Federal Rule of Civil Procedure 11(b), Park’s counsel sought time to “better study the applicable law” to confirm that Park’s claims were supported. *Id.* Notably, QSU did not object to these affidavits, nor did it submit any affidavits to the contrary. *Id.*

Nonetheless, the district court granted both of QSU’s motions, but it reduced QSU’s fee award to \$28,150. R. at 10a–11a. While Park’s actions “were not the result of bad faith,” the district court found that he was motivated to “eliminate a perceived tactical disadvantage in a different court.” R. at 11a. In reaching its conclusion, the district court determined that attorney’s fees fall within Rule 41(d)’s ambit as part of “the costs of that previous action.” *Id.*

Park appealed the district court’s judgment to the U.S. Court of Appeals for the Fourteenth Circuit. *Id.* The Fourteenth Circuit affirmed the district court’s

determinations. R. at 40a. In response to his due process claim, The Fourteenth Circuit held that only “some opportunity for real-time cross-examination” is mandated in the university disciplinary setting, a standard that the Board met through its selective questioning of Roe. R. at 17a. Additionally, the Fourteenth Circuit concluded that Roe sporting a face mask while speaking did not violate Park’s due process rights. R. at 24a. As for Park’s Title IX claim, the Fourteenth Circuit held that Park did not plead “a particularized causal connection between the allegedly flawed outcome of the Hearing and gender bias,” and thus that the outcome was not erroneous. R. at 28a. Finally, the Fourteenth Circuit also affirmed the district court’s award of costs and attorney’s fees to QSU by interpreting Rule 41(d) to include attorney’s fees. R. at 40a. Park timely appealed the Fourteenth Circuit’s decision, and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

Students possess well-recognized substantial interests in the right to an education. These important interests, consequently, requires robust protection. To ensure that these interests are protected from erroneous deprivation, due process requires the imposition of adequate procedural safeguards. In the university disciplinary setting, where a student faces the potential ultimate deprivation of his interests, due process mandates that the accused be afforded a right to direct and unfettered cross-examination. Only through the ability to probe the reliability of adverse witness testimony does the accused benefit from the robust protections guaranteed by due process. For cross-examination to function reveal the truth,

however, the process must proceed in an uninhibited manner. Thus, where an adverse witness is permitted to testify with her face obscured by an opaque face mask, the purpose of cross-examination is severely inhibited. Prohibited from cross-examining and from requiring his accuser to testify without a mask, Park was therefore deprived of his due process rights.

The long-standing American Rule has established that attorney's fees are not generally recoverable as costs, absent an express authorization to the contrary. Federal Rule of Civil Procedure 41(d) omits any express reference to attorney's fees. Three distinct approaches have been established to treat the award of attorney's fees. The first, and most consistent with the American Rule, holds that attorney's fees are never recoverable as costs. Another approach takes the opposite position: attorney's fees are categorically recoverable as costs. The final hybrid approach permits the recovery of attorney's fees when such fees can be considered a component of the statute underlying a previous matter. Because it respects longstanding precedent and the plain language of Rule 41(d), this Court should adopt the first approach, prohibiting the award of attorney's fees as costs.

ARGUMENT

I. DUE PROCESS REQUIRES THAT A STUDENT ACCUSED OF MISCONDUCT IN A UNIVERSITY DISCIPLINARY PROCEEDING BE AFFORDED A RIGHT TO DIRECT AND UNFETTERED CROSS-EXAMINATION TO ENSURE THE MOST ROBUST PROTECTION OF COMPELLING INTERESTS.

The Fourteenth Amendment assures that no state may "deprive any person of life, liberty, or property, without the due process of law." U.S. Const. Amend XIV.

This constitutional guarantee, at minimum, has been anchored to an authentic opportunity to be heard. *See Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Whether an individual has indeed been afforded such opportunity, however, shifts with the facts of the particular case. The amount of process due, therefore, hinges on the severity of the threat to one’s liberty and property. *See, e.g., Flaim v. Medical College of Ohio*, 418 F.3d 629, 634 (6th Cir. 2005). Courts assess the adequacy of the procedures employed by comparing the interests of the parties involved. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Under the framework established in *Mathews*, courts evaluate three interrelated factors: (1) the private interest that will be affected, *id.*; (2) the risk of an “erroneous deprivation of such interest” through the existing procedures along with the “probable value . . . of additional or substitute procedural safeguards,” *id.*; and (3) the public interest, including the “fiscal and administrative burdens” that would be imposed by the additional procedures, *id.*

The circumstances inherent in university disciplinary proceedings present uniquely severe consequences to the accused parties involved. The penalties of disciplinary proceedings irreparably scar students with reputational markings that ensure “immediate and lasting impact on a student’s life.” *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018). At risk in a disciplinary proceeding, therefore, are substantial interests. And when that proceeding develops as the result of an accusation of sexual misconduct, those interests embody the peak of the educational process. In accord with the seriousness of the penalty for sexual misconduct and the corresponding harshness of the deprivation of the accused student’s interests, due process demands

more thorough procedures govern the disciplinary hearing. *See Doe v. University of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017). When the outcome of such hearing hinges on a credibility determination, a battle between the competing narratives of the accused and the accuser, due process requires an opportunity for cross-examination. *See, e.g., Baum*, 903 F.3d at 581. When a credibility contest becomes the determinative factor “in the most serious of cases,” cross-examination becomes an indispensable element of due process. *University of Cincinnati*, 872 F.3d at 401 (quoting *Flaim*, 418 F.3d at 636). In the context of a university disciplinary hearing, therefore, direct and unfettered cross-examination must be embraced as the “greatest legal engine ever invented” to reveal the truth. *Id.* at 401–02.

In this case, Park’s disciplinary hearing lacked adequate procedural protections proportional to his potential punishment. Despite its engagement in an unforgiving credibility contest, QSU’s Hearing Board denied Park the opportunity to engage in cross-examination of his accuser, either through himself or his representative. Under the guise of its Code of Student Conduct (CSC), the Board substituted for direct cross-examination the opportunity to submit questions that, if judged appropriate, would be asked by the Hearing Board itself. Pursuant to this process, the Hearing Board refused to ask many of Park’s requested follow-up questions to Roe, the sole witness against him. The Board further objected to Park’s request that Roe remove her face mask while answering questions. This selective questioning process resulted in the Board’s determination that, on the basis of Park’s less credible testimony, Park likely committed acts of sexual misconduct violative of

the CSC. Absent adequate procedural safeguards to probe the reliability of Roe's testimony, this Court should reverse the decision below and hold that the Board's questioning procedures violated Park's due process rights under the Fourteenth Amendment and Title IX.

A. Park's Compelling Liberty Interest in His Continued Education and the Maintenance of His Reputation Mandate that the Refusal of an Opportunity to Directly Cross-Examine His Accuser, Where the Determination Turns on Credibility, Be Considered a Breach of Park's Due Process Rights.

As the ultimate penalty in the educational context, expulsion carries with it cherished property and liberty interests, the deprivation of which commands the application of meaningful due process protections. On balance, such paramount interests extract greater process to offer correspondingly robust protection for the rights of students. *See University of Cincinnati*, 872 F.3d at 400. When the imposition of this severest penalty hinges solely on the factfinder's ability to decipher the competing narratives of the accused and her accuser, the right to direct cross-examination becomes a necessary procedure. *See Watkins v. Sowders*, 449 U.S. 341, 349 (1981). Therefore, where the potential penalty threatens to blunder a student's educational opportunities and personal reputation—and that penalty results from the assessment of the parties' credibility—cross-examination becomes part of the minimum procedures required by due process. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975).

The liberty and property interests at stake where a university disciplinary hearing may result in expulsion are fundamental and require proportionally effective

protections. In determining the shape of these protections, courts balance the three factors elucidated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Foundationally, courts determine the private interest at stake. *Id.* The danger of an “erroneous deprivation” of that interest and the protection offered to it by additional procedural safeguards compose the second factor. *Id.* Finally, courts consider the government’s interest, including the cost associated with the implementation of additional safeguards. *Id.* These factors illustrate the inherently flexible nature of procedural due process, a concept defined by its ability to mold itself to varying circumstances. *See Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972). As the severity of the deprivation increases, therefore, so too does the efficacy of procedural protections.

i. The private interest at stake as a result of Park’s expulsion is compelling.

The private interest at stake in a university disciplinary proceeding is paramount when the student faces heightened academic sanctions, notwithstanding the fact that the deprivation of this interest follows a credibility contest. *See University of Cincinnati*, 872 F.3d at 400. In *University of Cincinnati*, the Sixth Circuit determined that an accused student’s opportunity to cross-examine is an essential procedural protection when the factfinder’s conclusion relies upon the competing narratives of the accused and the accuser. *Id.* at 402. The court recognized the significant interest at stake in a case involving a sexual offense. *Id.* at 400. A student’s long-term suspension for a sexual offense carries with it a “lasting impact” not only on the student’s personal life, *id.*, but also on future educational and employment opportunities, *id.* This first inquiry in determining what process is due

a student facing severe disciplinary sanctions weighs heavily towards heightened procedural protections. *Id.* See also *Doe v. Michigan State University*, 989 F.3d 418, 429 (6th Cir. 2021) (confirming that a student’s private interests at stake when expelled for sexual assault were significant).

The First Circuit also acknowledged the compelling interest at stake when a student is expelled for sexual misconduct. See *Haidak v. University of Massachusetts-Amherst*, 933 F.3d 56, 66 (1st Cir. 2019). In *Haidak*, the accused student challenged the university’s procedures as inadequate to protect his “legitimate entitlement to a public education.” *Id.* at 65. Applying the first *Mathews* factor, in its quest to determine whether the procedures employed by the university satisfied Haidak’s due process rights, the court recognized that the interests implicated in this context are of “paramount” stature, shaped by the importance of “avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma.” *Id.* at 66 (quoting *Gorman v. University of Rhode Island*, 837 F.2d 7, 14 (1st Cir. 1988)). The university’s procedural protections, the court acknowledged, must adapt to meet the accused student’s compelling interest. *Id.*

In this case, Park’s interest stands at the peak of university penalties. Far from a mere temporary suspension for an academic violation, punishment for sexual misconduct, as defined by QSU, transcends the realm of acknowledged transgression by a student. Rather, the punishment for sexual assault, and indeed the penalty imposed upon Park, R. at 8a, may rise to the level of expulsion from the university. This permanent penalty brings with it similarly harsh consequences that taint the

life of the punished student. *See* Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 648 (2018). In the educational context, expulsion deprives the student accused of sexual misconduct from the cherished interest to continued education. *See Goss*, 419 U.S. at 574. This educational penalty extends throughout the life of the student, for it imbues the accused's reputation with a nearly insurmountable stigma that, as both the First and Sixth Circuits recognize, commands serious procedural protections. *See Haidak*, 933 F.3d at 66; *University of Cincinnati*, 872 F.3d at 400.

Park's interest at stake is highly sensitive to the severity of his expulsion from QSU. Not only does his reputation suffer from the wrath of the evil that is sexual misconduct, but his ability to harness a complete education dissolves. The stigma associated with the consecration of his responsibility seeps into Park's future educational opportunities, personal relationships, and employment prospects. *University of Cincinnati*, 872 F.3d at 400. The severity of the alleged behavior paired with the permanence of the corresponding penalty infects Park's life in such a virulent manner that it commands that the procedures imposed to ensure a fair and constitutional deprivation of Park's private interest be correspondingly thorough. Absent adequate and effective procedural safeguards, Park's paramount interest, and ultimately his future, rests in the hands of a detached factfinder, whose allegiance to the truth remains dangerously unchecked and subject to myriad influences. The unmatched seriousness of Park's interest, particularly in the context of a disciplinary hearing for alleged sexual misconduct, weighs heavily in favor of requiring an

opportunity to cross-examine his accuser to ensure consistency with the dictates of due process.

- ii. *Absent an opportunity to directly cross-examine accusing or adverse witnesses, the risk of an erroneous deprivation of Park's serious private interest compels inclusion of the procedure.*

Recognizing the seriousness of the private interest at stake in a university disciplinary hearing for sexual misconduct, courts next assess the risk of an erroneous deprivation of that interest in the absence of additional procedural safeguards. *See University of Cincinnati*, 872 F.3d at 400. The disciplinary hearing in *University of Cincinnati* ultimately reduced to a battle between the claims of the accused student and his accuser. *Id.* at 398. While courts generally caution against the imposition of procedures that would transform the university disciplinary environment into a criminal prosecution, the procedures of the former setting cannot abdicate their role in effectively protecting student interests. *Id.* at 400. The Sixth Circuit recognized this important balance, holding that, where the factfinder must base its decision on the parties' competing claims, the ability to cross-examine is an essential component of the due process rights of a student accused of sexual misconduct. *Id.* at 401. "Few procedures," the court noted, "safeguard accuracy better than adversarial questioning," *id.*, particularly when competing narratives obscure a settled truth, *id.* As the "greatest legal engine ever invented," *id.* at 401–02, cross-examination promotes a reliable, fair disciplinary hearing process when the resulting deprivation depends on the inherently biased perspectives of accused and accuser, *id.* at 402. In the absence of this familiar procedure to root out the false from the credible, a

disciplinary hearing driven by a credibility contest is plagued by the dangerous likelihood that its result ignores the truth. *Id.* at 403. The risk, therefore, of an inaccurate deprivation of an accused student's interest increases significantly when the credibility of the accuser escapes the truth-detecting inquiry of cross-examination. *Id.* Where the narrative of one party must prevail over the other, the court concluded, cross-examination becomes an essential procedure to safeguard a mistaken deprivation of rights. *Id.* See also *Flaim*, 418 F.3d at 641 (noting that, where a case resolves itself into a choice "between believing an accuser and an accused . . . cross-examination is not only beneficial, but essential to due process").

The Sixth Circuit further emphasized the importance of cross-examination in a university disciplinary hearing that turns on the credibility of the accused or the accuser in *Doe v. Baum*, 903 F.3d at 581. Indeed, the court deepened its commitment to this procedural safeguard by holding that the accused must be afforded an opportunity to directly, either himself or through his representative, cross-examine his accuser. *Id.* at 583–84. The court recognized the risk inherent in a disciplinary hearing the result of which rests on the factfinder's credibility determination. *Id.* at 581–82. Absent adversarial questioning of the accuser or opposing witnesses, according to the court, "the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives." *Id.* at 582. Where a witness's reliability remains an unknown variable, the risk that the credibility equation reaches an incorrect solution becomes troubling. *Id.* Live, direct questioning allows the factfinder to peer through a witness's attempts to obscure the truth. *Id.* See also

Walsh v. Hodge, 975 F.3d 475, 484–85 (5th Cir. 2020) (concluding that cross-examination is a necessary component of the due-process rights afforded the accused in a university disciplinary hearing when credibility is a critical factor in the decision); *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 517 (10th Cir. 1998) (holding that adequate due process in an academic disciplinary setting requires an opportunity to cross-examine adverse witnesses).

While the First Circuit has avoided endorsing the Sixth Circuit’s categorical rule requiring direct cross-examination in cases hinging on credibility determinations, the court has acknowledged the significant risk that inheres in such cases absent an opportunity for some form of cross-examination. *See Haidak*, 933 F.3d at 69. The court in *Haidak* recognized the value of an opportunity to confront and verify the veracity of an accuser; real-time cross-examination remains an essential element of due process in the university disciplinary setting. *Id.* While the accused need not be afforded the right to question the accuser himself, the need for an adequate probing inquiry remains intact. *Id.* at 70. Without mirroring trial-type procedures, the university disciplinary setting should still guarantee, as a function of fundamental fairness, the accused an opportunity to answer, explain, and defend himself. *Id.* This critical fairness, however, remains absent where cross-examination is prohibited in a credibility determination. *Id.* In the absence of some form of cross-examination, the court ultimately held, the risk that an accused student’s compelling interest will bow to the untested account of his accuser becomes unbearable, for the path to the truth remains obscured. *Id.* *See also Gorman*, 837 F.2d at 14 (equating

refusal of the opportunity to cross-examine adverse witnesses in university disciplinary hearings to a heightened risk of depriving accused students of their protected interests).

Having acknowledged the seriousness of Park's interest, its deprivation warrants a critical evaluation of the procedures in-place at QSU. Ultimately, the inadequacy of QSU's existing hearing procedures, as established in the CSC, R. at 5a, creates a dire risk that the deprivation of the most serious interests of students amounts to an uncritical assessment of competing untested narratives. The CSC prohibition on the ability of the parties to a disciplinary hearing to cross-examine each other vests the Hearing Board with a powerful force of discretion. R. at 5a. As in *Haidak*, the CSC enabled both Park and Roe to submit questions to the Hearing Board, which, after deciding itself which questions were acceptable, would question the witnesses itself. R. at 5a. As a foundational matter, the QSU Hearing Board's unitary power to determine the extent to which it would question witnesses jeopardizes an accused student's ability to advocate for the protection of his important interests. When the outcome, as in this case, depends on the factfinder's credibility determination, the need to filter questions aimed at probing the reliability of the accuser's testimony through that same factfinder becomes a detrimental obstacle to reaching an accurate conclusion. The risk, therefore, of an erroneous deprivation of serious interests, in the absence of an opportunity to cross-examine the accuser, clings so closely to a process of questioning by a detached decisionmaker that due process gravitates towards the former procedure.

The risk of an erroneous deprivation in a credibility determination made without an opportunity for cross-examination is further illustrated by the QSU Hearing Board's limited questioning of Roe. While the Hearing Board asked many of Park's initial questions on the subject of Roe's intoxication, its refusal to pose most of Park's follow-up questions, R. at 6a, left many stones unturned. For instance, the Hearing Board's refusal to inquire into Roe's ability, as an underage patron, to purchase alcoholic beverages, R. at 7a, left unexplored potential exculpatory explanations for the alleged misconduct. At the end of its questioning of Roe, the Hearing Board had developed a record of incomplete testimony shrouded by a circumscribed process. As factfinder and decisionmaker, the Hearing Board possessed the ultimate authority to shape its conclusion. This immense discretion, however, hollows the constitutional guarantee of a fair disciplinary hearing. *Baum*, 903 F.3d at 581. The Hearing Board faced challenges neither to the legitimacy of its deciding which of Park's questions to omit, nor in the determination of the adequacy of Roe's answers. Absent stringent and standard procedural guardrails to ensure the accuracy of the Hearing Board's findings and ultimate determination, Park's expulsion sheds any imprimatur of certainty. Indeed, cross-examination becomes an essential feature of due process to guard against the deprivation of a serious private interest when that loss hinges on the potentially erroneous decision of an unchecked body to believe one party instead of the other.

QSU's discretion in selecting which of Park's questions to pose to Roe also risks insulating Roe's testimony from effective assessment. As the First Circuit recognized,

the power to strike questions proposed by the accused to be asked of the accuser creates the risk that the accuser's account may evade any confrontation. *Haidak*, 933 F.3d at 70. Where the decision to deprive a student of his well-established interest is reduced to a battle of competing narratives, the insulation of these accounts from thorough evaluation characterizes the deprivation as unfair. Cross-examination is uniquely poised to safeguard the accuracy of a factfinder's credibility determination. *University of Cincinnati*, 872 F.3d at 401. By responding to a witness's narrative, the procedure can expose inconsistency, uncertainty, or confusion, thereby detracting from the reliability of such testimony. The procedure empowers the factfinder to gauge a witness's truthfulness by exploring the details of her account. As a result of this probing inquiry, mistruths, mistaken accounts, and embellished tales evaporate, leaving some deposit of the truth behind. It is this ability to root out the truth of an accuser's testimony that allows the factfinder to accurately assess that witness's credibility. *See Walsh*, 975 F.3d at 485. Absent cross-examination, the risk that a factfinder assigns disproportionate value to unreliable testimony proves too great to comport with the dictates of due process, particularly when witness credibility alone provides the basis for the decision.

The value of cross-examination in promoting the accuracy of a credibility determination is especially realized when the questioning is direct and unfettered. To ignite the engine that is cross-examination, the questioning must be motivated by an effort to protect the party whose interests are at risk. Neutrality, that is, undermines the effectiveness of the procedure in stripping an adverse witness's

testimony of falsity and guaranteeing an accurate assessment of such testimony. Therefore, the efficacy of cross-examination in a credibility determination relies on the opportunity to pose questions directly to adverse witnesses. Whether questions come from the accused student himself or that student's personal representative, the direct nature of the process imbues the cross-examination with a consequentiality that is absent were the adverse witness to face questions from a detached factfinder. *Baum*, 903 F.3d at 583. Further, direct cross-examination instills adverse witnesses with a sense of the seriousness of the consequences that their testimony may cast upon the accused. This added dimension to questioning may encourage witnesses to allow the truth to guide their testimony, thereby guarding against an erroneous finding of liability. While some form of cross-examination is an irreplaceable component of due process in a university disciplinary hearing, direct cross-examination heightens the procedure's efficacy to further protect against an erroneous deprivation of essential student interests.

Although QSU's procedures in and of themselves may not guarantee an erroneous deprivation of Park's interest, their variability eschews congruency with the constitutional minimum that due process requires.

iii. QSU's interest in meaningful disciplinary hearings justifies providing an opportunity for direct cross-examination and outweighs the incremental cost of the procedure.

Universities share a substantial interest in developing a fair and constitutional disciplinary system. *See University of Cincinnati*, 872 F.3d at 404. According to the Sixth Circuit in *University of Cincinnati*, where a disciplinary hearing necessarily

turns on the factfinder's choice between believing an accused and an accuser, fairness eludes the disciplinary process without an opportunity for cross-examination. *Id.* While the procedure may introduce new costs to the university, the burden of affording the accused the opportunity to cross-examine his accuser when the credibility of the determinative testimony is unmeasured cannot justify the abrogation of the procedure. *Id.* at 406–07. The court accordingly concluded that fair university disciplinary hearings must provide the accused student an opportunity to question adverse witnesses when the veracity of their testimony becomes the basis for imposing severe sanctions. *Id.* at 406. *See also Michigan State University*, 989 F.3d at 431 (noting that direct and unfettered cross-examination would not pose a “significant administrative burden to the university . . . where the procedures for an in person hearing and cross-examination are already in place”).

The First Circuit also recognizes a university's important interest in the fair adjudication of serious disciplinary charges. *See Haidak*, 933 F.3d at 69. To successfully insulate the educational environment from threatening conduct, the disciplinary process must be heralded as an efficacious and accurate process. *Id.* at 66. In the absence, therefore, of fair procedures to bolster the reliability of disciplinary decisions, the university's interest in promoting an uninterrupted educational process flounders. *Id.* Cross-examination offers universities a tested mechanism for peeling away the layers of falsity that may distract from the truth. *Id.* at 69. The university's interest in affording this established procedure to students accused of harsh conduct, the court held, is significant. *Id.* at 70.

The accuracy that direct cross-examination vests in a university disciplinary hearing translates into significant benefits for the educational mission of the university. Confidence in the procedures devised to protect the university environment from threatening conduct no doubt remains a prerequisite to the successful enforcement of university policies. The truth-seeking prowess of cross-examination advances the fairness that due process requires by guaranteeing the accuracy of a university's decision-making process. *University of Cincinnati*, 872 F.3d at 406. Through the revealing process of cross-examination, university disciplinary decisions garner a legitimacy that allays concerns that efforts to ensure the safety of an alleged victim do not jeopardize the alleged perpetrator's entitlement to fair procedures. *Grannis*, 234 U.S. at 394.

Title IX charges public universities to provide equal access to education free from sex-based discrimination while promoting a fair disciplinary process for those students accused of sexual offenses. Striking an effective balance between these competing interests enables universities to pursue their educational mandates consistent with the constitutionally protected interests of all students. As the Department of Education's 2020 final rules expressed, the interests of accused students deserve robust protections from the inherently antisympathetic stigma sexual misconduct carries with it. *University of Cincinnati*, 872 F.3d at 404. The decision to abandon the 2011 Dear Colleague Letter and its central emphasis on the complainant in a case of alleged sexual misconduct follows a promising trend towards the even-keeled fairness that due process requires. Operating outside of the 2020

Title IX regulations, as the new rules did not take effect until after Park’s disciplinary hearing, R. at 26a, QSU was permitted to conduct the hearing with lower standards that broadly favor the accuser. But, as the 2020 rules emphasized, the requirement that universities provide an opportunity for direct cross-examination live in front of a factfinder is a “most important change . . . to ensure that determinations are fair.” *See* Nondiscrimination on the Basis of Sex in Education, 85 Fed. Reg. 30,311. Even without the legal obligation to provide an opportunity for cross-examination, QSU maintains a critical interest in incorporating a process that bolsters the credibility of its consequential actions.

As a standalone procedure, cross-examination may introduce high costs to be borne by universities. But, where procedures designed to mimic the effects of cross-examination are already incorporated into university disciplinary procedures, albeit in a circumscribed form, the burden becomes a procedural triviality outweighed by the fairness-inducing nature of direct cross-examination. QSU’s established procedure of questioning witnesses, while far from the accurate review provided by direct cross-examination, ultimately probes the witnesses “on the matters central to the charges,” R. at 21a. While the intended effect is similar, this circumscribed form of questioning lacks the same force for the truth carried by direct cross-examination. *University of Cincinnati*, 872 F.3d at 406. To permit Park himself or his representative to pose questions directly to Roe adds little burden, if any, to a process that already inquires into a witness’s account. Cross-examination, to the contrary, bolsters the inquisitorial effectiveness of QSU’s existing procedures; its

confrontational nature allows the factfinder to assess the veracity of the testimony that is to become the foundation of a highly consequential decision. By delving deeper into witness' narratives, QSU can ensure that the questions asked "add to the factfinder's ability to test [the witness's] credibility" in a way that detached and selective questioning could not. *Michigan State University*, 989 F.3d at 431.

Ultimately, the efficacy of cross-examination in extracting the truth from witness testimony is not only consistent with the goal of circumscribed methods of questioning, but also more effectively promotes the twin goals of eliminating sexual misconduct and promoting procedural fairness. As a valuable investigative tool, cross-examination responds to the varying pressure of disciplinary hearings. It affords both parties an equal opportunity to support their opposing positions without inherently tilting towards a finding for one party. In this way, cross-examination guides the disciplinary process towards an unobscured assessment of competing testimony. Rather than distract from the interest of eliminating sexual assault on university campuses by assigning undue weight to the interests of the accused, the implementation of cross-examination ensures "greater reliability [that] will lead to greater acceptance of the legitimacy of the decisions." *See Nondiscrimination on the Basis of Sex in Education*, 85 Fed. Reg. 30,313. Imbued with an aura of legitimacy that is absent from a disciplinary process that ignores the risk of false testimony, a university disciplinary procedure that provides an opportunity for direct cross-examination advances core educational interests. This enhanced reliability inspires

a needed confidence in the ability of educational institutions to promote the interests of all students.

- B. Without requiring witnesses to remove their face masks while testifying, the Board could not reliably assess witness credibility to make its credibility determination consistent with the dictates of due process.**

As established above, direct cross-examination is an indispensable component of due process in university disciplinary hearings. The procedure shields the compelling interests of students from the unyielding force of false testimonial accounts to promote legitimacy in the disciplinary process. To successfully “allow for the defendant to prove the claimant’s credibility and for the factfinder to observe the witness’s demeanor under questioning,” *Michigan State University*, 989 F.3d at 430, cross-examination must proceed in an unfettered manner. Indeed, to enable the procedure to reveal “who can be trusted,” *Baum*, 903 F.3d at 581, the factfinder must be able to observe witnesses subject to questioning. This basic requirement promotes the effectiveness of cross-examination and reveals fundamental limitations created when witnesses wear face masks while testifying. With her face obscured by an impenetrable face mask, the ability to study the nuances of the witness’s behavior, and ultimately to accurately assess credibility, is severely circumscribed. The value, therefore, of cross-examination can be recognized only where witnesses are compelled to testify without face masks.

While distinct from formal criminal trials, in which the Sixth Amendment bestows on defendants a right to confront adverse witnesses, university disciplinary hearings nevertheless require adequate procedural safeguards to protect against

potentially erroneous application of detrimental penalties. *Id.* at 582. As the Sixth Circuit recognized, direct cross-examination, unlike any other procedure, exposes the truth by prodding the infirmities of witness testimony. *Id.* at 583. The procedure enables the factfinder to evaluate witness reliability as evidenced by multifaceted responses to targeted questioning. *Id.* Particularly where a disciplinary decision hinges on the factfinder’s assessment of the credibility of competing witnesses, cross-examination becomes an indispensable tool to probe witness demeanor and to reveal signals of uncertainty. *Id.* at 585. As an inherently flexible concept, due process can morph to accommodate the unique features and consequences of a university disciplinary hearing. *Id.* While “classrooms are not courtrooms,” the value of direct and unfettered cross-examination commands adherence to the procedure to ensure the interests of the accused are adequately protected. *Id.* (citing *University of Cincinnati*, 872 F.3d at 404–05). *See also United States v. Cohn*, 481 F. Supp. 3d 122, 126 (E.D.N.Y. 2020) (explaining that “effective credibility evaluation (and perhaps the Confrontation Clause) requires that witnesses testify without traditional masks”).

In the university environment, the importance of direct cross-examination to constitutionally compatible due process is analogous to the constitutional right of confrontation in criminal proceedings. To be sure, the Supreme Court has established that the ultimate goal of the Sixth Amendment’s Confrontation Clause is “to ensure reliability of evidence.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004). This procedural guarantee, according to the Court, can be realized most effectively by

“testing [the evidence] in the crucible of cross-examination.” *Id.* The Constitution desires that evidence admitted against an accused demonstrate sufficient indicia of reliability. *Id.* at 62. And it is the tested method of cross-examination that, through open probing of witnesses, accomplishes this constitutional mission. *Id.* See also *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (noting that cross-examination not only provides for the opportunity of “testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief”); *United States v. Raddatz*, 447 U.S. 667, 669 (1980) (emphasizing that “courts must always be sensitive to the problems of making credibility determinations,” and characterizing the “look or manner of the witness . . . his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration” as important variables in those determinations); *United States v. Robertson*, No. 17-CR02949-MV-1, 2020 WL 6701874, at *1 (D.N.M. Nov. 13, 2020) (“An unimpeded opportunity to cross-examine adverse witnesses face-to-face and in full view of the jury is core to the Sixth Amendment right of confrontation.”).

Cross-examination cannot serve its protective purposes when the features of the witness it is meant to expose are physically obscured. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988). In *Coy*, the Court addressed whether the decision to allow the complaining witnesses, alleged victims of sexual assault, to testify behind a screen that would completely obscure the witnesses’ view of their alleged attacker. *Id.* at

1014–15. While the defendant’s ability to cross-examine the complaining witnesses was left intact, the Court concluded that the screen, which hid the defendant from the witnesses’ view as they testified, was a “damaging violation of the defendant’s right to a face-to-face encounter.” *Id.* at 1020. The Court acknowledged that the rights protected by the Confrontation Clause may be subject to exceptions that are “necessary to further an important public policy.” *Id.* at 1021. While the rights may give way to important interests, the Court tempered potential contraction of the Confrontation Clause by holding that any recognized exception must respect the intended purpose of the Clause: providing a right to “meet face to face all those who appear and give evidence at trial.” *Id.* (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)). The Court concluded that the general interest of protecting victims of sexual abuse was insufficient to justify an exception that prevented the realization of the right vested by the Confrontation Clause to probe the reliability of evidence through open, face-to-face questioning. *Id.* See also *United States v. Sheikh*, 493 F. Supp. 3d 883, 887 (E.D. Cal. 2020) (noting the procedural dangers that may result from the inability to “effectively evaluate prospective jurors, [or] assess the credibility of witnesses . . . if the participants are wearing masks”); *United States v. Young*, No. 19-cr-00496-CMA, 2020 WL 3963715, at *2 (D. Colo. July 13, 2020) (expressing concern that a “[d]efendant may be prejudiced by the jury’s inability to clearly observe witness reactions to assess credibility [when] the witnesses would be required to wear masks that cover their face”).

In lieu of face to face confrontation, the presence of robust means of testing witness reliability can preserve the constitutional goal of ensuring the reliability of evidence. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). In permitting an alleged victim of child abuse to testify through one-way video stream so that she could not see the defendant while testifying, the Court emphasized that the ability to garner reliable evidence, the “central concern of the Confrontation Clause,” *id.*, was preserved in the presence of other elements of confrontation, *id.* The Court ultimately held that the right to face to face confrontation may be satisfied “where the reliability of the testimony is otherwise assured.” *Id.* at 850. Absent physical confrontation, the combinatory effect of “physical presence, oath, cross-examination, and observation of the demeanor by the trier of fact” allays the concerns surrounding the intrusion of unreliable testimony. *Id.* at 846.

In this case, QSU’s refusal to require Roe to either remove her face mask while testifying in-person or to testify remotely without a face mask stripped Park of his constitutionally recognized due process rights. The severity of the consequences posed by Park’s potential academic sanctions solidify the important role of direct cross-examination in Park’s hearing. To enable this fundamental procedure to operate effectively, the factfinder must reserve the ability to measure the reliability of testimony. Accurate observation, however, requires an unfettered view of the witness, through which telling reactions to questions can inform the factfinder’s determinations. *Baum*, 903 F.3d at 583. This bedrock feature of cross-examination, consistent with the rights vested in criminal defendants by the Sixth Amendment’s

Confrontation Clause, erects rigid guardrails to guide the factfinder on a path that adheres as closely as possible to the truth. *Crawford*, 541 U.S. at 62. Where the witness’s expressions of confidence or doubt, sincerity or uncertainty are hidden by an opaque face covering, the ability to gauge credibility through cross-examination is eviscerated. *Raddatz*, 447 U.S. at 669.

The hindrance that a mask imposes on cross-examination becomes particularly detrimental when the factfinder’s decision necessarily turns upon a pure credibility determination. As in this case, where the QSU Hearing Board found against Park because it considered his testimony to be “less credible than Roe’s,” R. at 8a, adherence to a process that detracts from a legitimate assessment of the most dispositive element frustrates the fundamental guarantees of due process. The Hearing Board here embraced a double-edged sword; by refusing Park’s request to require Roe to testify remotely without a face mask and allowing Roe to testify in-person wearing a face mask, R. at 5a, the Hearing Board crippled its ability to accurately assess Roe’s demeanor. Roe’s mask shrouded a key index of reliability from the Hearing Board’s observations. Unable to monitor Roe’s sincere reaction to questions or to compare revealing facial expressions to her vocal tone, the Hearing Board foreclosed its opportunity to reach a decision informed by a reasoned attribution of value to Roe’s testimony. *Cohn*, 481 F. Supp. 3d at 126. As a result, by anchoring its finding of Park’s liability in its inherently incomplete evaluation of Roe’s credibility, the Hearing Board misappropriated Park’s constitutional right to ensure that his accuser is indeed “worthy of belief.” *Mattox*, 156 U.S. at 242–43. The

Hearing Board's decision to allow Roe to testify while wearing a face mask, especially in the trenches of a he-said/she-said debate, clashes with Park's due process rights.

Roe's safety concerns, which motivated her refusal to testify without a face mask, cannot justify the rampant violation of Park's right to unfettered cross-examination. As the Supreme Court established in *Coy*, general public policy exceptions to the Confrontation Clause must leave intact the defendant's right to confront an adverse witness face to face. *Coy*, 487 U.S. at 1021. By permitting Roe to testify while wearing a face mask, the QSU Hearing Board sacrificed Park's right to guarantee the reliability of his accuser's testimony, thereby increasing the risk that its credibility determination would wrongfully punish Park. The Hearing Board, while not obligated to replicate the bounds of a criminal proceeding, abdicated its constitutional responsibility to conduct fair hearings before depriving a student of his protected rights. And, as the Court confirmed in *Crawford*, discretionary exceptions to the fundamental rights guaranteed by the Constitution are incompatible with the dictates of constitutional fairness. 541 U.S. at 54.

Nor does Roe's physical presence mitigate the deprivation of Park's due process rights. As the Court expressed in *Craig*, the purpose of the Confrontation Clause is maintained, even in the absence of face-to-face confrontation, when other features of the proceeding can probe the witness's reliability. 497 U.S. at 846. While a one-way video feed was held to preserve the reliability-testing function of the Confrontation Clause in that case, Roe's ability to wear a face mask here, in the absence of any of the hallmark features of a formal trial, deprived Park of the

opportunity to effectively test his accuser's reliability. Absent the opportunity to cross-examine Roe, Park's ability to ensure the reliability of the testimony against him rested in the Hearing Board's selective and incomplete questioning of Roe. R. at 6a. Roe's mere physical presence cannot mitigate the absence of most of the essential indicia of reliability. Indeed, any benefit Roe's presence may have conferred upon the Hearing Board's ability to assess her credibility was offset by the opaque face mask that obscured her demeanor from effective observation. In this credibility determination, the Hearing Board therefore reached its decision without ever truly testing the reliability of the evidence it elicited from competing witnesses.

Consequently, the Hearing Board contravened Park's due process rights by adhering to procedures that created an unjustifiable risk of an erroneous deprivation of his interests. Relying solely on its perception of the relative credibility of Park and Roe, the Hearing Board rendered its decision to expel Park through procedures wholly disproportionate to the importance of the interests at stake. An accurate credibility determination hinges on the factfinder's ability to assess the trustworthiness of the competing parties. The necessity of this evaluation amplifies the importance of cross-examination, a procedure designed and tested to extract the truth. *Baum*, 903 F.3d at 581. Yet, the efficacy of cross-examination is severely hindered when the features it is meant to reveal are shrouded from observation; the crinkling of the nose or the wrinkling of the mouth, telling variables in the assessment of a witness's demeanor, are hidden from the factfinder. Cross-examination, as a result, cannot reach its true potential as a procedural safeguard

where face masks obscure important elements of reliability. *Id.* at 585. The QSU Hearing Board may have addressed the impact of Roe's face mask by requiring her to replace her opaque mask with a clear face shield, which were available with the State of Quicksilver at the time of Park's hearing. CLRF. ANS. #4. While a clear covering, or even live virtual testimony, would have enabled the factfinder to observe Roe's demeanor, and therefore more accurately assess her credibility, it cannot overcome the absence of cross-examination. Ultimately, Roe's opaque face mask, paired with the QSU's prohibition of direct cross-examination, insulated her from a probing assessment of her credibility. *Sheikh*, 493 F. Supp. 3d at 887. Failing this assessment, and with apparent impunity, the Hearing Board was free to deprive Park of his cherished interests without subjecting its consequential credibility determination to established standards of reliability. The risk that the deprivation of Park's interests turned on the testimony of a single unreliable witness, whose credibility was assumed without adequate inquiry, is too significant to ignore.

The heightened risk of an erroneous deprivation of Park's interests also outweighs the slight costs to QSU in requiring Roe to testify either while wearing a clear face mask or over live video conference without a mask. The ready availability of these alternatives illustrates the Hearing Board's complacency with procedures that jeopardize serious interests without affording correspondingly serious protections. By requiring Roe to replace her opaque face mask with a clear option, the Hearing Board could have bolstered its finding of liability by observing Roe's demeanor. Similarly, virtual testimony without a mask would have permitted an

unfettered review of Roe’s demeanor. The Hearing Board’s failure to address the impact of Roe’s shrouded facial features on its conclusion cannot be justified by the incremental cost of these alternative options to opaque face masks. Particularly where, as here, credibility carries the day, the cost of updating existing procedures pales in comparison to the risk that serious interests will be deprived absent sufficient indicia of reliability. *Crawford*, 541 U.S. at 62. Recognizing that Roe’s face mask inhibited the Hearing Board from accurately assessing her reliability as a witness before deciding that her credibility prevailed over Park’s, this Court should reverse the decision below and hold that a student accused of misconduct has a right, consistent with due process, to insist that adverse witnesses testify without such coverings.

II. THE FOURTEENTH CIRCUIT ERRED BY INTERPRETING THE TERM “COSTS” AS USED IN FEDERAL RULE OF CIVIL PROCEDURE 41(d) TO INCLUDE ATTORNEY’S FEES IN CONTRAVENTION OF ESTABLISHED PRECEDENT AND THE RULE’S PURPOSE.

Federal Rule of Civil Procedure 41(d) provides, in relevant part, that a plaintiff who previously dismissed an action may be ordered to “pay all or party of the costs of that previous action.” FED. R. CIV. P. 41(d). The federal circuits remain divided as to whether Rule 41(d) incorporates attorney’s fees in its definition of the term “costs.” This chasm has been emphasized by the three distinct approaches to answering this question that have emerged over time. *See Horowitz v. 148 South Emerson Associates LLC*, 888 F.3d 13, 24 (2d Cir. 2018) (contrasting the three approaches that have developed in the circuits). Proving to be an elusive question, the handling of attorney’s fees with respect to Rule 41(d) remains contentious. The Rule expressly provides that,

“[i]f a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper.” FED. R. CIV. P. 41(d). Notwithstanding the express omission of “attorney’s fees” from the language of the Rule, several courts interpret the term “costs” to include such fees. *See, e.g., Horowitz*, 888 F.3d at 25; *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980); *Andrews v. America’s Living Centers, LLC*, 827 F.3d 306, 309–12 (4th Cir. 2016).

The rationale through which these courts have permitted an award of attorney’s fees through Rule 41(d) varies substantially. Whether finding that attorney’s fees are categorically appropriate to realize the purpose of the Rule, *Horowitz*, 888 F.3d at 25, or that attorney’s fees may be appropriate when provided for by an underlying statute, *Andrews*, 827 F.3d at 311, the outcome remains the same. This result, however, conflicts with longstanding precedent: the so-called American Rule provides that attorney’s fees are generally not a recoverable cost “absent explicit congressional authorization.” *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). Indeed, traditional canons of statutory interpretation implore courts to root their award of attorney’s fees in a determination that “Congress intended to set aside this longstanding American rule of law.” *Id.* at 815 (quoting *Runyon v. McCrary*, 427 U.S. 160, 185–86 (1976)).

Presented with a menu of three contrasting approaches to the appropriate treatment of attorney’s fees, the Fourteenth Circuit upheld the district court’s award

of fees for QSU without adopting a clear rationale for its decision. R. at 36a. Its abstention not only demonstrates the tenuous justification for the incorporation of attorney's fees into Rule 41(d) "costs," but also compromises the legitimacy of its factual basis for finding that QSU was entitled to attorney's fees. Rather than adhere to this Court's precedent and fundamental principles of statutory interpretation, the Fourteenth Circuit leveraged judicially crafted exceptions that rely on its admittedly weak factual findings. Unwilling to adopt a standard rule to eliminate uncertainty in the administration of Rule 41(d) costs, the court below has perpetuated inconsistency. To resolve the remaining uncertainty, this Court should hold that the term "costs" as used in Rule 41(d) does not include attorney's fees and thus that QSU is not entitled to such fees under the Rule.

B. This Court's Precedent and Canons of Statutory Interpretation Compel a Finding that Attorney's Fees Should Be Categorically Excluded from "Costs" Under Rule 41(d).

When a statutory term has been interpreted consistently to mean one thing, an interpretation of that term in contravention of its accepted definition escapes the bounds of a court's interpretive power. *See Key Tronic*, 511 U.S. at 814. To construe "costs" as used in Rule 41(d) to include attorney's fees would lead a court astray from the well-recognized definition of the former term: the American Rule makes clear that attorney's fees are not awardable costs. *See Marek v. Chesny*, 473 U.S. 1, 8 (1985). Therefore, to remain consistent with this established definition in the absence of express language to the contrary, a finding that "costs" include attorney's fees under Rule 41(d) must emerge from the drafters' intent as evidenced by an alternative

statutory basis. *See id.* at 9. Ultimately, a finding that Rule 41(d) “costs” include attorney’s fees when either the plain language of the Rule conflicts with the definition or the statutory alternative remains unsatisfied would result in the judicial contravention of policy.

The inclusion of attorney’s fees in the definition of “costs” garners merely tenuous support when the provision at issue contains no express language in support of this definition. *Marek*, 473 U.S. at 8. In *Marek*, the Court assessed whether the term “costs” as used in Federal Rule of Civil Procedure 68 includes attorney’s fees. *Id.* at 7. While a survey of federal statutes which provided for costs in various cases revealed that eleven statutes expressly allowed for attorney’s fees as costs, the Court held that the lack of any definition of “costs” as used in Rule 68 did not invalidate the inclusion of attorney’s fees therein. *Id.* at 8–9. Given the importance of “costs” to Rule 68, the Court determined that “absent congressional expressions to the contrary, where the underlying statute defines ‘costs’ to include attorney’s fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.” *Id.* at 9. *See also Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 420, 260–62 (qualifying exceptions to the American Rule by noting that most exceptions were contained in federal statutes that explicitly provided for courts to award attorney’s fees as costs).

This Court tempered the readiness to recognize exceptions to the American Rule that “attorney’s fees are generally not a recoverable cost of litigation” in *Key Tronic*, 511 U.S. at 814. As this Court held in *Key Tronic*, the categorization of attorney’s fees as recoverable costs of litigation requires some evidence of

congressional intent to void the American Rule. *Id.* at 815. The Court also noted that evidence of congressional intent to provide for attorney’s fees may be sufficient to overcome the lack of explicit reference to such fees in the statute’s language. *Id.* However, because the relevant statutory provision at issue in *Key Tronic* lacked any term for fees when two other provisions expressly provided for fee awards, the Court held that Congress likely intended to prohibit such awards in the provision at issue. *Id.* at 818–19. Consistent with the plain meaning of the statutory terms and the established American Rule, this Court held the interpretation that the statute permitted an award of attorney’s fees to be improper. *Id.* at 819. *See also Rusello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); *Pinares v. United Technologies Corp.*, 973 F.3d 1254, 1262 (11th Cir. 2020) (“Where Congress knows how to say something but chooses not to, its silence is controlling.”).

The Sixth Circuit preserved the American Rule in crafting its approach to whether Rule 41(d) costs include attorney’s fees. *See Rogers*, 230 F.3d 868, 874 (6th Cir. 2000). Noting that Rule 41(d) does not expressly provide for attorney’s fees, the court declined to read such language into the rule. *Id.* at 875–76. The court supported its categorical approach with the fact that Congress has expressly provided for attorney’s fees where it intends to do so. *Id.* at 874. Similarly, the court maintained the general distinction between “costs” and “attorney’s fees,” holding that Congress’s

approval of Rule 41(d)'s language evinced its intent to do the same. *Id.* While the court also recognized that an award of attorney's fees may be authorized where the underlying statute intends to provide for such fees, it declined to extend this exception to Rule 41(d) costs. *Id.* at 875. Rather, the ambiguity of the Rule's treatment of attorney's fees, paired with the express provision of such fees in other Federal Rules of Civil Procedure, led to the court's categorical prohibition of the collection of attorney's fees under Rule 41(d). *Id.*

The district court's decision to award attorney's fees as a component of QSU's costs misconstrued Rule 41(d). In contravention of the long-standing American Rule that attorney's fees should generally not be considered recoverable costs, the Fourteenth Circuit upheld the district court's decision, R. at 62a, despite its incongruency with this Court's precedent and canons of statutory interpretation. As a first step, the plain language of Rule 41(d) omits any reference to attorney's fees. FED. R. CIV. P. 41(d); *Key Tronic*, 511 U.S. at 819. This express omission signaled to this Court, and the federal circuits commenting on the issue, that the provision of attorney's fees as Rule 41(d) costs evaded incorporation into the Rule as a matter of right. Rather, to support the provision of attorney's fees as costs required the court to craft an exception. *Key Tronic*, 511 U.S. at 815. Not even this exception, however, overcomes the fact that the plain language of Rule 41(d) omits attorney's fees. Absent the clear intent of the Rule's drafters to provide for attorney's fees, the provision of such fees still requires some showing that the desired definition of "costs" is supported by the policymaker's intent. *Id.* Given the need to stretch the interpretation of Rule

41(d) to hold that attorney's fees constitute costs to circumvent the pitfalls of the Rule's plain language, this Court would perpetuate uncertainty by holding as such. This Court should, therefore, embrace the consistency of the American Rule and confirm that Rule 41(d) does not make attorney's fees recoverable.

In addition to promoting consistency in the interpretation of Rule 41(d), a categorical exclusion of attorney's fees recognizes the likely intent that the Rule should follow the general prohibition of the collection of attorney's fees. As the Sixth Circuit recognized, Congress's approval of Rule 41(d)'s language reveals that it sought to maintain the distinction between attorney's fees and costs. *Rogers*, 230 F.3d at 874. This distinction is made clear when considering that other Federal Rules of Civil Procedure expressly provide for the recovery of attorney's fees under various circumstances. *See, e.g.*, FED. R. CIV. P. 37(c)(1). Similarly, as the *Key Tronic* Court explained, the fact that other provisions in the statute at issue in that case expressly permitted recovery of attorney's fees when the provision at issue did not evince Congress's decision to prohibit awards of such fees. *Key Tronic*, 511 U.S. 816–17. The selective treatment of attorney's fees illustrates the deliberate hand with which Congress has approached the inclusion of these fees. As a result, to hold that Rule 41(d) contemplates the award of attorney's fees contravenes the intentional decisions of the Rule's drafters. The inclusion of attorney's fees as Rule 41(d) costs ultimately hijacks the Rule's intentionally specific text.

The Sixth Circuit's approach to determining whether Rule 41(d) costs include attorney's fees offers the most reliable rule that remains consistent with this Court's

precedent. It respects the plain language of the Rule and eliminates scattershot efforts to overcome the express intent of the Rule’s drafters. *Alyeska*, 421 U.S. at 263. Therefore, this Court should adhere to the Sixth Circuit’s approach and hold that the QSU was not entitled to collect attorney’s fees under Rule 41(d).

B. A Categorical Rule that Always Permits Collection of Attorney’s Fees as Costs Under Rule 41(d) Is Overbroad.

The Fourteenth Circuit also considered adopting a rule that categorically permits the award of attorney’s fees as Rule 41(d) costs. This approach seeks to leverage the exceptions to the American Rule to establish that, notwithstanding express language to the contrary, attorney’s fees must be awardable costs under Rule 41(d) to further the purpose of that Rule. *Horowitz*, 888 F.3d at 25. While seemingly in line with recognized exceptions to the American Rule, this approach conflates the implied purpose of Rule 41(d) to an excessive degree. As evidenced by the express provision of attorney’s fees in other Federal Rules of Civil Procedure, Congress would have expressly incorporated attorney’s fees into Rule 41(d) if it sought to do so. *Key Tronic*, 511 U.S. at 818–19.

Finding that costs include attorney’s fees under Rule 41(d) necessarily requires ignoring the plain language of the Rule. To support its position that attorney’s fees are always recoverable as costs, the Second Circuit formulated a two-step process to enable it to find fees to be recoverable costs. *Horowitz*, 888 F.3d at 25. As a threshold matter, the court recognized that, absent express language providing for attorney’s fees, such fees can be awarded only where the underlying statute permits. *Id.* Having met this requirement, the court next assesses whether the underlying statute

provides a definition of “costs” that omits attorney’s fees. *Id.* If the term “costs” remains undefined, attorney’s fees may be included if the statute “evinces an intent to provide for fees.” *Id.* at 25 (quoting *Key Tronic*, 511 U.S. at 815). Finding that Rule 41(d) incorporates no definition of “costs” that excludes attorney’s fees, the court proceeded to evaluate whether the Rule implicitly intends to provide for such fees. *Id.* Because Rule 41(d) is intended to deter vexatious litigation, the court held the second inquiry to be satisfied, for the exclusion of attorney’s fees from Rule 41(d) costs would limit the Rule’s efficacy in serving as an effective deterrent. *Id.* at 25–26. When compared to the other circuits that have adopted this categorical rule, the Second Circuit presented a more reasoned justification for its finding that attorney’s fees are always collectible as costs. *See, e.g., Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980) (holding, without substantive discussion, that the district court did not abuse its discretion in awarding attorney’s fees under Rule 41(d)).

This contrarian categorical approach jettisons the plain meaning of Rule 41(d) that was accepted by Congress in favor of a substantial judge-made exception. The Second Circuit’s approach takes great pains to mitigate the absence of favorable language in Rule 41(d) by developing a multi-step analysis that purports to remain faithful to the text of the Rule by advancing its purpose. *Horowitz*, 888 F.3d at 26. Notwithstanding the fact the deterrent effect of Rule 41(d) may be lessened when attorney’s fees are not considered awardable costs, the Rule nevertheless provides for the collection of some costs. Whether the imposition of those costs culminates in the most significant deterrent effect to vexatious litigation exceeds the scope of Rule

41(d)'s textual foundation. The conclusion that Rule 41(d) always permits an award of attorney's fees based on a tenuous connection to the Rule's unenumerated purpose ultimately sacrifices the intent of the Rule's drafters to reach an unsupported outcome. Rule 41(d)'s silence as to attorney's fees provides the ultimate evidence that such fees are not meant to be considered awardable costs. *Pinares*, 973 F.3d at 1262.

Additionally, the universal provision of attorney's fees under Rule 41(d) untenably stretches the meaning of the Rule. *See, e.g., Portillo v. Cunningham*, 872 F.3d 728, 739 n.25. This approach not only permits a largely unfettered transgression of the express language of the Rule, but also detracts from the cohesive scheme for the collection of costs established in the Federal Rules of Civil Procedure. The plain language of Rule 41(d) should guide this Court to the conclusion that a categorical rule for the provision of attorney's fees is inappropriate. In the alternative, the inconsistency with which attorney's fees are read-in to costs counsels against a blanket rule that attempts to codify this presumptuous approach.

C. Even If This Court Adopts the Hybrid Approach to Permit Collection of Attorney's Fees as Costs Under Rule 41(d), Such Fees Would Not Be Recoverable Because QSU Cannot Make the Requisite Factual Findings.

Notwithstanding this Court's respect for the American Rule against including attorney's fees in the definition of "costs," some federal courts have sought to provide for attorney's fees as a function of the underlying statute upon which a case is brought. *See, e.g., Portillo*, 872 F.3d at 739; *Andrews*, 827 F.3d at 311. Under the guise of balancing the American Rule's general proscription of attorney's fees with the implied purpose of Rule 41(d), this hybrid approach relies heavily on the awarding

court's discretionary finding that attorney's fees are required. *Id.* at 312. Rooting the inclusion of attorney's fees in the purpose of Rule 41(d), however, mandates that the awarding court make factual findings consistent with that purpose. *Portillo*, 872 F.3d at 739–40. This multi-step inquiry looks beyond the text of Rule 41(d) to formulate a path to the provision of attorney's fees. Despite the leniency embedded in this hybrid approach, its application in this case falls short of a finding that QSU was entitled to collect attorney's fees under Rule 41(d).

The hybrid approach to awarding attorney's fees requires the awarding court to look beyond the text of Rule 41(d). *See Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000). Relying on *Marek*, 473 U.S. at 9, the Seventh Circuit in *Esposito* held that attorney's fees may be included as costs “where the underlying statute so provides,” *Esposito*, 223 F.3d at 501. This holding illustrates the hybrid approach's tendency to step outside of Rule 41(d) itself, for it enables the awarding court to anchor its decision in the statute that undergirds the matter, entirely distinct from Rule 41(d). *Id.* The court bolstered its decision to permit the award of attorney's fees by equating such fees to the advancement of the purpose of Rule 41(d). *Id.* Applying its hybrid approach, the court held that, because the district court failed to find that the plaintiff's action was frivolous or unreasonable, a requisite element for the collection of fees in the underlying statute, the award of attorney's fees was improper. *Id.*

In an effort to strike a balance between the American Rule and the purpose of Rule 41(d) to deter vexatious litigation, the hybrid approach vests awarding courts

with substantial discretion to ensure the award of attorney’s fees would maintain this equilibrium. *Andrews*, 827 F.3d at 312. Consistent with *Esposito*, the Fourth Circuit confirmed that Rule 41(d) permits an award of attorney’s fees where the underlying statute provides for such fees. *Id.* at 311. To fulfill the Rule’s purpose, the court noted that the award of attorney’s fees may be appropriate when a plaintiff has acted “in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Id.* The Fourth Circuit ultimately held that the awarding court abused its discretion by awarding attorney’s fees without a clearly supported finding that the plaintiff acted in bad faith. *Id.* at 312. Noting that the decision to award attorney’s fees is “one committed to the award court’s discretion,” *id.*, the Fourth Circuit emphasized that a determination of bad faith is a necessary element of the decision to award fees, *id.* See also *Portillo*, 872 F.3d at 739–40 (holding that, because the district court made no finding that the plaintiff’s claims were “frivolous, unreasonable, or without foundation,” it could not properly award attorney’s fees, even if the defendants were prevailing parties).

In this case, application of the hybrid approach fails to justify an award of attorney’s fees to QSU under Rule 41(d). As established by the subscribing courts, the first step of the hybrid approach requires a court to determine whether the underlying statute permits the award of attorney’s fees. *Esposito*, 223 F.3d at 501; *Andrews*, 827 F.3d at 311; *Portillo*, 872 F.3d at 739. Whether assessing Park’s due process or Title IX claim, the underlying statute to be assessed implicates the same statutory provision regarding fees. See 42 U.S.C. § 1988(b). Section 1988(b) provides that “in any action . . . to enforce a provision of . . . § 1983 . . . [or] title IX . . . the court, in its

discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.” *Id.* While the statute contemplates the award of attorney’s fees as costs in either of Park’s claims, it also establishes a dispositive prerequisite: the collecting party must be a prevailing party. Notwithstanding a finding that QSU is a prevailing party, the hybrid approach is justified by its adherence to the purpose of Rule 41(d). *Esposito*, 223 F.3d at 501; *Andrews*, 827 F.3d at 311. Even if this Court were to consider QSU a prevailing party in the litigation, the record contains no factual evidence to support a finding that Park’s action was “frivolous, unreasonable, or without foundation,” *Portillo*, 872 F.3d at 739–40.

Furthermore, status as a prevailing party is not generally available where the plaintiff has voluntarily dismissed a prior action. Consistent with this default rule, the fact that the district court had not yet ruled on QSU’s motion when Park voluntarily dismissed his action, R. at 38a, should be sufficient to preclude QSU from prevailing party status. The Fourteenth Circuit, however, avoid this course by emphasizing an exception to the general rule: a defendant can still be a prevailing party if the defendant demonstrates that the plaintiff withdrew “to avoid a disfavorable judgment on the merits.” *Portillo*, 872 F.3d at 740; R. at 37a. The decision below emphasized the district court’s finding that Park’s “actions, in dismissing his first action and refileing the instant action, were *technically* motivated by a desire to gain a tactical advantage.” R. at 37a. Irrespective of whether Park’s actions resulted in a tactical advantage, his decision to voluntarily withdraw represents the culmination of myriad considerations, not merely an intent to avoid

an unfavorable judgment. In defending his decision to withdraw and in an effort to avoid classification of his actions as baseless, for example, Park cited potential bias in the first district court. R. at 10a. Similarly, Park's counsel equated the voluntary withdrawal to an opportunity to become more familiar with the applicable law. R. at 10a. The district court's finding that Park's actions were "not the result of bad faith," R. at 11a, further bolsters the ample justifications for concluding that Park's actions were not motivated solely by a desire to avoid an unfavorable judgment, *Portillo*, 872 F.3d at 740. Rather, a contrary finding would risk frustrating the underlying statute that forms the basis for an award of attorney's fees. *Esposito*, 223 F.3d at 501; *Andrews*, 827 F.3d at 311.

Regardless of whether this Court determines that QSU is a prevailing party, the absence of any substantiated findings that Park's action was unreasonable precludes the award of attorney's fees under Rule 41(d). Far from a withdrawal to leverage a tactical advantage, Park's actions reflected the perceived bias of Judge Kreese. R. at 8a. As a QSU alumnus, and an outspoken fan with a significant internet following, Judge Kreese emanated allegiance to QSU. R. at 8a. Indeed, his ritualistic reciting of the QSU fight song before each day's proceedings, even when those proceedings involve QSU as a defendant, signals a bias that permeates the court. R. at 9a. Despite the Fourteenth Circuit's observation that Judge Kreese remained impartial throughout the hearing, R. at 9a, to hold that Park's withdrawal was a vexatious means of securing a more favorable outcome dangerously stretches the exception to the American Rule for awarding attorney's fees. *Portillo*, 872 F.3d at 740.

Indeed, finding that Park's well-founded concerns regarding Judge Kreese's bias towards QSU amount to frivolous or unreasonable justifications for his withdrawal would expand the hybrid approach to attorney's fees into an effectively categorical rule. Therefore, Park's reasonable concern for Judge Kreese's objectivity insulates his action from characterization as vexatious or frivolous. *Andrews*, 827 F.3d at 312. Because Park's actions evade classification as vexatious, this Court should hold that QSU was not entitled to attorney's fees under Rule 41(d), even if QSU is considered a prevailing party.

CONCLUSION

Where a university disciplinary proceeding threatens to deprive a student of his compelling interests, this Court should consider direct and unfettered cross-examination to be an essential and required element of due process. To recognize the full truth-seeking potential of cross-examination, particularly where, as here, the decision is reduced to a credibility determination, this Court should hold that due process requires witnesses to testify without a face mask. And consistent with the well-established American Rule that prohibits the award of attorney's fees as costs absent express authorization to the contrary, this Court should further hold that Rule 41(d) costs do not include attorney's fees. Therefore, this Court should reverse the decision below.

Respectfully submitted,
/s/ Team #11
Team #11
Counsel for Petitioner
November 21, 2022

CERTIFICATE OF SERVICE

By our signature, we hereby certify that a true and correct copy of
Petitioner's brief on the merits was forwarded to Respondent, Quicksilver State
University, through the counsel of record by certified U.S. mail, return receipt
requested, on this, the 22d day of November, 2022.

/s/ Team #11
Team #11
Counsel for Petitioner
November 21, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, we hereby certify that the Brief for the Petitioner, Kyler Park, contains 12,980 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

/s/ Team #11
Team #11
Counsel for Petitioner
November 21, 2022

APPENDIX A

Constitutional Provisions

The **Fourteenth Amendment** to the Constitution of the United States provides, in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

Statutory Provisions

42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

20 U.S.C. § 1681, known as “Title IX”, provides, in relevant part:

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[.]

42 U.S.C. § 1988(b) provides, in relevant part:

b. Attorney’s fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs[.]

42 U.S.C. § 1988(b).

Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 41(d) provides, in relevant 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[.]

Fed. R. Civ. P. 41(d)(1).