No. 21-8289

In the

Supreme Court of the United States

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 RESPONDENT

TEAM 23

QUESTIONS PRESENTED

1. The Fourteenth Amendment and Title IX, 20 U.S.C. § 1681 et seq., affords the accused minimum due process protections in university disciplinary proceedings. QSU provided Park notice of his misconduct accusation, a non-criminal hearing, and an ability to question his accuser. Should QSU be required to afford Park additional due process procedures including a direct and unfettered cross-examination of his accuser?

2. Immediately after a hearing on QSU's motion to dismiss, Park voluntarily dismissed his § 1983 suit against QSU only to refile an identical suit in the same court a month later. In situations like these, courts can order plaintiffs to pay part or all of the first suit's "costs" pursuant to Federal Rule of Civil Procedure 41(d). Did the district court err in awarding attorney's fees as part of these "costs" when it concluded that Park's actions were likely an attempt to "gain a tactical advantage" and to "avoid an unfavorable judgment on the merits"?

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JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit issued its opinion on October 18, 2021. The petition was timely filed and was granted on October 10, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but is reproduced on pages 1a–62a. The district court's decision is not reported and is not available.

CONSTITUTIONAL PROVISIONS OR STATUTES INVOLVED

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

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Civil Procedure 41(d) provides:

> 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.

STATEMENT OF THE CASE

Kyler Park, a male student at Quicksilver State University ("QSU") filed this suit to evade responsibility. Jane Roe, a female student at QSU, accused Park of sexually assaulting her on March 14, 2020. R. at 2a. Roe, like too many female students, was unable to consent due to incapacitation. R. at 3a. In the days following the assault, Roe repeatedly called Park to confirm what she believed to be true—he sexually assaulted her as she laid passed out from intoxication. R. at 3a.

Roe and Park noticed each other at a movie theater on March 14. R. at 2a. As casual acquaintances, the two chatted while Park bought Roe an alcoholic drink. R. at 2a. Shortly thereafter, Roe awoke in her dorm room to find Park engaging in intercourse with her. R. at 3a.

Park maintains a starkly different story—to evade responsibility. R. at 3a. He states the intercourse was consensual. R. at 3a. Park expressed that during Roe's calls to him, she expressed interest in a romantic relationship with him. R. at 3a.

Traumatized and yet undeterred, Roe filed a complaint with QSU's Division of Student Affairs. R. at 3a–4a. In less than two weeks after the assault occurred, QSU sent notice to Park that Roe had accused him of violating QSU's Code of Student Conduct ("CSC"). R. at 3a–4a. The notice of complaint informed Park he had allegedly "committed acts of sexual abuse, unwanted sexual contact, and dating violence." R. at 3a–4a. The notice also informed Park his student misconduct hearing ("Hearing") would occur on May 20, 2020. R. at 4a.

QSU took Roe's complaint seriously and objectively. Before making any determinations at the Hearing, QSU assigned an investigator to conduct a two-month review of Roe and Park's stories. R. at 4a. Due to the intimate nature of the incident, the investigator was unable to corroborate either story. R. at 4a.

When the Hearing Board ("Board") gathered on May 20 to assess the claim, they were well prepared. R. at 4a. The Board consisted of five members including employees and fellow students appointed by the Vice Chancellor for Student Affairs. R. at 4a–5a. The Board, Roe, Park, and Park's attorney were all present at the Hearing. R. at 4a–5a.

Neither Roe nor Park or his attorney directly cross-examined each other. R. at 5a. The parties did not do so because QSU's CSC written under controlling Title IX rules did not allow for direct cross-examination. R. at 5a. Given the seriousness of Park's potential discipline, however, QSU still allowed Roe and Park to cross-examine each other through submitted questions. R. at 5a. Each side was permitted to submit questions and the Board determined which questions were acceptable. R. at 5a. Almost all of Park's cross-examination questions were asked. R. at 5a.

When the hearing took place, the world was under lockdown due to the deadly COVID-19 virus. R. at 5a. The highly transmissible disease was in its early days and the vaccine would not be widely available for another year. To protect the health of all involved, participants in the Hearing resorted to wearing face masks and social distancing. R. at 5a. Roe, like everyone else involved with the Hearing, wore a face covering. R. at 5a. Park requested that the Board force Roe to remove her face

covering or to make her testify remotely. R. at 5a. The Board let Roe testify in person and wear a face covering. R. at 5a.

The Board followed QSU's CSC throughout the hearing. R. at 5a–6a. At the direction of controlling Title IX rules, the Board asked cross-examination questions aimed at mitigating or preventing traumatization or intimidation of Roe. R. at 6a–7a. Like almost all school disciplinary hearings, formal procedures like adherence to the rules of evidence or opening statements and closing arguments did not occur. R. at 5a–6a.

Park requested that the Board ask numerous follow-up questions to contest the validity of Roe's story—something similar to what happens in a criminal trial. Adhering to the CSC, the Board was not required to ask all of Park's suggested follow-up questions. R. at 6a. In part, the follow-up questions requested by Park were tangentially related. R. at 6a–7a. The Board denied Park's non-collateral follow-up questions. R. at 6a–7a.

After a lengthy six-hour hearing, the Board concluded Roe's story was credible. R. at 8a. The Board recommended that QSU expel Park. R. at 8a. The Vice Chancellor formally announced their decision to expel Park after the Board's decision announcement. R. at 8a.

On June 12, 2020, Park vengefully filed a § 1983 action against QSU in the District Court of Quicksilver. R. at 8a. In his complaint, Park claimed that QSU's disciplinary proceeding deprived him of due process and violated Title IX. R. at 8a.

Judge John Kreese, a QSU graduate and football fan, was randomly assigned to preside. R. at 8a.

On July 1, 2020, QSU moved to dismiss Park's suit "for failure to state a claim upon which relief could be granted." R. at 9a. Three weeks later, Judge Kreese held a hearing on QSU's motion. R. at 9a. This hearing was not unique to Judge Kreese's docket and, thus, Judge Kreese began the day as he always did: reciting the Pledge of Allegiance and singing the QSU fight song. R. at 9a. Judge Kreese then "listened carefully to both sides' arguments, asked numerous questions about the merits of each party's claims, and made no comment suggestive of bias toward either party." R. at 9a. As the hearing concluded, Judge Kreese did not rush into an immediate decision and instead took the matter under advisement. R. at 9a.

Just hours after the hearing, Park voluntarily dismissed his suit pursuant to Federal Rule of Civil Procedure 41(a)(1). R. at 9a. About a month later, on September 21, Park then refiled the same suit against the same defendant, QSU, in the same court. Between the two filings, only one thing changed: This time, Judge Kreese was not randomly assigned to preside; Judge Demetri Alexopoulos was. R. at 9a.

In response to Park's new—yet identical—suit, QSU filed two motions. R. at 10a. As expected, QSU filed the same motion to dismiss as in the first suit. R. at 10a. But this time, QSU also filed a motion under Federal Rule of Civil Procedure 41(d). R. at 10a. As part of this Rule 41(d) motion, QSU asked that the court award attorney's fees totaling $74,500 as part of the costs owed to QSU for Park's bad faith and/or vexatious litigation. R. at 10a.

Park responded to both motions with affidavits tendered by himself and his counsel assuring that Rule 41(d) was inapplicable. R. at 10a. While both affidavits pointed to Judge Kreese's "possible bias" as a reason for dismissal and refiling, Park's counsel's affidavit also explained that he needed "to better study applicable law and to ensure Park's claims were supported by existing law or presented a good-faith basis for extension of modification of existing law." R. at 10a.

Park again attempted to evade responsibility by appealing Judge Alexopoulos' unfavorable decision. On appeal to the Fourteenth Circuit, the court found no error with the lower court's decision on all issues, thereby affirming. R. at 2a. The Fourteenth Circuit found due process under § 1983 and Title IX, 20 U.S.C. § 1681 et seq. does not warrant accused students a direct, unfettered cross-examination in university disciplinary proceedings. R. at 24a; 26a. The court also affirmed the dismissal of Park's sex discrimination claim under Title IX and the district court's award of costs and attorney's fees to QSU. R. at 31a; 40a. The Court granted Park's petition for writ of certiorari on October 10, 2022, to determine the scope of a student's due process rights pursuant to the Fourteenth Amendment and Title IX as well as the definition of "costs" under Federal Rule of Civil Procedure 41(d).

SUMMARY OF THE ARGUMENT

Due Process Claims Under § 1983 and Title IX

Due process does not guarantee Park a direct and unfettered cross-examination of his accuser. QSU provided Park with notice, a hearing, an ability to cross-examine his accuser, and the opportunity to submit follow-up questions. Park's

request—as a student—for a direct, cross-examination and unlimited follow-up questions is unwarranted under the Fourteenth Amendment and Title IX, 20 U.S.C. § 1681 et seq.

QSU afforded Park sufficient due process through cross-examination for four reasons. The school implemented burdensome procedures for Park, given the seriousness of his possible sanction. Additionally, QSU went above student due process requirements by affording Park *more* than some type of notice and hearing. Third, Park received the opportunity to submit cross-examination questions. Finally, QSU ensured the Hearing did not spiral into a criminal trial by not affording Park the same due process rights given to criminal defendants.

Due process does not afford students an unfettered cross-examination. Schools should not permit students unlimited follow-up questions under the *Mathews v. Eldridge* balancing test. In light of the burden QSU would carry if forced to conduct a criminal trial, Park's risk of erroneous deprivation is small. Park also cannot demand a witness remove a face covering while testifying. Lower courts disagree on whether criminal defendants have the right to demand removal of face coverings. Students in disciplinary hearings surely do not have the right to make such a demand.

The Court should find students in university disciplinary proceedings are not afforded a direct, unfettered cross-examination. Alternatively, the Court should bar the § 1983 claims because as an agency of the State, QSU is entitled to sovereign immunity.

Attorney's Fees as "Costs" Under Rule 41(d)

This Court should conclude, like a majority of federal circuits across the country, that attorney's fees are recoverable as part of the term "costs" in Federal Rule of Civil Procedure 41(d). In so doing, this Court need only consider Rule 41(d)'s text and underlying purpose. This text-and-purpose approach not only comports with this Court's well-established precedent, but it also avoids placing an arbitrary remedial limitation on defendants sued under certain substantive actions. But even if this Court decides that attorney's fees are not recoverable under Rule 41(d) as a matter of course, this Court should at least adopt the same interpretative approach it adopted in *Marek v. Chesny*: Attorney's fees are recoverable as part of "costs" whenever the underlying cause of action provides for attorney's fees. This conditional approach pays heed to a bedrock common law principle, the American Rule, as well as its long-standing statutory exceptions. Although the text-and-purpose approach is better suited for Rule 41(d), either approach properly concludes that attorney's fees are recoverable as part of "costs."

Although attorney's fees are recoverable under Rule 41(d), Park tries to evade responsibility by arguing that QSU was incorrectly awarded attorney's fees here. However, this Court should further conclude that the district court did not abuse its discretion in awarding attorney's fees to QSU. Indeed, QSU's fee award is easily justified in light of QSU's sovereign immunity, as well the timeliness of and apparent motivations underlying Park's conduct. And although these fees are most appropriately awarded under Rule 41(d), the district court has an inherent power to

award fees in certain circumstances. The record overwhelmingly indicates that this is precisely one of those circumstances.

ARGUMENT

I. Due process does not entitle the accused a direct and unfettered cross-examination of the accuser in university disciplinary proceedings.

Student Kyler Park does not have a constitutional or statutory protected right to a direct and unfettered cross-examination in a school disciplinary hearing. Under the Fourteenth Amendment and Title IX, 20 U.S.C. § 1681 et seq., Park is not afforded the same procedural due process protections provided to criminal defendants. As a student in a disciplinary hearing, QSU simply needs to supply Park with *some* kind of notice and *some* kind of hearing. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). QSU went beyond these two basic procedural due process rights and allowed Park the right to cross-examine his accuser. Park is evading his responsibility and QSU should not be forced to accommodate a list of Park's requests under the guise of due process.

A. A direct, cross-examination in school disciplinary hearings is not required under the Fourteenth Amendment if the school provides some opportunity for cross-examination.

The Due Process Clause of the Fourteenth Amendment enables states to deprive a person's property interest if minimum processes are provided. U.S. CONST. amend. XIV. A student has a "legitimate entitlement to a public education as a property interest" under the Due Process Clause. *Goss*, 419 U.S. at 574. This protection is extended to higher education disciplinary decisions. *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th

Cir. 1986). Here, it is undisputed Park has a protected property interest and QSU afforded Park process. Nevertheless, Park contests the adequacy of that process QSU provided and demands QSU implement additional, costly procedures.

In *Mathews v. Eldridge*, the Court outlined three factors to "determin[e] what process is due." *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 99–100 (1978) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Court should first consider the nature of "the private interest that will be affected"; second, "the risk of an erroneous deprivation" under current procedures and "the probable value, if any, of additional or substitute procedural safeguards"; and third, "the Government's interest, including . . . the fiscal and administrative burdens that the additional . . . procedural requirement would entail." *Mathews*, 424 U.S. at 335. Historically, the minimum due process in school disciplinary proceedings is merely "*some* kind of notice" and "*some* kind of hearing." *Goss*, 419 U.S. at 579.

Park wrongly argues he has a right under the Fourteenth Amendment to "adversarial cross-examination." For four reasons, Park does not have a constitutional right to a direct, cross-examination. First, QSU afforded Park sufficient due process given the seriousness of his sanction. Second, Park was permitted more than *some* type of hearing. Third, Park received the opportunity to submit cross-examination questions to be asked in the presence of an impartial decisionmaker. Finally, school disciplinary proceedings must not mirror criminal trials.

i. QSU afforded Park sufficient due process given the seriousness of his sanction.

QSU provided adequate notice and hearing to Park given the sanction of expulsion. Importantly, suspension "is considered not only to be a necessary tool to maintain order but a valuable education device." *Goss*, 419 U.S. at 580. Nevertheless, QSU "must 'at least' provide notice of the charges . . . and an opportunity to present [Park's] side of the story." *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399–400 (6th Cir. 2017).

Here, Park's only protected due process is his property right to attend school. *Goss*, 419 U.S. at 574. Procedural due process cannot and must not consider the future reputation in academia as some circuits have suggested. *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (holding reputation is not a protected liberty interest); *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2019) (finding accused's personal relationships and future employment opportunities important in due process analysis). Given the nature of the property interest and the procedures supplied by QSU, Park's due process rights were not violated considering his expulsion.

ii. Park was permitted more than *some* type of hearing.

The Board afforded Park the most substantive hearing possible under the totality of the circumstances. "[*S*]*ome* kind of hearing" is necessary before a student is expelled. *Goss*, 419 U.S. at 579 (emphasis in original). The "opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L.

REV. 1267, 1281 (1975)). Park was allowed more than *some* kind of hearing, because the Board granted him a formal in-person hearing with presence of legal counsel and an ability to offer witnesses and evidence.

"[T]he Court [has] stopped short of requiring a *formal* hearing since 'further formalizing the suspension process and escalating its formality and adversary nature may be too costly.'" *Horowitz*, 435 U.S. at 88 (quoting *Goss*, 419 U.S. at 583). However, some circuits require universities to offer the accused a formal in-person hearing if the factfinder's determination depends on witness credibility. *See Baum*, 903 F.3d at 581; *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019). Even if this Court held the same, QSU would meet this requirement. Not only did QSU offer, but Park accepted, the opportunity to be heard at a live in-person hearing.

The live hearing provided by QSU rightly balanced under *Mathews* the risk of Park's erroneous deprivation and QSU's cost-burdens of adding, substituting, or implementing new procedures. QSU took on an immense cost of vetting Roe's claim and providing a substantive, live hearing. Not only did QSU assign an investigator to obtain evidence, but QSU also provided a Board comprised of high-profile university leadership, including Vice Chancellor for Student Affairs. Given the pandemic, the Board also selflessly risked their own health and safety to oversee the hearing.

QSU allowed Park the right to counsel even though the university is under no obligation to do so. A student has no recognized right to have counsel present during

disciplinary proceedings unless the proceedings are complex or where the university relies on an attorney. *Flaim v. Med. Coll. Of Ohio*, 418 F.3d 629, 640 (6th Cir. 2005); *Gormon v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1998) (stressing "the weight of authority is against representation by counsel at [school] disciplinary hearings . . . ."). Once again, QSU afforded Park more than he was due—this time, a right to counsel which is a procedure not required under the Fourteenth Amendment.

iii. Park had some opportunity to cross-examine his accuser.

Due process only entitles students to "some form of cross-examination." *Baum*, 903 F.3d at 582. QSU's CSC does not allow involved students to directly cross-examine witnesses through counsel or personally. QSU allows accused students to submit cross-examination questions to the Board and in turn, the Board will select the questions and itself question the witnesses. For two reasons, QSU's cross-examination policy does not violate Park's due process rights. First, a student's right to cross-examine is "circumscribed." Second, students are not entitled to a criminal, adversarial style of cross-examination.

Park's right to cross-examine Roe is circumscribed. *See Doe v. Mich. State Univ.*, 989 F.3d 418, 431 (6th Cir. 2021). Yet, Park suggests this Court should adopt the Sixth Circuit's approach established *Doe v. Baum*. *Baum*, 903 F.3d 575 (6th Cir. 2018). In *Baum*, the Sixth Circuit stated "if a public university has to choose between competing narratives to resolve a case the university must give the accused student or his agent an opportunity to cross-examine the accuser . . . ." 903 F.3d at 578; *but c.f. Haidak*, 933 F.3d at 69 (finding a categorical rule allowing the accused to cross-examine in adversarial hearing improper).

However, Park's request to adopt the Sixth Circuit's approach is flawed and ill-advised. For one, even the *Baum* court cautioned that the right to cross-examine should be in a "circumscribed form." 903 F.3d at 589. Moreover, this Court's decision in *Mathews* indicates that school disciplinary hearings providing "for cross-examination by the accused or his representative in *all* cases turning on credibility determinations" is an extreme rule. *Haidak*, 933 F.3d at 69 (emphasis added); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1986) (finding there "was no denial of appellants' constitutional rights to due process by their inability to question the adverse witnesses in the usual, adversarial manner").

A "circumscribed form of cross-examination" where the accused submits written questions to the Board, "who then determine[s] whether [the] questions are relevant and whether they will be posed to the witness," is a procedurally fair system for school hearings. *Doe v. Cummins*, 662 F.App'x 437, 439, 448 (6th Cir. 2016). QSU's circumscribed form of cross-examination derives from the Department of Education's (the "DOE") effort to "strongly discourage[] schools from allowing the parties personally to question or cross-examine each other during the hearing." DEP'T OF EDUC., *Dear Colleague Letter: Sexual Violence* (2011) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. By allowing the accused to "directly" question the accuser, the alleged victim is exposed to a "traumatic or intimating . . . hostile environment." *Id.* at 12. Circumscribed cross-examination strikes the right balance between Park's due process rights and curtailing potential victim trauma. This is precisely what QSU did here.

Adversarial style direct, cross-examination in school disciplinary hearings is unnecessary. Employing "a non-adversarial mode of truth seeking" is sufficient because there is serious doubt a "student-conducted cross-examination would increase the probative value of hearings" and decrease Park's "risk of erroneous deprivation[.]" *Haidak*, 933 F.3d at 68–69 (quoting *Mathews*, 424 U.S. at 335). An accused student cross-examining the student accuser could rapidly "lead to displays of acrimony or worse." *Id.*; *Doe v. Ark-Fayetteville*, 974 F.3d 858, 867–68 (8th Cir. 2020) (finding under *Mathews* "there are legitimate governmental interests in avoiding unfocused questioning and displays of acrimony by persons who are untrained in the practice of examining witnesses.").

Still, the Court may find persuasive the argument that cross-examination is "the greatest legal engine ever invented for the discovery of truth[,]" and so a representative of the accused—like an attorney—should be allowed to directly, cross-examine the accuser. *California v. Green*, 399 U.S. 149, 158 (1970). And indeed, Park argues an attorney, as an agent of Park, can cross-examine Roe without inflicting "emotional trauma of directly confronting her alleged attacker." *Baum*, 903 F.3d at 583. There are two reasons this argument fails.

First, a cross-examination of a student accuser by a neutral third party relying on the accused student's questions is not "so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation." *Haidak*, 933 F.3d at 69. It is unlikely the probable value of a full-scale adversarial style cross examination would mitigate Park's risk of erroneous deprivation.

Second, the government's interest in avoiding the costs of adversarial cross-examination is deeply rooted. If attorneys were allowed to direct-examine, cross-examine, and introduce evidence, there would be only one aspect of a traditional criminal trial missing: opening statements and closing arguments. Not only would such a rule equate school hearings and criminal trials, but the burden on schools to implement such trials would be costly—both educationally and financially.

"[E]ven truncated trial-type procedures might overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness." *Goss*, 419 U.S. at 583. Educational effectiveness will lessen if attorneys are allowed in an "outside a courtroom" setting. DEP'T OF EDUC., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30326, 2020 WL 2525707 (May 19, 2020). "[L]awyers . . . could engage in hurtful, harmful techniques" to the accuser under the guise of protecting the accused's due process rights. *Id.* Direct, cross-examinations of witnesses are not required under due process in school disciplinary proceedings.

iv. QSU's hearing cannot mirror criminal trials.

A "school is an academic institution, not a courtroom or administrative hearing room." *Bd. of Curators of Univ. of Mo.*, 435 U.S. at 88. Procedural due process does not entitle students to the full trial rights and formalities afforded to criminal defendants. *Flaim*, 418 F.3d at 635. Criminal formalities like "rules of evidence [or] rules of civil or criminal procedure" need not be applied. *Id.* Even in context of sexual-assault accusations, the protections afforded to an accused "need not reach the same

level . . . that would be present in a criminal prosecution." *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018).

QSU "is not required to 'transform its classrooms into courtrooms' in pursuit of a more reliable disciplinary outcome." *Univ. of Cincinnati*, 872 F.3d at 400 (quoting *Flaim*, 418 F.3d at 635). It is inappropriate for school disciplinary hearings to "mirror common law trials." *Haidak*, 933, F.3d at 69. Rather, the hearing should focus on whether Park "has an opportunity to answer, explain, and defend." *Gorman*, 837 F.2d at 14. QSU provided Park with an opportunity to answer, explain, and defend by affording him precisely the circumscribed form of cross-examination this Court requires.

B. The Fourteenth Amendment does not afford a student the right to unfettered cross-examination.

Unfettered cross-examination through unlimited follow-up questions and forced removal of witness face coverings is not a constitutionally-protected right. Permitting unlimited follow up questions is unnecessary to a student's due process rights and creates an unwieldly administrative burden. Allowing witnesses to testify with face covering in the beginning of a deadly pandemic does not violate an accused student's due process rights. Students in disciplinary hearings are not afforded the same constitutional rights as criminal defendants. Park does not have a right to an unfettered cross-examination of his accuser.

i. Permitting unlimited follow up questions is traumatizing and inessential.

"[U]nlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases," *Haidak*, 933 F.3d at 68 (emphasis

omitted), because "[e]ven in criminal trials, we do not expose victims of sexual assault to harassment in the form of unlimited cross-examination[.]" *Mich. State Univ.*, 989 F.3d at 431–32. When the Board engaged in its cross-examination of Roe and limited the number of follow-up questions, Park's due process rights were not violated.

Cross-examinations with unlimited follow-up questions is inessential. The second *Mathews* factor requires courts to weigh the risk of erroneous deprivation given the probable value of additional, substitute, or new procedures. 424 U.S. at 335. The question then becomes: To what extent would the extra procedure of asking unlimited follow-up questions "improve the proceedings[?]" *Mich. State Univ.*, 989 F.3d at 432. The answer is little—if any—because "[f]orcing the claimants to answer two additional categories of questions over the course of their cross-examination does not significantly add to the fact-finder's ability to test their credibility." *Id.* at 431. There is no question Park "has significant interests at stake," but "the additional safeguards [Park] proposed would not improve the proceedings." *Id.* at 432.

Park asserts that "requiring claimants to answer every question posed by the accused's attorney would not pose a significant administrative burden to the university." *Id.* However, Park's argument fails to consider the alleged victim's interests and the necessary deference yielded to QSU.

QSU's interests are strong. *See Mathews*, 424 U.S. at 335. The university has an interest in protecting victims of sexual assault. *Univ. of Cincinnati*, 872 F.3d at 403; *but c.f.* Sage Carson and Sarah Nesbitt, *Balancing the Scales: Student Survivors' Interests and the* Mathews *Analysis*, 43 HARV. J.L. & GENDER 319 (2020) (rebuking

the three part *Mathews* test as failing to "adequately account for all interests at stake[,]" including student victims). Students "have a right, and are entitled to expect that they may attend [QSU] without fear of sexual assault or harassment." *Id.* (citing 20 U.S.C. § 1681(a)). Severe harm to sexual assault victims will compound if perpetrators are granted unfettered cross-examinations. When an alleged perpetrator is provided unrestricted cross-examination, victims will face trauma and intimidations likely "escalating or perpetuating" hostile environments. *Id.* at 398.

Deference must be given to QSU's decision to ask certain follow-up questions. Even though "state universities must afford students minimum due process protections before issuing significant disciplinary decisions," "courts should not second-guess school officials" decisions. *Univ. of Cincinnati*, 872 F.3d at 399; *Stiles ex re. D.S. v. Grainger Cty.*, 819 F.3d 834, 849 (6th Cir. 2016); *Wood v. Strickland*, 420 U.S. 308, 326 (1975). Wide-ranging deference should be afforded to school disciplinary officials because universities "have an unquestionably powerful interest in maintaining the safety of their campuses and preserving their ability to pursue their educational mission." *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000).

ii. Face coverings do not impede the trier of fact from assessing witness credibility.

Park's due process rights were not violated when Roe protected herself from COVID-19 by testifying with a face covering. Park argues that Roe's credibility and demeanor could not be assessed due to her face covering. This is patently untrue.

The Constitution does not protect a student's right to confrontation. Under the Sixth Amendment, criminal defendants maintain the right to confront one's accuser.

U.S. CONST. amend. VI; *Maryland v. Craig*, 497 U.S. 836 (1990). The "primary object" of the Sixth Amendment is to give the accused an "an opportunity . . . of testing . . . the witness . . . face to face with the jury in order that they may look at him, and judge by his demeanor . . . whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242–43 (1895). But, this constitutionally-protected right of confrontation is one for criminal defendants alone.

Even criminal defendants cannot always demand removal of witness face coverings. *Compare United States v. Robertson*, No. 17-CR-02949-MV-1, 2020 WL 6701874, at *3 (D.N.M. Nov. 13, 2020) (mandating removal of witness face coverings given the Confrontation Clause), *with United States v. Clemons*, No. CR RDB-19-0438, 2020 WL 6485087, at *2–3 (D. Md. Nov. 4, 2020) (finding "[w]earing masks mitigates for all trial participants the risk of transmission of a potentially deadly or disabling virus, while leaving the Defendant's ability to examine witnesses and confront his accusers intact."). If it is unclear whether criminal defendants can constitutionally force witnesses to remove face coverings, it is only logical students in disciplinary hearings do not have the power to mandate such removal.

Face coverings do not diminish witness testimony. Requiring a witness to remove a face covering to assess their credibility is no different than "subject[ing] the back of a witness's neck to a magnifying glass to see if the hair raised during particularly probative questioning." *United States v. Crittenden*, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *7 (M.D. Ga. Aug. 21, 2020). Demeanor evidence can be insightful, but it can also "produce misleading clues and lead juries to think witnesses

are lying when [they are] not." Cynthia R. Cohen, *Demeanor, Deception and Credibility in Witnesses*, ABA Section of Litigation Program Materials, Chicago, IL (2013). There is no certainty that forcing Roe to remove her face covering would alter the Board's perception of her credibility. There *is* certainty that if COVID-19 was present in the Hearing room, Roe would have been exposed by Park's forcible removal of her face covering.

Procedural due process is flexible and can adapt to COVID-19. There is no "particular form of procedure . . . dictated by the Due Process Clause." *Kremer v. Chem. Contr. Corp.*, 456 U.S. 461, 482 (1982). Indeed, "the very nature of due process" is to not create procedures "applicable to every imaginable situation." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609 (1974). The Board adapted to COVID-19 by balancing Park's due process right to in-person witnesses and the safety of all participants. COVID-19 presented a unique set of circumstances the modern judiciary and school disciplinary mechanisms have never seen. The Hearing occurred in May 2020, only two short months after the country-wide lockdowns. CDC, *COVID-19 Timeline* (2022) https://www.cdc.gov/museum/timeline/covid19.html. Centers for Disease Control and Prevention guidelines during May 2020 made clear individuals should wear a face covering outside the home and social distance six feet away from each other. *Id.* The Board implemented flexible procedures to accommodate the deadly virus and Park's due process rights.

C. Title IX, 20 U.S.C. § 1681 et seq., does not afford the accused a direct, unfettered cross-examination.

QSU followed Title IX procedures during Park's hearing and therefore did not violate Park's due process rights. QSU administered Park's misconduct hearing under Title IX rules promulgated prior to May 19, 2020. The Board balanced Park's due process rights with Title IX standards for sexual misconduct hearings. But, even if the Court agrees with Park that the Board should have followed Title IX's new rules, QSU *still* afforded Park the right to cross-examine his accuser.

The DOE provided new guidance on sexual harassment and violence to universities in 2011. This guidance was supplied in the form of a "Dear Colleague" letter. A "Dear Colleague" letter is the primary communication the DOE uses to advise stakeholders on Title IX changes. The 2011 Dear Colleague Letter encouraged universities to adopt a preponderance-of-the-evidence standard in school disciplinary hearings. DEP'T OF EDUC., *Dear Colleague Letter: Sexual Violence* (2011) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

The 2011 letter also "discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing, because the accused directly crossing the accuser would be 'traumatic and intimidating.'" *Id.* at 12. Universities, including QSU, quickly responded to the letter by updating or establishing new policies for sexual misconduct cases.

The 2011 letter revolutionized how universities treated sexual misconduct issues. *Rossley v. Drake Univ.*, 979 F.3d 1184, 1196 (8th Cir. 2020). It transformed the review of previously shunned victim claims into a "rigorous" "investigation and

resolution of harassment claims." *Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019) (citations omitted). The goal of the letter was to make "campuses . . . safer for students across the country." *Id.*

When a new administration took office, the DOE Office of Civil Rights in 2017 withdrew the 2011 Dear Colleague Letter because of its "minimal standard of proof" and "discourage[ment] of cross-examination." DEP'T OF EDUC., *Dear Colleague Letter: Campus Sexual Misconduct* (2017) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf (last visited Nov. 21, 2022). On May 6, 2020 the DOE announced new Title IX regulations and shortly thereafter, the regulations were published in the Federal Register on May 19, 2020. DEP'T OF EDUC., *Questions and Answers Regarding the Department's Title IX Regulations* (Jan. 15, 2021) https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf; 85 Fed. Reg. 30026 (codified at 34 C.F.R. Part 106). The new DOE regulations "became effective on August 14, 2020." *Id.*

The new regulations, in part, state: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility. . . ." 34 C.F.R. § 106.45(b)(6)(i).

After universities across the country changed their sexual misconduct policies to better administer victim complaints, universities were forced to change their policies yet again. Universities were "to work towards compliance during summer [2020] break, while they are out of session" to meet the August 14, 2020, deadline.

Pennsylvania v. Devos, 480 F.Supp.3d 47, 65–66 (D.D.C. 2020). The gap in implementation intended to prevent "problems with applying two sets of rules to sexual misconduct incidents occurring in the same school year." 85 Fed. Reg. at 30533–34. It is for this reason that QSU held Park's disciplinary hearing in May 2020 under previous Title IX rules.

Park argues QSU violated his purported right to an unfettered cross-examination under Title IX. He suggests QSU "should have disregarded Roe's testimony because of her refusal to testify without a face covering." *Park v. Quicksilver State Univ.*, No. 22-4601, 26 (14th Cir. 2021). DOE regulations declare that if a witness in a disciplinary hearing does not engage in a cross-examination, the Board cannot depend on that witness's testimony. 34 C.F.R. § 106.45(b)(6)(i). The Fourteenth Circuit rejected Park's argument for three reasons. First, the DOE Section cited by Park did not take effect until August 14, 2020. *Park*, at 26a. Second, Roe did "submit to cross-examination." *Id.* Third, a court ruled the regulation arbitrary and capricious. *Id.*; *Victim Rights Law Ctr. v. Cardona*, 552 F.Supp.3d 104 (D. Mass. 2021).

Even if the Court ruled QSU should have followed Title IX's new regulations promulgated on May 19, QSU still afforded Park sufficient due process. The DOE regulation in question does not textually commit to a direct and unfettered cross-examination of witnesses. 34 C.F.R. § 106.45(b)(6)(i). And it does not mention the words "mask" or "face coverings." The rule only requires witnesses to "submit to cross-examination at the live hearing." "Only the written word is the law[.]" *Bostock*

v. Clayton Cty., 140 S.Ct. 1731, 1737 (2020). Park cannot write favorable words into the regulation. Roe submitted to cross-examination at the Board's Hearing. The Board can consider her testimony.

Park cannot turn to Title IX to evade the responsibility of his actions. QSU afforded Park a cross-examination under *both* sets of Title IX rules. The Fourteenth Circuit also dismissed Park's Title IX sex discrimination claim. Park's argument that QSU disciplined him because he is male and the Board credited "exclusively" female testimony does not hold weight against the backdrop of caselaw and the facts presented. *Park*, at 27–31a (citing *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994)); *Baum*, 903 F.3d at 586; *Cummins*, 662 F. App'x at 453–54. Park cannot be afforded new costly process procedures not mandated by the Constitution or statute to evade his responsibility.

D. Notwithstanding the adequacy of process afforded to Park, QSU is entitled to sovereign immunity under the Eleventh Amendment such that Park's position is inconsequential.

Alternatively, QSU is entitled to sovereign immunity under the Eleventh Amendment and therefore, Park's § 1983 and Title IX due process claims are barred. The Eleventh Amendment recognizes the fundamental constitutional principle that a state cannot be sued in federal court without its consent. U.S. CONST. amend. XI. Lawsuits are precluded when a citizen of a state sues that state or one of its agencies. *Northern Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189, 193 (2006).

Like most state universities, QSU is an agency of Quicksilver. *Doe v. Hass*, 427 F.Supp.3d 336 (E.D.N.Y. 2019); *Pennhurst State Sch. & Hosp. v. Halderman*, 465

U.S. 89, 100 (1984). Park can sue QSU if he can prove one of two exceptions to sovereign immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54–55 (1996). First, Quicksilver consented to be sued; or second, Congress through statute abrogated the state's immunity. *See id.* at 55. The record does not indicate Quicksilver nor its agency, QSU, consented to suit. Congress did not abrogate states' sovereign immunity for § 1983 claims. *Quern v. Jordan*, 440 U.S. 332 (1979); *Mamot v. Bd. of Regents*, 367 Fed. Appx. 191, 192–93 (2d Cir. 2010). QSU does not argue Park's dismissed Title IX sex discrimination claim is barred. 42 U.S.C. § 2000d–7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972 . . . ."). Park cannot prove QSU consented to being sued nor can he prove Congress abrogated Quicksilver's immunity from suit under § 1983 claims. Thus, "Plaintiff's [non–Title IX] claims [against the University] . . . are barred by the Eleventh Amendment." *Doe v. Univ. of Colorado*, 255 F.Supp.3d 1064, 1081 (D. Colo. 2017).

II. QSU was correctly awarded attorney's fees pursuant to Federal Rule of Civil Procedure 41(d).

Since Park's expulsion from QSU, he has become rather familiar with the District of Quicksilver filing system. In the span of just one month, Park filed a § 1983 suit against QSU, voluntarily dismissed that suit immediately after QSU's motion to dismiss hearing, and subsequently refiled the same suit against QSU in the same court. Although Park offered some fleeting justifications for his conduct, Park's convenient timing tells a different story. Now, to avoid the consequences of

these actions, Park claims that QSU was incorrectly awarded attorney's fees as part of the "costs" associated with his first suit because Federal Rule of Civil Procedure 41(d) does not allow such a recovery and because the record does not support it. However, this position directly controverts the prevailing Rule 41(d) interpretation, this Court's well-established precedent, and the district court's own factual findings.

Rule 41(d) is relatively simple. When plaintiffs like Park voluntarily dismiss a suit and later refile the same suit against the same defendant, the court presiding over the second suit can order that plaintiffs pay the first suit's "costs" pursuant to Rule 41(d). FED. R. CIV. P. 41(d). Although neither Rule 41 nor the Advisory Committee Notes define the term "costs," most federal circuits have already addressed whether and under what circumstances Rule 41(d) permits an attorney's fee award as a component of "costs." *See Horowitz v. 148 South Emerson Associates LLC*, 888 F.3d 13 (2d Cir. 2018); *Garza v. Citigroup Inc.*, 881 F.3d 277 (3d Cir. 2018); *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306 (4th Cir. 2016); *Portillo v. Cunningham*, 872 F.3d 728 (5th Cir. 2017); *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868 (6th Cir. 2000); *Esposito v. Piatrowski*, 223 F.3d 497 (7th Cir. 2000); *Evans v. Safeway Stores, Inc.*, 623 F.2d 121 (8th Cir. 1980) (per curiam); *Meredith v. Stovall*, 216 F.3d 1087 (10th Cir. 2000) (unpublished). An overwhelming majority of these circuits have reached an unequivocal conclusion: Attorney's fees are recoverable under Rule 41(d). *Horowitz*, 888 F.3d at 25; *Garza*, 881 F.3d at 282–83; *Andrews*, 827 F.3d at 311; *Portillo*, 872 F.3d at 739; *Esposito*, 223 F.3d at 501; *Evans*, 623 F.2d at 122; *Meredith*, 216 F.3d at 1.

Ultimately, this Court should affirm the United States Court of Appeals for the Fourteenth Circuit by endorsing the prevailing Rule 41(d) interpretation and by finding that QSU was correctly awarded attorney's fees here. In so concluding, this Court should first determine whether attorney's fees are recoverable under Rule 41(d). This is a question of law subject to *de novo* review. *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1236 (10th Cir. 2013) (citation omitted). There are only two plausible conclusions at this early juncture: (1) attorney's fees are recoverable as a matter of course by virtue of Rule 41(d)'s text and purpose, or (2) attorney's fees are recoverable under Rule 41(d) by virtue of Park's underlying § 1983 claim. Then, this Court should review the district court's decision to award attorney's fees to QSU in the case at bar. As a question of fact, this decision should be reviewed for abuse of discretion and should be reversed only if the court's findings are "without factual support in the record." *Id.*; *United States v. Hardage*, 985 F.2d 1427, 1436–37 (10th Cir. 1993). On this point, the timeliness and apparent motivations underlying Park's conduct are conclusive: QSU was correctly awarded attorney's fees pursuant to Rule 41(d).

A. Rule 41(d)'s text and purpose evince a clear intent to provide attorney's fees as a matter of course.

To begin, Rule 41(d)'s text and purpose unmistakably indicate that attorney's fees are always recoverable as part of costs. Indeed, this conclusion naturally flows from this Court's two-step analysis by which cost-shifting provisions just like Rule 41(d) have been interpreted. First, as with any other interpretative undertaking, courts must look to the provision's text. *Roadway Express, Inc. v. Piper*, 447 U.S.

752, 757 (1980). If this text incorporates some definition of the term "costs" such that attorney's fees either are or are not part of costs, then the provision should be interpreted accordingly. *Id.* at 760. But if the text neither incorporates nor precludes attorney's fees, courts must consider whether the provision "otherwise evinces an intent to provide for [attorney's] fees." *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994). When the provision indeed does, then attorney's fees are recoverable under that provision. *Id.*

i. Rule 41(d) is silent on attorney's fees and, thus, attorney's fees are not precluded as a recoverable cost.

Rule 41(d)'s silence on attorney's fees ultimately indicates that attorney's fees are not precluded as a recoverable cost. When a cost-shifting provision like Rule 41(d) does not define "costs," this Court has looked to surrounding provisions for further illumination. *Roadway Express*, 447 U.S. at 759. It is clear that if a cost-shifting provision does not define "costs" but otherwise incorporates an enumerated list of "costs" that itself omits attorney's fees, the term "costs" does not include attorney's fees. *Id.* at 760–61. But by virtue of this logic, the contrapositive must also be true: Attorney's fees are not precluded as a recoverable cost when a provision does not define "costs" *and* does not incorporate a list of "costs" that itself omits attorney's fees.

This contrapositive is perfectly applicable here. Rule 41(d)'s explicit text does not define "costs." It does not provide an enumerated list of "costs" that plainly omits attorney's fees. There are no surrounding provisions that Rule 41(d) could incorporate such that "costs" obviously do not include attorney's fees. Accordingly, this Court's precedent mandates only one conclusion: Rule 41(d)'s silence on

attorney's fees does not mean that attorney's fees are not a recoverable cost—it only means that the term "costs" *does not preclude* attorney's fees.

Although it is true that Congress could have been more explicit had it meant to include attorney's fees as part of costs, this position is simply unpersuasive. Indeed, this rationale has the same thrust when flipped on its head: Congress also could have been more explicit had it meant to *preclude* attorney's fees from recoverable costs. Thus, it is unhelpful to hold an imaginative Rule 41(d) against Rule 41(d) in reality. Justice Stevens once put this same point well: "[This Court's] duty is to ask what Congress intended, not to assay whether Congress might have stated the intent more naturally, more artfully, or more pithily." *Sullivan v. Everhart*, 110 S. Ct. 960, 973 (1990) (Stevens, J., dissenting). For this reason, the fairest conclusion to draw from Rule 41(d)'s text is not concrete preclusion, but non-preclusion that may be further illuminated by Rule 41(d)'s underlying intent.

ii. Rule 41(d)'s intent to serve as a deterrent plainly indicates that attorney's fees are recoverable as part of costs.

Rule 41(d) itself evinces an intent to provide attorney's fees as part of costs. Although some cost-shifting provisions like Rule 41(d) do not define the term "costs" either explicitly or implicitly, they may still "evince an intent" to provide attorney's fees as part of costs. *Key Tronic*, 511 U.S. at 815. A cost-shifting provision evinces precisely this intent when it relies on the recoverability of attorney's fees to effectuate its central purpose. *Marek v. Chesny*, 473 U.S. 1, 9 (1985). Thus, when a provision relies on the recoverability of attorney's fees, it necessarily follows that the provision provides for attorney's fees. *Id.*

To be sure, Rule 41(d)'s intent is unequivocal and effectively undisputed: It "serve[s] as a deterrent to forum shopping and vexatious litigation," as well as attempts to "gain any tactical advantage by dismissing and refiling [a] suit." *Horowitz*, 888 F.3d at 25; *Rogers*, 230 F.3d at 874; *Andrews*, 827 F.3d at 309 (quoting *Simeone v. First Bank Nat'l Ass'n*, 971 F.2d 103, 108 (8th Cir. 1992) and citing *Esposito*, 223 F.3d at 501); *Adams v. N.Y. State Educ. Dep't*, 630 F.Supp.2d 333, 343 (S.D.N.Y. 2009); 8 Moore's Fed. Prac. § 41.70[1] (3d ed. 2016). The unanimity with which so many courts understand Rule 41(d) comes as little surprise. After all, Rule 41(d) permits defendants to recover costs associated with a suit only after a plaintiff "dismisse[s] an action" and subsequently "file[s] an action based on or including the same claim against the same defendant . . . ." FED. R. CIV. P. 41(d). By hinging the recoverability of the first suit's costs on plaintiffs' repetitive actions, Rule 41(d) threatens to punish plaintiffs who might be tempted to take those actions. Thus, Rule 41(d) not only deters repetitive actions, but any motivations that may lead to repetitive actions: "forum shopping," "vexatious litigation," and even attempts to "gain any tactical advantage."

Given its intent to deter repetitive actions and affiliated motivations, Rule 41(d)'s entire scheme would be "substantially undermined" if attorney's fees were not a recoverable cost. *Horowitz*, 888 F.3d at 25 (citing *Pelczar v. Pelczar*, No. 16-CV-55 (CBA) (LB), 2017 WL 3105855, at *2 (E.D.N.Y. July 20, 2017) (listing a significant number of district courts that have reached this exact conclusion)). This is precisely because, empirically, Rule 41(d) applies primarily to litigants like Park who file

actions only to quickly dismiss them before any substantive judgment can be made. *Horowitz*, 888 F.3d at 26. Because plaintiffs tend to dismiss their first actions relatively soon after they filed it, the action will have been minimally litigated. Indeed, defendants will have incurred only minor "costs" other than attorney's fees––*e.g.*, charges for document delivery or one of the court reporter's transcripts. While these costs are relatively negligible at this early stage in the litigation, attorney's fees may still be substantial. *Horowitz*, 888 F.3d at 26. Thus, attorney's fees are essential to Rule 41(d)'s purpose. Without them, Rule 41(d) only threatens plaintiffs with the payment of negligible costs; with them, Rule 41(d) threatens sufficiently substantial costs that it serves as a deterrent against repetitive actions just as intended.

This common-sense conclusion ultimately reveals why this Court should adopt the text-and-purpose approach to Rule 41(d) as opposed to the conditional approach adopted in *Marek v. Chesny*. 473 U.S. 1 (1985). In *Marek*, this Court interpreted the term "costs" in Federal Rule of Civil Procedure 68 to include attorney's fees only when the underlying cause of action itself provided for attorney's fees. *Id.* at 9. Critical to this conclusion was Rule 68's purpose, which is "to encourage settlement." *Id.* at 5. Given this purpose, it made sense to limit the scope of the term "costs" to the cause of action because the incentive to settle is inherently connected to the total recovery available under that action.

However, Rule 41(d) does not similarly intend to encourage settlement; it serves as a deterrent against repetitive actions and affiliated motivations. This conduct, unlike settlement, is not inherently connected to total available recovery.

Without this connection, *Marek's* conditional approach places an arbitrary limitation on Rule 41(d) that would disproportionately sanction equally vexatious litigants that bring remedially different—but otherwise substantively identical—actions. *See, e.g.*, *Lightfoot v. Union Carbade Corp.*, 110 F.3d 898, 913–14 (2d. Cir. 1997) (dismissing a plaintiff's claim under the federal Age Discrimination in Employment Act, which provides for attorney's fees, and leaving the plaintiff to recover only under the substantively similarly New York State Human Rights Law which does not provide for attorney's fees). This absurd result comports neither with the text of Rule 41(d) nor its intent and, thus, would be an improper approach to Rule 41(d).

B. Even if this Court conditions the recoverability of attorney's fees under Rule 41(d) on Park's underlying § 1983 action, attorney's fees are still recoverable.

Even if this Court rejects the idea that Rule 41(d) provides attorney's fees as a matter of course, the recoverability of attorney's fees under Rule 41(d) should at least be conditioned upon Park's underlying § 1983 action. Pursuant to *Marek v. Chesny*, this interpretative approach follows from two well-established points. 473 U.S. 1 (1985). First, the Federal Rules of Civil Procedure were wittingly authored against the backdrop of the American Rule—a common law principle that generally prohibits the recoverability of attorney's fees unless a relevant substantive statute provides otherwise. *Id.* at 7–8 (citing Act of Feb. 26, 1853, 10 Stat. 161). Second, 42 U.S.C. § 1983 is a quintessential exception to the American Rule such that attorney's fees are recoverable as part of costs whenever it is the underlying cause of action. *Id.* at 9;

Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 253 (2010). Because these two points are applicable here, attorney's fees are recoverable as part of costs.

To start, the term "costs" in Rule 41(d) should be read to refer to all costs awardable under Park's substantive § 1983 action. The logic here is simple and perfectly mirrors this Court's rationale in *Marek*. Rule 41 is a Federal Rule of Civil Procedure. Every Federal Rule of Civil Procedure was adopted well after the American Rule and its statutory exceptions had become bedrock common law principles. *Marek*, 473 U.S. at 7–8. Thus, the authors of Rule 41(d) were fully aware of the American Rule and its statutory exceptions when it awarded "costs" without definition or explanation. Given this awareness, as well as the cruciality of "costs" to Rule 41(d)'s practical operation, it is unlikely that the term "costs" is undefined and unexplained by virtue of mere oversight. Instead, the most reasonable inference is that the term "costs" in Rule 41(d) was intended to refer to all costs awardable under the relevant substantive statute or other authority. This was precisely this Court's approach when it interpreted the term "costs" in Rule 68 and nothing about Rule 41's history or substance would necessitate a different approach now.

Once this first point is established, there is only one plausible conclusion: Rule 41(d) should be read to award all costs, including attorney's fees, because attorney's fees are explicitly awardable under the cause of action here. Indeed, this Court need not look any further than the statute under which Park filed suit: 42 U.S.C. § 1983. Pursuant to 42 U.S.C. § 1988, attorney's fees are awardable to any "prevailing party" in a § 1983 action. 42 U.S.C. § 1988(b). Thus, the term "costs" in § 1983 is explicitly

defined in such a way that includes attorney's fees. Indeed, this Court has long considered § 1983 a quintessential exception to the American Rule precisely because of the clarity with which it permits the recovery of attorney's fees. *Hardt*, 560 U.S. at 253. Accordingly, this Court should draw an all-too-familiar conclusion now: "Since Congress expressly included attorney's fees as 'costs' available to a [prevailing party] in a § 1983 suit," such fees are subject to Rule 41's cost-shifting provision. *See Marek*, 473 U.S. at 9 (reaching this conclusion with respect to Rule 68 for the same reasons discussed here).

C. The district court did not abuse its discretion by awarding attorney's fees to QSU.

No matter how this Court interprets Rule 41(d), the district court did not abuse its discretion by awarding attorney's fees to QSU. This conclusion flows from three undisputed factual realities of this case: (1) If Rule 41(d) always provides attorney's fees as part of costs, then the timeliness of Park's conduct justifies an attorney's fee award; (2) Even if this Court conditions the recoverability of attorney's fees upon Park's underlying § 1983 action, an attorney's fee award is still appropriate because QSU is the "prevailing party"; (3) An attorney's fee award is justified even if Rule 41(d) never provides for attorney's fees because the district court has inherent power to award fees in light of QSU's sovereign immunity and Park's fraudulent conduct. For these three reasons, the district court did not abuse its discretion no matter if attorney's fees are always, sometimes, or never recoverable under Rule 41(d).

i. QSU is entitled to attorney's fees under Rule 41(d) because attorney's fees are recoverable as a matter of course and awarding attorney's fees here best honors Rule 41(d)'s purpose.

If this Court concludes, as it should, that attorney's fees are always recoverable as part of costs under Rule 41(d), then an attorney's fee award is easily justified now by the timeliness of Park's conduct. As discussed, Rule 41(d) seeks to deter forum-shopping and vexatious litigation. *Horowitz*, 888 F.3d at 25; *Rogers*, 230 F.3d at 874; *Andrews*, 827 F.3d at 309 (quoting *Simeone*, 971 F.2d at 108 and citing *Esposito*, 223 F.3d at 501); *Adams*, 630 F.Supp.2d at 343 (S.D.N.Y. 2009); 8 Moore's Fed. Prac. § 41.70[1] (3d ed. 2016). In theory, Rule 41(d) seeks to deter this conduct at any stage of litigation; but in effect, Rule 41(d) primarily applies to litigants who file suits only to dismiss and refile them shortly thereafter. *Horowitz*, 888 F.3d at 26. Because this repetitive conduct typically occurs early in the litigation, attorney's fees *must* be recoverable to meaningfully effectuate Rule 41(d)'s purpose. *Id.* "Costs," without attorney's fees, are simply too minimal at this point to have any significant effect on litigant financials; however, even at this early juncture, attorney's fees may still be significant enough to deter repetitive actions. *Id.* Thus, attorney's fees are justified exactly *because*—and so surely *whenever*—litigants file an action only to quickly dismiss it before any significant non-fee costs are incurred.

Ultimately, Park filed precisely the repetitive actions that Rule 41(d) means to deter with precisely the timing that necessitates attorney's fees. On June 12, 2020, Park filed a § 1983 action against QSU. On July 1, QSU moved to dismiss Park's action and, on July 22, a hearing on QSU's motion to dismiss was conducted. *Just*

hours after this hearing was conducted, Park voluntarily dismissed his § 1983 action only to later refile the exact same action against QSU less than a month later. By the time Park voluntarily dismissed this first action, the litigation had lasted only a month and a half. At this point, QSU's non-fee costs were undoubtedly minimal—perhaps limited to charges associated only with filings or transcript retrieval. However, Park's first action did force QSU to draft a motion to dismiss and prepare for a hearing on that same motion. This caused QSU to incur $74,500 in attorney's fees, which almost certainly dwarfs all other non-fee costs. These disproportionate totals—non-fee costs alone versus non-fee costs *and* attorney's fees—perfectly exemplify why Rule 41(d) must include attorney's fees as part of costs. And indeed, these totals also exemplify why an attorney's fee award is appropriate here.

ii. Even if the recoverability of attorney's fees under Rule 41(d) is conditioned upon Park's underlying § 1983 action, an attorney's fee award is permissible because QSU is a "prevailing party" for purposes of § 1988.

To be sure, the district court did not abuse its discretion in awarding attorney's fees to QSU even if the recoverability of attorney's fees is conditioned upon Park's underlying § 1983 action because QSU was a "prevailing party" for purposes of § 1988(b). Under § 1988(b), only a prevailing party can be awarded attorney's fees in a § 1983 action. 42 U.S.C. § 1988(b). Although *plaintiffs* are not prevailing parties until they win a judgment "on the merits," *defendants* are not held to that same standard. *CRST Van Expedited v. EEOC*, 578 U.S. 419, 433 (2016). Rather, this Court only requires defendants to show the plaintiff's suit was "frivolous, unreasonable, or without foundation" to establish entitlement to an attorney's fee

award under § 1983. *Fox v. Vice*, 563 U.S. 826, 833 (2011). This standard generally harkens to the one outlined in Federal Rule of Civil Procedure 11(b)(2), which similarly threatens to sanction parties engaged in frivolously argued litigation or litigation without legal foundation. *See* FED. R. CIV. P. 11(b)(2); *Baker v. Alderman*, 158 F.3d 516, 524–25 (11th Cir. 1998).

There is perhaps no suit more frivolous, unreasonable, and foundationless than one filed against a state or a state-affiliate entitled to sovereign immunity—and that is exactly the type of suit Park filed here. It is well established that the Eleventh Amendment of the United States Constitution bars suits against a state or "an arm of the state," like state universities. U.S. CONST. amend. XI; *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429–30 (1997); *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 86 (3d Cir. 2016); *Hass*, 427 F.Supp.3d at 346–48. In fact, such suits are permissible only if Congress explicitly overrode state immunity by statute or if the state itself waived immunity. *Clark v. Barnard*, 108 U.S. 436, 460–61 (1883). However, Congress did not abrogate states' immunity when it enacted § 1983. *Quern*, 440 U.S. at 345. And even if a state did consent to suit under § 1983, it cannot be held liable because it is not "persons" within the statutory meaning of § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Thus, QSU is so clearly entitled to sovereign immunity such that Park's § 1983 action is, by nature, frivolous, unreasonable, and foundationless.

To clarify, QSU would not claim sovereign immunity to Park's suit *had it been filed directly under Title IX*. *See* 42 U.S.C. § 2000d–7(a)(1) ("A State shall not be

immune under the Eleventh Amendment . . . from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972 . . . ."). But Park's suit was instead filed under § 1983, which is a distinctively different action in scope and remedy than an action filed under Title IX. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009). This difference ultimately means that QSU remains immune to § 1983 actions even when Title IX violations are alleged. Accordingly, Park's suit is still frivolous, unreasonable, and foundationless.

But what is more, Park's counsel effectively *admitted* that the suit was frivolous, unreasonable, or without foundation. When Park voluntarily dismissed his first suit and later refiled the exact same claim, QSU filed its second motion to dismiss and its first motion for costs associated with Park's first suit under Rule 41(d). In response, Park and his counsel filed two affidavits. Although both affidavits fleetingly expressed some concern about bias in Judge Kreese, the judge presiding over Park's first suit, Park's counsel's affidavit also explained that the dismissal was prompted by something else entirely: a desire "to better study applicable law and to ensure Park's claims were supported by existing law or presented a good-faith basis for extension or modification of existing law." Indeed, Park's counsel *cited and effectively quoted* Rule 11(b)(2)'s standard for frivolous and foundationless litigation as a central reason for dismissing Park's first suit. Because Rule 11(b)(2)'s standard reflects the same standard this Court uses to award attorney's fees under § 1988, the conclusion is automatic: The record overwhelmingly indicates that Park's action was frivolous, unreasonable, or without foundation such that fees were justified.

Although one lower court requires that defendants also "demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits" before they can recover attorney's fees under § 1988, this heightened standard is inconsequential here. *Portillo*, 872 F.3d at 740. For one, this standard is not grounded in this Court's precedent and is administered by the Fifth Circuit alone—a court to which this Court is simply not bound. But even more than that, Judge Alexopolous, the judge presiding over Park's second suit, reached this precise conclusion: Park voluntarily dismissed his first action "to gain a tactical advantage" and "to avoid a disfavorable judgment on the merits." To be sure, both Park and Park's counsel tendered affidavits denying this strategy. As part of their denial, they name Judge Kreese's alleged bias as one reason for voluntary dismissal. However, Judge Alexopolous saw this justification for what it was: window dressing to cover much more vexatious motivations.

To start, Park's judicial bias accusation against Judge Kreese must be a pretense for more vexatious motivations because the record simply does not support it. Although Judge Kreese was a QSU graduate and recited QSU's fight song as a pre-proceeding ritual, there is no indication that this affiliation impacted his ability to neutrally adjudicate Park's first suit. In fact, Park does not dispute that "Judge Kreese listened carefully to both sides' arguments, asked numerous probing questions about the merits of each party's claims, and made no comment suggestive of bias toward either party." Judge Kreese's neutrality is also evidenced by his refusal to issue an immediate judgment and his promise to take the matter under advisement. While Park perhaps had reason to believe Judge Kreese's pre-proceeding rituals were

better suited for a football stadium than a courthouse, the record in no way indicates that Judge Kreese exhibited bias against Park. Thus, it comes as no surprise that Park's alleged concerns of judicial bias fell on deaf ears.

Park's vexatious motivations are also further revealed by the strategy with which Park's counsel pursued the repetitive actions. If Park was sincerely attempting to address judicial bias, he would not have resorted to voluntarily dismissal. Instead, he would have used a basic and commonly-used tool specifically meant to address judicial bias: a motion for recusal pursuant to 28 U.S.C. § 455. Section 455 does not come with the same risks that voluntary dismissal does—*e.g.*, paying costs pursuant to Rule 41(d)—and still addresses judicial bias concerns. Yet, Park voluntary dismissed his first suit immediately after the hearing on QSU's motion to dismiss—the only method by which Park could potentially be assigned a "more favorable" judge while simultaneously avoiding a disfavorable judgment on the merits. Thus, Park's election for voluntary dismissal as opposed to a motion for recusal tips his hand: Judicial bias was not his reason for dismissal—an imminent disfavorable judgment was. Even under this heightened standard, then, the district court did not abuse its discretion in awarding attorney's fees.

iii. QSU is entitled to attorney's fees for reasons entirely unrelated to Rule 41(d).

Although neither Rule 41(d)'s text and purpose nor this Court's precedent support it, this Court may still find that the term "costs" in Rule 41(d) never meant to include attorney's fees. Even then, however, the district court did not abuse its discretion in awarding attorney's fees to QSU. As a wholly independent exception to

the American Rule, this Court has consistently recognized "unquestionable assertions of inherent power in the [district] courts" to award attorney's fees in particular circumstances. One such circumstance is when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59 (1975). This type of conduct ultimately indicates that "fraud has been practiced" on the court such that "the very temple of justice has been defiled." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). When parties have acted in this way, district courts are not merely *allowed* but are actually *encouraged* to award attorney's fees. *Id.*

The record overwhelmingly indicates that Park acted in bad faith and ultimately practiced fraud on the district court when he filed insincere affidavits to justify his voluntary dismissal. In these affidavits, Park and his counsel cited judicial bias and frivolity as reasons for Park's voluntary dismissal. But as already discussed, Park would have filed a motion for recusal if he had sincere bias concerns. And if Park's counsel genuinely worried about the frivolity of Park's first suit, those concerns certainly would have haunted him well before Judge Kreese conducted a hearing on QSU's motion to dismiss. Indeed, Park's first suit was filed 19 days before QSU even filed its motion to dismiss. Another 21 days passed before Judge Kreese conducted a hearing on that motion. Thus, Park had *40 total days* to address frivolity concerns about his first suit. And, yet, Park did not dismiss his suit until just after the hearing—and ultimately refiled the *exact same suit* hardly one month later. These undisputed facts surely indicate that Park voluntarily dismissed his first suit not for

the bias or frivolity concerns he swore to by affidavit, but to avoid an unfavorable judgment. The district court seemed to reach this same conclusion when it awarded attorney's fees to QSU for Park's "desire to gain a tactical advantage" and "avoid an unfavorable judgment on the merits."

CONCLUSION

For these reasons, QSU respectfully requests that this Court affirm the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,
/s/ Team No. 23
November 21, 2022
Counsel for Respondent