No. 21-4601

In the Supreme Court of the United States

KYLER PARK,

Petitioner-Appellant,

- v. -

QUICKSILVER STATE UNIVERSITY,

Respondent-Appellee.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

November 21, 2022

Submitted by:

TEAM NUMBER 13
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether, during a postsecondary school disciplinary proceeding, a student accused of sexual misconduct has a right to direct and unfettered cross-examination of witnesses under either the Fourteenth Amendment to the United States Constitution or Title IX, 28 U.S.C. §1681, *et seq*.?

2. Whether the term "costs" as set forth in Federal Rule of Civil Procedure § 41(d), includes attorneys' fees?

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The opinion of the United States District Court for the District of Quicksilver is unpublished but can be located at D.C. No. 20-cv-7615. The United States Court of Appeals for the Fourteenth Circuit opinion is unpublished but can be located at No. 21-4601 and is reprinted on pages 1a-62a of the Record.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Fourteenth Circuit had jurisdiction under 28 U.S.C. § 1291 and entered judgment in this case on October 18, 2021. (R. at 1a). Petitioner timely filed a petition for writ of certiorari, which this Court granted pursuant to 28 U.S.C. § 1254(1) on October 10, 2022. (R. at 1a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The central constitutional provision is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1. This case also involves provisions of the Education Amendments of 1972 ("Title IX), 20 U.S.C. § 1681 *et seq.*, and Federal Rule of Civil Procedure 41. Each of these provisions is set forth in relevant part in Appendix A.

STATEMENT OF THE CASE

This appeal arises from an alleged sexual assault involving two Quicksilver State University ("QSU") students, Kyler Park ("Petitioner") and Jane Roe. (R. at 2a). Roe notified QSU that Petitioner had intercourse with her knowing that she was intoxicated and, therefore, unable to consent. (R. at 2a). Hours before the alleged sexual assault, the two socialized at a movie-theater bar where Petitioner gave Roe

one alcoholic beverage. (R. at 2a). After Roe consumed the beverage, the two walked back to Roe's dormitory and had sexual intercourse. (R. at 2a). QSU's Division of Student Affairs investigated and thereafter scheduled a Title IX hearing for May 20, 2020. (R. at 4a).

Roe, Petitioner, Petitioner's attorney, and the Board (consisting of five students and employees) attended the hearing, each wearing face coverings due to the COVID-19 pandemic. (R. at 4-5a). Petitioner demanded that Roe be forced to remove her face covering while speaking at the hearing, but QSU denied the request. (R. at 5a). Pursuant to the school's Code of Student Conduct ("CSC"), the parties submitted questions for the Board to pose to witnesses. (R. at 5a). The Board did not permit either party, personally or through an attorney, to directly question witnesses. (R. at 5a).

Petitioner submitted his questions to the Board, but the Board excluded two lines of questioning based on relevancy. (R. at 6a). First, Petitioner asked the Board to compel Roe to produce her credit-card statements from the night in question, believing they would indicate whether she purchased any alcohol earlier that night. (R. at 6-7a). Petitioner hoped this would impeach Roe and show that she was not intoxicated when they had intercourse. (R. at 7a). The Board disagreed that Roe's credit-card statements were relevant and worried this forced production would violate her financial privacy. (R. at 7a).

Second, Petitioner sought to attack Roe's contention that she was visibly intoxicated. (R. at 7a). Roe testified that she had "excellent balance from many years

of martial arts training" thanks to her father, who owned a martial arts dojo. (R. at 7a). But Petitioner believed Roe's father was actually a car salesman. (R. at 7a). He submitted follow-up questions regarding her father's occupation, but the Board again refused to ask them on the basis of relevance. (R. at 7a).

After the hearing concluded, Petitioner insisted that all of Roe's testimony be retroactively disregarded on the grounds that her credibility could not be reliably assessed with an N95 face covering over her mouth and nose. (CLRF. ANS. # 3); (R. at 8a). The Board denied this request. (R. at 8a). After a six-hour hearing, the Board concluded that Petitioner violated QSU's code of conduct and expelled him. (CLRF. ANS. #5); (R. at 8a).

In June 2020, Petitioner filed a two-count complaint in federal court. (R. at 8a). Count one alleged that QSU violated his procedural due process rights by: (1) not allowing him or his attorney to directly question Roe; (2) not questioning Roe about her credit-card statements and her father's occupation; and (3) permitting Roe to wear a face covering while speaking. (R. at 8a). Count two alleged that QSU discriminated against him under Title IX. (R. at 8a). Petitioner asserted that the CSC was inherently biased against men, and the hearing therefore resulted in an "erroneous outcome." (R. at 8a).

The district court assigned the suit to the Honorable John Kreese, a QSU alumnus. (R. at 8-9a). QSU filed a 12(b)(6) motion to dismiss and requested a hearing. (R. at 9a). At the hearing, Judge Kreese was unbiased, "listened carefully," and asked "numerous questions about the merits of each party's claim." (R. at 9a). Before the

district court ruled on the motion, Petitioner voluntarily dismissed his suit under Federal Rule of Civil Procedure 41(a)(1). (R. at 9a). He then re-filed the same claims, again in the District of Quicksilver. (R. at 10a). QSU filed a new 12(b)(6) motion, as well as a motion for costs under Rule 41(d). (R. at 10a). QSU asked the district court to find that Petitioner had acted in bad faith or vexatiously. (R. at 10a). As such, QSU requested $74,500 in costs, inclusive of attorney's fees. (R. at 10a).

In response, Petitioner submitted affidavits affirming that his voluntary dismissal was not filed in bad faith. (R. at 10a). The new judge considered QSU's motions. He ultimately granted both but reduced the fee award to $28,150. (R. at 10-11a). The court concluded that, while Petitioner did not act in bad faith, his actions were a "misguided" attempt to gain a tactical advantage by obtaining a different forum. (R. at 11a).

SUMMARY OF THE ARGUMENT

The United States Constitution guarantees adequate notice and an opportunity to be heard prior to the deprivation of life, liberty, or property by a state actor. But it does not entitle a private actor to such wide latitude in Title IX disciplinary proceedings that he may enjoy the use of any and every conceivable cross-examination method. Even though the Board did not permit Petitioner or his attorney to directly cross-examine Roe, he was afforded all the process owed to him under *Mathews v. Eldridge*. The Due Process Clause merely requires *some* opportunity to cross-examine witnesses, and Title IX does not confer any such right to Petitioner. Further, Department of Education ("DOE") regulations are not controlling. DOE's

views on this issue are so brazenly contradictory that only Congress can resolve the instant question.

Here, QSU's inquisitorial process, whereby the Hearing Board administered questions itself, sustained a careful balance. The hearing did not devolve into a *de facto* criminal trial, yet Petitioner was still meaningfully heard.

Next, there is no constitutional right requiring that all of Petitioner's follow-up questions be asked. The interests of QSU, a government actor, outweigh any potential benefits Petitioner might gain by pursuing such extensive and arduous lines of questioning. On this same note, Title IX (as interpreted consistently through DOE's regulations) affords Petitioner no right to have all of his questions asked. The agency has long held that Title IX requires decision-makers to be trained in relevancy determinations. If the regulations expressly mandate decision-makers to exclude irrelevant questions, it follows that accused students do not have the right to ask all of their desired follow-up questions.

Further, Petitioner has no constitutional right to ask Roe to remove her face covering. The risk of erroneous deprivation was particularly low here. First, Petitioner made no showing that removing her face covering would have affected the hearing's outcome. Second, Petitioner wore a face covering for the entirety of the hearing; thus, the Board made its credibility determinations in a uniform setting. Third, QSU has a paramount interest in protecting its students' health and safety, and permitting Roe to wear her face covering serves that interest.

Likewise, Title IX does not confer the right to insist that face coverings be removed. Relevant DOE regulations only provide mechanisms that ensure proceedings are fair to both sides. They do not go so far as to imply a right that participants' faces must be shown at all times.

As to the second issue on appeal, the term "costs" in Federal Rule of Civil Procedure 41(d) always includes attorney's fees when the rule is read in context. The definition of "costs" is not uniform throughout the federal rules, so courts should look to other interpretive tools to discern its meaning. Here, purpose and context are most dispositive. Interpreting "costs" to exclude fees undermines Rule 41(d)'s deterrent purpose. Additionally, other provisions of the federal rules, federal statutes, and the common law pursue similar purposes through fee-shifting.

The Sixth Circuit incorrectly relied on *Key Tronic Corp. v. United States* to hold that the word "costs" never includes fees. First, *Key Tronic* applies *Alyeska Pipeline Service Company v. Wilderness Society*. *Alyeska*'s holding, which abrogated the "private attorney general" concept, is narrower than *Rogers* assumes. *Alyeska* does not implicate rules of practice and procedure because such procedural rules do not infringe on policy matters reserved for Congress. And second, *Key Tronic* permits fee-shifting when the law evinces an intent to include fees. The purpose and context of Rule 41(d) evince an intent to include fees as part of costs.

Courts that adopt a hybrid approach based on *Marek v. Chesny* similarly err. *Marek* discussed "costs" in Rule 68. That rule, which addresses offers of judgment, is necessarily intertwined with the underlying statute. In contrast, Rule 41(d) is solely

related to court practice and procedure. Because Rule 41(d) has no relationship to the underlying cause of action, tying the meaning of "costs" to the statute places an arbitrary condition on the rule. While the drafters of Rule 41(d) deliberately left "costs" vague, the gap should not be filled by the statute in this case. Instead, "costs" should be defined in relation to rules, statutes, and common law provisions that pursue similar deterrent purposes.

ARGUMENT

I. Neither the Fourteenth Amendment to the United States Constitution nor Title IX Confers the Right to Direct or Unfettered Cross-examination in Postsecondary School Disciplinary Proceedings.

Petitioner argues that the Due Process Clause and the Education Amendments of 1972 ("Title IX") confer a right to a direct and an unfettered cross-examination of witnesses in a postsecondary school disciplinary proceeding. As a threshold matter, the right to "directly" cross-examine witnesses refers to a party's right to orally question witnesses himself or through his attorney. (CLRF. ANS. #1). An "unfettered" cross-examination, however, is one in which all of the party's questions are asked—regardless of who asks them. (CLRF. ANS. #1). It also means the right to insist that witnesses remove their face coverings while being examined. (CLRF. ANS. #1).

Petitioner asserts that both the Fourteenth Amendment and Title IX confer a right to a direct and an unfettered cross-examination. But neither the Fourteenth Amendment nor Title IX confers these rights; as such, this Court must affirm the Fourteenth Circuit below.

A. *The Fourteenth Amendment Confers No Right to "Direct" or "Unfettered" Cross-Examination of Witnesses.*

The Due Process Clause prohibits states from enacting or enforcing a law which "deprive[s] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Thus, to invoke the Fourteenth Amendment's due process requirements, a party must identify both a challenged state action and a protected interest in life, liberty, or property. *See id.* Because a public university system operates as an arm of state government, QSU's disciplinary proceedings fall within the "state action" requirement. *See Duke v. N. Tex. State Univ.*, 469 F.2d 829, 837 (5th Cir. 1972). State action alone, however, is insufficient to implicate due process protections. This Court must still consider whether the state's actions jeopardize a protected interest. Only if Petitioner meets this threshold requirement, should this Court consider "what process is due" and if that process was violated. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

1. *A student's enrollment in a public postsecondary institution is not a protected interest under the Fourteenth Amendment.*

Neither the Constitution nor any statute confers a right to student enrollment in postsecondary public education. *See generally Goss. v. Lopez*, 419 U.S. 565 (1975). In *Goss*, Ohio high school students filed a class action suit alleging that their suspension from school, absent any disciplinary hearing, violated their procedural due process rights. *Goss*, 419 U.S. at 565. The students' argument hinged on an Ohio statute[1] that required local authorities to provide public education to citizens ages

[1] Ohio Rev. Code Ann. § 3321.04 (1972).

five to twenty-one. This Court held that the school district was barred from withdrawing that statutory right without due process. *Id.* at 574 ("Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."). This Court only treated the students' public education as a protected property interest because Ohio law conferred that interest upon them. *Id.* ("Here, *on the basis of state law*, appellees plainly had legitimate claims of entitlement to a public education.") (emphasis added).

This Court has never formally extended *Goss*'s holding to postsecondary institutions. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222 (1985) (assuming a protected interest only for the sake of argument); *Bd. of Curators of the Univ. of Mo. v. Horowitz,* 435 U.S. 78, 84-85 (1978) (reasoning the same). Despite *Goss*'s narrow holding, lower courts have misinterpreted that case to conclude that all students have a protected property interest in public education. *See, e.g.*, *Haidak v. Univ. of Mass.-Amherst,* 933 F.3d 56, 65 (1st Cir. 2019) (quoting *Goss*, 419 U.S. at 574); *see also* (R. at 13a).

Here, Petitioner alleges a property interest in his education at QSU. (R. at 13a). However, nothing in the record suggests that Petitioner would be unable to transfer his earned credits to another postsecondary institution. As such, Petitioner has not been deprived of any interest.

Admittedly, the *Goss* Court posited that school disciplinary proceedings may implicate a protected *liberty* interest. *Goss,* 419 U.S. at 574. However, one year after its holding in *Goss,* this Court held that harm to reputation alone does not deprive a person of any liberty interest that would invoke procedural due process protections. *Paul v. Davis*, 424 U.S. 693, 712 (1976). Moreover, the record lacks any assertion from Petitioner that he was deprived of a liberty interest, and this Court should not consider new constitutional arguments on appeal. *United States v. Andreas*, 150 F.3d 766, 769 (7th Cir. 1998) ("[W]e have held time and again that perfunctory and undeveloped arguments (even constitutional ones) are waived."); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 645 (3d Cir. 2003) (noting that "failure to raise an issue in the district court constitutes a waiver of the argument"); *United States v. Pipkins*, 412 F.3d 1251, 1253 (11th Cir. 2005) (declining to consider issue which was raised for the first time on appeal).

Therefore, this Court should not take for granted that public postsecondary disciplinary proceedings implicate procedural due process. Distinct from *Goss*, the record is silent on any Quicksilver statute that may confer a right to public postsecondary education. Because there is no protected interest in public postsecondary education, this Court should disregard Petitioner's due process claim.

2. *Even if postsecondary education is a protected interest, due process in a university disciplinary setting requires only that Petitioner be given some opportunity to cross-examine witnesses in real-time.*

If this Court determines that due process applies, it must then ask "what process is due?" *Morrissey*, 408 U.S. at 481. At a minimum, procedural due process

requires notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Petitioner's argument focuses on the latter requirement, contesting his inability to cross-examine his accuser in a direct and unfettered manner. (R. at 14a, 20a, 24a). But the extent of the procedures owed to Petitioner are not fixed. *Morrissey*, 408 U.S. at 481. Due process is a "flexible standard" dependent upon the circumstances and the protected interest at stake. *Id.*

To apply this "flexible standard," courts utilize a three factor balancing test, weighing (1) the private interest threatened by the official action; (2) the risk of employed procedures erroneously depriving an individual of that interest, plus the value, if any, of supplemental or substitute procedural safeguards; and (3) the government's interest, including any financial or administrative burdens which may be exacerbated by supplemental or substitute procedures. *Mathews*, 424 U.S. at 335. An additional or substitute procedure is only required if the threat to the private interest, coupled with the danger of erroneous error, outweighs the burden that the procedure would impose on the government. *Id*. To resolve the present controversy, this Court must apply *Mathews*'s balancing test to each issue raised by Petitioner's due process claim.

Each time the *Mathews* test is applied herein, factor one (Petitioner's private interest) will remain the same. Petitioner asserts an interest in the most comprehensive and thorough hearing possible. (R. at 14a, 20a). Petitioner argues that a fair hearing necessitates a direct and an unfettered cross examination of witnesses.

The rest of this Section will address the second and third *Mathews* factors for each due process issue.

a. *Petitioner has no due process right to a direct cross-examination of witnesses.*

Turning to the first *Mathews* analysis, this Court must address whether his inability to directly cross-examine witnesses—either personally or through his attorney—would erroneously deprive him of a comprehensive and thorough hearing. *See Mathews*, 424 U.S. at 335. Next, this Court must ask whether the risk of erroneous deprivation, coupled with Petitioner's interest, outweighs any burden imposed on QSU. *See id.*

In addressing similar constitutional challenges, lower courts have routinely held that the risk of erroneous deprivation does not outweigh the burden imposed on the government. *See Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020); *Doe v. Univ. of Ark.-Fayetville*, 974 F.3d 858, 869 (8th Cir. 2020); *Haidak,* 933 F.3d at 69 ("[W]e doubt that student-conducted cross-examination would so increase the probative value of hearings and decrease the risk of erroneous deprivation."); *Nash v. Auburn University*, 812 F.2d 655, 664 (11th Cir. 1987).

Postsecondary students facing disciplinary actions are promised only reasonable notice and the opportunity to be "meaningfully heard." *Haidak,* 933 F.3d at 68-73. While courts agree that postsecondary students facing expulsion have a due process right to "some kind of hearing," that hearing need not mirror criminal trials. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 634-35 (6th Cir. 2005). These postsecondary students are not criminal defendants, so their due process protections are not as

expansive. *Id.* As such, accused students are not entitled to the same "adversarial cross-examinations" as criminal defendants. *Id.* Rather, where the crux of the case depends on the credibility of witnesses, the accused student is entitled only to *some* form of cross-examination. *Doe v. Mich. State Univ.*, 989 F.3d 418, 429 (6th Cir. 2021).

With that in mind, this Court must consider *Mathews*'s third factor: QSU's interests. A postsecondary institution has two critical interests: first, in preserving its fiscal and administrative resources, and second, in protecting its individual students and the collective student body. *Haidak*, 933 F.3d at 66; *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988).

Courts have gone to great lengths to protect these two government interests. For example, students facing disciplinary action in university proceedings generally do not have a due process right to bring independent legal counsel, let alone to have counsel examine witnesses. *Haidak,* 933 F.3d at 68-69; *Gorman*, 837 F.2d at 16. True, a student may have the right to counsel if a university is represented by counsel, or if the disciplinary proceedings employ complex procedures or rules of evidence. *Flaim*, 418 F.3d at 640. However, as in *Flaim*, QSU's disciplinary proceedings were not procedurally complex, nor did they employ state or federal rules of evidence. (R. at 5-8a). Even then, Petitioner would have only the right to have counsel present, not to have counsel participate in the proceedings. *Flaim*, 418 F.3d at 640. This deliberate exclusion of legal counsel protects universities' first government interest in

preserving resources and achieving an expeditious and accurate adjudication. *Haidak,* 933 F.3d at 66.

Allowing only the Hearing Board to examine witnesses directly prevents the possibility of undue delay. *Gorman*, 837 F.2d at 15; *Flaim*, 418 F.3d at 640. For example, if an attorney utilizes superfluous tactics or otherwise time-consuming strategies, the university expends more time, energy, and taxpayer dollars to mitigate otherwise avoidable setbacks. *Id*. Thus, QSU has a considerable interest in excluding legal counsel from participating during the hearing. Moreover, it has an equal, if not greater, interest in preventing Petitioner from administering the cross-examination himself. Most university students are not trained legal professionals and do not possess the knowledge or skill set to properly or efficiently administer a cross-examination. *See Haidak,* 933 F.3d at 68 (noting that "cross examination in the hands of an experienced trial lawyer is an effective tool"). It logically follows that if a legal professional's participation in the proceedings poses a risk of undue delay, so too would the participation of an untrained student.

Moreover, universities have a paramount interest in protecting assault survivors from additional and unnecessary trauma. *Walsh*, 975 F.3d at 484. While universities should not sacrifice the pursuit of a fair adjudication solely for survivors' comfort, *Mathews* illustrates that harmony can exist between both interests. *See id.*

The Fifth Circuit attempted to achieve this harmony in *Walsh v. Hodge*. There, the court held that the probative value of allowing the accused to directly cross-examine the victim would not have decreased the risk of erroneous deprivation. *Id.*

at 485. Allowing a legal professional trained in cross-examination to intimidate assault victims would discourage others from coming forward with their claims. *Id.* If alleged perpetrators were given the freedom to cross-examine their victims directly, universities may reasonably fear a combative confrontation or display. *Haidak*, 933 F.3d at 69.

Finally, this Court must consider the third *Mathews* factor. With the interests of both Petitioner and QSU in mind, the dispositive factor in this Court's analysis is the risk of QSU's procedure erroneously depriving Petitioner of a thorough hearing.

Petitioner's argument rests on the idea that his directly cross-examining Roe would have decreased the risk of an erroneous outcome. But an adversarial direct cross-examination may have turned combative, ultimately impeding the Board's assessment of Roe's credibility. Roe may have become more defensive and less forthcoming had she been examined by Petitioner or his attorney. Thus, direct cross-examination is more likely to increase the risk of erroneous error. In summation, so long as the relevant questions are being asked, having the Board ask them would only avoid unnecessary obstacles, not create them. QSU's interests in protecting victims and in administrative efficiency outweigh Petitioner's interest, particularly given that there is minimal risk of erroneous outcome.

Simply put, Petitioner was afforded adequate process. He had the opportunity to answer questions, explain his position, and defend against the charges. (R. at 4-6a). QSU allowed him to have his attorney present, which is more due process than he was owed under the circumstances, and the university held his live hearing within

sixty-seven days of the alleged incident. (R. at 4a). He submitted questions to the Board for cross-examination, and his hearing, with only two witnesses, spanned six hours—more than enough time to be meaningfully heard. (R. at 6a).

As the Fourteenth Circuit properly recognized, QSU's procedures did not erroneously deprive Petitioner of any due process. Petitioner cannot demonstrate that directly cross-examining Roe would have changed the ultimate outcome. Therefore, the Fourteenth Circuit properly dismissed Petitioner's Fourteenth Amendment claim as to direct cross-examination.

b. *Petitioner has no due process right to an unfettered cross-examination of witnesses.*

As discussed above, the Due Process Clause guarantees Petitioner *some* kind of hearing and *some* kind of cross-examination. *Flaim*, 418 F.3d at 635; *Mich. State Univ.*, 989 F.3d at 429. But Petitioner has no right to an "unfettered" cross-examination. *Gorman*, 837 F.2d at 16 ("[T]he right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases."). Petitioner views his disciplinary hearing as if it is a criminal trial. Yet even in the criminal setting, a trial court may impose reasonable restrictions on cross-examination. *United States v. Tagliaferro*, 531 F. Supp. 3d 844, 850 (S.D.N.Y. 2021) (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

i. <u>*There exists no due process right to ask unlimited follow-up questions.*</u>

Just as with Petitioner's asserted right to direct cross-examination, a *Mathews* analysis demonstrates that Petitioner did not have a right to an unfettered cross-examination. With respect to *Mathews*'s first factor, Petitioner has a cognizable

interest in a thorough and comprehensive hearing. *See supra* Section I.A.2. This test therefore turns on factors two and three: the risk of erroneous deprivation and QSU's government interests.

Beginning with the third factor, universities have a legitimate government interest in fair and efficient adjudications. *See supra* Section I.A.2.a. If students were allowed to ask any question with no intervention from the Hearing Board, there would be heavy administrative and financial burdens on the university. *Gorman*, 837 F.2d at 15. Proceedings would run longer, witnesses would become restless, and the university would be responsible for covering all of the associated costs. *Id*. This Court must consider judicial efficiency beyond the four corners of the case at hand. While the instant case involves only two witnesses, other cases may involve several fact witnesses, each of whom the accused would have a right to cross-examine. (R. at 4a). This would significantly delay the adjudication process and impose significant costs on the university. *Gorman*, 837 F.2d at 16. For example, in this case, the Hearing Board consisted of five university personnel, all of whom received some form of compensation for their time. (R. at 4a). If Petitioner were permitted an unfettered cross-examination, his hearing may have lasted days instead of hours, and QSU would have paid the costs from taxpayer dollars.

Turning to *Mathews*'s second factor, unfettered cross-examination has no bearing on the risk of an inadequate hearing. In this case, Petitioner submitted follow-up questions asking the Board to compel access to Roe's credit-card statements. (R. at 6-7a). The Board refused this demand because the credit-card

statement would not show if Roe purchased any alcohol. (R. at 7a). The Board's decision to exclude this line of questioning comports with courts' reasoning even in the criminal context. As an example, while the Federal Rules of Evidence ("FRE") do not apply in university disciplinary proceedings, they do provide a useful framework. *Haidak*, 933 F.3d at 67.

The FRE specifically provides that evidence is relevant if it has any tendency to make a fact of consequence "more or less probable than it would be without the evidence." Fed. R. Evid. 401. Under the FRE, Petitioner's inquiry into Roe's credit-card statements would be excluded because the credit-card statements would not make it any more probable that Roe consumed alcohol. The same reasoning applies to Petitioner's follow-up questions regarding Roe's father's karate dojo. Petitioner argues that, had he been allowed to ask questions regarding her father's occupation, he would have been able to prove Roe was not intoxicated during their encounter. (R. at 7a). This conclusion requires several inferences, and even Judge Walt, dissenting below, recognized that this line of questioning may have been of "dubious pertinence." (R. at 7a, 53a).

In line with this reasoning, this Court should consider again that judges have authority to exclude relevant evidence. *Haidak*, 933 F.3d at 67. The FRE provides that a judge has discretion to exclude evidence "if its probative value is substantially outweighed by a danger of . . . undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Thus, even if Petitioner were a criminal defendant and allowed the corresponding due process, he would still not be permitted

to ask *any* relevant question. *Haidak*, 933 F.3d at 67. The judge, in this case the Hearing Board, would exercise its discretion in admitting or excluding the evidence.

Here, the Hearing Board determined that the information Petitioner sought was irrelevant. (R. at 7a). And even if it were relevant, the probative value of the information that Petitioner sought was substantially outweighed by the risk of undue delay or wasting time. As explained, QSU has an interest in administering a swift and efficient adjudication; so long as that interest does not risk erroneously depriving Petitioner of his private interest, QSU is constitutionally permitted to exclude these lines of questioning. *Gorman*, 837 F.2d at 13.

Further, Petitioner has not demonstrated that, were he allowed to ask these questions, it would have changed the hearing's result. As shown, in order for Petitioner to have actually extracted any probative value from his questions, he would have had to make a leap of inferences and waste the Board's time and resources. Moreover, there is no guarantee that Roe would have volunteered the information he sought.

Because Petitioner cannot demonstrate that the Board's failure to ask follow-up questions would have decreased the risk of an inadequate hearing, the Fourteenth Circuit correctly held that QSU's procedure did not deprive Petitioner of due process.

ii. *There exists no due process right to insist that a student remove her face covering.*

Finally, Petitioner asserts that his due process rights were violated when QSU did not compel Roe to remove her face covering. (R. at 24a). Thus, this Court must apply the *Mathews* balancing test a final time.

As to the third factor, QSU has a paramount interest in protecting its students. *Haidak*, 933 F.3d at 66; *Gorman*, 837 F.2d at 14. This interest encompasses not just psychological protections, but also physical safety. *Walsh*, 975 F.3d at 484. As the Fourteenth Circuit noted below, Petitioner's hearing took place in the early days of the COVID-19 pandemic. (R. at 24a). No court can reasonably fault QSU for protecting Roe from potential exposure. QSU was therefore justified in denying Petitioner's request based on the risk of exposure alone.

Turning to the second *Mathews* factor, the record does not support Petitioner's claim that Roe removing her face covering would decrease the risk of an inadequate hearing. Assuredly, cross-examination is a valuable tool in assessing witness credibility. *Haidak*, 933 F.3d at 68. In light of the pandemic, some lower courts have granted continuances on the grounds that face coverings inhibit jurors' ability to properly assess credibility. *See United States v. Sheikh*, 493 F. Supp. 3d 883, 887 (E.D. Cal. 2020); *United States v. Young*, No. 19-cr-00496, 2020 WL 3963715, at *2 (D. Colo. July 13, 2020). But the Hearing Board members are no more jurors than Petitioner is a criminal defendant.

To reiterate, due process is a "flexible standard." *Morrissey*, 408 U.S. at 481. The amount of process owed depends upon both the circumstances and the protected interest at stake. *Id.* COVID-19 posed novel challenges for courts, including how to conduct judicial processes with face coverings. In navigating these challenges, courts have held that face coverings do not affect credibility assessments enough to merit unnecessary delay. *State v. Modtland*, 970 N.W.2d 711, 716 (Minn. Ct. App. 2022),

review granted in part (Apr. 27, 2022) (holding that the district court did not violate the Confrontation Clause by requiring witnesses to wear face coverings); *United States v. Thompson*, No. CR 19-1610, 2021 WL 2402203, at *5 (D.N.M. June 11, 2021) (holding that a defendant's ability to see the upper half of prospective jurors' faces was sufficient to assess their credibility and satisfy his constitutional rights).

Here, Petitioner asked the Board to wholly disregard Roe's testimony because her face covering "complicated" the Board's ability to assess her credibility. (R. at 8a). However, Petitioner himself also wore a face covering for the entirety of the hearing. (R. at 5a). As such, Petitioner's requested procedure would not "level" the proverbial playing field but would instead put him at an advantage over Roe.

Thus, *Mathews*'s sliding scale does not justify any additional or supplemental processes for Petitioner. Accordingly, this Court should affirm the Fourteenth Circuit's holding and find that Petitioner had no right to an unfettered cross-examination of Roe.

B. *Title IX Confers No Right to "Direct" or "Unfettered" Cross-Examination of Witnesses.*

As the foregoing explains, Petitioner has no constitutional right to direct or unfettered cross-examination; therefore, Title IX is the only remaining avenue for relief as to Petitioner's substantive claim. For the following reasons, however, Title IX does not confer these rights.

1. *Title IX neither explicitly nor impliedly confers the right to a direct cross-examination.*

To determine if Title IX confers a right to direct cross-examination, this Court must first turn to the text of the statute itself. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute."). Title IX states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).

Thus, Title IX does not prescribe specific grievance-hearing procedures. *See id.* In fact, Congress did not recognize that sexual harassment claims implicate Title IX until 1992, twenty years after its enactment. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)) ("We believe the same rule [that sexual harassment is discrimination based on sex] should apply when a teacher sexually harasses and abuses a student."). Thus, the statute does not expressly confer a right to direct cross-examination.

Rather than directly regulating Title IX grievance procedures, Congress passed the "Department of Education Organization Act" in 1979 which, *inter alia*, created the Department of Education ("DOE") as it exists today. 20 U.S.C. § 3411 *et seq*. Since Title IX is silent on this matter, this Court must consider how DOE has interpreted the statute through its regulations. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer

is based on a permissible construction of the statute."). But this Court should only defer to DOE to the extent its interpretations are consistent and reasonable. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987).

a. *Despite the presence of currently effective binding regulations requiring "advisor-conducted" cross-examination, this Court should not afford* Chevron *deference to DOE because its recent interpretations of Title IX are inconsistent.*

The doctrine of *Chevron* deference is thoroughly entwined with the instant case. An agency's interpretation of a statute is normally afforded *Chevron* deference when it possesses the "force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). A court will defer to an agency's reasonable interpretation of a statute it administers. *Transitional Hosps. Corp. of La. v. Shalala*, 222 F.3d 1019, 1024 (D.C. Cir. 2000). But when an agency's current interpretation of a statute is in conflict with an earlier interpretation of the same provision, the agency is entitled to considerably less deference. *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *see also Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (citing *I.N.S.*, 480 U.S. at 446, n. 30). DOE's interpretation of Title IX grievance procedures suffers from this infirmity.

Current DOE regulations confer a right to "advisor-conducted" cross-examination. *See* 34 C.F.R. § 106.45(b)(6)(i) (2022) ("[C]ross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally."). However, this Court should not afford *Chevron* deference to this interpretation because DOE's position on cross-examination rights changes with each presidential administration. *See I.N.S.*, 480

U.S. at 446. And even the current regulation does not require that a student have the opportunity to cross-examine a witness personally. *See* 34 C.F.R. § 106.45(b)(6)(i).

In *I.N.S.*, this Court considered a question similar to the instant case. There, this Court addressed the Board of Immigration Appeals' interpretation of a statute that raised the burden of proof required to gain asylum. *I.N.S.*, 480 U.S. at 422. The agency had previously held the position that a lower standard of proof was sufficient. *Id.* The agency argued that even though there were two different standards of proof, the standards were practically identical, and thus *Chevron* deference was warranted. *Id.* at 445. This Court rejected the agency's argument and did not defer, citing the "inconsistency of the positions the [agency] has taken through the years" as justification. *Id.* at 446, n. 30.

This Court's reasoning in *I.N.S.* is directly applicable here. The Obama administration issued a guidance document in 2011 that galvanized postsecondary schools to make sweeping changes to sexual harassment disciplinary proceedings. (R. at 15a). The "Dear Colleague Letter" encouraged a broader definition of "sexual harassment" in school policies and a lower burden of proof in disciplinary proceedings. (R. at 15a). After this, however, the Trump administration rescinded the guidance document and "swung the pendulum in the other direction" by enacting 34 C.F.R. § 106.45 *et seq*. (R. at 16a). Within the last few months, however, the Biden administration filed a Notice of Proposed Rulemaking in the Federal Register which, when finalized, will repeal Trump's DOE requirement of advisor-conducted cross-examination:

> . . . The Department's tentative view is that the requirement for all postsecondary institutions to hold a live hearing with advisor-conducted cross-examination exceeds what is required in order to provide equitable procedures to the parties and is not necessary to provide a respondent with a meaningful opportunity to be heard.

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,505 (July 12, 2022).

Therefore, the "pendulum" continues to swing back and forth with one administration expressly declaring that cross-examination rights are present in the statute, and another expressly declaring that they are not. As in *I.N.S.*, DOE continues to contradict itself by overruling its own regulations. *See id.*; *I.N.S.*, 480 U.S. at 445. In such circumstances, courts must determine whether the agency is "merely changing its mind" or if this Court would be justified in reviewing the statute *de novo*. *N.L.R.B. v. Loc. Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 351 (1978).

Title IX's silence on cross-examination rights necessarily indicates that DOE is not simply "changing its mind." *Id.* The statutory text cannot plausibly support both interpretations, nor has any new or ground-breaking empirical social data on cross-examination mechanics come to light since the regulation was codified. Rather, the question of Title IX cross-examination rights is so politically controversial that DOE will change the statute's interpretation every time a new party takes office. Thus, current DOE regulation is no more a reliable metric for the rights conferred by Title IX than any other political authority. This Court should afford no deference to Trump's DOE and review Title IX *de novo*. After doing so, this Court must affirm the

Fourteenth Circuit and affirm that Title IX provides neither an express nor an implied right to direct cross-examination in postsecondary disciplinary proceedings.

b. *Even if this Court affords DOE* Chevron *deference, such binding agency regulation cannot be retroactively applied to Petitioner's hearing date absent express congressional language.*

Even if this Court defers to Trump's DOE regulation, Petitioner still does not have a right to direct cross-examination. The pertinent regulations did not come into effect until three months after Petitioner's disciplinary hearing, (R. at 26a), and "[r]egulations cannot be applied retroactively unless Congress has so authorized the administrative agency and the language of the regulations requires this result." *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1083 (9th Cir. 2002) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)); *see also Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109, 1111, n.1 (6th Cir. 1997).

This Court has set forth a two-step test to determine whether the language of a statute or regulation requires a retroactive result:

> In determining whether a statute [or a regulation] has an impermissibly retroactive effect, the Court first looks to and in the absence of express language tries to draw a comparably firm conclusion about the temporal reach specifically intended by applying its normal rules of construction. If that effort fails, the Court asks whether applying the statute to the person objecting would have a retroactive effect in the disfavored sense of affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment. If the answer is yes, [then the presumption against retroactivity will apply].

Fernandez-Vargas v. Gonzales, 548 U.S. 30, 30–31 (2006) (citations omitted).

Here, the Petitioner's alleged right to direct cross-examination through his attorney did not materialize until August 2020, but his disciplinary hearing occurred

in May 2020. (R. at 4a). Thus, under step one, this Court should ask whether Congress has expressly prescribed Title IX's reach. *Gonzales*, 548 U.S. at 31. As mentioned above, Congress is wholly silent as to all rights afforded under Title IX, so this Court should move to the second step and ask whether retroactive application of the regulation will negatively affect rights, duties, and liabilities of others. *Id.* Here, applying Trump's DOE regulation retroactively could encourage many previously-expelled students to file § 1983 complaints. Not only would such a situation be an undue administrative burden for the school to litigate but, assuming these plaintiffs already hold college degrees from other institutions, they would have to retroactively prove their cases for compensatory damages.

c. *Even if this Court finds that the advisor-conducted cross-examination requirement can be retroactively applied, the regulation expressly provides that DOE will not enforce it retroactively.*

DOE's final rule, effective August 14, 2020, provides that "the Department will not enforce these final regulations retroactively." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,061 (May 19, 2020). Perhaps more importantly, the fact that the final rule (which later became codified) was published one day before Petitioner's hearing is patently irrelevant. Pursuant to the Administrative Procedure Act ("APA"), a final rule may not take effect until at least 30 days after its publication in the Federal Register. *See* 5 U.S.C. § 553(d). There are three exceptions to this provision, but none of them apply to the subject regulation. *See* 5 U.S.C. §§ 553(d)(1)-(3). Therefore, the earliest Petitioner could have vindicated this alleged right would

have been Friday June 19, 2020—30 days after his hearing occurred. (R. at 4a). Petitioner's attempt to apply the regulation retroactively and grant himself a non-existent statutory right not only runs contrary to settled common law and the APA, but also contradicts the agency that promulgated the regulation itself.

2. *"Unfettered" cross-examination in postsecondary disciplinary proceedings was never conferred to any class of persons under Title IX.*

Petitioner argues that QSU's refusal to ask all of his follow-up questions and force Roe to remove her face covering constitutes reversible error and a violation of his rights under Title IX. (R. at 6-8a).

Title IX confers neither of these asserted rights. First, while this Court should not defer to DOE's inconsistent position on direct cross-examination, this Court may still extend *Chevron* deference to DOE's position on unfettered cross-examination. DOE has sufficiently and consistently held that only "relevant" and "limited" follow-up questions may be asked in Title IX sexual harassment grievance proceedings. *Compare* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,364, *with* 34 C.F.R. § 106.45(b)(6)(ii) (2022). Second, the language set forth in the pertinent DOE regulations, while permitting questions to be asked regarding credibility, do not go so far as to imply a right to unilaterally command another to expose their face in the midst of a global pandemic.

a. *DOE's interpretation of Title IX, that only relevant follow-up questions be posed to witnesses, is entitled to* Chevron *deference because it is historically consistent.*

Petitioner alleges that Title IX confers some right to have all of his follow-up questions asked of Roe. Specifically, Petitioner asserts that Title IX requires that the Board compel Roe to provide her credit-card statements and answer questions regarding her father's true occupation. (R. at 6-8a). As such, this Court again must turn to DOE's promulgated regulations to ascertain whether Title IX actually confers this right. *See supra* I.B.1. According to the relevant regulation, "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." 34 C.F.R. § 106.45(b)(6)(i).

Though this Court owes the "advisor" component of this regulation no deference, this Court should still defer under *Chevron* to the remaining substance of the regulation—namely, the requirement that only relevant questions be asked. This provision is a logical outgrowth from the Trump administration's original November 2018 Notice of Proposed Rulemaking. That proposal first gave decision-makers the authority to exclude irrelevant questions, and this authority is present in the final rule. *Compare* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,475 (Nov. 29, 2018) ("[t]he decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant"), *with* 34 C.F.R. 106.45(b)(6)(i) ("Before a . . . witness answers a cross-examination or other

question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."). Notably, the Board provided Petitioner an explanation as to why his questions were excluded. *See* (R. at 7a). Petitioner argues that they should not have been excluded at all.

Even further, pursuant to DOE's current regulation, "[a postsecondary institution] must ensure that decision-makers receive training on . . . issues of relevance . . . and evidence." 34 C.F.R. 106.45(b)(1)(iii) (2022). It frustrates the purpose of the regulation to train decision-makers on relevancy determinations but allow parties like Petitioner to ask unlimited questions. This particular regulation warrants *Chevron* deference because, regardless of the presiding administration, DOE has consistently held that decision-makers have broad discretion to limit questioning. *See I.N.S.*, 480 U.S. at 446, n. 30. Thus, while DOE has been historically inconsistent on advisor-conducted cross-examination rights, its interpretation of Title IX as to unfettered cross-examination has not waivered. As such, DOE's interpretation of Title IX's statutory scheme regarding unfettered questioning merits *Chevron* deference.

b. *Title IX does not grant an accused student the right to unilaterally command a witness to remove their face covering.*

DOE regulations require that schools and coordinators ensure an opportunity to assess witness credibility. *See* 34 C.F.R. § 106.45(b)(6)(i); *see also* 34 C.F.R. § 106.45(b)(1)(ii) (2022) ("A [school's] grievance process must [r]equire an objective evaluation of all relevant evidence . . . and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.").

However, this language does not imply a right to have another expose their face to the decision-maker for the purpose of assessing credibility. The decision-makers are only required to assess credibility by considering a witness's answer itself; not the witness's demeanor while answering. DOE has not passed any regulations mandating a decision-maker to determine trustworthiness, integrity, or believability based upon subjective physical observations.

Admittedly, the regulations state, "At the request of either party, the [postsecondary institution] must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions." 34 C.F.R. § 106.45(b)(6)(i). At first glance, this provision could suggest that decision-makers must always have an unobstructed view of a witness's face. But the purpose of remotely broadcasting audio and video through separate rooms has nothing to do with assessing witness credibility. Rather it ensures that a victim does not have to sit across the table from their abuser.

Therefore, there is no Title IX right to unilaterally insist that a witness show and maintain an unobstructed view of their face to the decision-maker.

II. The Term "Costs," as Used in Federal Rule of Civil Procedure 41(d), Always Includes Attorney's Fees.

Rule 41(a) of the Federal Rules of Civil Procedure ("FRCP") permits a plaintiff to voluntarily dismiss an action before the opposing party serves an answer or a motion for summary judgment. Rule 41(d) provides that:

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

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

The general "American Rule" is that each party pays its own attorney's fees. (R. at 33a). But the general rule has numerous exceptions, including when Congress authorizes fees by statute, when fees are paid from a common fund, or when the court relies on its inherent powers to punish a vexatious litigant. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975). The circuit courts do not agree if Rule 41(d) may award fees under an exception. (R. at 32a).

The Sixth Circuit, citing *Key Tronic Corp. v. United States*, never awards fees because the rule's language does not explicitly allow for them. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 875-76 (6th Cir. 2000) (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994)). The Second, Eighth, and Tenth Circuits, some reasoning that the rule's deterrent policy cannot be served without fees, always award them. *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 25-26 (2d Cir. 2018); *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980) (per curiam); *Meredith v. Stovall*, 216 F.3d 1087 (10th Cir. 2000) (unpublished table decision). And the Fourth, Fifth, and Seventh Circuits rely on *Marek v. Chesny* to follow a hybrid approach, awarding fees only if the underlying statute so permits. *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017); *Andrews v. Am.'s Living Ctrs.*, LLC, 827 F.3d 306, 311 (4th Cir. 2016) (relying on *Marek v. Chesny*, 473 U.S. 1, 9 (1985));

Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000). The Fourteenth Circuit affirmed the district court's fee award in the instant case but declined to align itself with any particular approach. (R. at 36a).

This Court should hold that the Fourteenth Circuit properly awarded attorney's fees because the word "costs," when read in context, always includes fees under Rule 41(d). But even if this Court applies *Key Tronic* or *Marek*, it should uphold the Fourteenth Circuit's decision because the rule evinces an intent to include fees, and the underlying statute would award fees to QSU as the prevailing party.

A. *The Term "Costs," When Rule 41(d) Is Read in Context, Always Includes Attorney's Fees.*

The Sixth Circuit never awards fees under Rule 41(d), reasoning that the plain language of the rule does not explicitly provide for them. *Rogers*, 230 F.3d at 875 (citing *Key Tronic*, 511 U.S. at 815); *see also* (R. at 34a, 59a). But "language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). To interpret language, courts should "look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). Rule 41(d) cannot effectuate its policy objectives unless "costs" includes fees. Additionally, other provisions of the Federal Rules of Civil Procedure, federal statutes, and the common law pursue similar deterrent purposes through fee-shifting.

1. <u>*Interpreting "costs" to include attorney's fees furthers Rule 41(d)'s purpose.*</u>

When language is not plain on its face, courts may look to purpose. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7-12 (2011) (relying on the purpose of the law to define an

ambiguous term); Antonin Scalia and Brian Garner, *Reading Law* 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

Looking to the Federal Rules of Civil Procedure and to the law as a whole, the word "costs" has no uniform meaning. *Horowitz*, 888 F.3d at 24-25 (collecting authorities). For example, courts have interpreted "costs" in FRCP 54(d) to include fees; courts include fees as part of "costs" only in some instances for FRCP 68 and Federal Rule of Appellate Procedure ("FRAP") 7; and "costs" under FRAP 39 never includes fees. *Id.* Given this lack of uniformity, courts must rely on other interpretive tools, like purpose, to define "costs" under Rule 41(d). *See Kisor*, 139 S. Ct. at 2415.

Rule 41(d) deters plaintiffs from abusing 41(a) by engaging in "forum shopping and vexatious litigation." *Horowitz*, 888 F.3d at 25. This purpose "would be substantially undermined were the awarding of attorney's fees to be precluded" from costs. *Id.* When a case is dismissed before the defendant files an answer or a summary judgment motion, costs other than fees are typically low. *Horowitz*, 888 F.3d at 26. Only by awarding attorney's fees can a court give Rule 41(d) its full deterrent effect. *Id.* As one district court has remarked, "Surely, Congress intended that the provision of the federal rules have some teeth . . . ." *Behrle v. Olshansky*, 139 F.R.D. 370, 374 (W.D. Ark. 1991).

The dissent below argued that Congress knows how to require the loser to pay fees when it wants to, and that "where Congress knows how to say something but chooses not to, its silence is controlling." (R. at 59a) (citations omitted). But *Key Tronic*

instructed that "the absence of specific reference to attorney's fees is not dispositive." 511 U.S. at 815; *see also Hall v. Cole*, 412 U.S. 1, 13 (1973) (awarding fees in the absence of explicit language because failing to do so "would be tantamount to repealing the Act itself by frustrating its basic purpose"). And courts interpret other federal rules to allow for fee-shifting, even when the text does not expressly provide.

2. *The context of Rule 41(d) demonstrates that "costs" include attorney's fees.*

Language must be understood in its overall context. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citations omitted) (noting that "a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). To clarify the meaning of "costs," this Court should look to the other rules of civil procedure, as well as the rest of the law. Courts award fees under analogous provisions of the Federal Rules of Civil Procedure, federal statutes, and the common law.

a. *When read in the broader context of the Federal Rules of Civil Procedure, the term "costs" in Rule 41(d) includes attorney's fees.*

Both Rule 41(a)(2) and Rule 11 award fees to deter litigants' bad behavior. In addition to pursuing similar deterrent aims, these rules are connected structurally to Rule 41(d).

Rule 41(a)(2), another provision in the same rule, permits fee-shifting to deter the abuse of the voluntary dismissal rules. *Carroll v. E One Inc.*, 893 F.3d 139, 149 (3d Cir. 2018). This subsection of Rule 41 provides that "except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Courts interpret the

phrase "terms that the court considers proper" as allowing fees. *Carroll*, 893 F.3d at 148 (citing *Cauley v. Wilson*, 754 F.2d 769, 772 (7th Cir. 1985)). Rule 41(a)(2) fee-shifting discourages a plaintiff's "failure to perform a meaningful pre-suit investigation, as well as a repeated practice of bringing meritless claims and then dismissing them with prejudice after both the opposing party and the judicial system have incurred substantial costs." *Id.* (citing *Colombrito v. Kelly*, 764 F.2d 122, 134-35 (2d Cir. 1985); *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997)). In the same way, Rule 41(d) deters abuse of the judicial system through forum shopping or vexatious litigation. *Horowitz*, 888 F.3d at 25 (citations omitted). Two provisions from the same rule that share comparable purposes should also share the same interpretation.

Similarly, Rule 11 sanctions—which can include attorney's fees—are designed to "deter baseless filings." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). *Cooter & Gell* considered whether a court retains jurisdiction to impose Rule 11 sanctions after a case has been voluntarily dismissed under Rule 41(a). *Id.* at 393-94. Remarking that "both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system," *id.* at 397, this Court held that "any interpretation must give effect to the Rule's central goal of deterrence," *id.* at 393.

Cooter & Gell supports the awarding of fees under Rule 41(d) in two ways. First, just as with Rule 11, any interpretation of section 41(d) must give effect to its central deterrent goal. And second, both rules prevent abuse of Rule 41(a). Rule 11 ensures that a litigant cannot hide behind Rule 41(a) to avoid the consequences of

baseless filings, and Rule 41(d) ensures that a litigant cannot abuse Rule 41(a) to forum shop or act vexatiously. Both rules better achieve these purposes when fee-shifting is permitted.

b. *Federal statutes and the common law utilize fee-shifting to effectuate deterrent purposes analogous to those of Rule 41(d).*

Similarly, 28 U.S.C. § 1927, 28 U.S.C. § 2412(d)(1)(D), and 26 U.S.C. § 6673 permit fee-shifting to deter litigants' undesirable behavior. Two of these statutes require any attorney who "multiplies the proceedings in any case unreasonably and vexatiously" to personally pay the other side's fees. 28 U.S.C. § 1927; 26 U.S.C. § 6673. Section 2412 permits a losing party to recover fees incurred defending against an unreasonable judgment request by the United States. 28 U.S.C. § 2412(d)(1)(D). These statutes permit fee-shifting to deter bad behavior and promote the smooth administration of justice. The fact that Congress assesses fees to pursue similar deterrent purposes by statute supports the inclusion of fees as part of "costs" under Rule 41(d).

Further, at common law, "[i]t is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Hall*, 412 U.S. at 5 (citations omitted). Fee-shifting under Rule 41(d) is distinct from a court's inherent power to award fees. But the court's long-standing power to deter bad behavior through fee-shifting provides additional contextual support for defining "costs" in Rule 41(d) to include attorney's fees. *See generally id.* If courts have the inherent power to award

fees, then the Judicial Conference should be able to award fees via rules it promulgates.

3. *This Court has wide latitude to interpret Rule 41(d) based on its purpose because Congress delegated procedural rule-making authority to the judiciary.*

Congress delegated to the judiciary the power to prescribe rules of practice and procedure in the Rules Enabling Act. Rules Enabling Act, Pub. L. No. 100-702 §401(a), 102 Stat. 4642, 4648-50 (1988). Congress also instructed the judiciary to promulgate the Federal Sentencing Guidelines. 28 U.S.C. § 994. This Court unanimously held that the sentencing guidelines "are the equivalent of legislative rules adopted by federal agencies" and that guideline policy statements are "akin to an agency's interpretation of its own legislative rules." *Stinson v. United States*, 508 U.S. 36, 45 (1993). That analogy can extend to the Federal Rules of Civil Procedure because the judiciary promulgates the rules and the sentencing guidelines in the same way.

Independent bodies within the judicial branch prescribe both the rules and the guidelines. 28 U.S.C. §§ 331, 994. Proposed amendments to each are published in the Federal Register and go into effect after the closing of a months-long congressional veto window. 28 U.S.C. § 2071; United States Sentencing Commission, *Rules of Practice and Procedure* (Aug. 18, 2016). The federal rules are akin to the guidelines, and the advisory committee notes are similar to the guideline policy statements. *See* Thomas E. Baker, *An Introduction to Federal Rulemaking*, 22 Tex. Tech. L. Rev. 323,

328-31 (1991). Congress does not affirmatively approve, but instead has an opportunity to veto, both the guidelines and the rules. *Id.*

Following the *Stinson* analogy, the federal rules are like agency regulations, the advisory committee notes receive deference similar to *Auer*, and this Court's interpretation of the federal rules should receive something like *Skidmore* deference. *See generally Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As a result, this Court may look to its own informed judgment about the purpose of Rule 41(d) as a highly persuasive interpretive guide. *See id.*

One justification for deferring to an agency is that the agency, as policymaker, is best suited to interpret ambiguous laws with policy implications. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *Kisor*, 139 S. Ct. at 2415. That reasoning holds up quite well here. When the term "costs" does not have a consistent definition, *see supra*, Section II.A.1, this Court is best positioned to construe a permissible meaning that effectuates Rule 41(d)'s deterrent purposes.

B. Alyeska *and* Key Tronic *Have Too Narrow a Holding to Apply Here; but If This Court Does Apply Those Cases, Rule 41(d) Evinces An Intent to Provide Fees.*

In *Key Tronic v. United States*, this Court noted that "attorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional approval.'" *Key Tronic Corp.*, 511 U.S. at 814 (citing *Runyon v. McCrary*, 427 U.S. 160, 185 (1976) (citing *Alyeska Pipeline Serv. Co.*, 421 U.S. at 247)). In order to set aside the general "American Rule" that a prevailing party cannot recover its fees, a court must determine that Congress intended for it to do so. *Id.* at 815 (citing *Runyon*, 427 U.S.

at 185-86). This congressional authorization need not be expressly stated; a court may award fees if "the statute otherwise evinces an intent to provide those fees." *Id.*

The Sixth Circuit relies on *Key Tronic*, and by extension *Alyeska Pipeline Service Company v. Wilderness Society*, to hold that Rule 41(d) *never* allows an award of attorney's fees. *Rogers*, 230 F.3d at 875-76 (citing *Key Tronic*, 511 U.S. at 815). *Rogers* held that reading Rule 41(d) to permit fees gives "too little weight to [the rule's] plain language." *Id.* at 875; *see also* (R. at 34a, 59a). But this reasoning suffers from two faulty assumptions. First, *Alyeska* and *Key Tronic* do not control, because Rule 41(d) does not "make major inroads on a policy matter that Congress has reserved for itself." *Alyeska*, 421 U.S. at 269. And second, even if these cases are binding, Rule 41(d) evinces an intent to award attorney's fees.

1. Alyeska *and* Key Tronic *do not control because the awarding of attorney's fees under Rule 41(d) does not make "major inroads on a policy matter that Congress has reserved for itself."*

The *Rogers* court erred by applying *Alyeska* and *Key Tronic* too broadly. *Alyeska*, the case on which *Key Tronic* relied, abrogated the "private attorney general" concept. *Id.* at 241, 245. Under this concept, courts would award attorney's fees to encourage plaintiffs to bring public-interest related suits for the benefit of all citizens. *Id.* at 245-46. Noting that Congress writes fee-shifting into public interest statutes when it wants to, the *Alyeska* Court held that awarding fees when the underlying statute does not "would make major inroads on a policy matter that Congress has reserved for itself." *Id.* at 269.

Importantly, *Alyeska* abrogated only one of the three ways a court could award fees through its inherent power at common law. *Alyeska* abandoned the "private attorney general" concept. *Id.* at 241. But it explicitly left intact a court's inherent power to award fees from a common fund or to punish a vexatious litigant. *Id.* at 257-259 (holding that "these exceptions are unquestionably assertions of inherent power in the courts"). *Aleyska* was narrowly focused on fee-shifting under public-interest statutes, and *Key Tronic* did not expand its holding. *See Key Tronic*, 511 U.S. at 811 (considering environmental clean-up statutes).

Congress has extensively codified the "private attorney general" concept, so *Alyeska* made a reasonable inference that when Congress fails to provide for fee-shifting in a public interest statute, the omission is intentional. *Alyeska*, 421 U.S. at 269. But Congress has not so actively codified fee-shifting via common fund or as punishment for vexatious behavior. *See* Henry Cohen, Cong. Rsch. Serv., 94-970, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies* 5-6 (2008). It follows, then, that *Alyeska* does not apply to laws awarding fees in these two categories.

Rule 41(d) is a rule of practice and procedure that maintains the integrity of Rule 41(a) by curbing abuse of voluntary dismissals. *Horowitz*, 888 F.3d at 25-26. It is not at all connected to the underlying cause of action. *Id.* at 26, n. 6; *Cooter & Gell*, 496 U.S. at 396 (remarking that the imposition of costs and attorney's fees is "not a judgment on the action's merits"). Thus, it is not "making major inroads into a policy matter Congress has reserved for itself." *See Alyeska*, 421 U.S. at 269. To the contrary,

Congress empowered the judiciary to draft Rule 41(d). *See* Rules Enabling Act, §401(a). So long as the rule does not infringe upon a substantive right[2], Congress has freed this Court to exercise its discretion. *Id.* *Alyeska* and *Key Tronic* do not control.

2. *Even if* Key Tronic *and* Alyeska *do control, Rule 41(d) evinces the intent that "costs" include attorney's fees.*

Under *Key Tronic*, "the absence of specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees." 511 U.S. at 815. However, "mere generalized commands" are not sufficient. *Id.* (citing *Runyon*, 427 U.S. at 186).

A statute's purpose can evince an intent to provide fees. In *Hall v. Cole*, this Court considered fee-shifting in a cause of action brought under § 102 of the Labor-Management Reporting and Disclosure Act. 412 U.S. at 7. The *Hall* Court acknowledged that §§ 201 and 501 of the Act expressly awarded fees, while § 102 was silent as to fee-shifting. *Id.* at 10. But *Hall* declined to find § 102's silence dispositive. *Id.* at 13. Instead, the Court held that § 102 did provide for fees because "[n]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose." *Id.*

Here, Rule 41(d) can meaningfully effectuate its purpose only if the term "costs" includes fees. *Horowitz*, 888 F.3d at 25-26. Rule 41(a) dismissals occur at an early stage of litigation, when costs other than fees are low. *Id.* at 26. Rule 41(d) only has the teeth it needs to prevent abuse of 41(a) if attorney's fees are included in "costs."

[2] Rule 41(d) does not infringe a substantive right. *See Bus. Guides Inc. v. Chromatic Comm. Enter., Inc.*, 498 U.S. 533, 552 (1991).

Id.; *Behrle*, 139 F.R.D. at 374. Not allowing for fee-shifting would frustrate Rule 41(d)'s basic deterrent purpose. *See Hall*, 412 U.S. at 13.

In the absence of express language awarding fees, mere "generalized commands" cannot justify fee-shifting. *Key Tronic*, 511 U.S. at 815 (citing *Runyon*, 427 U.S. at 186). The plaintiffs in *Runyon v. McCrary* sought attorney's fees under the Civil Rights Act. *Runyon*, 427 U.S. at 164. The Act, as in force in 1976, stated that its provisions should be "enforced in conformity with the laws of the United States . . . but in all cases where they are not adapted to the object . . . the common law . . . shall be extended to and govern the said courts in the trial and disposition of the cause." *Id.* at 184 (quoting Civil Rights Act, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976) (amended 2020)).

The *Runyon* plaintiffs argued that this language contained a "uniquely broad commission to the federal courts" to enforce the Civil Rights Act via devices available at common law, including a court's inherent power to award fees. *Id.* at 184. This Court declined to read so far into an Act that, as of 1976, had never been interpreted to provide fees. *Id.* at 185. The *Runyon* Court found that, in light of *Alyeska*, § 1988's "generalized command" did not overcome Congress's failure to expressly allow fee-shifting under the Civil Rights Act. *Id.* at 186.

Here, Rule 41(d) contains far more than the generalized command upon which the *Runyon* petitioners relied. First, courts have already interpreted other sections of Rule 41 to permit fees. *Carroll*, 893 F.3d at 148 (citing *Colombrito*, 764 F.2d at 134; *AeroTech*, 110 F.3d at 1528). And second, the purpose of Rule 41(d) demands that the

term "costs" includes fees. *Horowitz*, 888 F.3d at 25-26. In contrast, *Runyon*'s "generalized command" to utilize statutory and common-law remedies leaves any number of other avenues to effectuate the purpose of the Civil Rights Act. *See Runyon*, 427 U.S. at 184-85. Finally, fee-shifting under Rule 41(d) is consistent with fee-shifting permitted under other laws that pursue similar deterrent purposes. *Supra* Sections II.A.1 & 2. Thus, Rule 41(d) evinces an intent to provide fees to deter vexatious behavior and forum shopping, through far more than generalized commands.

In holding that attorney's fees are not available under Rule 41(d) because "the rule does not explicitly provide for them," the *Rogers* court ignores *Key Tronic*'s instruction that the absence of express language authorizing fees is not dispositive. *Rogers*, 230 F.3d at 874; *Key Tronic*, 511 U.S. at 815. Even if *Key Tronic* controls, this Court should affirm the Fourteenth Circuit.

C. *Even If This Court Applies* Marek's *Hybrid Approach, 42 U.S.C. § 1988 Permits Fee-Shifting When The Plaintiff Voluntarily Dismisses To Avoid A Disfavorable Judgment On The Merits.*

Several circuits have applied this Court's decision in *Marek v. Chesney* to Rule 41(d) and developed a hybrid approach, awarding fees only when the underlying statute permits. *Portillo*, 872 F.3d at 738–39; *Andrews*, 827 F.3d at 311; *Esposito*, 223 F.3d at 501. But *Marek*, which addressed Rule 68, is distinguishable from this case. Even if this Court chooses to apply the hybrid approach, it should still affirm the Fourteenth Circuit because Petitioner engaged in forum shopping and vexatious behavior.

1. Marek *does not control because there is no connection between the behavior Rule 41(d) seeks to influence and the underlying cause of action.*

In *Marek*, this Court held that the term "costs" in Rule 68 only includes attorney's fees if fee-shifting is permitted by the statute under which the cause of action was brought. *Marek*, 473 U.S. at 9. Rule 68 concerns offers of judgment. Fed. R. Civ. P. 68. If an offeree rejects an offer and then obtains a less favorable judgment, "the offeree must pay the costs incurred after the offer was made." *Id.* at 5. The *Marek* Court held that the drafters intentionally left "costs" undefined. *Id.* at 9. It concluded that the most reasonable inference is that "the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Marek*, 473 U.S. at 8-9.

Unlike Rule 68, Rule 41(d) is not connected to the underlying statute. *Horowitz*, 888 F.3d at 26, n. 6; *see also Cooter & Gell*, 496 U.S. at 396. The *Marek* Court allowed the underlying statute to fill in the intentional gap left by the word "costs" in Rule 68 because costs under that rule are derived from the merits of the case. *Marek*, 473 U.S. at 8-9. In contrast, Rule 41's deterrent purpose is "largely untethered to the merits." *Horowitz*, 888 F.3d at 26, n. 6. Because Rule 41(d) is a procedural rule concerned with the smooth administration of justice, other provisions of the law with similar deterrent purposes should fill the definitional gap inherent in the term "costs." *See supra* Section II.A.2.b. Filling the gap with analogous provisions of the law leads to an interpretation that always permits fee-shifting. *Id.* This construction of "costs" avoids placing an arbitrary condition on the Rule. *Horowitz*, 888 F.3d at 26, n.6.

Unnecessarily applying the hybrid approach would also transgress this Court's instruction that satellite litigation over attorney's fees should be discouraged. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002). Statutory fee awards are rarely simple to calculate; the "untidiness" of litigation can lead to extensive legal battles over which party has prevailed and what fees are due. *See Fox v. Vice*, 563 U.S. 826, 833-34 (2011). Adopting a bright-line rule that fees are always permitted could avoid this untidiness. (R. at 43a). Admittedly, so too would a bright-line rule that fees are never permitted. But a clear rule that never permits fees would run counter to the context and purpose of Rule 41(d), as well as *Key Tronic*'s instruction that fees should be awarded when the law evinces an intent to do so.

Even if this Court adopts the hybrid approach, it should affirm the Fourteenth Circuit because § 1988 permits fee-shifting in this case.

2. *Section 1988 would award QSU attorney's fees because Petitioner withdrew his suit to avoid a disfavorable judgment on the merits.*

Section 1988 governs fee-shifting for claims brought under § 1983 and Title IX. 42 U.S.C. § 1988(b). Courts may award fees to defendants under § 1988 when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *see also White v. S. Park Indep. Sch. Dist.*, 693 F.2d 1163, 1169 (5th Cir. 1982) (noting that *Christiansburg* applies to § 1988 fee-shifting).

The Fifth Circuit seems to be the only circuit that has addressed whether a defendant can be the "prevailing party" after a Rule 41(a) dismissal. When a plaintiff voluntarily dismisses its suit under Rule 41(a) "to avoid a disfavorable judgment on

the merits," the Fifth Circuit considers the defendant the "prevailing party." *Portillo*, 872 F.3d at 740; (R. at 37a). *Portillo*'s reasoning aligns with this Court's holding in *C.R.S.T. Van Expedited, Inc. v. EEOC* that defendants can obtain fees without prevailing on the merits. 578 U.S. 419, 432 (2016).

Here, the trial court made a finding of fact that Petitioner voluntarily dismissed his claim and refiled to avoid a disfavorable judgment on the merits. (R. at 37a). Thus, the Fourteenth Circuit rightly upheld fee-shifting under *Christiansburg* and *Portillo*. (R. at 37a). The dissent argued that Petitioner's actions were not unreasonable because they were not the result of bad faith. (R. at 62a). But courts can award attorney's fees to defendants under § 1988 even absent bad faith. *Christiansburg*, 443 U.S. at 421.

Further, the decision to award attorney's fees under a court's inherent power is reviewed only for abuse of discretion. *Andrews*, 827 F.3d at 312. Independently of Rule 41(d), courts have the inherent power to award fees to punish vexatious litigants. *Runyon*, 427 U.S. at 183. When a plaintiff voluntarily dismisses a complaint and refiles a "virtually identical complaint" in an effort to obtain a more favorable forum, that plaintiff behaves vexatiously. *Robinson v. Bank of Am.*, 553 F. App'x 648, 652 (8th Cir. 2014) (unreported). In this case, Petitioner refiled his suit under the same claims, (R. at 9a), and the district court made a finding of fact that he did so to "eliminate a perceived tactical disadvantage" by obtaining a different judge, (R. at 39a). Based on these factual findings, the district court did not abuse its discretion in awarding fees under its inherent power. *See Andrews*, 827 F.3d at 312; (R. at 39a).

Thus, even if this Court finds that fees are never awardable under Rule 41(d), it should still affirm the Fourteenth Circuit in this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit as to both issues.

Respectfully submitted,
/s/ Team 13
Respondent-Appellee

APPENDIX

Constitutional Provisions

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]
>
> U.S. Const. amend. XIV, § 1.

Statutory Provisions

20 U.S.C. § 1681(a) provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .
>
> 20 U.S.C. § 1681(a).

Federal Rules

Federal Rule of Civil Procedure 41(d) provides in pertinent part:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
>
> 1. may order the plaintiff to pay all or part of the costs of that previous action; and
>
> 2. may stay the proceedings until the plaintiff has complied.
>
> Fed. R. Civ. P. 41(d).