21-8289

In The Supreme Court of the United States

KYLER V. 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 RESPONDENT

s/Team 36
Counsel for Respondent

QUESTIONS PRESENTED

1. Does a university student have an unlimited right to cross examine witnesses directly or through counsel, and to require those witnesses to remove protective face masks during a global pandemic, at a school disciplinary hearing, either under the Fourteenth Amendment or Title IX, 20 U.S.C. §§ 1681 *et seq*.?
2. Does Federal Rule of Civil Procedure 41(d) authorize the award of attorneys' fees as "costs" when a litigant has dismissed and refiled an action to gain a tactical advantage?

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STATEMENT OF JURISDICTION

The district court had jurisdiction to hear Mr. Park's original action under 42 U.S.C. § 1983. Quicksilver State University responded to the complaint by filing a motion to dismiss for failure to state a claim upon which relief may be granted under Fed. R. Civ. Proc. 12(b)(6). The district court granted QSU's motion to dismiss on December 17, 2020. Mr. Park timely appealed the dismissal to the Court of Appeals for the Fourteenth Circuit, which affirmed the district court's dismissal in a published opinion on October 18, 2021. Mr. Park again timely appealed to this Court, which granted certiorari on October 10, 2022. This Court has jurisdiction to hear this appeal on a writ of certiorari under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Quicksilver State University, a public university in Quicksilver which instructs thousands of students in post-secondary education annually, received a report of sexual misconduct against junior Kyler Park from an unnamed female student, Jane Roe, in March of 2020. R. at 2a-4a. The report stemmed from a March 14, 2020, encounter wherein Roe accused Park of engaging in sexual intercourse with her while she was too intoxicated to consent to the activity. *Id*. Both Park and Roe agree that the two were casual acquaintances before March 14th, when they came upon each other at a movie theatre bar. R. at 2a. There, Park purchased and gave to Roe (who was underage) an alcoholic beverage as conversation continued. *Id*. An hour later, Park and Roe returned to Roe's dorm room on QSU's campus where the sexual intercourse took place. *Id*. Roe alleges that she was too intoxicated to consent to sex, a fact which she accuses Park of knowing and taking advantage of, leading to her sexual misconduct report against Park to the QSU Division of Student Affairs. R. at 2a-4a. Student Affairs notified Park of the accusation, alleging a violation of QSU's Code of Student Conduct, on March 23, 2020, and further set a hearing to adjudicate the allegation on May 20, 2020. R. at 3a-4a. Park denies the allegations. R. at 2a.

Following the March 23rd notification of the allegation and hearing date, QSU cancelled all in-person classes due to the outbreak of COVID-19. R. at. 4a. During the two-month period between notification and hearing, QSU assigned an investigator to interview both parties, neither of whom suggested further witnesses to the events in question. *Id*. On May 20, 2020, QSU convened a five-member hearing panel in person on their campus, composed of students and staff appointed by the QSU Vice Chancellor for Student Affairs. *Id*. Roe, Park, and Park's attorney all attended the hearing, all wearing face masks in compliance with QSU protocol to combat the COVID-19 pandemic. R. at 4a-5a.

During the hearing, QSU allowed both Park and Roe to ask questions of the other by writing the question down and presenting it to the panel, who then decided what questions were permissible and asking those questions on behalf of the party. R. at 5a. The panel asked almost all of Park's initial line of questions and allowed Park to present follow up questions to the panel for consideration. R. 6a. However, the panel declined to ask many Park's follow up questions, because they sought private and non-dispositive financial information from Roe, would implicate Roe in possible criminal activity, or were so far beyond the bounds of the facts at issue as to be irrelevant to the proceedings. R. at 6a-8a. Throughout the hearing, Park also sought to force Roe to remove her face mask while answering questions, which the panel refused to permit in light of the danger of COVID-19 and the relevant dearth of information about the virus at that time. R. at 5a. At the conclusion of the hearing, Park asked the panel to wholly disregard Roe's testimony, since the face mask she wore to protect her health from a deadly virus as required by QSU policy obscured a portion of her face; the panel declined to do so. R. at 8a.

After hearing testimony from both Roe and Park using an identical mode of questioning and procedure, the panel found Park's testimony less credible than Roe's and found that Park had likely violated the QSU Code of Student Conduct's prohibition on sexual misconduct. *Id.* The panel recommended that Park be expelled as a result of its findings, which the Vice Chancellor for Student Affairs immediately did. *Id.*

On June 12, 2020, Park filed a § 1983 action against QSU in the District of Quicksilver, alleging the University violated his civil rights by depriving him of due process and reaching an erroneous outcome under Title IX. *Id.* On July 1, 2020, QSU filed a motion to dismiss Park's complaint under Fed. R. Civ. Pro. 12(b)(6), for failing to state a claim upon which relief could be granted. R. at 9a. Judge Kreese of the district court, a notable QSU alumnus, heard the motion to

dismiss on July 22, 2020, which ended with Judge Kreese taking the matter under advisement. R. at 8a-9a. That same day, Park voluntarily dismissed his complaint under Fed. R. Civ. Proc. 41(a)(1), only to refile in the same court on September 21, 2020. R. at 9a.

This time, the district court assigned Judge Alexopoulos to hear Park's complaint. *Id.* QSU again filed a Rule 12(b)(6) motion to dismiss as well as a motion under Rule 41(d) for an award of costs, including attorneys' fees, as Park had acted vexatiously or in bad faith in dismissing his complaint only to refile in the hopes of gaining a tactical advantage in the form of another judge and additional time for legal research. R. at 10a. Park contested the allegation of bad faith or vexatious litigation, and Judge Alexopoulos heard the matter on December 17, 2020. *Id.* At the conclusion of that hearing, the district court granted QSU's motion to dismiss and granted in part its motion under Rule 41(d) by awarding a reduced fee, finding that Park did refile his action to gain a tactical advantage, but was not acting in bad faith. R. at 11a.

Park appealed to the Court of Appeals for the Fourteenth Circuit, who affirmed in a 2-1 panel decision. R. at 1a-2a. Following his loss there, Park petitioned for certiorari to this Court, which granted cert on October 10, 2022.

SUMMARY OF ARGUMENT

This Court should affirm the court below in upholding the district court's dismissal for failure to state a claim upon which relief could be granted. When a plaintiff files a lawsuit that is facially deficient such that it does not allege a violation of law that could be reasonably adjudicated and result in granting the requested relief, that complaint ought to be dismissed under Rule 12(b)(6). *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, Park's complaint is properly dismissed because nothing in the Fourteenth Amendment nor Title IX secures a right to the direct and unfettered cross examination which Park seeks in the university disciplinary hearing setting.

First, nothing in the Fourteenth Amendment nor Title IX requires a university hearing to allow an accused student, either personally or through counsel, to directly question witnesses. Due Process litigation concerning the property rights of students to continue their education at public institutions makes clear that trial-level cross examination rights are neither protected nor required for the accused, and Title IX regulations in place at the time of Park's hearing make clear that adversarial cross examination is disfavored as a matter of policy. And since the protocols used by the QSU hearing panel in administering the cross examinations which did take place have been upheld in circuit courts across the nation, there is nothing to suggest that this Court should upset the balance of the law in favor of the expansive and direct cross examination that Park erroneously demands.

Second, nothing in the Fourteenth Amendment nor Title IX requires an accuser to testify as to irrelevant matters or without appropriate medical devices meant to prevent the spread of a deadly airborne virus. Where Park argues that an unfettered right to cross examination is protected by the Fourteenth Amendment and Title IX, neither source of law imports his physical

confrontation claims from the Sixth Amendment criminal trial context into a school disciplinary hearing context nor prevents a hearing panel from deciding to disallow irrelevant questions. Even where the credibility of opposing witnesses is dispositive of the underlying allegations in a school disciplinary hearing, the right of an accused student to cross examination does not trump the use of sensible measures to protect the health and safety of the accuser, especially from pervasive physical threats like a global pandemic. Yet even if the Fourteenth Amendment or Title IX embraced the Sixth Amendment's rule for physical confrontation, the use of a face mask while testifying would still be permissible under this Court's precedent in *Maryland v. Craig*, 497 U.S. 836 (1990).

Finally, where a plaintiff knowingly and voluntarily dismisses his § 1983 complaint under Fed. R. Civ. Proc. 41 and refiles the same action, with the intent of securing a more favorable judge, Fed. R. Civ. Proc. 41(d) entitles a defendant to a recovery of costs, including attorneys' fees, incurred in the first litigation. The lower court correctly joined the majority of circuit courts in holding that "costs" ought to include attorneys' fees, at least, as here, where the statute underlying the rule includes them. This Court should endorse the reasoning of the court below in finding attorneys' fees be included in "costs" as a matter of law and decline to upset the District Court's finding as a matter of fact regarding the Plaintiff's vexatious conduct, which warranted the imposition of costs in this case.

For these reasons, this Court should affirm the court below on both questions.

ARGUMENT

This Court should affirm the court below on both questions for three reasons. First, the court below correctly held that neither the Fourteenth Amendment nor Title IX require a university to allow a student accused of sexual misconduct to question, either personally or through counsel, a witness. Second, the court below correctly held that neither the Fourteenth Amendment nor Title IX require a university to allow a so-accused student to cross examine witnesses free from reasonable limitations on what is relevant and appropriate, or with physical confrontation by ordering the removal of a face mask during a global airborne pandemic. And third, the court below correctly held that attorneys' fees are included in the definitions of "costs" under Fed. R. Civ. P. 41(d), which the district court correctly determined should be granted here.

I. Park has no right to directly cross examine witnesses in a university disciplinary hearing.

Mr. Park alleges that both the Fourteenth Amendment to the Constitution and Title IX provide him a broad right to personally cross examine witnesses in the context of a university disciplinary hearing. He claims Quicksilver State University abridged this right in their hearing procedures in place on May 20, 2020, when QSU's Hearing Board convened to adjudicate the student conduct violations leveled against Mr. Park. Yet neither the Fourteenth Amendment nor Title IX requires a university to protect an accused student's right to cross examination in this way. Further, the procedures for cross examination in place at QSU and followed during the May 20th hearing have been routinely upheld in federal courts across the country, and no fact on the record exists here which should counsel a departure from those decisions. Accordingly, this Court should affirm the court below and find that QSU's Hearing procedures for cross examination did not violate any rights afforded to Mr. Park under the Fourteenth Amendment or Title IX.

The Fourteenth Amendment provides, in part, that no state may "deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, sec. 1. Thus, to deprive one of liberty or property in particular, the state or its agent must secure certain minimum procedures of due process, including notice and a "meaningful" opportunity to be heard, or risk violating the Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Higher education is one such property right which the Fourteenth Amendment protects, and disciplinary decisions of a public university must follow the due process requirements imposed on the state. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005). *See also Goss v. Lopez*, 419 U.S. 565, 575 (1975) (high school suspensions implicate due process property rights); *Haidak v. Univ. of Mass.*-Amherst, 933 F.3d 56, 65 (1st Cir. 2019) (suspension of expulsion implicate Fourteenth Amendment property interests); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (a student's interest "in pursuing an education is included within the fourteenth amendment's protection of liberty and property."). Before a university like Quicksilver State University can expel a student, it must afford that student, at minimum, fair notice and a meaningful opportunity to be heard.

But the extent to which the protections of the Due Process Clause arise is context-dependent, turning on the nature of the property interest at issue, the risk of error under the state actor's current procedure, the value of additional procedures, and the state's interest and burden in imposing additional procedures. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Mathews*, 424 U.S. at 335. Accordingly, the higher the possible penalty in the educational context, like suspension or expulsion, the higher the required minimum due process becomes. Yet school disciplinary hearings are not criminal trials and "need not take on many of [the] formalities" of criminal trials. *Flaim*, 418 F.3d at 635. No court has required a school to provide a full,

adversarial trial to adjudicate student conduct complaints which may end in expulsion, opting instead to focus on the opportunity of the accused student to "respond, explain, and defend" against the allegations of misconduct. *Id*. at 635, 640.

The Department of Education has long promulgated policies and procedures to guide public universities in navigating the due process requirements which both the Fourteenth Amendment and Title IX impose upon them. One such policy, the so-called "Dear Colleague" letter of April 4, 2011, declined to require that parties to a school disciplinary hearing have lawyers present throughout the process, and further "strongly discourage[d] schools from allowing the parties to personally question or cross-examine each other," which the letter acknowledges "may be traumatic or intimidating" for victims and could "escalat[e] or perpetuat[e] a hostile environment" in the hearing room. DEP'T OF EDUC., *Dear Colleague Letter* (Apr. 4, 2011), at 12. It was under this Department of Education policy that Park's hearing took place.[1]

Given the "Dear Colleague" regulations and the background rules on Due Process established in higher education disciplinary hearings, an important principle for the requirements of Due Process emerges: when the outcome of the hearing turns on the credibility of the witnesses, "the university must give the accused student *or his agent* an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018) (emphasis added). Park's challenge to the cross examination procedure at QSU centers on the Sixth Circuit's holding in *Baum*, which he

[1] Though the Department of Education issued new guidance on these hearings on May 19, 2020, one day before the hearing in this matter took place, those guidelines did not take effect until three months after their issuance, and neither here nor anywhere below has Park raised any argument about the choice of Department of Education guidelines. *See* 34 C.F.R. § 106.45; *Victim Rights Law Ctr. v. Cardona*, ___ F. Supp. 3d ___, 2021 WL 3185743, at *1, *14 (D. Mass. July 28, 2021).

interprets as requiring the accused student to personally question any witness in cross examination to satisfy the Due Process requirements of the Fourteenth Amendment and Title IX.

Yet that reading is contrary both to the text of *Baum* and to the principles of Due Process enshrined in the preceding case law and "Dear Colleague" regulations. First, *Baum* itself authorizes parties besides the accused to perform the questioning on the accused's behalf. *Id*. By calling for cross examination by the accused "or his agent," the *Baum* court explicitly noted the option of having individuals or entities act on behalf of the accused as examiner on cross. *Id*. That is precisely what QSU's hearing panel did in soliciting questions from the parties and asking those questions as an intermediary. A disinterested hearing panel, as impartial arbiters in the student conduct hearing, became the "agent" of the accused when asking questions which the accused himself has written.

Second, reading *Baum* to require cross examination to be conducted personally by the accused student flies directly in the face of the "Dear Colleague" regulations. Those regulations make clear that institutes of higher education must prioritize avoiding "traumatic or intimidating" questioning of accusers by the accused. *Dear Colleague Letter*, at 12. One way which these regulations "strongly" suggest avoiding that outcome is by disallowing personal questioning between the parties. *Id*. QSU's policy of questioning all witnesses in all postures through written submissions of the parties and verbal presentation by the panel is squarely within both the text and the spirit of these regulations, and nothing in *Baum* should suggest to this Court that that balance be disrupted.

Third, as the court below correctly noted, *Baum* (and importantly, Park's reading of *Baum*) is not the rule for Due Process in higher education disciplinary hearings. R. at 19a-20a. Instead, it is one piece of a larger body of law which clearly separates the requirement of trial-

level or trial-like requirements for cross examination from the minimum Due Process required for such disciplinary hearings. And while the issue in *Baum* was whether a cross examination of any kind was required in the hearing--not specifically if a cross examination by the accused was required--here Park's reading the language from *Baum* to suggest a requirement of personal cross examination is no more than a misreading and overextension of dicta and not an accurate expression of that court's holding. 903 F.3d at 582. Taken as a whole, this Court should affirm the court below in finding that neither the Due Process Clause nor Title IX require personal cross examination by the accused student.

Finally, the caselaw on cross examination in higher education disciplinary hearings is no stranger to panel questioning procedures like those employed by QSU. Indeed, markedly similar questioning procedures have been upheld by the Sixth Circuit itself on at least two occasions. *See Doe v. Cummins*, 662 F. App'x 437, 448 (6th Cir. 2016) (unpublished) (finding no Due Process violation in written questions submitted to a panel to ask); *Doe v. University of Cincinnati,* 872 F.3d 393 (6th Cir. 2017) (seeing no Due Process issue where a student submits questions to a panel who asks some, but not all, of the questions). *Baum* does nothing to overrule these cases, either explicitly or implicitly, and where even the Circuit most favorable to Park's argument for direct questioning upholds procedures that mirror QSU's procedures, this Court should join the multiple courts below in affirming such procedures as not violative of the Due Process requirements of higher education disciplinary hearings.

II. Park has no right to an unfettered cross examination, and QSU properly limited both the scope of his cross examination and the degree of physical confrontation afforded during the hearing.

Mr. Park further alleges that the Fourteenth Amendment and Title IX preserve a right to unfettered cross examination, one which authorizes him to ask any question he deems relevant or

important and one which would be hindered if the witness wore a face covering thought medically necessary to prevent the spread of a deadly virus. Yet again, neither the Fourteenth Amendment nor Title IX import either an unlimited subject matter rule for cross examination, or the rights commonly associated with the Sixth Amendment's Confrontation Clause into school disciplinary hearings. And even if they did, the state of the law on confrontation would embrace the wearing of a face covering to prevent the spread of a deadly virus amidst a global pandemic as a legitimate interest in protection of the public that warrants limitation on the right to physical confrontation.

a. Neither Fourteenth Amendment Due Process nor Title IX require trial-level expansivity for cross examination.

Where the determination of a school disciplinary hearing turns on the comparative credibility of witnesses, cross examination is necessary as a tool to test that credibility. *Baum*, 903 F.3d at 578. When cross examination is performed not by the student, but by the hearing panel or other school-selected individual or group, the school is responsible for ensuring the questioning on cross examination is "reasonably adequate." *Haidak*, 933 F.3d at 70. A "reasonably adequate" cross examination is not one which takes an "ill-suited kid gloves" approach to questioning, but rather questions both accuser and accused in the same fashion and ensures the accuser is questioned "at length on matters central to the charges" before the hearing panel. *Id*. Requiring an accuser to answer cross examination questions on subjects that are minor when compared to the entirety of the questioning "does not significantly add to the fact-finder's ability to test [the accuser's] credibility;" in fact, such questioning is likely to contravene the school's interest and obligations to "protect[] victims of alleged sexual assault while on the stand." *Doe v. Michigan State University*, 989 F.3d 418, 430-31 (6th Cir. 2021). Indeed, when additional cross examination would offer only a "marginal benefit" to the fact-finding process

and the burden on the university of asking those questions outweighs that small benefit, refusal to ask cross examination questions does not deny the accused their Due Process rights. *Cummins*, 662 F. App'x at 448. Above all else, a school disciplinary hearing need not mirror standard criminal trial procedures. Accordingly, the same degree of cross examination is not required by the Due Process Clause to satisfy a student's right to a fair hearing as would be required by the Sixth Amendment to satisfy a criminal defendant's right to a fair trial. *Flaim*, 418 F.3d at 635. Nothing in the Fourteenth Amendment, Title IX, or the cases interpreting them in the context of the school disciplinary hearing require more cross examination than is "reasonably adequate" to test the credibility of the accuser. *Haidak*, 933 F.3d at 70.

Yet here, Park asks this Court to read into the Fourteenth Amendment or Title IX a broad and unfettered right to cross examination, one which would require the school hearing panel to ask any question which Park deems appropriate, without regard to the "Dear Colleague" regulations protecting victims of misconduct from additional trauma and without regard to the relevance, import, or credibility-testing value of the questions in issue. Park's argument for unlimited cross examination is not supported by the law throughout the country on the issue and would upend precedent across the nation. As a result, this Court should affirm the court below in holding that Park's right to cross examination was not harmed by the exclusion of certain relatively minor follow up questions which Park asked the panel to present.

Important to this determination is the understanding, readily acknowledged by the court below and not contested by any party to these proceedings, that the hearing panel at QSU questioned Park's accuser at length on numerous topics in order to test her credibility and memory of the events of the night in question. R. at 21a. In particular, the panel pursued lines of questioning about the number of alcoholic drinks Roe consumed the evening of the alleged

sexual misconduct and about possible motives which Park alleged might have driven Roe to bring the claim in the first place. *Id.*; R. at 3a, 6a-7a. In so doing, the panel certainly engaged in the kind of questioning "at length on matters central to the charges" that the Sixth Circuit in *Haidak* found necessary to ensuring the Due Process rights of the accused.

This questioning notwithstanding, Park situates his argument around the few questions and follow up questions which the hearing panel did not ask. In particular, Park requested, and the panel denied, to ask Roe for the specific name of the clear alcoholic beverage which she admitted to drinking at the movie theatre, for a copy of her credit card statement (hoping to show the number of alcoholic beverages which Roe purchased at the theatre), for an admission as to how Roe purchased alcohol as an individual under 21 years old, and for information concerning the nature of her father's employment in an attempt to challenge an answer Roe gave about a history of martial arts training in support of her balance. R. at 6a-7a. The panel properly refused to ask these questions, none of which would meaningfully allow the panel to assess Roe's credibility any more than the remainder of the lengthy examination did and several of which pry for private information meant only to harass or re-victimize the accuser in violation of the school's interest and obligation to prevent the same.

First, questions involving the name of alcoholic beverages which Roe consumed were and remain irrelevant to the central issue of credibility. As the panel properly noted during the hearing, badgering the accuser on details which do not meaningfully affect the fact at issue (namely, whether Roe was intoxicated and unable to consent to sex) like the name of the alcohol which produced the intoxication, does not change whether she was intoxicated and serves no purpose beyond harassing an accuser. R. at 6a. Such "overly aggressive" questioning violates the letter and spirit of the "Dear Colleague" letter's instructions to higher education institutions to

prevent "intimidating" or "traumati[zing]" the alleged victim. R. at 6a.; *Dear Colleague Letter*, at 12. And where questions about the name of the alcohol do not "*significantly* add to the fact-finder's ability to test [the accuser's] credibility," as here, their exclusion does nothing to harm the accused's right to cross examination. *Mich. State*, 989 F.3d at 431 (emphasis added).

The same rationale supports the panel's decision not to force Roe to produce a bank account statement in the hopes of showing how many drinks Roe purchased at the theatre and its decision not to question Roe at length about her father's employment. First, no one contests that the theatre in question sold non-alcoholic as well as alcoholic beverages (among food, tickets, and more). R. at *3. Accordingly, nothing about a credit card statement, which at best would reveal the amount either in total for purchases at the theatre or for each time Roe made a purchase at the theatre that evening, would show how much alcohol Roe purchased, let alone consumed. *Id*. Without any such fact implicated in the records Park requested, it is impossible to say the records would "significantly" aid the panel in assessing Roe's credibility, and thus the exclusion of these questions does not constitute a denial of Due Process or Title IX rights under *Michigan State*. 989 F.3d at 431.

Despite Park's claims that the nature of Roe's father's employment now could undermine her credibility as to her answer that her father once operated a karate dojo wherein Roe learned her martial arts skills and improved her balance, the proposition itself strains relevance to its limit and is so far attenuated from the facts actually at issue in Park's hearing as to render the panel's decision not to pursue this line of questioning more than reasonable. R. at 7a. Nothing in *Baum*, *Haidak*, or any other authority on the matter requires a school disciplinary hearing to declare open season on any matter which one party seeks to address; such school disciplinary hearing panels are obviously "reasonably adequate" in their questioning to exclude a far-flung

doubt on an alibi offered in tangential explanation of another line of questions and which itself would invite dozens of reasonable potential responses which do not "substantially" affect the panel's credibility determinations. *Haidak,* 933 F.3d at 70; *Mich. State,* 989 F.3d at 431.

Finally, the panel's decision not to harass Roe into potentially incriminating herself for possession of a fake I.D. also does not undercut their requirement to be "reasonably adequate" in questioning witnesses. *Haidak,* 933 F.3d at 70. That individuals younger then 21 years old drink alcohol, and that some may use false identification as a means to obtain that alcohol, ought not to surprise this Court; requiring Roe to admit to such conduct, which implicates her in criminal wrongdoing, does nothing to render her testimony unbelievable. Without a "significant" impact on credibility assessments, additional lines of questions are simply not required. *Mich. State,* 989 F.3d at 431. Here, where the accuser openly admits to consuming alcohol and the facts on the record indicate her status as a person younger than 21 years old, further questioning about how that alcohol was obtained serves only to embarrass, harass, or penalize the accuser for reporting Park's alleged sexual misconduct. To allow such questions certainly violates QSU's obligations under the "Dear Colleague" letter. QSU's decision to comply with its obligations by not asking such questions certainly does not violate Park's right to a fair hearing.

Nothing about the questions the panel declined to ask Roe implicate a "significant" impact on Roe's credibility and do not show the panel failing to provide "reasonably adequate" cross examination to Park; instead, the burden of questioning Roe as Park desired would vastly outweigh any "marginal benefit" to the fact-finding process that such questions might offer here. *Mich. State,* 989 F.3d at 431; *Haidak,* 933 F.3d at 70; *Cummins*, 662 F. App'x at 448. Without such a showing, this Court should affirm the court below in finding no abrogation of Park's Due Process or Title IX rights and privileges.

b. Neither Fourteenth Amendment Due Process nor Title IX demand adherence to the Confrontation Clause in school disciplinary hearings, and if they did, the use of a face mask in a global pandemic would not run afoul of Confrontation.

Park next argues that, by allowing (indeed, requiring) Roe to wear an opaque face mask while testifying, QSU's hearing panel further denied him effective cross examination and robbed the panel of the opportunity to test Roe's credibility. Here too, Park's argument fails in the face of case law interpreting the Fourteenth Amendment and Title IX and of the Confrontation Clause in the Sixth Amendment. Yet even if Due Process required the imputation of Confrontation Clause standards from the criminal trial process into the school disciplinary hearing setting, the use of a face mask to prevent the spread of a deadly airborne virus while testifying would still not rob Park of his constitutional rights under this Court's confrontation jurisprudence.

The school disciplinary hearing is not the same as the criminal trial, and the implications of Due Process in the criminal trial setting need not be mirrored in the school disciplinary setting. *Flaim*, 418 F.3d at 635. The level of Due Process required at any given hearing involving property or liberty is variable, where the more severe the punishment, the higher degree of process required. *Morrissey*, 408 U.S. at 481; *Mathews*, 424 U.S. at 335. While criminal trials require the right to physical confrontation (that is, to see and be seen by the witnesses testifying against them) in accordance with the Sixth Amendment Confrontation Clause, school disciplinary hearings require only fair notice and a meaningful opportunity to be heard. *Mathews*, 424 U.S. at 333. No circuit court in the country has held that the Sixth Amendment's Confrontation Clause is imputed against public universities in the handling of student disciplinary hearings, and this Court should certainly not take such a step in light of the great body of law governing such disciplinary hearings that carves out a distinction between criminal trials and school disciplinary hearings.

Nor does the realm of Title IX regulation harbor the right to physical confrontation that Park seeks here. Indeed, the whole of Park's argument connecting Title IX to confrontation rests in the Department of Education regulations issued on May 19, 2020 (a single day before the hearing in question), found at 34 C.F.R. § 106.45. Particularly, Park argues that by wearing a face mask, Roe essentially "did not submit to cross-examination at the live hearing," which would require the hearing panel under these Department of Education regulations to disregard her testimony entirely. 34 C.F.R. § 106.45(b)(6)(i).

But this argument is, as the court below correctly held, faulty on every ground. First, Section 106.45 was not in effect on May 20, 2020; it would not have taken effect at all until August of that year under the Department of Education's own implementation window. 34 C.F.R. § 106.45. *See also Cardona*, 2021 WL 3185743, at *1, *14. Instead, the Department of Education regulations in place at the time of Park's hearing were those of the "Dear Colleagues" letter, which make clear that the primary concern of the school is "student safety." *Dear Colleague Letter*, at 15. Where nothing in the "Dear Colleague" letter suggests that physical confrontation is required to satisfy the Due Process rights of the accused, Title IX provides no support for Park's argument here.

Second, Section 106.45 says nothing of the physical presentation by which a witness must "submit" to cross examination. 34 C.F.R. § 106.45(b)(6)(i). As discussed in detail above, *supra* Part I and II.a, Roe did submit to cross examination. Nowhere in Section 106.45 does the right to physical confrontation appear, either implicitly or explicitly. And where this Court's jurisprudence on the Confrontation Clause holds out a difference between physical confrontation and the right to confrontation via cross examination, this Court should not now read physical confrontation into cross examination wheresoever it appears. *Compare Craig*, 497 U.S. 836 (on

physical confrontation) *to Crawford v. Washington*, 541 U.S. 36 (2004) (on cross examination and the protection from hearsay as elements of confrontation).

Third, even if Section 106.45 did require physical confrontation (which it does not) and even if Section 106.45 was in effect at the time of Park's hearing (which it was not), Section 106.45 has been vacated as arbitrary and capricious, and this case is not the vehicle for this Court to overrule that finding. *Cardona*, 2021 WL 3185743, at *15–16. On every count, Park's argument to root the right to physical confrontation into Title IX and its accompanying regulation failed in the court below, and nothing about that holding deserves reconsideration here; accordingly, this Court should affirm the court below in finding no right to physical confrontation for Park in either Title IX or the Fourteenth Amendment Due Process Clause.

Yet even if this Court did read into Due Process or Title IX a requirement of physical confrontation akin to that preserved in the Sixth Amendment, a witness's use of a face mask as a medical intervention to prevent the spread of a deadly airborne virus would still not violate this Court's law on the subject. *Maryland v. Craig* is instructive on this topic, wherein this Court articulated the holding that physical confrontation is not an absolute right, but a "preference that 'must occasionally give way to considerations of public policy and the necessities of the case,'" 497 U.S. at 849 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)). There, this Court approved of testimonial procedures whereby a child who was the alleged victim of sexual violence could testify against the defendant via closed-circuit television system, where the child was in one room and the defendant in another. *Craig*, 497 U.S. at 853-54. This Court held that "a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853.

Here, the law on sexual misconduct hearings at the university level has also recognized an important interest of the university, as agent of the state, in "protecting victims of alleged sexual assault while on the stand." *Mich. State*, 989 F.3d at 431. As the court below articulates, there is no logical reason to protect psychological harm, like might be incurred by aggressive cross examination by one's abuser, but not physical harm, like might befall someone who contracts the COVID-19 virus through airborne transmission. R. at *6; *see also* CTR. FOR DISEASE CONTROL & PREVENTION, *How to Protect Yourself and Others* (updated Oct. 19, 2022), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html. Indeed, given how widespread the COVID-19 pandemic was on May 20, 2020, and considering the unavailability of vaccinations against the virus at that time, there is ample evidence to support this Court finding a "sufficiently important" interest in protecting members of the hearing from exposure to COVID-19 by limiting the physical, face-to-face confrontation afforded to the accused. *Craig*, 497 U.S. at 853.

Finally, it is worth pointing out that the same face mask requirement imposed on Roe, which Park alleges hindered the ability of the panel to properly assess her credibility as a witness against him, also applied to Park; Park too wore a face mask when he answered questions, written and submitted to the panel by Roe to test his credibility. The university decision to require the use of face masks also advanced the important interest in protecting Park's physical health, just as the method of questioning Roe by written questions from Park applied equally to the questioning of Park by written questions from Roe. Indeed, every argument Park raises as undermining the panel's ability to properly assess Roe's credibility applies just as strongly to the panel's ability to properly assess Park's credibility. If this Court finds any of these decisions from the hearing panel did limit their ability to properly judge credibility, it did so evenly for

both parties, and thus no factor which Park raises impermissibly harms his ability to undermine Roe's credibility incommensurate with Roe's ability to do the same. The fact remains, that despite all of Park's arguments, the hearing panel properly considered the evidence in front of them, properly assessed the credibility of both Roe and Park, and properly concluded that Roe's testimony was more credible than Park's, leading to his ultimate expulsion from QSU. This Court thus should not disturb the holding of the court below, which correctly states the law on all Fourteenth Amendment and Title IX claims Park raises while rejecting the same.

III. Fed. R. Civ. Proc. 41(d) allows for attorney's fees to be included in "costs" awarded to the defendant.

Mr. Park alleges that Federal Rule of Civil Procedure 41(d) does not include attorney fees in any circumstances, and specifically not in this case. This is inconsistent with the purpose and language of the rule, Supreme Court precedent on the issue, and the holdings of all but one of the circuit courts that have considered the issue. Rule 41(d)'s language and purpose clearly show its "costs" are intended to include attorney's fees. However, even under the narrower approach some circuit courts have adopted, Rule 41(d) would include attorney fees in the instant case since the underlying substantive statute defines "costs" to include attorney fees.

a. "Costs" awarded under 41(d) should always include attorney's fees.

There is currently a circuit split about whether costs awarded under Rule 41(d) include attorney fees. Circuit courts have taken three main approaches. The first, which only the Sixth Circuit has adopted, holds that attorney's fees are never a part of costs awarded pursuant to 41(d). *See Rogers v. Wal-Mart Stores, Inc*., 230 F.3d 868, 874 (6th Cir. 2000). The second approach, adopted by the Third, Fourth, Fifth, and Seventh Circuits, holds that attorney's fees are permitted under Rule 41(d) only when the underlying statute defines "costs" to include attorney's fees ("hybrid approach"). *See Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Circ.

2017); *Garza v. Citigroup Inc.*, 881 F.3d 277, 282–83 (3d Cir. 2018); *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 311 (4th Cir. 2016); *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000). The third approach, followed by the Second, Eighth, and Tenth Circuits, finds that Rule 41(d) *always* allows for the recovery of attorney's fees. *See Horowitz v. 148 South Emerson 34a Associates LLC*, 888 F.3d 13 (2d Cir. 2018); *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Circ. 1980); *Meredith v. Stovall*, 216 F.3d 1087, 2000 WL 807355, at *1 (8th Cir. 2000) (unpublished).

This Court should adopt the third approach as it fits within the plain meaning and purposes of the rule, as well as applicable precedent. The term "costs" is general in nature, and the legislature knows this, hence the decision to explicitly exclude attorney's fees from the otherwise broad language of other rules like 54(d)(1) which is titled, "Costs Other than Attorney's Fees." If the term "costs" was not to include attorney's fees in any context, there would be no need for such an explicit instruction excluding attorney fees from the meaning of "costs."[2] One cannot, without instruction to the contrary, infer that the word "costs" inherently forecloses awarding attorney's fees. *See also* Thomas Southard, *Increasing the "Costs" Nonsuit,* 32 Seton Hall L. Rev. 367, 376 (2002) ("That Rule 41(d) fails to make explicit reference to attorneys' fees does not make such fees unrecoverable."). The Supreme Court has similarly made clear that explicit reference of attorney's fees is not required in order to find them awardable under a statute. In *Key Tronic Corp. v. United States*, the Court explained that "the absence of

[2] There are dozens of examples where Congress seems to imply attorney's fees are included within "costs." The dissent in *Marek v. Chesny*, 473 U.S. 1, 44 (1985) included an appendix of sixty-three such examples, including: Freedom of Information Act, 5 U.S.C. §§ 552(a)(4)(E) ("attorney fees and other litigation costs"); § 18. Complaints against registered persons, 7 U.S.C. § 18(c) ("payment of costs, including a reasonable attorney's fee); 42 U.S.C. § 1988 ("a reasonable attorney's fee as part of the costs"), etc.

specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees." 511 U.S. 809, 815 (1994).

The court in *Horowitz*, along with courts following the hybrid approach, correctly infer that attorney's fees are awardable under 41(d), as otherwise the purposes of the rule would be significantly curtailed. As explained in *Horowitz*, "Rule 41(d)'s purpose is clear and undisputed: to serve as a deterrent to forum shopping and vexatious litigation" and to avoid increasing costs on the defendant and judiciary solely for the plaintiff to gain a tactical advantage. *Id*. at 26 (quoting *Andrews*); *see also* Thomas Southard, *Increasing the "Costs" Nonsuit*, 32 Seton Hall L. Rev. 367, 380 (2002) ("The rule was created to deter vexatious and bad faith litigation, such as forum shopping . . . for tactical gain."); *Simeone v. First Bank Nat. Ass'n*, 125 F.R.D. 150 (D. Minn. 1989) (invoking Rule 41(d) to punish plaintiff for forum shopping). The need for attorney's fees is "especially acute" in the Rule 41(d) context, since 41(d) applies in cases where plaintiffs initiate, then quickly dismiss, complaints. *Horowitz* at 26. In such cases, the "costs" other than attorney's fees will often be *de minimis*. The instant case provides a good example: costs other than attorney's fees are in the low hundreds of dollars compared to tens of thousands of dollars for attorney fees. R at 42a. If the purpose of the rule is to deter vexatious or tactically repetitive litigation (a purpose which the Sixth Circuit does not contest), it cannot be thought that these purposes will be served with the award of such negligible costs. *See United States v. Brown*, 333 U.S. 18, 25–26 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose.").

Rule 41(d) is intended to create the presumption that when the plaintiff acts in the manner outlined by the Rule, he is putting an unfair and oppressive burden on the defendant, who is therefore entitled to attorney fees. *See F. D. Rich Co. v. U. S. for Use of Indus. Lumber Co.*, 417

U.S. 116, 129 (1974) ("We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."). The Rule's language requires no finding of vexatiousness or bad faith, instead it simply allows the award of costs to the defendant where a plaintiff "who previously dismissed an action in any court files an action based on or including the same claim against the same defendant." Fed. R. Civ. Proc. 41(d).

The court in *Esquivel v. Arau*, explained that the "requirement for payment of 'costs' by a plaintiff who dismisses an action and then brings the same action" demonstrates a "legislative presumption that such conduct is *abusive per se*". 913 F. Supp. 1382, 1391 (C.D. Cal. 1996) (emphasis added). The choice to leave out any requirement of forum shopping or vexatiousness indicates that the drafters intended to make 41(d) an automatically applicable rule. The drafters of the rule outlined activity that, barring good cause, is presumed to fall within the category of behavior that has always entitled defendants to an award of costs including attorney fees per *F. D. Rich Co*. *See* Rochelle Cooper Dreyfuss, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346 (1980) ("The bad faith award has been partially codified by . . . by FED. R. CIV. P. 41(d)."). The judicial discretion embedded in the rule is designed to allow exceptions in cases where, like in *Andrews*, [3] the plaintiff has good reason to withdraw and refile, or where interests of justice and the rule would otherwise not be served by its application.

Reading Rule 41(d) to not include attorney's fees would also be inconsistent with the rule itself, since under Rule 41(a)(2) attorney's fees may be awarded as a "term or condition" of voluntary dismissal. *See, e.g., LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680,

[3] 827 F.3d 306, 309 (4th Cir. 2016) (finding there is no vexatiousness because the magistrate encouraged the plaintiff to voluntary dismiss the action and possibly refile the same claim).

686 (7th Cir.1998); *Mortgage Guar. Ins. Corp. v. Richard Carlyon Co.*, 904 F.2d 298, 300 (5th Cir. 1990); *McGregor v. Board of Comm'rs of Palm Beach County*, 956 F.2d 1017, 1021 (11th Cir. 1992). The Seventh Circuit has noted the incoherence of such a reading, explaining in *Esposito v Piatrowski*, "it would be inconsistent to award attorneys' fees as a condition of voluntary dismissal under Rule 41(a)(2), but completely prohibit the awarding of such fees when a case that is voluntarily dismissed is refiled under Rule 41(d)." 223 F.3d 497, 501 (7th Cir. 2000). Under both Rule 41(d) and Rule 41(a)(2), the plaintiff has caused the defendant to incur costs that could be substantial, and there is no reason to think the drafters intended the defendant to recover attorney's fees only under one circumstance but not the other without any explicit direction. This is especially true in the 41(d) context, where unlike 41(a)(2) cases, the need for compensation is readily apparent because the plaintiff has already refiled suit, thus subjecting the defendant to additional costs.

The purposes of Rule 41(a)(1), which the Plaintiff used in this case, further demonstrates that 41(d) should allow the Defendant to recover attorney fees. The Supreme Court, in *Cooter & Gell v. Hartmarx Corp.*, explained that the purpose of Rule 41(a)(1) was to "eliminate 'the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure'." 496 U.S. 384, 397 (1990) (quoting Judge George Donworth, member of the Advisory Committee on Rules of Civil Procedure). Further, the Court summarized that the intended goal of the rule was "curbing abuses of the judicial system" by plaintiffs who sometimes abused the earlier laissez-faire voluntary dismissal system. *Cooter* at 398. Park's maneuvering in this case exemplifies exactly the sort of burdensome litigation the rule was designed to prevent. Here, the defendant, QSU, is "being summoned into court in successive

actions," and the only way to prevent unjust harm to the defendant is to award them the costs, including attorney fees, of the previous action. *Id*. at 397. The defendant should not have to bear the burden of Park's decision to voluntarily dismiss the case in hopes of finding a better judge, or to better research the case law, which is exactly the reason the Plaintiff cited in this case. R at 11a. Unless attorney fees are included in the award of costs, then the majority of the substantial harm to the defendant remains, and Rule 41 is rendered impotent to achieve its goals of deterring such repetitive and burdensome litigation.

Finally, the permissive and discretionary nature of the statute supports the implication that the term "costs" is intended to be interpreted broadly. The rule explains that the court "may" award costs "as it deems proper." Fed. R. Civ. Proc. 41(d). It would be awkward to read such permissive language as to concern such small and definite costs. *See* Thomas Southard, *Increasing the "Costs" Nonsuit*, at 394 (explaining that "restricting a court's authority under Rule 41(d) to granting only taxable costs traditionally recognized under Rule 54 or 68, which generally involves little discretion and provides for automatic calculation by the clerk of the court, renders this discretionary language meaningless and does nothing to further Rule 41(d)'s purpose of avoiding repetitive filings."). In cases where 41(d) applies, including the instant action, the "costs" excluding attorney fees are likely to be quite low, and thus, it would seem odd to grant the judge such expansive discretion over such a small and definite sum.

The Sixth Circuit erred in *Rogers* when it decided that without explicit authorization attorney's fees should not be awardable under 41(d), as the court failed to account for the contextual factors that *Key Tronic* held could evince an intent for attorney's fees. That intent is clear in Rule 41(d), and to hold otherwise, would render the statute inconsistent and toothless, granting large deference to the judge's discretion but only over negligible sums. The purpose of

the statute is to prevent the abuse of voluntary dismissal at the expense of defendants. The drafters of Rule 41(d) created a category of conduct that is presumed to unfairly burden the defendant. There is no good cause in this case to excuse Park from bearing the costs he imposed on QSU in choosing to voluntarily dismiss and refile the same claim in hopes of a better outcome.

b. Even if fees are not always included under Rule 41(d), they are included when the underlying substantive statute contemplates attorney's fees.

While some courts maintain that attorney's fees are not *always* recoverable under 41(d), only the Sixth Circuit takes the extremely narrow approach that forbids the award of attorney's fees even when the underlying substantive statute defines costs to include attorney fees. The reason all the other circuits who have considered this question have held that at the very least the hybrid model is correct, is because finding otherwise is directly contrary to the Supreme Court's holding in *Marek v Chesny*, 473 U.S. 1 (1985). In *Marek*, the Court considered whether Fed. R. Civ. Proc. 68's[4] use of the word "costs" includes attorney's fees where the underlying claim (§ 1988) considers attorney's fees as part of costs, and found that it did. The Court reasoned that Rule 68's broad use of the word "costs" was intentional, explaining that, "given the importance of 'costs' to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute." *Marek* at 9. The Court emphasized that this reading "is the only construction that gives meaning to each word in both Rule 68 and § 1988." *Id*. at 9. The Sixth Circuit's reasoning, seemingly directly contrary to *Marek*, relies heavily on *Key Tronic* which came after *Marek* and held that attorney's fees "generally are not a

[4] Fed. R. Civ. Proc. 68 requires that when a party rejects a pre-trial settlement offer it must pay the costs the offering party incurred after the offer was made, if the eventual trial award is less than the unaccepted offer.

recoverable cost of litigation absent explicit congressional authorization." *Id*. at 815. However, the Court in *Key Tronic* made clear that even if a statute or rule does not expressly mention attorney's fees, they can still fall within costs "if the statute otherwise evinces an intent to provide for such fees." *Id*. at 815. *Key Tronic* also made no mention of *Marek* or implied its decision-making was flawed in any way.

The Sixth Circuit's holding that 41(d) never includes attorney's fees is incorrect, as it takes the Court's holding in *Key Tronic* much further than the Court intended, leading to an unnaturally narrow interpretation of 41(d). *Key Tronic* was simply restating and applying the existing doctrine to the highly particularized statute at issue (CERCLA), not changing it. *See Id.* at 814 (citing a long list of cases supporting its holding, as opposed to stating a new finding or overturning precedent). The facts underlying *Key Tronic* also make it extremely distinguishable from the case at bar and from *Marek.* The language at issue in *Key Tronic* is fundamentally different from the language in 41(d) and § 1988. As opposed to just "costs," the underlying statute uses language such as: "costs of response," "all costs of removal," "costs of any health assessment," and this language is in the context of a statute specifically concerning environmental cleanup. 42 U.S.C. § 9607(4)(A-D). This type of restrictive language is distinguishable from the unqualified use of the word "costs" in Rule 41(d) and Rule 68. The choice to use the unrestricted language "costs" is exactly what the Court found to impliedly adopt the definition of costs from the underlying statute. *See Marek* at 9 (explaining that the reasonable inference from the undefined use of "costs" that it "was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."). Unlike the language in *Key Tronic*, here the underlying statute, 42 U.S.C. § 1988, explicitly contemplates

attorney's fees, and the term "costs" in Rule 41(d) is broad, completely undefined, and intended to apply to all civil cases, not just those particularized to costs regarding certain activities.

The Sixth Circuit relied heavily on the absence of explicit statutory authorization for the award of attorney's fees in finding Rule 41(d) never includes such fees. *See Rogers* at 874 (holding that "attorney fees are not available under Rule 41(d). The reason is simple—the rule does not explicitly provide for them."). This reasoning fails to consider the context which is vital to statutory interpretation. *Marek* demonstrates that the term "costs" can adopt the meaning of the statute underlying the relevant claim. When *Key Tronic* discusses lack of specific congressional authorization regarding attorney's fees, it is deciding a case where there is no mention of attorney's fees in any of the underlying statutes. However, in this case and the Rule 41(d) and § 1983 cases generally, there *is* specific language allowing the award of "attorney's fee[s] as part of the costs." 42 U.S.C.A. § 1988(b). There is nothing in conflict between the hybrid approach and the holding of *Key Tronic,* and contrary to the Sixth Circuit's opinion that other circuits "give too little weight to [Rule 41(d)'s] plain language," the hybrid model simply brings into harmony the broad language of 41(d) with the specific language of the underlying statute that authorizes attorney's fees. *Rogers* at 875.

Another reason for applying the hybrid approach, which mirrors the reasoning in *Marek*, is that it "is the only construction that gives meaning to each word in both" Rule 41(d) and § 1988. *Marek.* at 9. Applying Rule 41(d), with § 1988's definition of costs, furthers the goal of "protecting defendants from burdensome litigation," which the Court found was the "second, but equally important" purpose of § 1988, while also furthering 41(d)'s goals of deterring repeated and costly litigation. *Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412, 420 (1978). Allowing attorney's fees to be awarded where the underlying statute defines

costs to include them can only serve to increase the deterrent effect of 41(d) and does nothing to under undermine § 1983 and § 1988. The Court in *Marek* noted that "there is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned." *Id*. at 10. This reasoning applies in this case, as there is no reason to think Congress intended § 1983 and § 1988 to be immune from otherwise applicable procedural rules, including 41(d) and its aim to prevent vexatious or costly litigation. The concerns the dissent raised in *Marek* are not relevant, or their relevance is severely diminished, in the Rule 41(d) context. In *Marek* the Court was concerned with disincentivizing civil rights actions, as the dissent explained that "requiring plaintiffs to make wholly uninformed decisions on settlement offers, at the risk of automatically losing all of their postoffer fees . . . will work just such a deterrent effect." *Id*. at 32. This concern is virtually irrelevant in the Rule 41(d) context, where there is no deterrent effect on plaintiffs bringing meritorious civil rights cases. In Rule 41(d) cases, the plaintiff makes the affirmative choice of voluntarily dismissing the case (unlike a Rule 68 settlement offer which any defendant can thrust upon a plaintiff). Additionally, the attorney's fees are typically much lower in the litigation at this stage, since there has not been a trial on the merits. There is no reason a plaintiff wouldn't bring or continue a § 1983 case if 41(d) included attorney fees, the only risk is that plaintiffs will not voluntarily dismiss and refile the exact same suit without good reason, which fits within the goals of both rules.

The dissent in *Marek* also expressed deep concern with the "mechanical" nature of Rule 68, which allows judges no discretion. *See Id*. at 29 (Brennan, J. dissenting) (explaining that the majority is making Rule 68 "a mechanical per se provision automatically shifting "costs" incurred after an offer is rejected."). However, the Rule 41(d) language is the opposite; it merely

states that judges "*may*" order the plaintiff to pay "all *or* part" of the costs from the previous action. Fed. R. Civ. Proc. 41(d) (emphasis added). Applying the *Marek* approach in the Rule 41(d) context has all the upside of *Marek* - bringing the statutes and their goals into harmony - without the potential downsides that Rule 68 presented.

The hybrid approach is clearly in line with the Supreme Court's precedent. The Sixth Circuit's approach in *Rogers* focused solely on *Key Tronic* failing to discuss or even cite to *Marek*, the most on-point precedent. *Marek* makes clear that civil rules with broad language regarding costs should adopt the meaning of the word "costs" from the underlying substantive statute, specifically in the § 1983 and § 1988 context. This not only furthers the goals of the original rule (41(d)), but also the statute underlying the claim (§ 1988). This court should follow in the footsteps of every circuit who has considered this question, except the Sixth, and find that at least in § 1983 cases, Rule 41(d) costs include attorney's fees.

IV. Quicksilver State University is entitled to attorney's fees per Rule 41(d) and § 1988.

a. QSU is entitled to attorney's fees based solely on the factors required under 41(d) and is not required to meet the more stringent "prevailing party" standard for defendants under § 1988.

Typically, in § 1983 and § 1988 cases, to be considered the "prevailing party" entitled to attorney fees, a defendant must show that the litigation was "unfounded, meritless, frivolous or vexatiously brought." *Christiansburg* at 420 (quoting *United States Steel Corp. v. United States*, 519 F.2d 359, 363 (3d Cir. 1975) and explaining, "we think that the concept embodied in the language adopted by these two Courts of Appeals is correct."). The purpose of this heightened standard is to ensure that the two primary goals of § 1988 can both be met. The Court explained that, while "Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation." *Id.* at 420. Most lower courts who

have adopted the hybrid approach for 41(d) have required that defendants meet these requirements when the inclusion of fees comes from § 1988. While this is normally the standard for awarding fees to "prevailing defendants" in § 1988 cases, it should not be required in the context of Rule 41(d). Common sense and Supreme Court precedent compel this result.

In actions like the instant one, the impetus for the award comes from Rule 41(d), and therefore, it is the standards and goals of Rule 41(d) that control; § 1983 and §1988 merely provide the definition of "costs." As the Court explained in *Marek*, the reasoning which all circuit courts rely on when including attorney fees in 41(d) costs, "since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68." *Id*. at 9. Similarly, § 1988 just provides a definition for the word "costs" in Rule 41(d), and those costs "are subject to the cost-shifting provision of" Rule 41(d), not to the cost-shifting provisions of Rule § 1988. *Marek* at 9. The Court in *Christiansburg* was concerned that awarding attorney's fees to prevailing defendants without something more would "undercut the efforts of Congress to promote the vigorous enforcement" of civil rights actions. *Id.* at 423. However, in the case of Rule 41(d) actions, there is no such risk, as the only activity being deterred would be straightforward violations of Rule 41(d), which is intended to prevent duplicative and vexatious litigation. This is an interest of any case including § 1988 cases. This holding would in no way restrict a § 1988 plaintiff's ability or incentive to litigate; only his or her willingness to voluntarily dismiss and refile the same suit without good cause would be deterred.

Interpreting Rule 41(d) to include attorney fees in "costs," at least in the § 1988 context, and then still requiring a full § 1988 analysis would be redundant and incoherent. With or without 41(d), a defendant can obtain attorney fees in a § 1983 action when there is a voluntary

dismissal if the defendant can meet the *Christiansburg* standards. To include attorney fees as part of 41(d) costs, but then repeat the same § 1988 analysis a court would conduct if 41(d) wasn't implicated, demonstrates the absurdity of such a conclusion. Requiring a § 1988 *Christiansburg* analysis, thus rendering 41(d)'s presence superfluous, cuts against the Supreme Court's admonishment that, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, both statutes are capable of coexistence, as 41(d) can adopt the definition of "costs" from § 1988 while still shifting those costs according to 41(d)'s substantive provisions.

Importantly, the Court in *Marek* did not require the defendant be the "prevailing party" according to *Christiansburg* and its progeny, even though § 1988 itself specifically uses the language of "prevailing party." To the contrary, the Court in *Marek* found that the Plaintiff was not entitled to attorney fees even though it was "technically the prevailing party," because it was Rule 68 that governed the award of "costs" including fees. *Id.* at 11. The Court was very clear that "section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives." *Id.* at 11. The same exact dynamic is at play in this case. Rule 41(d) is intended to lower administrative and defense costs by deterring repeated, vexatious, or frivolous litigation; § 1988 is intended to encourage plaintiffs to bring meritorious civil rights suits, "and second, but equally important" it is intended to "protect defendants from burdensome litigation." *Christiansburg* at 420. There is "nothing incompatible" between these two objectives, to the contrary, they work in perfect harmony, each furthering the other's goal. Forcing a heightened bar on § 1988 defendants in the 41(d) context would serve only to weaken the effect of Rule 41(d) and do nothing to further the

goals of § 1988. It would instead defeat § 1988's goal of deterring burdensome litigation on the defendant while similarly undermining Rule 41(d).

There is currently a circuit split concerning the breadth of the Court's holding in *Marek.* Some courts interpret *Marek* to only allow for the canceling out of attorney's fees that would otherwise be awarded to the plaintiff, but not allowing for defendants who lose on the merits to obtain the postoffer attorney's fees Rule 68 would otherwise seem to allow.[5] *Harbor Motor Co., Inc. v. Arnell Chevrolet–Geo, Inc.*, 265 F.3d 638 (7th Cir. 2001); *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016 (9th Cir. 2003). However, the Eleventh Circuit disagrees, and allows attorney fees to be shifted as any other costs would be in a Rule 68 case (other circuits allow for fees to the defendant but only if the typical § 1988 requirements are met). *Jordan v. Time, Inc.*, 111 F.3d 102 (11th Cir. 1997). This interpretation could be seen as limiting the effect of *Marek* in the 41(d) context. Even though no circuit court seems to have found this to be the case (the Seventh Circuit which adopted the narrow interpretation still allows the award of fees to defendants under Rule 41(d)), it is still worth addressing here.

Those circuits which adopt the narrower interpretation are in direct contradiction with the Court's reasoning in *Marek* which forces them to tortuously reach for unintuitive conclusions from what is an otherwise straightforward opinion. For example, these courts often cite to the fact that in *Marek,* the Court spoke of fees "properly awarded" in the underlying statute. *See Champion* at 1031. Some circuits grab onto these two otherwise unremarkable words and interpret them to be a major feature of the Court's holding. Under this theory, the Court only intended for fees "properly awarded" under the underlying statute, and therefore, a court could

[5] *Marek* did not address this specific aspect of the question since the defendant did not appeal the denial of postoffer attorney fees. However, it made no comment implying that it was intentionally leaving this question open, or that its reasoning would not apply with equal weight in that context.

not award fees in the Rule 68 context to a defendant since the defendant would not be a "prevailing party." *Id.* at 1029. There are multiple issues with this analysis. First, if that was the case, then the plaintiff in Rule 68 cases *would be* entitled to attorney's fees under § 1988, since he or she would be the prevailing party to whom fees would be "properly awarded," the exact opposite of the outcome in *Marek*. Second, there is no indication the words "properly awarded" were intended to mean anything so significant. There was no briefing on that issue and the language from the opinion does not seem to impose any limits on defendants obtaining attorney fees (*Christiansburg* and its limitations are not cited at all by the majority).[6] To the contrary, the majority seems to understand it is drastically raising the stakes for plaintiffs, not just removing an otherwise available form of relief. The Court explained, "to be sure, application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile." *Marek* at 11. Courts who adopt this narrow interpretation still award costs, *excluding* attorney fees, to the defendant. This defies logic, since *Marek* clearly held that the term "costs" in Rule 68 adopts the definition from the underlying statute, and there is thus no room to arbitrarily decide which costs the defendant then receives. *See Marek* at 9 ("Where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68."). This interpretation also cuts against how the Dissent in *Marek* perceived the Majority's holding, as it explained that defining "costs" in Rule 68 to include attorney fees would mean "prevailing plaintiffs falling within Rule 68 would be required to bear the defendant's postoffer attorney's fees." *Marek* at 29 (Brennan, J. dissenting).

[6] *See* Jay Horowitz & Introduction, *Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements*, 87 Denv. U. L. Rev. 485, 503 (2010) (explaining that the briefs did not address this issue and the language was likely Justice Burger's "short-hand" for the fee shifting statute).

Another important detail that cuts against applying a limited view of *Marek*, specifically in the 41(d) context, is the Supreme Court's decision in *CRST Van Expedited, Inc. v. E.E.O.C.* 578 U.S. 419, 422 (2016). In *CRST*, the Court held that "a defendant need not obtain a favorable judgment on the merits in order to be a 'prevailing party'" in the context of § 1988. *Id*. at 431. This undermines the reasoning and weight of the major cases supporting the narrow interpretation like *Champion*, which came before *CRST*, and which focus a significant portion of their reasoning on the fact that a defendant cannot be a "prevailing party" in Rule 68 cases since the defendant necessarily loses on the merits. The Court in *CRST* made clear that winning on the merits is not a prerequisite for defendants to obtain attorney fees in § 1988 cases.

Here, where Rule 41(d) is the operative rule under which costs including attorney's fees are being awarded, § 1988 only serves to define "costs" (under the hybrid approach). Like *Marek*, the court here followed the fee shifting provisions of 41(d) without considering heightened or unique requirements in a typical § 1988 case adjudicated on the merits. To do otherwise would undermine the purpose of Rule 41(d) and render it superfluous, since it would simply require the same § 1988 analysis which can always be applied regardless of whether 41(d) is implicated. As the Court explained in *Marek*, there is nothing in the language of § 1988 that would imply Congress thought "civil rights claims were to be on any different footing from other civil claims." *Id.* at 10. There is no reason § 1983 and § 1988 claims should have a higher bar than any other litigation that falls under Rule 41(d), as it would not benefit the purposes of either statute. Rule 41(d) only serves to deter unnecessarily repetitive and costly litigation, which does not conflict with § 1988's goals of promoting meritorious litigation or implicate the concerns that motivated the Court in *Christiansburg*. Thus, this Court should affirm the award of attorney's fees as costs under Rule 41(d).

b. QSU meets the heightened "prevailing party" standard for defendants and is therefore entitled to attorney's fees under § 1988.

§ 1988 allows for the "prevailing party" in a § 1983 action to obtain attorney's fees. Although on its face the statute makes no distinction between a prevailing defendant or plaintiff, the Supreme Court has read in an implied distinction. In *Christiansburg*, the foundational case on this subject, the Court found that a prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances," and that awards should be made to a defendant only where "the action brought is found to be unreasonable, frivolous, meritless or vexatious." *See Christiansburg* at 421 (explaining that the "concept embodied in th[is] language . . . is correct."). While *Christiansburg* concerned Title VII, the relevant language is the same, and the Court in *CRST Van Expedited, Inc. v. E.E.O.C.* explained that "Congress has included the term 'prevailing party' in various fee-shifting statutes, and it has been the Court's approach to interpret the term in a consistent manner." 578 U.S. 419, 422 (2016). The Court in *Christiansburg* explained that, although it was adopting the Third Circuit's reasoning concerning when a defendant could be considered "prevailing," the term "vexatious" "in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him." *Id*. at 420.

This case clearly falls within the *Christiansburg* framework as Park's actions in litigating this case were both "unreasonable" and "vexatious," falling within the "concept embodied in the language" the Court in *Christiansburg* adopted. *Id*. at 21. Several circuits who have considered voluntary dismissal cases have found there can be "prevailing parties" in such contexts for § 1988 purposes. *See Valley Disposal, Inc. v. Cent. Vermont Solid Waste Mgmt. Dist.*, 71 F.3d 1053 (2d Cir. 1995) (finding that claims for attorney fees are not waived even if case voluntarily dismissed); *DeMier v. Gondles*, 676 F.2d 92 (4th Cir. 1982) (holding that attorney fees are awardable after a dismissal pursuant to Rule 41(a)(1)). The Court's holding in *CRST* is

instructive, as it explained that the defendant has "fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision. The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." *Id*. at 431. In this case, the Defendant not only won as a clearly prevailing party in the second action, but the trial court's finding that the Plaintiff voluntarily dismissed the first suit in order to avoid an unfavorable judgment on the merits demonstrates that the Defendant successfully "rebuffed" the first suit. R at 11a. This is supported by Park and his counsel's own affidavits which show they were fearing that the judge was not going to rule in their favor (based on their misperceived bias) and that his counsel wanted to find more legal support for his arguments. R at 10a.

While the underlying claims of Park may not be vexatious or frivolous (QSU does not request fees for the second litigation), the question here is whether his choice to withdraw and refile the same claim in a different court was vexatious or unreasonable, and here it certainly was. *Black's Law Dictionary* defines "vexatious" as "(of conduct) without reasonable or probable cause or excuse; harassing; annoying." *Vexatious*, *Black's Law Dictionary* (11th ed. 2019). Here there is no doubt Park's conduct in refiling the same suit in hopes of a better judge and subsequently better outcome is "harassing" or "annoying" and is "without . . . excuse." In *Horowitz*, the Second Circuit found that the plaintiff's conduct was "vexatious" when they dismissed a claim "immediately after" the court "stated its belief that the action was meritless" and then filed a similar suit in another court. *Horowitz* at 23. This mirrors the vexatious conduct in this case, the Defendant should not bear the burden of Plaintiff's attempts to evade an unfavorable ruling (as the district court found was the motivation). R at 11a. Had the Plaintiff waited until they lost on the merits (as the trial court found they expected), then refiled the same

claim, there would be no question it was frivolous and vexatious. There should be no exception when the plaintiff is quick enough to withdraw shortly before the unfavorable ruling, only to refile in hopes of a better outcome. As the court in *Esquivel v. Arau* opined, this activity which falls within Rule 41(d) is believed to be "abusive *per se*." 913 F. Supp. 1382, 1391 (C.D. Cal. 1996).

In *Dean v. Riser*, the Fifth Circuit adopted a specific, and arguably more stringent, test for defendants to obtain attorney fees in § 1988 cases concerning voluntary dismissal. 240 F.3d 505 (5th Cir. 2001). Under that test, the defendant must show that the plaintiff's voluntary dismissal was intended to "escape a disfavorable judicial determination on the merits" along with the standard heightened requirements for § 1988 defendants. *Id*. at 510. It is worth noting that this case was decided fifteen years before *CRST* where the court found that defendants, unlike plaintiffs, did not need to "prevail on the merits" in order to be a prevailing party. However, even under this two-prong approach, QSU is entitled to attorney's fees. The district court found that Park's dismissal was intended to "avoid an unfavorable judgment on the merits." R at 11a. While Park may contend that they had good cause, since they thought the judgment was going to be influenced by bias, the court found this perception of bias was incorrect, and the district court's factual findings are reviewed under a "clearly erroneous" standard. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (holding that a trial court's finding that is plausible "must govern," "even if another is equally or more so."). Additionally, the Plaintiff also cited the need for more legal research as a motivating factor in refiling litigation, the Defendant should not need to bear the costs of Plaintiff's unpreparedness. R at 10a. The district court correctly concluded that the actions in this case gave rise to the sort of unreasonable litigation tactics that § 1988 is intended to prevent, and this Court should defer to the trial court's factual holdings due to its intimate

familiarity with the case. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (explaining that the standard of review for a district court's decision to award fees under § 1988 is "abuse of discretion.").

Based on the district court's findings, Park's actions entitle QSU to attorney fees. QSU's motion under 41(d) requested that Judge Alexopoulos find that the Plaintiff "acted in bad faith and/or vexatiously." R at 10a. While the Judge found there was no bad faith, he implicitly found the repeat litigation was vexatious, as he awarded attorney's fees to the defendant, citing the Plaintiff's motives to avoid a disfavorable judgment on the merits. R at 10a. This is enough to entitle the Defendant to attorney fees even under the most stringent standards. The District Court's finding that Park's dismissal and refiling of the same claim was intended to avoid a disfavorable judgment on the merits is supported by the record and is clearly the type of unreasonable, burdensome, and harassing litigation that § 1988 and 41(d) are intended to deter. Thus, this Court should affirm the court below in upholding the award of attorney's fees.

CONCLUSION

Wherefore, in light of all the above, Quicksilver State University respectfully asks this Court to **AFFIRM** the holding of the court below.

Respectfully submitted,

s/Team 36
Counsel for Respondents

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that this brief was filed in compliance with Rule 2.11 and, for the purposes of that rule, is 13,167 words long.

Respectfully submitted,

s/Team 36
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