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 THE PETITIONER

TEAM 31
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a student facing expulsion for alleged sexual misconduct has a right under the Fourteenth Amendment and Title IX to conduct direct and unfettered cross-examination of his accuser, the only adverse witness, and insist that she testify unobscured by opaque face covering.

II. Whether the term "costs" as used in Federal Rule of Civil Procedure 41(d) includes attorney's fees when neither its language nor the record of its statutory usage expressly indicate as such.

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The decision of the United States District Court for the District of Quicksilver is not reported. The opinion of the United States Court of Appeals for the Fourteenth Circuit is not published but is reproduced in the record. R. at 1a–62a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourteenth Circuit entered judgment on October 21, 2021. R. at 1a. This Court, which has appellate jurisdiction pursuant to 28 U.S.C. § 1254(1), granted the petition for writ of certiorari on October 10, 2022.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

Title IX of the Education Amendments of 1972 provides in relevant 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 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 . . . may order the plaintiff to pay all or part of the costs of that previous action." FED. R. CIV. P. 41(d).

STATEMENT OF THE CASE

Statement of Facts

This case is about how a university's attempts to protect an alleged victim of sexual assault involved limiting the accused's ability to test her credibility. This case is also about interpreting a federal rule in accordance with settled legal tradition and congressional intent.

The Alleged Misconduct. Kyler Park was only a year away from graduation when he was accused of sexually assaulting Jane Roe. R. at 2a. Both Park and Roe were students at Quicksilver State University ("QSU"), and they encountered each other at a bar. *Id.* There, Park bought an alcoholic drink for Roe, who was under the age of 21. *Id.* After she finished her drink, the two walked together to Roe's dorm room, where she had sex with Park. *Id.* No identified witnesses observed any of the events leading up to their encounter. *Id.*

In subsequent phone calls, Park claims that Roe wanted to enter into a relationship, and when he told her that he was not interested, she became angry and threatened to report him for sexual assault. *Id.* On the other hand, Roe alleges that she called Park to ask about their encounter, which she claimed she could not remember because of her intoxication level. *Id.*

QSU's Division of Student Affairs soon notified Park that he had been accused of sexual misconduct that violated the Code of Student Conduct ("the CSC"). *Id.* QSU then informed Park that a university hearing ("the Hearing") would adjudicate the alleged violations. R. at 4a.

The Hearing. The Hearing was held during the COVID-19 pandemic. *Id.* Both Roe and Park, along with Park's attorney, attended the Hearing in-person. *Id.* All persons at the Hearing were required to wear facial coverings because of the pandemic. R. at 5a. Park requested that Roe be required to remove her face mask while she was testifying, which Roe refused to do. *Id.* Park then asked the Board to have Roe testify remotely without a facial covering. *Id.* Roe insisted on being physically present, and the Board denied Park's requests *Id.*

The Hearing Board ("the Board") consisted of five appointed employees and students. R. at 4a. The Board required the submission of all questions to the Board for approval, which would strike questions that it deemed unacceptable. R. at 5a. Only the Board could ask the approved questions to the witnesses. *Id.* In compliance with QSU policy, the Board must prioritize student comfort "at the expense of rigorous examination" and does not have to follow traditional rules of evidence. R. at 5a–6a. The Board could also exercise its discretion to exclude "unduly repetitious or irrelevant evidence." R. at 6a.

The Cross-Examination. Although the Board asked most of Park's initial questions regarding the alleged intoxication, it rejected significantly more of his follow-up questions than Roe's. R. at 6a, 57a.

For example, Park observed Roe drinking a clear liquid when he first approached her. R. at 6a. Thus, he believed that the only non-alcoholic drink Roe consumed that night was the one that he bought for her. *Id.* When Roe contended that the clear liquid was actually alcoholic, Park urged the Board to ask her what

type of alcohol it was. *Id.* The Board denied the question as overly aggressive and irrelevant. *Id.*

Park also requested that the Board ask her how many drinks she had, and Roe said she could not remember, nor did she keep any receipts. R. at 7a. Park then asked the Board to compel her credit-card statement to verify any purchases, but the Board also denied that question to protect Roe's privacy. R. at 6a–7a. Park submitted follow-up questions asking how Roe could have purchased alcohol at all if she was underage, but the Board also denied those questions to prevent Roe from potentially implicating herself in criminal conduct. R. at 7a.

Park also submitted follow-up questions as to Roe's father's occupation as a car salesman since she testified that he owned and operated a karate dojo—a fact she used to explain why she appeared to maintain excellent balance on security-camera footage despite claiming to be intoxicated. *Id.* The Board dismissed such questions as irrelevant. *Id.*

The Board ultimately found Roe's testimony more credible than Park's and recommended expulsion for his alleged sexual misconduct. R. at 8a. Accordingly, QSU expelled Park. *Id.*

Course of Proceedings

Park filed suit against QSU, alleging two counts: (1) QSU violated his constitutional rights under 42 U.S.C. § 1983 by depriving him of due process, and (2) QSU violated Title IX, 20 U.S.C. § 1681 *et seq.*, by reaching an erroneous outcome in the Hearing because of Park's sex. *Id.* Park's case was assigned to Judge John Kreese,

a QSU alumnus, a former member of a QSU fraternity, and an outspoken fan of its football team. *Id.* Two weeks later, on July 1, 2020, QSU moved to dismiss Park's suit under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. R. at 9a.

Judge Kreese conducted the hearing on the 12(b)(6) motion. *Id.* Despite his obvious allegiance and ties to QSU (going so far as to sing the QSU fight song to begin the proceeding), Judge Kreese seemed to conduct the hearing fairly. *Id.* After the hearing concluded, Judge Kreese did not make a ruling, stating that he would take the matter under advisement. *Id.*

Later that afternoon, Park filed a voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1) and refiled the same lawsuit two months later, this time assigned to Judge Demetri Alexopoulos. *Id.* At this point, QSU filed another 12(b)(6) motion to dismiss alongside a motion under Federal Rule of Civil Procedure 41(d), asking Judge Alexopoulos to find that Park's refiling was in bad faith and/or constituted vexatious litigation. *Id.* QSU asked the Court to award its costs and its attorney's fees in the amount of $74,500. R. at 10a. Park promptly responded to the 12(b)(6) motion and further tendered affidavits from himself and his counsel, explaining that they acted in good faith to avoid perceived bias and to further develop their knowledge of the applicable law. *Id.*

The United States District Court for the District of Quicksilver granted both of QSU's motions and reduced the attorney's fees award to $28,150. R. at 11a. Park filed his appeal to the United States Court of Appeals for the Fourteenth Circuit. *Id.*

The Fourteenth Circuit affirmed the district court's dismissal of Park's suit under Rule 12(b)(6), holding that QSU's limitations on cross-examination and failure to compel Roe to reveal her face while she testified did not violate Park's due-process right to support his § 1983 claim. R. at 11a, 20a. The Fourteenth Circuit also held that Park's Title IX claim did not plausibly allege facts that causally connected the alleged erroneous outcome with gender bias. R. at 28a. Regarding the Rule 41(d) motion, the Fourteenth Circuit found that the district court did not abuse its discretion by awarding attorney's fees. R. at 37a. The opinion applies the hybrid approach used in circuit courts, finding that Park's dismissed his case either to avoid an unfavorable judgment or to vexatiously gain a tactical advantage. *Id.* Yet the Fourteenth Circuit stopped short of fully endorsing the hybrid approach over the always-awardable approach to avoid issuing an advisory opinion. R. at 36a.

Circuit Judge Fernandez wrote a concurrence, agreeing that the district court did not abuse its discretion but urging the Fourteenth Circuit to adopt the always-awardable approach. R. at 41a. Circuit Judge Walt dissented, arguing that QSU deprived Park's due-process rights and discriminated against him on inherent gender biases. R. at 45a. Moreover, the dissent advocated for the adoption of the never-awardable approach based on Rule 41(d)'s plain language and found that even under the more lenient hybrid approach, Park did not act in bad faith to justify the awarding of attorney's fees. R. at 55a–58a.

Park appealed the judgment from the Fourteenth Circuit, and this Court granted the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENTS

I.

The Fourteenth Circuit erred in holding that a student facing expulsion is not entitled to ask direct and unfettered questions to his accuser and to insist that she testify without an opaque face mask to reasonably probe her credibility. The Due Process Clause of the Fourteenth Amendment protects against deprivations of a student's liberty and property interests without due process of law. Consequently, disciplinary hearings for whether a student should be expelled require due-process protections. The level of process due depends on the severity of the student's deprivation, the risk of error without additional or alternative safeguards, and the administrative and private burden of implementing those additional procedures.

The severity of the student's deprivation is greatest when he faces expulsion, especially when the decision rests entirely on credibility contests between the accuser and accused. Thus, even though an adversarial setting might evoke trauma for an alleged victim of sexual assault, the risk of reaching a wrongful verdict because of the failure to adequately probe witness credibility and veracity outweighs other concerns, especially when mitigating steps are taken to ensure some degree of student comfort.

The right to insist that a witness remove her face covering during her testimony also implicates due-process concerns. Evaluation of the witness's demeanor is so crucial for credibility determinations that some courts entirely disregard any cross-examination from a witness whose face was covered while testifying. But where

viable alternatives means or methods exist to accommodate the health interests of witness at minimal cost to the university, then due-process concerns are satisfied.

The Fourteenth Circuit also erred in denying Park relief under Title IX. To demonstrate that a university violated Title IX for such an injury, the student must first cast doubt on the accuracy of the erroneous outcome and then establish a causal connection between the outcome and gender bias. Because due-process violations address the first inquiry, a plaintiff could satisfy the second prong by pointing to disparate treatment of the accused and the accuser during the proceeding and plausibly alleging ulterior motives based on Title IX's conditional funding. Park plausibly alleged instances of unfair questioning and harsher treatment that indicate the Board's bias toward him based on his sex. Thus, this Court should reverse the Fourteenth Circuit's holding and find that Park's Title IX did not deserve dismissal.

II.

Federal Rule of Civil Procedure 41(d) cannot be interpreted as allowing recovery of attorney's fees as Respondent is requesting. This Court has been persistent in maintain the American Rule and its presumption against fee-shifting. To deviate from that presumption requires express authority in the provision's text or explicit, specific evidence from Congress.

Therefore, this Court should reverse the Fourteenth Circuit's decision for three reasons. First, the always-awardable approach and the hybrid-approach disregard the ambiguous language of Rule 41(d) and also incorrectly infer that Congress has otherwise provided specific authority when that is not the case. Second, the

Fourteenth Circuit improperly declined to follow the never-awardable approach, which is the only correct interpretation of Rule 41. Finally, even if the hybrid-approach were plausible, its stringent standards were not satisfied in this case despite the district court's improper conclusion, which misapplied legal principle and overlooked pertinent facts.

STANDARD OF REVIEW

This case considers questions of law concerning the Due Process Clause, Title IX, and Rule 41(d). Questions of law are reviewed de novo. *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020).

For appeals that arise from a Rule 12(b)(6) motion to dismiss, this Court accepts as true all well-pleaded, non-conclusory facts from the complaint. *Ashcroft v. al–Kidd*, 563 U.S. 731, 734 (2011). The pleadings bar is especially low because all reasonable inferences drawn from these facts must be interpreted in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the facts raise a right of relief beyond mere speculation, then the claimant avoids dismissal. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A lower court's legal interpretation of Rule 41(d) is subject to de novo review. *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 309 (4th Cir. 2015). The legal principles used to meet the interpretation of the Rule are reviewed for an abuse of discretion. *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1236 (10th Cir. 2013). Finally, if the award of attorney's fees results from a finding of fact, then the applicable standard of review is for clear error. *United States v. Hardage*, 985 F.2d 1427, 1436–37 (10th Cir. 1993); *see Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 800 (5th Cir. 2006).

ARGUMENTS AND AUTHORITIES

I. The Fourteenth Amendment and Title IX afford Park the right to conduct direct and unfettered cross-examination against an adverse witness unobscured by face covering.

The Fourteenth Circuit erred by denying Park his constitutional right to confront and cross-examine his accuser. The Fourteenth Amendment enshrines this procedural right in the Due Process Clause, which prohibits the deprivation of "life, liberty, and property, without due process of law." U.S. CONST. amend. XIV, § 1. The Due Process Clause applies in almost every matter where such deprivations turn on questions of fact. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). An individual who suffers thusly at the hands of a state actor can bring a cause of action under 42 U.S.C. § 1983. *Doe v. Purdue Univ.*, 928 F.3d 652, 659 (7th Cir. 2019). When a university like Respondent deprives a student's liberty and property interests in pursuing his education without adequate process, that student can seek redress under § 1983. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975).

The stringency of due-process requirements heightens for serious deprivations. Basic due process requires notice and an opportunity to "respond, explain, and defend." *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988). But this requirement represents merely the floor of acceptable procedures, and the true inquiry revolves around "what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). This determination evaluates three factors: (1) the nature of the private interest affected, (2) the danger of error and the probative benefit of additional or alternate procedures, and (3) the administrative burden of mandating those additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The Mathews *Test in School Disciplinary Hearings*

Under *Mathews*'s first prong, a student's private interest is strongest when facing expulsion. *See Goss*, 419 U.S. at 575. Expulsion can devastate a student's reputation and quality of life, with far-reaching consequences for future employment prospects. *See id.*; *see also Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 602 (D. Mass. 2016). Expulsions resulting from sexual assault allegations are the most serious since the only evidence is often just the accused's word against the accusers. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017).

Thus, under *Mathews*'s second prong, these "he-said/she-said" cases need heightened cross-examination to avoid erroneous conclusions. *See id.* at 401–02; *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005). Cross-examination tests credibility like no other procedural device. *Doe v. Mich. State Univ.*, 989 F.3d 418, 429–30 (6th Cir. 2021); *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

For *Mathews*'s final prong, the burden of more stringent cross-examination procedure is light compared to the gravity of expulsion. This is particularly true when existing procedures require only minor changes. *See Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016). Universities might be unduly burdened if required to adopt the rigor of criminal proceedings. *See Flaim*, 418 F.3d at 635. But schools are now adjudicating sexual assault claims "that constitute serious felonies under virtually every state's laws." *Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016). Indeed, due-process concerns are highest when a student faces expulsion for these allegations. *See Mich. State.*, 989 F.3d at 434 (Nalbandian, J., concurring).

Additionally, universities must consider the interests of the accuser, especially in cases dealing with campus sexual assault. To combat the prevalence of student sexual assault, the Department of Education issued guidance through the *Dear College Letter* ("DCL") that required a preponderance of the evidence standard when adjudicating sexual misconduct claims and strongly recommended against cross-examination that would engender trauma and hostility.[1]

The fair application of these policies might have resulted in just outcomes for victims of sexual assault. But that is not the case here. Park faced disciplinary sanctions of the utmost severity because of Roe's threadbare accusations. Yet Respondent failed to provide the level of process that he was due: (1) to provide the opportunity to conduct direct and unfettered cross-examination to fairly judge the credibility and demeanor of his accuser and (2) to insist that Roe testify with her face uncovered. Moreover, inherent biases motivated the Board's failure to adopt these two considerations, justifying Park's Title IX claim.

A. Indirect cross-examination consisting of pre-submitted questions hindered Park's due-process right to actively probe Roe's credibility.

The demand for questions to be submitted before the hearing for review stripped Park of his right to meaningfully react to Roe's initial live testimony in a probative way. And because the Board had the exclusive ability to question the witnesses, Park was also deprived of zealously defending his own interests. The

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[1] *See* "Dear Colleague" Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. DEP'T OF EDUC. (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

Board's system is undoubtedly a "stilted method" that "does not allow for immediate follow-up questions based on a witness's answers, and stifles [the accused's] presentation of his defense to the allegations." *Doe v. Univ. of Notre Dame*, 2017 WL 1836939, at *10 (N.D. Ind. May 8, 2017).

1. *Direct cross-examination is crucial for credibility determinations*

Where questions of credibility are of utmost importance, the adversarial system must rise to the same level to allow for direct cross-examination of an adverse witness. *See Cincinnati*, 872 F.3d at 406; *Doe v. Baum*, 903 F.3d 575, 583 (6th Cir. 2018). For example, in *Cincinnati* and *Baum*, the accused was entitled to "back-and-forth adversarial questioning" to "probe the witness's story to test her memory, intelligence, or potential ulterior motives." *Baum*, 903 F.3d at 582–83 (quoting *Univ. of Cincinnati*, 872 F.3d at 402). In both cases, whether the sexual assault occurred depended entirely on the opposing testimonies of the accuser and the accused, without any physical evidence to corroborate either account. *Cincinnati*, 872 F.3d at 396; *Baum*, 903 F.3d at 582.

In *Baum*, the university did not allow direct cross-examination, allowing the accused only to review the victim's written statement and submit a response identifying inconsistencies. 903 F.3d at 582. The university argued that there would consequently be no added benefit to cross-examination. *Id.* Yet the Sixth Circuit rejected the position, clarifying that the core purpose of cross-examination was not meant solely to draw attention to alleged inconsistencies—instead, it is also essential in credibility contests because it takes aim at credibility like no other procedural

device. *Id.* Indeed, "without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives." *Id.*

Conversely, courts have found that indirect cross-examination is constitutionally satisfactory only when the specters of credibility and veracity are not present. *See Winnick v. Manning*, 460 F.2d 545, 549–50 (2d. Cir. 1972). In *Winnick*, the Second Circuit held that a student challenging a semester-long suspension was not entitled to cross-examination because he had admitted facts central to the alleged violation. 460 F.2d at 550; *see also Flaim*, 418 F.3d at 641 (finding that student's admission of felony conviction upon which university issued discipline would render cross-examination fruitless). It is also worth noting that the activity in *Winnick* was a classroom disturbance, a relatively tame mischief compared to a serious crime like sexual assault. *See* 460 F.2d at 547. While the court ultimately did not require an adversarial hearing, it did recognize that direct confrontation may be essential in some cases that deal with a problem of credibility. *Id.* at 549–50. Because credibility is at the forefront of Park's case, direct cross-examination is required. *See id.*

2. *Direct cross-examination by Park's attorney could have been sufficiently adversarial without being traumatic.*

Respondent justifies indirect cross-examination by claiming it would prevent additional trauma. *See Dear Colleague Letter,* at 12. Yet these good intentions can become paternalistic. *See Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019). Barring reasonable questions is the type of "ill-suited kid-gloves approach" that softens cross-examination at the cost of legitimate truth-seeking. *See id.*

Regardless of how "sensitive" a sexual assault proceeding might be, a university is still required to preserve the accused's constitutional rights. *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997). A mutually beneficial solution would be to allow an attorney to conduct the cross-examination would mutually benefit both parties. But Respondent's solution was far from mutually beneficial.

Courts have recognized that "direct" cross-examination does not necessarily mean "personal" cross-examination. *See Baum*, 903 F.3d at 583. For example, the Sixth Circuit recognized a university's motivation to prevent the hostile questioning of a victim. *Id.* To avoid this, the university could allow the accused's counsel to conduct cross-examination on his behalf. *Id.*

This circumvention would also assuage the concerns of allowing untrained individuals to engage in "unfocused questioning and displays of acrimony." *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 867–68 (8th Cir. 2020). Courts have doubted that a cross-examination conducted by a legally unsophisticated student would so increase the probative value of hearings as to be constitutionally required. *Haidak*, 933 F.3d at 69; *see also Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020) (holding that personal cross-examination "might well have led to an unhelpful contentious exchange or even a shouting match"). Allocating cross-examination from the hands of a "relative tyro" to the hands of experienced counsel would prevent the examination from devolving into mere displays of antagonistic debate. *See Haidak*, 933 F.3d at 69.

In the present case, Respondent's constriction of the manner and scope of questioning prevented Park from developing effective cross-examination. The

limitations against Park are more similar to those in *Baum* than the Fourteenth Circuit would have this Court believe. R. at 19a. While the Fourteenth Circuit dismisses *Baum*'s analysis entirely because the university there did not permit cross-examination whatsoever, the factual analogies are not so easily distinguished. *Id.*

The fact-finding systems in both *Baum* and Park's proceeding both dealt with the submission of factual questions and objections without an opportunity to hear live testimony. *Baum* rejected a process in which a student could only challenge discrepancies in his accuser's statements via written responses. Respondent's cross-examination procedure barely rises above this level. R. at 5a, 14a. Because Park's questions and accompanying evidence were submitted beforehand, he could not have actively formed his questions responding to or informed by his accuser's live testimony. *See id.* Instead, like in *Baum*, his questions could not have been anything more than preliminary factual objections posed as questions based on his limited understanding of what his accuser would say during her testimony.

The Fourteenth Circuit also dismisses the valid alternative of allowing Park's counsel to conduct direct cross-examination without a compelling reason. It waves away a cogent solution as unbinding dicta from *Baum* (a moot argument considering that decisions from other circuit courts have only persuasive authority in the first place). R. at 19a. Regardless, *Baum*'s analysis is especially ripe now, since the facts at hand are similar to the circumstance that *Baum* posited would justify direct examination by an attorney. Here, under *Mathews*, the benefits of allowing live adversarial questioning are especially important to judging Roe's credibility, weighed

in consideration of the otherwise stilted cross-examination that barely scratched the inconsistencies of her story. Allowing counsel to directly cross-examine witnesses would also avoid the exchange from devolving into unsophisticated, meandering, and hostile debate, protecting the accuser from any trauma that may result.

B. The Board violated Park's due-process right by restricting Park's ability to ask reasonable questions.

To remove the right of direct cross-examination from the individual to the adjudicator already shirks the Due Process Clause. To then unduly restrict which questions may be asked is an even more egregious abridgement of Park's right to unfettered cross-examination.

Even if this Court were to find that a university would be a suitable intermediary between the accused and the accuser, allowing the school to hold complete discretion over which initial and follow-up questions to allow would be unconstitutional, especially if the questions are reasonably tailored to address deficiencies in a witness's testimony. The central question is "whether the university's inquisitorial approach was so inadequate that it violated [the accused's] procedural due process rights." *Haidak*, 933 F.3d at 70. When a university reserves for itself the right to conduct cross-examination, it bears the responsibility to "reasonably probe the testimony tendered against that student." *Id.* The Board shunned this duty when it proscribed Park from probing discrepancies in Roe's testimony.

1. *The scope of cross-examination must be proportional to the accused's interests.*

The crux of the determination is reasonableness—in no way is unlimited cross-examination justified in university disciplinary proceedings. *See Mich. State*, 989 F.3d at 431. The Sixth Circuit expressly recognizes the need for circumscribing cross-examination of student victims—this Court has even imposed limits on confrontation of victims of sexual violence in full criminal trials. *See id.* (citing *Mich. v. Lucas*, 500 U.S. 145, 149–50 (1991)).

Limitations on irrelevant and non-probative questions are justified. In *Michigan State*, the accused's attorney cross-examined two alleged victims, and after the university's adjudicator permitted the victims to refuse to answer certain questions, the accused student alleged violation of a due-process right to full, unlimited cross-examination. 989 F.3d at 427. Though the Sixth Circuit, drawing upon its precedent in *Doe v. Cummins*, 662 F. App'x 437 (6th Cir. 2016), recognized that limitations on cross-examination were justified when balanced against its potential benefits and costs, as required by the *Mathews* test. *Id.* at 429. Although the court recognized that significant liberty and property interests were at stake, the risk of erroneous deprivation was insignificant: the accused's attorney was allowed to cross-examine the witnesses over a three-day hearing. *Id.* at 432. The barred questions would not have added much probative value. *Id.* And while the administrative costs would not have been substantial, as procedures for cross-examination were already in place, the court found that the additional questioning would pointlessly subject the victims to additional trauma. *Id.*

2. *Questions that directly probe the credibility of witness testimony cannot be limited.*

The lesson garnered from *Michigan State* does not necessarily preclude a student from complaining of limitations upon cross-examination. In fact, its analysis strongly suggests that the issues require a case-by-case, fact-intensive analysis on the quality, not the quantity, of the questions admitted or denied. *See id.* at 435 (Nalbandian, J., concurring).

For example, a witness might answer hundreds of admitted questions on tangential matters, but if a question that directly probes into the credibility or veracity of a key element in the testimony is barred, then the cross-examination right is endangered. *See id.* at 433; *see Doe v. Ohio State Univ.*, 311 F. Supp. 3d 881, 889 (S.D. Ohio 2018). For example, in *Ohio State*, the court found that an accused's cross-examination right was unconstitutionally limited because the university did not allow him to pose questions regarding two alleged misrepresentations to the school. 311 F. Supp. 3d at 893. The misrepresentations of a potential ulterior motive for reporting a sexual assault—a medical student, who had twice failed the first year of medical school, would be granted a reprieve based on the trauma from the alleged assault. *Id.* at 889. Because the accuser falsely claimed that there was no possible motive for her to lie, a follow-up question probing the credibility of her response would have been a reasonable attempt to impeach her honesty. *Id.* Thus, limiting just one category of questioning nonetheless violated the accused's due-process right. *Id.* at 889.

The First Circuit likewise expressed its concern with university policies that restricted the number of questions to value the comfort of the accused. *See Haidak*, 933 F.3d at 70. When the accused submitted a list of thirty-six questions to the Board, twenty were eliminated, creating "the possibility that nobody would effectively confront [the] accusations." *Id.* Yet the Board still managed to afford equal treatment to both parties, probing for details from Roe about the level of her intoxication on the night of the alleged assault. *Id.* As a result, it was able to extract information that partially absolved the accuser of harassment. *Id.* at 70–71. The court concluded that the accused's due-process rights were properly observed because the Board examined the adverse witness "in a manner reasonably calculated to expose any relevant flaws in her claims." *Id.*

Here, while the Fourteenth Circuit found that no harm occurred because the Board asked most of Park's initial questions, this fact alone does not indicate that due-process concerns were observed. R. at 6a. As stated in *Michigan State*'s concurrence, the number of questions admitted or denied does not by itself determine whether there was adequate cross-examination. In fact, because the record does not indicate that Park or his attorney had any investigatory power prior to the hearing, he likely had no idea about what questions to ask until Roe began testifying. Thus, it is probable that the majority of those initial questions were only collateral issues. Additionally, none of the lower courts acknowledged the potential chilling effect that the submission procedure could have had in deciding what questions were likely to be approved. The CSC made clear that the Board would disfavor leading or

adversarial questions, which in turn discourages the type of inquiries that have the strongest probative value. R. at 5a. Consequently, the argument that Respondent avoided due-process violations because it admitted most of Park's questions remains unconvincing. R. at 6a.

The most concerning violation of Park's due-process right occurred when the Board limited Park's follow-up questions. R. at 6a. The Board justifies the denials based on their irrelevance or their intrusion into Roe's personal sphere, but *Mathews* requires that these considerations be balanced against the severity of Park's expulsion and the risk of error that could have been avoided had the questions been asked. R. at 6a–8a. All of Park's follow-up questions centered around the crux of the Board's factual inquiry—was Roe intoxicated at the time she had sex with Park, and did Park have reason to know that she could not give adequate consent as a result? R. at 6a, 7a.

Questions regarding the type of clear alcohol that Roe was drinking at the time are reasonable in determining whether she could recall the specific name of her drink, which seeks to probe her memory of the night in question. R. at 6a. That the Board deemed such questions irrelevant and even aggressive is misguided and unduly protective of the alleged victim's comfort, without considering that a positive answer could strengthen and enhance her credibility. *Id.*

The same is true regarding the questions surrounding her alleged drink purchases and her underage status. R. at 7a. The Board again adopts the "ill-suited kid-gloves" approach to shield Roe from relative intrusions into her right to financial

privacy and to avoid self-incrimination—a glaring double-standard considering that Park was facing an expulsion that deprives a far more serious constitutional right. *Id.* The Fourteenth Circuit agreed that the credit card statements were non-probative since they did not show the specific items ordered, but the proper course of action would have been to allow that information to be volunteered and explained by Roe herself. *Id.* Instead of barring the request completely, she could have been compelled to produce a statement redacting all other irrelevant transactions on her statement to minimize the intrusion.

Questions about the occupation of the alleged victim's father, no matter how irrelevant they may seem on their face, are also more probative than the Fourteenth Circuit suggests. R. at 7a. Granted, whether her father operated a karate dojo or whether he sold cars is not central to the main factual inquiry surrounding the night in question. *Id.* Though where cross-examination addresses the credibility and veracity of a witness's statement, that inquiry is always relevant. Like in *Ohio State*, Park's accuser is potentially misrepresenting a fact that can be readily impeached, but the Board let it go untested. This crucial credibility determination might not have been key to determining Park's innocence or guilt, but it would have lent substantial weight in determining the honesty of the accuser. Ultimately, all of Park's questions were reasonable requests to obtain more relevant information or to ascertain the truth of Roe's statements. The Fourteenth Circuit erred in upholding their denial.

C. The Due Process Clause gives Park the right to insist that Roe's physical demeanor be viewable when testifying.

The ability to observe a witness's facial expressions in full view during cross-examination is critical for both the questioner and the fact-finder to make credibility evaluations of their statements. But face coverings debilitate the efficacy of cross-examination because they restrict the assessment of the witness's physical demeanor. *See Baum*, 903 F.3d at 585. Cross-examination is only useful insofar as the fact-finder's ability can fully view facial expressions, "critical components of body language" that "contribute significantly to the determination of credibility." *United States v. Thompson*, 543 F. Supp. 3d 1156, 1163 (D.N.M. 2021). The right to view adverse witnesses face-to-face is protected by the Confrontation Clause of the Sixth Amendment, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. XVI. Though because the Confrontation Clause applies only in criminal prosecutions, applying it whole-cloth to university disciplinary proceedings would certainly violate the admonishment to prevent them from mirroring criminal trials. *See Flaim*, 418 F.3d at 635.

But simply requiring a witness to testify without a face covering is a far cry from the exacting, complicated evidentiary mechanisms that control examination in criminal proceedings, such as hearsay exceptions and formal oathtaking. *See Crawford v. Washington*, 541 U.S. 36, 40 (2004). In fact, examining the overarching goal of the Confrontation Clause reveals the same principles that guide the Due Process Clause: an opportunity to cross-examine an accuser and to allow the fact-

finder to make credibility judgments based on her responses. *See Mattox v. United States*, 156 U.S. 237, 241 (1895). To some degree, Respondent's disciplinary procedures seek to follow the spirit of the Confrontation Clause in a manner that the Fourteenth Circuit deems acceptable, and drawing the line at requiring a witness to remove her mask is an arbitrary distinction. Instead, a proper calculation must arise from weighing the probative value and imposed burdens of the proposed measure against the risk of an erroneous deprivation of the accused's interests.

1. Park's liberty and property interests outweigh Roe's physical safety interests.

The Fourteenth Circuit did not correctly balance Park and Roe's interests to determine what process is due. Under *Mathews*, the proper level of due process asks if Roe's interest in wearing a mask is so great that it does not justify the probative value gained by requiring her to remove it. Because the evidentiary and credibility deficiencies in Park's proceeding exacerbated the risk of a wrongful expulsion, Park's interests in preserving his reputation and livelihood substantially outweigh the health risks that Roe incurs if she were to testify without her mask.

Park requested that Roe be compelled to remove her face mask whenever she spoke or answered questions at the onset of the hearing. R. at 5a. If the Board had approved his request, then the probative value of that accommodation would have been significant compared to the deficits in the Hearing's procedures. Viewing Roe's face during testimony would be the only fertile ground for the Board to make material credibility conclusions. Granted, Roe's COVID-related safety concerns are valid. At the time of the Hearing, COVID-19 was still a poorly understood disease. R. at 24a.

Here, however, it is this uncertainty that makes Roe's physical safety interests more nebulous as well. For Park, the clear and present danger of risking the deprivation of his livelihood is tangible and imminent. For Respondent to value Roe's unmanifested fears over Park's exemplifies more of the paternalistic coddling of student comfort that *Haidak* rejects. Indeed, the Fourteenth Circuit even unjustifiably infers that protections insulating a victim of sexual assault from further trauma also include protecting her from physical danger as well. But this reading does not comport with the DCL nor with the analysis of courts like who have only held that limitations on due process were justified when they had the legitimate purpose of preventing a victim from reliving her trauma. Thus, requiring Roe to remove her mask would have been an acceptable curtailment of her interests for the sake of upholding Park's.

2. Facial coverings inhibit fact-finders ability to observe witness demeanor.

The availability of alternative measures can satisfy any health concerns at minimal cost. Respondent's failure to adequately consider or implement these alternatives also added to the risk of Park's unjust outcome without any justifiable gain in student comfort. Other courts have provided alternate means of ensuring the physical safety of individuals while still retaining the full rights of the accused. *See Thompson*, 543 F. Supp. 3d at 1163; *see also United States v. Robertson*, 2019 WL 5457082, at *2 (D.N.M. Oct. 24, 2019). The courts in both *Thompson* and *Robertson* minimized health risks posed by COVID-19 by ordering witnesses to substitute face masks for clear face shields that would not obstruct facial expressions. *Id.*

Similarly, video conferencing has also served as a valid substitute for in-person appearances. After all, the trier of fact's ability to evaluate witness credibility is contingent upon the witness's physical demeanor, not the physical presence in a courtroom. *See Cincinnati*, 872 F.3d at 406. Courts, in both civil and criminal proceedings, have thus utilized remote video technology expansively. *Sonrai Sys., LLC v. Romano*, 2020 U.S. Dist. LEXIS 122339, at *6 (N.D. Ill. July 13, 2020); *Shockey v. Huhtamaki, Inc.*, 280 F.R.D. 598, 602 (D. Kan. 2012). This method ensured that non-verbal demeanor could be assessed during criminal proceedings. *Shockey*, 280 F.R.D. at 602. Civil proceedings also determined that remote video communication sufficed for credibility determinations during depositions, which had been hindered by facial coverings worn in-person. *See Reynard v. Washburn Univ. of Topeka*, 2020 WL 3791876, at *6 (D. Kan. July 7, 2020). Critically, remote testifying allows the observations necessary to assess witness credibility while limiting the right of the accused to physically confront his accuser, a concern that Respondent felt should be limited exclusively to criminal cases. *Doe v. Transylvania Univ.*, 2020 WL 1860696, at *27 (E.D. Ky. Apr. 13, 2020).

Here, Respondent could have mandated that Roe testify with a different type of facial covering that would not have obstructed most of her face. R. at 8a; Clar. Ans. 3 (clarifying that she wore an opaque N95 mask that fully covered her nose and mouth). Clear facemasks were available in the state of Quicksilver at the time. Clar. Ans. 4. These options would have satisfied due process as Roe's credibility could not have otherwise been properly ascertained. Under *Mathews*, it is difficult to justify

why using these alternative safety methods would have imposed an unmanageable burden on either Roe or Respondent, especially when balanced with the likelihood of error under the current approach. Despite these feasible alternatives, Respondent failed to give Park the process he was due. Thus, this Court should reverse the Fourteenth Circuit.

D. The Board's unfounded credibility determinations and inherent biases violated Park's Title IX rights.

The culmination of due-process violations led the Board to find Park's guilt, based on evidence obtained from half-baked procedure. Courts have steadfastly maintained that due-process violations must be examined as a whole to see if they "shock the conscience." *See, e.g., T.D. v. Patton*, 868 F.3d 1209 (10th Cir. 2017); *Lock v. Jenkins*, 641 F.2d 488, 491 (7th Cir. 1981) (finding that conditions must be examined cumulatively to determine if due process was met). Taken individually, each of the claims in Respondent's disciplinary process is constitutionally questionable. But when examined in their totality, they present an egregious violation of Park's due process, which, had it been properly applied, would have potentially resulted in a different outcome.

The Board's conclusion is the erroneous outcome contemplated by the second prong of *Mathews*, in which procedural defects led to a holding based on unfounded accusations. Thus, Park has valid ground to challenge the decision with the rights he also has under Title IX, under which he plausibly alleged that he was discriminated against on the basis of his sex. For a Title IX claim to prevail on an erroneous outcome theory, Park must plead facts sufficient to cast "articulable doubt on the accuracy of

the outcome," as well as a particularized causal connection between the flawed outcome and gender bias. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). The record, especially taken in the light most favorable to Park, fulfills these elements.

1. Park questioned the accuracy of the outcome given Respondent's failure to ensure adequate due-process.

Park sufficiently alleged facts to satisfy the first prong of the *Yusuf* test. Some courts recognize this prong can be met in "a number of ways including (i) pointing to procedural flaws in the investigatory and adjudicative processes, (ii) noting inconsistencies or errors in the adjudicator's oral or written findings, or (iii) challenging the overall sufficiency and reliability of the evidence." *Doe v. Univ. of Dayton*, 2018 WL 1393894, at *23–24 (S.D. Ohio 2018) (citation omitted).

Importantly, the bar to meet the first prong of the *Yusuf* test is not a high one. *See Norris v. Univ. of Colo.* 362 F. Supp. 3d 1001, 1011 (D. Colo. 2019). For example, in *Baum*, this prong was satisfied when a university did not provide an opportunity for cross-examination. 903 F.3d at 585–86; *see Doe v. Miami Univ*, 882 F.3d 579, 592 (6th Cir. 2018). Likewise, in *Miami University*, there was adequate doubt surrounding the accuracy of a hearing's findings when the panel conducting the investigatory hearing did not sufficiently analyze evidentiary inconsistencies—something that was also unexplored in Park's case through the limitation of his follow-up questions. 883 F.3d at 592; R. at 6a, 7a.

Here, there is enough reasonable doubt surrounding the accuracy of the Board's final decision to pass muster under the first prong of *Yusuf*. Inherent flaws in the investigatory and adjudicatory process allowed tenuous, unsubstantiated

testimony to stand. For example, Park was not allowed to conduct a direct cross-examination despite the fact that expulsion threatened Park's future employment and educational opportunities. R. at 5a. Further, Roe's use of an opaque face mask impaired the fact-finder's ability to judge her credibility based on her facial expressions—a factor that multiple courts have found to be crucial in assessing the credibility of a person. *See, e.g.*, *Reynard*, 2020 WL 3791876, at *6; *Transylvania Univ.*, 2020 WL 1860696, at *27; R. at 8a. Lastly, the Board's prohibition of Park's follow-up questions that pointed directly at the discrepancies in Roe's testimony presented the greatest danger of leading to a wrongful outcome. R. at 6a, 7a.

2. Park's pleading sufficiently showed a connection between the flawed outcome and gender bias.

The second prong of *Yusuf* requires that an individual must show a causal connection between the flawed outcome in a disciplinary hearing and gender bias. 35 F.3d at 715. Usually, this is done through any evidence that shows "gender was a motivating factor in the decision to discipline." *Doe v. Colgate Univ.*, 760 Fed. App'x 22, 30 (2d Cir. 2019). The court in *Yusuf* elaborated that evidence may be composed of "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." 35 F.3d at 715.

When evidence favors one party's version of a disputed matter where credibility is of issue, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based on the evidence), it is plausible to infer that the evaluator was influenced by bias. *See Doe v. Columbia Univ.*, 831 F.3d 46, 57 (2d Cir.

2016). It is true that simply alleging that a disciplinary process favors a female accuser over an accused male "do[es] not necessarily relate to bias on account of sex." *Id.* But Rule 12(b)(6) "does not require that the inference of discriminatory intent supported by the pleaded facts be *the most plausible* explanation of the defendant's conduct." *Id.* at 57 (2d Cir. 2016) (emphasis added). It is sufficient if the inference of discriminatory intent is simply plausible. *See id.* The Seventh Circuit clarifies that the best way to analyze a Title IX claim is to ask, "Do the alleged facts, if true, raise a plausible inference that the university discriminated against [the Plaintiff] 'on the basis of sex'?" *See Purdue Univ.*, 928 F.3d at 667–68.

For example, in *Purdue*, the court found that the DCL provided a contextual backdrop that, when accompanied by particularized facts of discrimination, gave rise to a plausible claim. *Id.* at 668. The accused student argued that the DCL's guidance substantially influenced the procedures of the school for sexual assault claims because it "mandate[ed] that schools prioritize the investigation and resolution of harassment claims" and requir[ed] them to adopt a lenient 'more likely than not' burden of proof when adjudicating claims against alleged perpetrators." *Id.* The court found that the letter created a plausible inference that the university had a financial motive for discriminating against males in sexual assault investigations to elevate the number of punishments. *Id.* Other courts have likewise found that the DCL is relevant in evaluating plausibility and bias in Title IX claims. See e.g., *Miami Univ.*, 882 F.3d at 594; *Baum*, 903 F.3d at 586; *Columbia Univ.*, 831 F.3d at 58.

In the present case, it is critical to note that the bar for Park's pleading is exceedingly low under Rule 12(b)(6). In addition to taking all well-pleaded allegations in the complaint as true, the standard also mandates resolving all reasonable inferences drawn from those facts in favor of Park. Here, Park experienced discrimination arising from unfair policies influenced by DCL's guidance. Park alleged that the Board seemed to favor Roe's position, going so far as to smile at her and frown at him, praise her for stepping forward during the hearing, and discredit significantly more of Park's follow-up questions than Roe's. R. at 28a, 56a. An allegation itself might not have evidentiary weight, but taken as true, the Board's bias is apparent, especially when they curbed Park from asking reasonable questions that only sought to point out discrepancies in Roe's responses. Further, one of the Board members made a particularly damaging comment when they "grilled Park about 'statistics' showing that only 'two to ten percent' of rape allegations ultimately prove to be false." R. at 57a. It is true that these facts alone do not conclusively provide the grounds to prevail on a Title IX claim, but that is not the purpose of Rule 12(b)(6). When paired with the policy motivations behind the DCL, this satisfies a plausibility of gender bias that is indicative of an erroneous outcome. Here, Park has pled sufficient facts to survive a motion to dismiss, which would meet the second prong of *Yusuf*. Thus, this Court should reverse the Fourteenth Circuit finding that Respondent did not violate Title IX.

II. Under Federal Rule of Civil Procedure 41(d), "costs" do not include "attorney's fees."

The second issue before this Court concerns the permissibility of recovering attorney's fees under Rule 41(d). The Fourteenth Circuit's holding is without textual predicate, supporting precedent, and factual reason. It creates inconsistency across the Federal Rules of Civil Procedure and federal statutes. Most concerningly, it usurps Congress's authority by disregarding the separation of powers.

Rule 41(d) interpretation remains subject to a circuit split. Courts that have adjudicated the issue have adopted one of three approaches: (1) the always-awardable approach, (2) the never-awardable approach, and (3) the hybrid approach. The Fourteenth Circuit and the district court declined to follow the never-awardable approach in favor of the other two. R. at 37a. This decision was incorrect.

The always-awardable approach is followed by the Second, Eighth, and Tenth Circuits.[2] Relying on Rule 41(d)'s purpose, which is to prevent forum shopping and vexatious litigation, the Second Circuit argues that purpose would be "substantially undermined" if attorney's fees were unavailable. *Horowitz*, 888 F.3d at 25. Finding that Rule 41(d) allows for fee recovery because of a district court's discretionary power underlies the Eighth and Tenth Circuits decision to adopt the always-awardable approach. *See Meredith*, 216 F.3d at 1087; *Evans*, 623 F.2d at 22.

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[2] *See Horowitz v. 148 South Emerson Assoc. LLC*, 888 F.3d 13, 24 (2d Cir. 2018); *Meredith v. Stovall*, 216 F.3d 1087, 1078 (10th Cir. 2000); *Evans v. Safeway Stores*, Inc., 623 F.2d 121, 122 (8th Cir. 1980) (per curiam).

The Sixth Circuit has adopted the never-awardable approach. Contrary to the always-awardable approach, its holding is rooted in this Court's precedent and the American Rule's presumption against fee-shifting. *Rogers v. Wal-Mart Stores, Inc.,* 230 F.3d 868, 874 (6th Cir. 2000).

The Third, Fourth, Fifth, Seventh, and Ninth Circuits opt for a hybrid of the first two approaches.[3] These courts primarily focus on the underlying substantive statute of a claim and on the district court's discretion to penalize a litigant acting in bad faith as they deem necessary.

The Fourteenth Circuit disregarded the never-awardable approach and instead embraced the always-awardable and hybrid approaches despite decades of precedent instructing otherwise. R. at 35a. It affirmed the district court's decision to grant Respondent's fee request even though no support for that conclusion exists in the record. *Id.* This decision was incorrect for three reasons. First, the presumption against fee-shifting can only be overcome by Congress authorizing fee recovery in the text of a statute or by explicitly indicating any deviation. Second, the never-awardable approach is the correct interpretation due to Rule 41(d)'s text and this Court's precedent. Finally, even if the hybrid approach were correct, the stringent standards are not met in this case.

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[3] *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017); *Garza v. Citigroup Inc.*, 881 F.3d 277, 282–83 (3d Cir. 2018); *Andrews*, 827 F.3d at 311; *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000); *Moskowitz v. American Savings Bank*, F.S.B., 37 F.4th 538, 546 (9th Cir. 2022).

A. The presumption against fees requires courts to first look to the text and meet the express evidentiary standard to deviate from the baseline.

The presumption against fee-shifting prevents courts from disregarding the plain language and the standards required to deviate from the American Rule. The American Rule requires each party to pay their own attorney's fees in litigation, regardless of whether that party won or lost, unless otherwise provided by a statute or contract. *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 370 (2019). In the words of this Court, "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow fees under some, but not others." *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 263 (1975).

Neither the district court nor the Fourteenth Circuit can overcome the applicability of the American Rule. *Peter,* 140 S. Ct. at 371. There has never been a suggestion "that any statute is exempt from the presumption against fee-shifting. Nor has [the Court] limited its American Rule inquiries to prevailing party statutes." *Id.*

1. *The text and record of statutory usage confirm fees are not recoverable, which invalidates the always-awardable approach.*

Resolving the issue in this case begins with an analysis of Rule 41(d)'s language, as is customary when interpreting statutes. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The text of Rule 41(d) neither explicitly nor implicitly indicates "costs" should be interpreted as including attorney's fees:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the 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. RULE CIV. P. 41(d)(1)–(2). It is undeniable that this language does not indicate a means for fee recovery. It is true that the absence of explicit authority in the text of a provision is not necessarily dispositive to overcoming the presumption. But that is only so if Congress provided "a sufficiently 'specific and explicit' indication of its intent to overcome the American Rule's presumption against fee shifting." *Peter*, 140 S. Ct. at 365 (quoting *Alyeska,* 421 U.S. at 263). That is not the case for Rule 41(d).

As a result, the always-awardable approach's legitimacy is bolstered by two principal facts. First, as defined by multiple dictionaries, the terms "costs" and "fees" contain different connotations and purposes. Second, Congress included "attorney's fees" repeatedly in the Federal Rules, and therefore, the omission of that term in Rule 41(d) is persuasive.

Comparing legal and lay definitions of "costs" reveal it is a term of art given specific meaning in the context of federal litigation. For example, the legal definition holds, "Generally, 'costs' do not include attorney fees unless such fees are by a statute denominated costs or are by statute allowed to be recovered as costs in the case." *Cost*, BLACK'S LAW DICTIONARY 346 (6th ed. 1990). On the other hand, the common usage of the term was defined as "legal expenses, especially those allowed in favor of the winning party or against the losing party in a suit." *The Oxford Dictionary and Thesaurus* 317 (Am. ed. 1996).

To the same effect, the frequent use of "attorney's fees" in the Federal Rules implies that Congress recognizes the two terms as distinct, not interchangeable. *See*

FED. R. CIV. P. 54(d). Many rules also provide sub-provisions confirming when expenses or recovery includes attorney's fees. *See, e.g.*, FED. R. CIV. P. 4, 11. This inclusion in other rules once again indicates that the omission of attorney's fees in Rule 41(d) is instructive. Additionally, the Advisory Committee Notes do not define or interpret "attorney's fees" for Rule 41(d).

2. *The always-awardable approach and hybrid-approach cannot overcome the text and absence of specific and explicit evidence needed to deviate from the presumption.*

Because of Rule 41(d)'s plain language and the record of its statutory usage, there are no grounds for the always-awardable approach. Not only does the always-awardable approach ground its analysis incorrectly, but it altogether fails to recognize the presumption of the American Rule. Contrarily, not only does the never-awardable approach adhere to the text of Rule 41(d) and the American Rule presumption, but it also respects the boundary between the courts and the legislature.

In adopting the never-awardable approach, the Sixth Circuit concluded that because the Federal Rules of Civil Procedure are inconsistent and "ambiguous at best" on the applicability of attorney's fees, it does not evince an intent to the degree that is necessary to deviate from the American Rule. *Rogers*, 230 F.3d at 874. Specifically, the Sixth Circuit found that when Congress does intend for attorney's fees to be available under a statute or rule, "it has usually stated as much and not left the courts guessing." *Id.*

As the dissent stated, when "Congress knows how to say something but chooses not to, its silence is controlling." R. at 59a; (quoting *Pinares v. United Techs. Corp.*,

973 F.3d 1254, 1262 (11th Cir. 2020) (citation omitted)). And further, Congress has shown that when it does intend for a party to bear the burden of the winner's fees, it not only knows how to do just that, but it has done just that. R. at 59a.

Therefore, the Fourteenth Circuit improperly agreed with the always-awardable approach and the never-awardable approach because they disregard the American Rule, the text, and the stringent standards needed to deviate from the presumption against fee-shifting.

B. The Fourteenth Circuit incorrectly declined to follow the never-awardable approach.

Declining to follow the never-awardable approach solely for the sake of policy and ignoring the extensive cases where this Court has interpreted Rule 41 was incorrect. The never-awardable approach should have been adopted for three reasons: (1) it grounds its legitimacy in recent precedent on the issue, (2) it avoids subjective policy preferences, and (3) it recognizes that allowing fees would re-write the Rule which is solely within Congress's powers and not the courts.

The Fourteenth Circuit relied extensively on this Court's decision in *Marek v. Chesny,* 473 U.S. 1, 1 (1985). In doing so, the Fourteenth Circuit ignored *all* of the cases that this Court has decided since. *See, e.g., Key Tronic Corp. v. United States*, 511 U.S. 809, 814-15 (1994). Instead of treating *Marek* as if it exists in a vacuum, the Fourteenth Circuit should have adhered to the numerous cases that can only justify the never-awardable approach.

In *Key Tronic,* this Court did not permit fee recovery under a statute with the term "necessary costs." 511 U.S. at 814-15. The statutory provision at issue charged

responsible parties with "any necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 96708(a)(4)(D). *Key Tronic*'s analysis emphasized that fee recovery is never the presumption "absent explicit congressional authorization." 511 U.S. at 814-15. Deviating from the standard requires a textual showing that "Congress intended to set aside this longstanding American rule of law in the absence of "attorney's fees." *Id.* Mere "[g]eneralized commands" will not suffice. *Id.*

Unlike *Key Tronic*, *Marek* allowed fee recovery for "costs" as used in Rule 68, which states that when an offer for settlement is turned down, if the judgment amount is less than what is favorable, the "offeree must pay the costs incurred after making the offer." FED. R. CIV. P. § 68. The inconsistent interpretation of "costs" and the increasing number of federal statutes with fee-recovery provisions caused the majority to conclude that Congress's omission of a specific prohibition allowed for those fees. *Marek,* 473 U.S. at 8-9. The majority held that Congress had to be aware of the ever-changing atmosphere regarding "costs" and thus fee-recovery was permissible. *Id.*

But *Marek* was decided nine years prior to *Key Tronic*'s decision. Since *Key Tronic*, this Court has maintained its position on fee-recovery and on when parting from that presumption is acceptable. *See Peter,* 140 S. Ct. at 371 (holding Patent Act provision could not allow fee recovery, and prevailing party statutes are not excused from the American Rule or treated any differently); *Baker Botts L.L.P, v. ASARCO LLC,* 576 U.S. 121, 125 (2015) (finding bankruptcy provisions as being capacious

enough to include fees, but not specific or explicit enough to authorize deviating from American Rule); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 253 (2010) (holding the basic point of reference is the American Rule); *Sebelius v. Cloer*, 569 U.S. 369, 369 (2013) (confirming the presumption against fee shifting applies to all statutes).

The Fourteenth Circuit's embrace the never-awardable approach amounts to judicial legislation. Criticizing the majority's holding, the dissent pointed out that "courts that have interpreted Rule 41(d) as allowing for the recovery of attorney's fees generally have done so because they deem such awards better further their assumptions about the policy for the rule." This Court has noted that courts cannot "jettison the traditional rule against non-statutory allowances to the prevailing party and to award attorney's fees whenever the courts deem the public policy is important enough to warrant the award." *Alyeska Pipeline,* 421 U.S. at 263. But that is exactly what was done in this case. These subjective preferences do not change the fact that the text of a provision is the "primary guide" to Congress's preferred policy. R. at 60a. Here, the text of 41(d) reveals Congress never intended for the American Rule to be abandoned.

Allowing fee-recovery changes here would be rewriting the statute. Therefore, the never-awardable approach is also correct in the way it recognizes the boundaries of a court's authority. The Sixth Circuit explained that when Congress does intend for attorney's fees to be available under a statute or rule, "it has usually stated as much and not left the courts guessing." *Rogers,* 230 F.3d at 874. The dissenting

opinion in the Fourteenth Circuit's decision similarly argued that when many courts have used policy as their reason to overlook the language, "it is not our role to rewrite the law under the guise of interpreting it." R. at 60a. The never-awardable approach should be adopted to avoid disregarding precedent, prioritizing subjective policy, and violating the separation of powers.

C. Even if the hybrid approach were to be adopted, Respondent cannot recover attorney's fees because the district court erred in applying the legal principles.

The hybrid approach adopted in the Third, Fourth, Fifth, Seventh and Ninth Circuits[4] applies the Court's analysis from *Marek*, which used the underlying substantive statute of a claim as "specific and explicit" evidence to deviate from the text. 473 U.S. at 1 (1985). The question was whether Rule 68's "costs" could be interpreted as attorney's fees when § 1988's prevailing party provision undergirds the Rule. This Court concluded it could. To reach this conclusion, this Court first recognized that at the time of adoption, federal statutes had specifically provided for a deviation from the Rule for nearly a century. *Marek*, 473 U.S. at 175.

Another form of the hybrid approach recognizes fee-recovery in Rule 41(d) only when bad faith has been established by the plaintiff. To establish this, courts look for proof of bad faith in the forms of vexatious litigation and forum shopping.[5]

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[4] *Garza*, 881 F.3d at 279; *Andrews*, 827 F.3d at 311; *Portillo,* 872 F.3d at 739; *Esposito*, 223 F.3d at 501; *Moskowitz*, 37 F.4th at 546.

[5] *Horowitz*, 888 F.3d at 25–26; *Andrews,* 827 F.3d at 311; *Meredith*, 216 F.3d at 1087.

1. The "*underlying substantive analysis" approach fails because Respondent is not a prevailing party.*

If the "underlying substantive analysis" approach were correct, Respondent does not meet the standard necessary to recover attorney's fees. In Rule 41(d), in cases where a plaintiff voluntarily dismissed his claim prior to receiving judgment on the merits, a defendant cannot be a "prevailing party" as defined in § 1988—unless defendant proves that the reason for voluntary dismissal was to avoid unfavorable judgments. 42 U.S.C. § 1988. If the defendant is able to prove the dismissal was out of that motivation, the defendant must further show that the plaintiff's claim was frivolous, groundless, or meritless.

For prevailing plaintiffs seeking attorney's fees under § 1983, courts have found that they "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Garza*, 881 F.3d at 283 (quoting *Newman v. Piggie Park Enters.*, Inc., 390 U.S. 400, 402 (1968) (per curiam)). In contrast, prevailing defendants may only recover attorney's fees if the plaintiff's claim was "frivolous, unreasonable, or groundless." *Garza*, 881 F.3d at 283 n.6 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)). The Fourth Circuit found the hybrid approach requires a thorough analysis of the underlying substantive statute and a finding of bad faith, vexatious litigation, or forum shopping. *See Andrews,* 827 F.3d at 312.

The Fifth Circuit clarified that when making this determination, courts are to look at the record, "supplemented by affidavits and, only if necessary, testimonial evidence." *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001). Additional relevant

inquiries include, but are not limited to, "information concerning discovery delays and abuses, slothful prosecution, negative rulings, and sanctions against the plaintiff," or any other relevancies. *Id.*

Here, the district court and the Fourteenth Circuit both erred by failing to apply the legal principles used by courts when determining nonsuit motivations. Park and his counsel tendered affidavits thoroughly explaining there was neither bad faith nor a "desire to engage in vexatious litigation" at the time of refiling. R. at 10a. In fact, the affidavits utilized Federal Rule of Civil Procedure 11(b) to preclude any misplaced conceptions about the motivations. *Id.* His counsel even communicated that "the dismissal was prompted by counsel's 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." *Id.* (emphasis added). Respondent neither filed counter affidavits nor objected Park and his counsel's filings. *Id.*

Nowhere in the record is there evidence of the relevant information the Fifth Circuit provided. The record does not indicate any sanctions, negative rulings, or slothful conduct by Park. In fact, the record provides the opposite of dilatory conduct, noting that Park's response to the second 12(b)(6) motion was "prompt." R. at 10a.

The record also provides no basis for any inferences that Judge Kreese would find for Respondent. First, in his dissenting opinion, Judge Walt emphasized two facts that neither lower court acknowledged. R. at 58a. First, the original claim was the first motion on the morning docket. *Id.* Second, Judge Kreese told the parties, "You will have my ruling soon, probably later today." R. at 61a. Yet Park did not file

his nonsuit until "the very end of the business day." *Id.* Finally, even the hearing transcript confirms that Judge Kreese "listened carefully" to *both* claims, raised "numerous probing questions about the merits of each party's claims," and explicitly confirmed he would be taking "the matter under advisement." R. at 9a.

Therefore, finding Park attempted to avoid an unfavorable judgment, and as in the words of the district court "*technically* motivated by a desire to gain a tactical advantage—or more appropriately, to eliminate a perceived tactical *disadvantage*," is not clearly erroneous. R. at 11a. That Park did not file his nonsuit prior to the anticipated ruling is simply not supported by the record, and the disinterested manner in which Judge Kreese guided the proceeding also contradicts any argument that an unfavorable outcome was obvious.

2. *Even if Respondent was a prevailing party, the district court did not find the claims frivolous or baseless.*

The record also fails to identify the district court's finding of Park's action as being frivolous, unreasonable, or without foundation, which is required to justify the award of attorney's fees. It is reasonable to find that a plaintiff's nonsuit was frivolous when the plaintiff lacked support for his claims from the start of a case yet continued to litigate regardless. For example, the Sixth Circuit recognized such conduct when the plaintiff "admitted he had no evidence of discriminatory intent and the theories he proffered amount to speculation on his part." *Bowman v. City of Olmsted Falls,* 802 Fed. App'x. 971, 975 (6th Cir. 2020). The Sixth Circuit further recognized the lack of foundation because the plaintiff had already brought the claims to the Common Pleas Court and the Eighth Appellate Court, resulting in decisions on the merits. *Id.*

Relitigating claims that have been already decided is "the exact kind of unfounded action" that should be deterred. *Id.*

In contrast, when there was no indication in the district court's orders that the found claims to be frivolous, it cannot "properly" award attorney's fees. *Portillo*, 872 F.3d at 740. Nor does the "bare fact" that plaintiff's claim was dismissed show frivolousness. *Id.* As a matter of fact, the aforementioned affidavits indicated a good-faith intent to develop a cogent understanding of the law, especially when Title IX regulations were in flux. R. at 10a. Moreover, as Park's substantive claims in the first issue demonstrate, there are genuine allegations of injuries that are plausibly grounded in the complaint.

3. *The bad faith, vexatious litigation, and forum shopping interpretation of the hybrid approach is not satisfied.*

The interpretation of the hybrid approach that only looks to a litigant's conduct when determining whether fee-recovery is available is not satisfied in this case because Park's was not motivated by bad faith, vexatious litigation, or forum shopping.

The Fourth Circuit noted that while courts do have discretion to award attorney's fees, it must make "a specific finding that the plaintiff has acted in 'bad faith, vexatiously, wantonly, or for oppressive reasons." *Andrews*, 827 F.3d at 311. And conducting a review of a district court's analysis on these specific findings is, according to the Fourth Circuit, reviewed for a finding of clear error since a "finding of fact underlying the district court's discretionary decision to award fees." *Id.* In fact, the Fourth Circuit cited the legal definition of vexatious, which is "without reasonable

or probable excuse," and proceeded to discredit each of the Defendant's attempts to characterize the plaintiff as vexatious. Significantly, the Fourth Circuit noted, "considering the definition of vexatious, we would be hard-pressed to find that [Plaintiff] was acting without reason or cause." *Id.* at 313.

Vexatious litigation may also be satisfied if a plaintiff does not inform the court why he is voluntarily dismissing the claim and refiling the same claim. For instance, the Eighth Circuit affirmed the district court's findings that a plaintiff's conduct was vexatious since the court could "ascertain no credible reason" for the voluntary dismissal. *See Kent v. Bank of Am.*, N.A., 518 Fed. Appx. 514, 517 (8th Cir. 2013).

Similarly, vexatious litigation and forum shopping under Rule 41(d) may be determined if the plaintiff's conduct is clearly calculated and motivated by attempts to avoid unfavorable judgments. *Horowitz*, 888 F.3d at 25–26. In *Horowitz*, the plaintiff filed a claim in a Georgia court, dismissed his claim after the court "stated its belief that the action was meritless and that its filing likely contravened an order of another court." *Id.* at 23. The plaintiff then proceeded to refile in a New York court. *Id.* The Second Circuit concluded that because the plaintiff refiled in another state only after hearing the Georgia court found his claim meritless, he undeniably was engaging in vexatious litigation and forum shopping. *Id.*

While it is true the refiled claim resembled the original one, the Fourteenth Circuit and the district court incorrectly concluded Park was acting in such a way that vexatious litigation or forum shopping was established. The district court found that his actions were "misguided" but "not the result of bad faith." R. at 11a. But

there was no evidence that Park's actions were "misguided" considering the court never inferred he would not prevail: he refiled in the exact same court and tendered affidavits explaining the action for multiple reasons, all of which were in good faith. R. at 9a. The error in the court's holding is also supported by the fact that the District of Quicksilver "does not prohibit the refiling of an action in attempt to get a different judge." R. at 9a. n. 5.

Therefore, even if the never-awardable approach is not adopted, the hybrid approach was not satisfied in this case and therefore both the Fourteenth Circuit and the district court were incorrect in their conclusions.

CONCLUSION

The Fourteenth Circuit incorrectly denied Park's due-process right under the Fourteenth Amendment to engage in reasonable confrontation and cross-examination, which includes the right to insist that his accuser testify without with a face covering. As a result, Park was found to be guilty on erroneous conclusions informed by biases against his sex in violation of Title IX.

The Fourteenth Circuit also erred in finding that the term "costs" as used in Rule 41(d) always allow for fee-recovery. This holding is incorrect due to the presumption against fee-shifting, the text of Rule 41(d), and this Court's case law on the matter.

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Fourteenth Circuit Court of Appeals.

Respectfully submitted,

TEAM 31
Attorneys for Petitioner

CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon Respondent Quicksilver State University through the counsel of record by certified U.S. mail return receipt requested, on this day, the 23rd of November, 2022.

/S/ TEAM #31

TEAM 31
Counsel for Petitioner