No. 21-8289

In The

Supreme Court of the United States

January Term, 2023

KYLER PARK,

Petitioner,

v.

QUICKSILVER STATE UNIVERSITY

Respondent.

On Petition for Writ of Certiorari from
the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

Oral Argument Requested

Team 41
Counsel for the Respondent
November 21, 2022

QUESTIONS PRESENTED

I. Under the Fourteenth Amendment and Title IX, does a student accused of misconduct in a university disciplinary proceeding have the right to direct and unfettered cross-examination of witnesses and to insist that such witnesses remove facemasks while testifying when the absence of same nevertheless comported with due process?

II. Under Rule 41(d) of the Federal Rules of Civil Procedure, does the term "costs" as used therein include an award of attorney's fees when the purpose, language, and context of the Rule evinces an intent to permit attorney's fee awards?

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OPINIONS BELOW

The decision of the United States District Court for the District of Quicksilver is reported at *Park v. Quicksilver State Univ.*, No. 20-cv-7615 (D.C. Dec. 17, 2020). The decision of the United States Court of Appeals for the Fourteenth Circuit is reported at *Park v. Quicksilver State Univ.*, No. 21-4601 (14th Cir. Oct. 18, 2021).

STATEMENT OF JURISDICTION

As this case involves federal questions, this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Factual Background

Kyler Park, the Accused Student. At the time of the misconduct allegation, Kyler Park ("Park") attended Quicksilver State University ("QSU") as an incoming senior. R. at 2a. Park is a male and of legal age to consume alcohol. R. at 2a.

Jane Roe, the Alleged Victim. Jane Roe ("Roe"), a female student who attended QSU, is the alleged victim of sexual misconduct. R. at 2a. During the relevant time, Roe was under the age of twenty-one. R. at 2a.

Events Giving Rise to the Claim. On March 14, 2020, alone for Spring Break, Roe visited a movie-theater bar and sat down for a drink. R. at 2a, 3a. After some time, Park, an acquaintance of Roe's, entered the bar and noticed Roe drinking a clear beverage. R. at 2a, 6a. The two decided to sit together. R. at 2a. While Park ordered one alcoholic drink for Roe, Park did not consume alcohol himself. R. at 2a. The two talked for approximately one hour before walking together to Roe's on-campus dorm room, where the pair engaged in sexual intercourse. R. at 2a. Thirteen

days later, on March 23, QSU's Division of Student Affairs notified Park that Roe accused Park of violating the Code of Student Conduct ("CSC") by allegedly "commit[ing] acts of sexual abuse, unwanted sexual contact, and dating violence." R. at 3a-4a. Thus, QSU scheduled a disciplinary hearing (the "Hearing") to adjudicate the matter. R. at 4a.

The COVID-19 Pandemic. The outbreak of the COVID-19 pandemic forced QSU to cancel all classes held in person for the remainder of the semester. R. at 4a. However, because QSU set its CSC policies to change over the summer in response to new Title IX regulations issued in May of 2020, QSU held the Hearing in-person on the scheduled date for purposes of uniformity. R. at 4a. Thus, QSU held the Hearing pursuant to the policies in place for the school year in which the alleged misconduct occurred. R. at 4a.

Competing Narratives. Because Spring Break prompted most students to leave town, neither Park nor Roe identified witnesses to corroborate their stories. R. at 3a. This rendered more difficult an accurate reconstruction of the evening. R. at 3a. While Park and Roe communicated over the phone after their encounter, the pair dispute the content of the conversations. R. at 3a. On one hand, Park claimed that Roe threatened to file a sexual assault report against Park after Park allegedly declined Roe's advances for a romantic relationship. R. at 3a. On the other hand, Roe claimed that she called Park to piece together the evening in question. R. at 3a. According to Roe, her intoxication level rendered her night a blur, vaguely recalling

that she saw park at the bar but her memory failing until she awoke to Park engaging in non-consensual sexual intercourse with her. R. at 3a.

The Investigation and Commencement of the Hearing. QSU assigned Ali Mills ("Mills") to investigate Roe's claim, who similarly failed to identify witnesses to corroborate the parties' accounts. R. at 4a. Thus, approximately two months after the filing of the claim, the Hearing commenced in-person without additional witnesses. R. at 4a. The Vice Chancellor for Student Affairs, Tory Nichols ("Vice Chancellor Nichols") appointed the Hearing Board ("the Board"), composed of five QSU employees and students. R. at 4a. The Hearing lasted six hours, beginning at 9:00 a.m. on May 20, 2020, and continuing until 3:00 p.m. the same day. CLRF. ANS. #5. Both Roe and Park attended, with Park accompanied by an attorney. R. at 4a.

Effect of the COVID-19 Pandemic. In response to the novel health risks introduced by the pandemic, QSU required everyone at the Hearing to wear facemasks. R. at 4a, 5a. Thus, Roe wore an opaque N95 facemask that covered her mouth and nose. CLRF. ANS. #3. Although Roe physically appeared, testified, and submitted to questioning, Park insisted that the Board should have granted his requests either to require Roe to remove her facemask while speaking or to require Roe to testify remotely without a mask. R. at 5a. However, absent from the record is any request by Park for Roe to wear an alternative facemask despite the availability of clear facemasks in Quicksilver in May of 2020. CLRF. ANS. #4.

Method of Questioning. Although the CSC during the 2019-2020 school year disallowed the students from cross-examining witnesses "directly," it permitted cross-

examination by the Board. R. at 5a. Thus, Roe and Park submitted questions to the Board. R. at 5a. In considering whether to pose the questions proposed by both parties, QSU policy controlled. R. at 5a. Specifically, the QSU manual required the Board to prioritize student comfort over rigorous examination—instructing the Board to begin examinations with "easy" questions, to steer clear of leading questions, and to avoid "pursuing a line of questions" for fear of traumatizing students. R. at 5a. The manual further permitted the Board both to disregard formal rules of evidence and to exclude "unduly repetitious or irrelevant evidence." R. at 5a.

Roe's Intoxication. Concerning the first area of dispute, the Board permitted Park to submit numerous initial and follow-up questions aimed at Roe's alleged intoxication. R. at 6a. After considering the probative value of the questions, the Board asked Roe most of Park's initial questions on the subject; however, it excluded many follow-up questions intended for impeachment or to elicit details it deemed intrusive or irrelevant. R. at 6a-7a. For instance, Park assumed that the clear beverage Roe drank was non-alcoholic while Roe claimed the opposite. R. at 6a. The Board inquired into the subject and deemed overly aggressive and irrelevant follow-up questions concerning the type of alcohol Roe allegedly consumed. R. at 6a. Moreover, Roe allegedly drank multiple alcoholic beverages that evening, but Roe did not remember the total number. R. at 6a. Without a receipt, the Board declined to invade Roe's financial privacy by compelling access to the credit-card statement on her smartphone. R. at 6a-7a. In any event, the statements likely would not have specified the items ordered. R. at 7a. To avoid forcing Roe to potentially implicate

herself in possible criminal conduct, the Board further excluded Park's follow-up questions inquiring into how Roe purchased alcohol while underage. R. at 7a.

Park's Knowledge of Roe's Intoxication. The second area of dispute concerned whether Park knew of Roe's intoxication. R. at 7a. On this subject, Park presented video footage from a security camera that captured Roe outside of the bar, contending that it depicted Roe's lack of intoxication because she appeared to walk without difficulty. R. at 7a. However, Roe advanced that martial arts training provided her with excellent balance. R. at 7a. Probing deeper, the Board posed Park's follow-up questions, asking more than once whether her bank statement reflected payments for such training. R. at 7a. Eliciting an answer in the negative, the Board thereafter declined to probe Roe further for lack of relevance. R. at 7a.

Park Urges the Board to Disregard Roe's Testimony. Park requested for the Board to wholly disregard Roe's testimony on the basis that Roe's facemask covered the majority of her face, thereby allegedly complicating the Board's assessment of her credibility. R. at 8a. In its discretion, the Board declined. R. at 8a.

The Decision. Because the Board found Roe's testimony more credible than Parks, the Board determined at 3:00 p.m. on May 20, 2020 that Park likely violated the CSC and recommended expulsion. R. at 8a; CLRF. ANS. #6. Agreeing, Vice Chancellor Nichols immediately expelled Park. R. at 8a; CLRF. ANS. #6.

Procedural History

Park Files the Initial Lawsuit. Alleging that QSU deprived him of due process under 20 U.S.C. § 1983 and that QSU reached an erroneous outcome on the

basis of his sex in violation of Title IX, Park sued QSU on June 12, 2020, in the District Court of Quicksilver. R. at 8a. Judge Kreese, an alumnus of QSU and a former QSU fraternity member, oversaw the case. R. at 8a. Of relevance, Judge Kreese supported both the QSU football team and his former fraternity on Twitter, wherein he accumulated a substantial follower base. R. at 8a.

QSU Moves to Dismiss. QSU moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) on July 1, 2020. R. at 9a. The hearing on this motion occurred on July 22, 2020, following a routine recitation of the QSU fight song. R. at 9a. After the hearing commenced, Judge Kreese carefully listened to the arguments of each side, probed the merits of both parties' claims, and made no comment suggestive of bias. R. at 9a. In fact, Judge Kreese declined to enter a ruling at the close of the hearing, deciding instead to take the case under advisement. R. at 9a.

Park Files a Voluntary Dismissal and Refiles. On July 22, 2020, before the final judgment, Park filed a voluntary dismissal of the lawsuit under Rule 41(a)(1) of the Federal Rules of Civil Procedure. R. at 9a. Less than two months later, Park refiled the lawsuit in the District Court of Quicksilver on September 21, 2020. R. at 9a. Naming QSU as defendant, Park asserted identical claims as in the initial lawsuit. R. at 9a. This time, Judge Alexopoulos oversaw the case. R. at 9a.

QSU Again Moves to Dismiss. Once again, QSU filed a motion to dismiss under Rule 12(b)(6); however, this time, QSU filed an additional motion pursuant to Rule 41(d), requesting an award of costs, including attorney's fees of $74,500.00, on the basis that Park acted in bad faith and/or vexatiously in dismissing and refiling

the action. R. at 10a. In response to the latter motion, Park provided affidavits from his counsel and from himself that denied the allegations and reasoned that the first court presented concerns of possible bias. R. at 10a. The affidavit from Park's counsel further provided that counsel decided to dismiss for want of time 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." R. at 10a. QSU neither objected to these affidavits nor presented courter-affidavits. R. at 10a.

The Decision of the District Court of Quicksilver. The district court ruled in favor of QSU on both of its motions on December 17, 2020. R. at 10a, 11a. Finding that Park likely nonsuited the initial lawsuit to avoid an unfavorable judgment on the merits, Judge Alexopoulos further found that Park's actions, "in dismissing his first action and refiling the instant action, were *technically* motivated by a desire to gain a tactical advantage—or more appropriately, to eliminate a perceived tactical *disadvantage* in a different court in which [Park] believed (erroneously) that the court favored his opponent from the get-go." R. at 11a. Further finding that Park nevertheless did not take these actions in bad faith, the district court ultimately reduced the attorney's fee award from $74,500.00 to $28,150.00. R. at 11a. In granting these fees, the court interpreted "the costs of that previous action" under Rule 41(d) as including the costs associated with attorney's fees. R. at 11a.

The Decision of the Court of Appeals. The United States Court of Appeals for the Fourteenth District affirmed the decision of the lower court, agreeing that: (1) the procedure provided to Park at the Hearing conducted by QSU comported with due

process, thus warranting dismissal of the claim; (2) Park failed to state a claim under Title IX upon which relief could be granted, likewise warranting dismissal of the claim; and (3) the district court properly interpreted "costs" under Rule 41(d) as including attorney's fees. R. at 40a.

SUMMARY OF THE ARGUMENT

This Court should affirm the lower court's decision and find that the United States Court of Appeals for the Fourteenth Circuit correctly interpreted both the Fourteenth Amendment and Rule 41(d) of the Federal Rules of Civil Procedure for the following two reasons.

First, the question of whether a university provided an accused student sufficient process under the Fourteenth Amendment and Title IX, insomuch as it implicates the Fourteenth Amendment, is a fact-intensive determination decided by applying the *Mathews* test, laid out by the Supreme Court of the United States. Under this analysis, courts balance the interests of the accused student with the procedure afforded and the interests of, and burdens placed on, a university if the court determines that additional or substitute procedure is necessary. Moreover, universities may adopt procedures that favor alleged victims and federal law does not require a university to discredit the testimony of a witness in a university disciplinary hearing who testified and submitted to cross-examination in the physical presence of the factfinder. Thus, placing a categorical requirement that universities must provide an accused student the right to the direct and unfettered questioning of witnesses,

including the right to require such witnesses to remove facemasks while testifying, would ignore precedent and would likely result in heavy burdens on universities.

Second, interpreting Rule 41(d) of the Federal Rules of Civil Procedure as permitting the recovery of attorney's fees advances the purpose of the Rule, comports with congressional intent and the language of the Rule, and allows for a consistent interpretation between Rule 41(a)(2) and Rule 41(d). Specifically, Rule 41(d) is intended to deter forum shopping and vexatious litigation, the context and language of the Rule demonstrates that congress intentionally omitted a definition of "costs" to permit the recovery of attorney's fees, and courts already permit the recovery of attorney's fees under Rule 41(a)(2), a rule that contains no provision for costs nor for attorney fees.

Accordingly, this Court should affirm the lower court's decision and hold both that due process does not require the direct and unfettered cross-examination of witnesses in all university disciplinary proceedings by a student accused of misconduct and that Rule 41(d) permits the recovery of attorney's fees.

STANDARD OF REVIEW

Application of the legal principals underlying the decision of a lower court is a question of law reviewed *de novo*. *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1236 (10th Cir. 2013). This means that the Supreme Court of the United States review *de novo* a lower court's interpretation of the Fourteenth Amendment, a question of law. *See generally Id.* Thus, the Supreme Court also reviews *de novo* a lower court's interpretation of the Federal Rules of Civil Procedure. *See Garza v. Citigroup Inc.*, 881 F.3d 277, 280 (3d Cir. 2018).

ARGUMENT

For the following reasons, this Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit.

I. Because the process due in university disciplinary proceedings is determined by a balancing test depending on the facts of each case, students accused in such proceedings lack the categorical right to direct and unfettered cross-examination of witnesses.

The Due Process Clause of the Fourteenth Amendment prohibits the deprivation of a liberty or property interest of an accused absent certain minimum procedures. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); USCS Const. Amend. 14. A long-standing principle, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. Clearly, the decision of a university to suspend or expel a student implicates a property interest of such student. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). However, as academic disciplinary proceedings are not criminal trials, a proceeding need not entail many of the formalities required in the criminal context. *Flaim v. Med. Coll. Of Ohio*, 418 F.3d 629, 634 (6th Cir. 2005). Accordingly, "[o]nce it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Thus, a university may opt to conduct inquisitorial cross-examination—permitting only a hearing board to cross-examine witnesses—but then assumes the obligation to conduct reasonably adequate questioning. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019). Even where the issue of a proceeding turns on credibility, the right of an accused to cross-examine his or her accuser remains limited. *Doe v. Cummins*, 662 F. App'x 437, 448 (6th Cir. 2016); *See Doe v. Univ. of*

Cincinnati, 872 F.3d 393, 406 (6th Cir. 2017) (noting that a factfinder can assess demeanor without the physical presence of a witness); *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020) (with credibility at issue, the accused should have been allowed to submit questions to the hearing committee to ask the alleged victim).

In other words, cross-examination need not be adversarial. *Flaim*, 418 F.3d at 640. Nor are students accused of misconduct entitled to the unfettered questioning of witnesses in a disciplinary proceeding. *Doe v. Mich. State Univ.*, 989 F.3d 418, 431 (6th Cir. 2021). Rather, courts determine the amount of process due on a case-by-case basis. *Flaim*, 418 F.3d at 634. This means that due process in the academic disciplinary setting is not a "one-size-fits-all" scenario. *See Id.* Thus, while circuit courts disagree as to the degree of permissible limits placed on cross-examination where a university disciplinary hearing turns on credibility, none of these courts have held that students must receive the right to direct and unfettered questioning of witnesses. *See Haidak*, 933 F.3d at 69; *Mich. State. Univ.*, 989 F.3d at 431. Accordingly, these cases are analyzed under the fact-intensive test laid out by the Supreme Court in *Mathews v. Eldridge* to determine the amount of process due in each case by balancing the interests of the parties involved. *Mich. State. Univ.*, 989 F.3d at 431; *Mathews*, 424 U.S. at 334-35.

Requiring universities to provide students accused of misconduct in a university disciplinary proceeding the right to the direct and unfettered cross-examination of witnesses would apply equally to all disciplinary cases, whether for alleged sexual misconduct or otherwise, with the issue turning on credibility or not,

and no matter the burden placed on the university; therefore, a blanket mandate that universities must permit an accused student to conduct the direct and unfettered cross-examination of witnesses in all cases disregards precedent and places a heavy burden on universities. Accordingly, this Court should hold that universities are not required to afford accused students the right to the direct and unfettered cross-examination of witnesses.

A. The process due in university disciplinary proceedings is determined on a case-by-case basis under *Mathews* to balance the burdens placed on a university with the interests of an accused student.

Because courts have long held that the amount of process due in a university disciplinary proceeding is determined on a case-by-case basis under the *Mathews* test, this Court should uphold this precedent and decline to require universities to permit students accused of misconduct the right to the direct and unfettered cross-examination of witnesses no matter the totality of the process otherwise afforded.

Under *Mathews*, courts balance three factors to determine whether a university disciplinary proceeding afforded the accused due process under the circumstances: (1) the private interest that the official action will affect; (2) the risk of an erroneous deprivation of such private interest by the procedures used, and the probable value, if any, of substitute or additional procedural safeguards; and (3) the interest of the Government, including the function involved as well as the fiscal and administrative burdens that the substitute or additional procedural requirement would entail. *Mathews*, 424 U.S. at 335. This test recognizes that "[s]tudents have 'paramount' interests in completing their education, as well as avoiding unfair or

mistaken exclusion from the educational environment, and the accompanying stigma." *Haidak*, 933 F.3d at 66 (quoting *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988)). At the same time, the *Mathews* test recognizes that a university "has an important interest in protecting itself and other students from those whose behavior violates the basic values of the school…and in balancing the need for fair discipline against the need to allocate resources toward" the promotion and protection of the primary function of universities—to educate its students. *Haidak*, 933 F.3d at 66.

In other words, courts confront the question of whether a university disciplinary proceeding provided sufficient process to an accused student on a case-by-case basis by balancing the interests of such students with the interests of, and burdens placed on, the university. *See Id*; *Cummins*, 662 F. App'x at 448 (stating that a student subject to probation may be entitled to receive less process than a student subject to disciplinary suspension); *Univ. of Cincinnati*, 872 F.3d at 399-400 ("[w]hile the exact outlines of process may vary, universities must "at least" provide notice of the charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker."); *Gorman*, 837 F.2d at 12 ("[d]ue process… is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation.").

1. The First, Second, Fifth, Eighth, and Eleventh Circuit Courts do not require universities to provide students the right to direct and unfettered cross-examination under the Mathews test.

The majority of circuit courts, specifically the First, Second, Fifth, Eighth, and Eleventh Circuits, hold that due process does not generally include the opportunity

to cross-examine in university proceedings. *See Haidak*, 933 F.3d at 69; *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 867-68 (8th Cir. 2020); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987). Rather, the First and Fifth Circuits hold "that due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel." *Haidak*, 933 F.3d at 69; *Walsh*, 975 F.3d at 485. Similarly, the Eighth Circuit holds that the process of submitting questions only through a hearing board is not "so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation." *Univ. of Ark.-Fayetteville*, 974 F.3d at 867 (quoting *Haidak*, 933 F.3d at 69); *See Nash*, 812 F.2d at 664 (holding no due process violation occurred by inquisitorial cross-examination). Moreover, the First Circuit has placed importance on whether the procedures treated the accuser and accused in like manner. *Haidak*, 933 F.3d at 70.

In any event, these courts consider the adequacy of process afforded to an accused student in a university disciplinary hearing under the *Mathews* test. *Id.* at 66; *See Gorman*, 837 F.2d at 14 ("[a]lthough the protection of such a vital interest would require all possible safeguards, it must be balanced against the need to promote and protect the primary function of institutions that exist to provide education.").

For instance, the First Circuit in *Haidak* upheld inquisitorial cross-examination applied to *Mathews* despite the disposition of the matter turning on credibility. *Haidak*, 933 F.3d at 69, 71. First, the accused student faced expulsion

upon a finding of fault. *Id.* at 66. Second, university policy implicitly instructed the board to prioritize student comfort at the expense of adversarial cross-examination, calling for the board to begin questioning by calming the witness with "easy questions, to avoid leading questions typical of cross-examination, and to remain cautious of the "danger of pursuing a line of questions" because "it can be very adversarial." *Id.* at. 70. Thus, neither the accused student nor the alleged victim made opening or closing arguments, submitted brief-like materials, nor questioned witnesses; rather, both parties only submitted to the hearing board written statements of fact. *Id.* at 68. While the court noted that applying such efforts only to a complainant-witness has helped render similar proceedings potentially unfair, the court found important that the university manual advised the board to employ the same approach for all witnesses. *Id.* at 70.

Thus, considering the third prong of the *Mathews* test, the First Circuit determined that the interests of the university weighed against permitting student-conducted cross-examination, because "when the questioner and witness are the accused and the accuser, schools may reasonably fear that student-conducted cross-examination will lead to displays of acrimony or worse." *Id.* at 69. The court further doubted that direct cross-examination would increase the probative value of such hearings. *Id.*

Moreover, the accused student submitted thirty-six questions directed at the alleged victim, twenty of which the investigator struck before the questions reached the board. *Id.* Although this procedure concerned the court because it "created the

possibility that nobody would effectively confront [the alleged victim's] accusations," the board nevertheless avoided violating the due process rights of the accused both by questioning the alleged victim extensively regarding matters central to the charges, thereby exposing weaknesses, and by alternating questioning between the alleged victim and the accused. *Id.* at 70-71. Specifically, the board probed for detail and required the alleged victim to clarify ambiguous responses. *Id.* at 70.

Although the accused nevertheless argued that the board improperly failed to pursue areas of inquiry regarding the alleged victim's "propensity for violence" and character for untruthfulness, the court disagreed on the basis that the Federal Rules of Evidence also would exclude such evidence. *Id.* at 71; *See Nash*, 812 F.2d at 665 ("[a]lthough remaining fair to the accused, student disciplinary hearings follow flexible rules and need not conform to formal rules of evidence."). Thus, the First Circuit determined that the limited questioning conducted comported with due process under the *Mathews* test. *Haidak*, 933 F.3d at 70; *See Gorman*, 837 F.2d at 15 ("it is no exaggeration to state that the undue judicialization of an administrative hearing…may may result in an improper allocation of resources…").

Similarly, the Eleventh Circuit in *Nash* considered the *Mathews* test in determining whether the process afforded to two accused students sufficed under the Fourteenth Amendment. 812 F.2d at 660. First, the university sanctioned the students with a year-long suspension from a graduate program for alleged academic dishonesty. *Id.* at 658. Second, the process afforded to the students during the day-long hearing included inquisitorial cross-examination through a non-voting hearing

board member, the allowance of an attorney, and the opportunities to present statements in response to the charges, bring witnesses, appeal an adverse decision, and to rebut adverse testimony. *Id.* at 658, 661. Subsequently, the accused students alleged that the university provided them insufficient notice, and admitted irrelevant and prejudicial testimony, among other claims. *Id.* at 661. Further, the students advanced that the inquisitorial form of cross-examination utilized abridged their due process rights. *Id.* at 667.

Third, allowing the accused students to conduct cross-examination directly, according to the Eleventh Circuit would not place a great burden on the university. *Id*; *But see Univ. of Ark.-Fayetteville*, 974 F.3d at 868 ("there are legitimate government interests in avoiding unfocused questioning and displays of acrimony by persons who are untrained in the practice of examining witnesses. There also would be costs and burdens" on the university); *Walsh*, 975 F.3d at 485 (explaining that adversarial cross-examination "might well have led to an unhelpful contentious exchange or even a shouting match."). Nor would providing more detailed notice of the charges. *Nash*, 812 F.2d at 667. However, considering the amount of process provided as a whole, the Eleventh Circuit held that any potential value in additional procedures was "doubtful." *Id*; *See Walsh*, 975 F.3d at 485 ("[w]e are not persuaded, however, that cross examination of [the alleged victim] by [the accused] personally would have significantly increased the probative value of the hearing.").

Conversely, the Fifth Circuit in *Walsh* held the disciplinary procedure insufficient not due to inquisitorial cross-examination, but because the accused

lacked any opportunity to confront the alleged victim, who failed to appear entirely. 975 F.3d at 485. Unlike the cases discussed above, an alleged victim accused a professor of sexual misconduct. *Id.* at 478. However, the Fifth Circuit nevertheless applied the *Mathews* test as follows. *Id.* at 483. First, the accused faced loss of employment, an adverse impact on future employment opportunities, and a tarnished reputation. *Id.* Second, a fellow professor accompanied the accused at the hearing, the university permitted the accused to bring character witnesses and to appeal an adverse decision, and witnesses underwent inquisitorial cross-examination. *Id.* at 480. Notably, the accused received only the right to inquisitorially cross-examine an investigator regarding "snippets of quotes" from one of the alleged victims, rather than the victim personally. *Id.* at 485. Third, the interests of the university included preserving resources to serve its function of education, protecting victims of sexual misconduct and other vulnerable witnesses, and providing a safe environment for students and faculty. *Id.* at 484.

However, given that the alleged victim "was a graduate student presumably in her mid-twenties," requiring her to answer additional questions posed by the hearing board "would not have been so unreasonable a burden as to deter her and other similar victims of sexual harassment from coming forward." *Id.* at 485. Thus, where the "entire hearing boiled down to an issue of credibility," the court held that the university should have permitted the accused to submit questions to the hearing board to propound the alleged victim. *Id.* at 484.

Based on the foregoing, these courts clearly apply *Mathews* to determine the amount of process due in each case by assessing the private interest of the student affected by the decision of a university disciplinary board, the risk of an erroneous deprivation of such private interest by the procedure afforded, the probable value, if any, of additional or substitute procedural safeguards, the interests of the university, and the burdens placed on the university if the court determines that additional or substitute safeguards are necessary. *See* 424 U.S. at 335. In other words, these courts assess each case based on the totality of the circumstances rather than by placing a blanket rule on universities.

Given the differing facts, including the interests of the accused, procedural safeguards employed, and the interests of, and burdens imposed on, the universities in each case in which an accused alleges a due process violation in a university disciplinary hearing, coupled with the concern expressed by courts in permitting students to personally conduct cross-examination, this Court should hold that universities are not required to permit accused students a categorial right to the direct and unfettered cross-examination of witnesses. Otherwise, imposing such a blanket requirement might greatly burden universities and alleged victims alike in future misconduct proceedings, wherein their interests also might not be adequately protected.

2. The Sixth Circuit does not categorically require universities to provide students the right to direct and unfettered cross-examination under the Mathews test.

The minority view amongst Circuit Courts, the Sixth Circuit holds that due process in university disciplinary proceedings generally includes some opportunity for cross-examination. *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). However, the Sixth Circuit has held that inquisitorial cross-examination is constitutionally sufficient, even where credibility is at issue, so long as a "mutual test of credibility" is employed. *Univ. of Cincinnati*, 872 F.3d at 404. The Sixth Circuit has also held that the accused in a university disciplinary proceeding is entitled to "some form of cross-examination" that allows a factfinder to determine credibility more accurately and to observe the demeanor of the alleged victim on the stand. *Baum*, 903 F.3d at 582; *Mich. State Univ.*, 989 F.3d at 431. While the court is concerned that universities might not properly credit witness testimony without direct cross-examination where the issue of the matter turns on credibility, the Sixth Circuit has never categorically required the direct and unfettered cross-examination of witnesses in all cases. *See Mich. State. Univ.*, 989 F.3d at 431. Rather, the Sixth Circuit determines whether the process afforded to an accused student comports with the Fourteenth Amendment by analyzing the facts of the case under the *Mathews* test. *See Cummins*, 662 F. App'x at 446, 447 (applying *Mathews* and explaining that the focus "is not whether each procedural protection is required, but rather what protections, as a whole, were required in this case.").

Thus, the Sixth Circuit in *Cummins* upheld the procedure provided to two students accused of sexual misconduct, one who faced a three-year suspension and the other facing disciplinary probation. 662 F. App'x at 438, 448. Focusing on whether

the students received an adequate opportunity to "respond, explain, and defend," the court determined that indirect cross-examination through the hearing board sufficed under the *Mathews* test. *Id.* at 448. Notably, the accused student who faced disciplinary probation received only the ability to indirectly cross-examine the alleged victim in an initial hearing—not the hearing of the final decision. *Id.* Moreover, both accused students in *Cummins* alleged constitutional violations due to the refusals of the hearing board both to pose all of the questions submitted and to permit the submission of follow-up questions. *Id.* Approving this circumscribed form of cross-examination applied to the second and third prongs of the *Mathews* test, the Sixth Circuit determined that the burden on the university of overseeing cross-examination outweighed any benefit of allowing follow-up questions. *Id.*

Subsequently applying the *Mathews* test in another due process case against a university, the Sixth Circuit reached the opposite conclusion. *Univ. of Cincinnati*, 872 F.3d at 399, 405. There, the university found the accused student responsible for sexual assault based only on hearsay statements by the alleged victim, who failed to appear at the disciplinary hearing. *Id.* at 396. Thus, the accused student argued before the Sixth Circuit that due process required the university to provide the student the opportunity to inquisitorially cross-examine the alleged victim. *Id.* at 400. The Sixth Circuit accordingly analyzed the case under the *Mathews* test as follows. *See Id.* at 399-400. First, university sanctioned the accused student with expulsion. *Id.* at 401. Second, the only evidence proffered by the Title IX office following its investigation consisted of hearsay statements by the alleged victim yet the entire

proceeding boiled down to a credibility determination. *Id.* at 401-402. Third, a "well recognized" interest of a university is the maintenance of "a learning environment free of sex-based harassment and discrimination." *Id.* at 402. While universities also have a strong interest in establishing disciplinary systems that are constitutionally permissible, universities are not required to follow evidentiary rules of courts. *Id.* at 404.

However, applying the facts of this case to the *Mathews* test, the Sixth Circuit determined that "[s]paring the [hearing board] from having to navigate traditional cross-examination justifies the requirement for written preapproved questions, but it does not justify denying the opportunity to question an adverse witness altogether." *Id.* at 404-405. The Sixth Circuit further explained that a factfinder may adequately assess demeanor without the physical presence of the witness. *Id.* at 406. Accordingly, the court emphasized the narrow obligations of a university conducting a disciplinary hearing, stating that the university "must provide a means for the [hearing board] to evaluate an alleged victim's credibility, *not for the accused to physically confront his accuser*." *Id.* (emphasis added).

Three years later the Sixth Circuit decided *Baum*, wherein the accused student urged that due process requires an opportunity to cross-examine adverse witnesses where the finding of responsibility turns on credibility. 903 F.3d at 580. There, the accused student received only the opportunity to examine the written statements of the alleged victim and then respond in writing to identify inconsistencies, as the university failed to hold any type of testimonial hearing. *Id.* at 580, 582. Based only

on these written statements and a report by the investigator—who recommended dropping the complaint—the hearing board found the accused student responsible, deeming the alleged victim more credible because the witnesses for the accused consisted primarily of his fraternity brothers. *Id.* at 586. Notably, several of the witnesses for the alleged victim also consisted of her sorority sisters. *Id.*

The *Baum* court applied the *Mathews* test as follows. *See Id.* at 582, n.2 ("we apply the Mathews factors herein."). First, labelling a student as a sex offender carries both an immediate and lasting impact on the student, who might be forced to withdraw from classes and move out of campus housing. *Id.* at 582. As the accused student faced expulsion, a finding of responsibility might further lead to difficulty in obtaining both future educational and employment opportunities. *Id.* Second, the university failed to identify any substantial burden that it would face if required to allow some opportunity for cross-examination in sexual assault cases, specifically. *Id.* Moreover, allowing some form of cross-examination would only minimally burden the university because it already provided cross-examination in other types of misconduct cases. *Id.* Third, although the university did have a legitimate interest in avoiding procedures that might further harm an alleged victim, the court held that these interests did not justify the complete denial of cross-examination. *Id.* at 582-83. *But see Univ. of Cincinnati*, 872 F.3d at 403 (warning that strengthening procedures can lead to adverse effects on victims, which is "the same hostile environment Title IX charges universities with eliminating.").

Although the Sixth Circuit in *Baum* suggested that accused students receive the right in a university disciplinary proceeding to personally or through an agent conduct adversarial cross-examination, the court did not so hold. *See Id.* at 583 (suggesting that, rather than allowing an accused student to personally confront an alleged victim, "the university *could* allow the accused student's agent to conduct cross-examination on his behalf.") (emphasis added); *Id.* at 584 ("if credibility is in dispute and material to the outcome, due process requires cross-examination."); *Id.* at 583 ("[t]hat is not to say…that the accused student always has a right to *personally* confront his accuser."). First, the accused student in *Baum* lacked any opportunity to confront his accuser; the issue therefore centered around a complete denial of cross-examination. *Id.* at 582. In holding written statements without a live hearing insufficient for cross-examination, the court stated that "[i]nstead, the university must allow for some form of *live* questioning *in front of* the factfinder [sic]." *Id.* at 583. Before acknowledging that due process at the very least requires circumscribed cross-examination, the court stated its conclusion: "if credibility is in dispute and material to the outcome, due process requires cross-examination." *Id.* at 584, 585.

Only one year after *Baum*, the Sixth Circuit again considered the constitutionality of process afforded to an accused student sanctioned by expulsion. *Mich. State. Univ.*, 989 F.3d at 430. There, the court explained that *Baum* provided "extensive justifications" to help define the constitutional minimum; first, that cross-examination allows the accused to challenge witness credibility and "probe the witness's story to test her memory, intelligence, or potential ulterior motives," and

second, cross-examination allows the factfinder to observe a witness' demeanor. *Id.* (quoting *Baum*, 903 F.3d at 582). Based on these guidelines, the court stated that "[i]t follows, then, that the form of cross-examination required must allow for the defendant to probe the claimant's credibility and for the factfinder to observe the witness's demeanor under questioning." *Id.* In upholding the constitutionality of the process afforded, the court further explained that "*Mathews* does not call for uncircumscribed cross-examination." *Id.*

Focusing on the questions omitted by the hearing board, the accused student urged that the board should have required the alleged victim to answer all questions posed during cross-examination. *Id.* at 427. Although the record omitted the specific questions the alleged victim refused to answer, the Sixth Circuit stated that "[t]he issue is not necessarily the content of the questions, but whether permitting the complainants to refuse to answer some small number of questions throughout the course of a three-day hearing is a violation of [the accused student's] due process rights." *Id.* Deciding in the negative, the court held that the accused received sufficient process irrespective of the relevance of the questions refused. *Id.* After all, the student received a three-day hearing during which the board permitted the student's attorney to cross-examine the alleged victim. *Id.* at 424. Notably, the court proceeded to explain that:

> Nowhere in *Baum*, *University of Cincinnati*, or *Cummins* does this court suggest that the accused in a university disciplinary proceeding is entitled to unlimited questioning of alleged victims. They are entitled to "some form of cross-examination" that allows for a factfinder [sic] to more accurately make a determination of credibility and to witness the claimant's demeanor on the stand.

Id. at 431; *See Id.* at 434 (Nalbandian, J., concurring) ("[t]he inquiry isn't categorical. It is, as a procedural due process question, fact intensive.").

Based on the foregoing, the Sixth Circuit clearly applies *Mathews* to determine whether the process employed in a university disciplinary proceeding comports with due process. *See Cummins*, 662 F. App'x at 446, 447. Thus, the Sixth Circuit assesses each case based on the totality of the circumstances rather than by placing a blanket rule on universities in all misconduct cases. *See Id.* For instance, in *Baum*, the court explained that the university identified no substantial burden that it would face if the court required it to provide some opportunity for cross-examination in sexual assault cases. 903 F.3d at 582. There, requiring some form of cross-examination would only minimally burden the university because it already provided for cross-examination in other types of misconduct cases. *Id.* This is not true of every university, but rather the university in *Baum*, specifically. *See Id.* Moreover, the issue there concerned a complete denial of cross-examination. *Id.* Thus, this holding might not be the same if the university provided inquisitorial cross-examination initially because the case would then entail different facts applied to the *Mathews* test.

Notably, placing a blanket requirement on universities to provide accused students the right to personally cross-examine witnesses and to ask such witnesses unlimited questions would render unconstitutional even the process provided in the *Michigan State University* case. There, the accused student received the right to an attorney who cross-examined witnesses on behalf of the accused student. *See Mich. State. Univ.*, 989 F.3d at 424. There, the Sixth Circuit explained that it does not

require unfettered questioning. *Id.* at 431. Moreover, even Judge Nalbandian in concurrence explained that these types of cases are determined on a case-by-case basis. *Id.* at 434 (Nalbandian, J., concurring). Conversely, a blanket requirement would apply equally to all cases, whether concerning sexual misconduct or otherwise, and no matter the burden placed on, or the interests of, the university in future cases.

Because placing a blanket requirement on universities to permit a student the right to the direct and unfettered cross-examination of witnesses at a disciplinary proceeding carries the potential for harmful consequences by placing a heavy burden on universities and because universities may adequately protect the interests of students accused of misconduct without categorically requiring same, and for the remaining reasons discussed above, this Court should hold that universities are not required to adopt procedures that permit a student the right to the direct and unfettered cross-examination of witnesses in all cases.

B. Neither Title IX nor federal law requires a university to provide an accused student in a disciplinary hearing the right to the direct and unfettered cross-examination of witnesses in order to comply with the Fourteenth Amendment.

Because universities may adopt procedures that favor alleged victims under Title IX and the Fourteenth Amendment, and because federal law places no requirement on universities to discredit the testimony of a witness who submitted to live, in-person cross-examination while wearing a facemask, this Court should hold that university procedures that comport with due process under the *Mathews* test suffices.

1. Universities may adopt procedures that favor alleged victims.

The right to a fair trial in front of a fair tribunal is among the basic requirements of due process. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). This principle applies to university disciplinary proceedings. *Flaim*, 418 F.3d at 633. Relatedly, Title IX prohibits discrimination on the basis of sex by educational institutions that receive federal funding. *Cummins*, 662 F. App'x at 451; 20 U.S.C. § 1681(a). In this manner, due process and Title IX intertwine to prohibit such educational institutions from using gender as a motivating factor in adopting and implementing disciplinary procedures. *Cummins*, 662 F. App'x at 449-50. This means that a court in assessing the adequacy of process afforded to a given student may consider whether a university employed sexual bias in its disciplinary procedures. *See Id.* at 449. However, university disciplinary adjudicators are presumed impartial absent evidence of actual bias. *Id.* In other words, "[a]ny alleged prejudice on the part of the [decisionmaker] must be evident from the record and cannot be based in speculation or inference." *Id.* at 450 (quoting *Nash*, 812 F.2d at 665). This is no slight burden. *See Walsh*, 975 F.3d at 482. Moreover, universities may adopt procedures that favor alleged victims. *See Cummins*, 662 F. App'x at 453. This is because, as explained by the Sixth Circuit, both males and females can fall victim to sexual assault. *Id.*

Issued by the Department of Education in 2011, the "Dear Colleague" letter provided guidance to educational institutions in complying with Title IX and initiated a more rigorous approach by such institutions in responding to allegations of sexual misconduct. *Rossley v. Drake Univ.*, 979 F.3d 1184, 1195-96 (8th Cir. 2020). Namely, the letter instructed educational institutions to prioritize investigating and resolving

such claims, attached a broader definition to the term "sexual harassment," and further required the adoption of a lower burden of proof in disciplinary proceedings against students accused of sexual misconduct *Id.* at 1196. Notably, the letter contained statistics of both male and female victims of sexual assault and detailed its instructions to educational institutions in gender-neutral terms. DEP'T OF EDUC., *Dear Colleague Letter*, at 2, 4 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

Subsequent to the issuance of the "Dear Colleague" letter, several students sanctioned by universities for sexual misconduct contested its guidelines, arguing that the letter prompted universities to discriminate against male students on the basis of gender—however, as previously stated, impermissible discrimination in this context means not that the procedures favor alleged victims, but that such procedures favor one gender over the other. *Cummins*, 662 F. App'x at 453; *See Doe v. Regents of the Univ. of Minn.*, 999 F.3d 571, 578 (8th Cir. 2021) (indicating that the "Dear Colleague" letter is insufficient to violate Title IX); *accord Rossley*, 979 F.3d at 1194, 1196 (holding gender-neutral language in university policy for sexual misconduct proceedings and in "Dear Colleague" letter rendered such evidence insufficient for purposes of Title IX); *Cummins*, 662 F. App'x at 452 (because federal regulations required universities to offer certain accommodations to alleged victims, the accused student's Title IX claim failed to the extent it alleged such accommodations evidenced gender-based bias); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 607 (S.D. Ohio 2016) (holding that "actions taken by [the university] to comply with guidance to

implement Title IX cannot have been in violation of Title IX.") *aff'd*, *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

Accordingly, the Sixth Circuit in *Cummins* granted summary judgment in favor of the university after determining that the alleged deficiency at most evinced a disciplinary system biased in favor of alleged victims of sexual assault, not in favor of a certain gender. 662 F. App'x at 453. There, the student accused of misconduct argued that the university's adoption of an inquisitorial form of cross-examination constituted a procedural deficiency in violation of Title IX and of the student's due process rights. *Id*; *See Rossley*, 979 F.3d at 1196 (affirming summary judgment of Title IX claim despite alleged procedural flaws).

Based on the foregoing, universities may permissibly adopt procedures that favor alleged victims under Title IX and the Fourteenth Amendment. This means that universities that employ inquisitorial cross-examination and limited questioning of witnesses in disciplinary proceedings for concern of traumatizing an alleged victim may do so if the university employs the same approach regardless of gender. *See Cummins*, 662 F. App'x at 453. Thus, to ensure the interests of a university in protecting alleged victims are properly considered, this Court should hold that university procedures that comport with due process under the *Mathews* test suffices.

2. Federal law does not obligate university disciplinary hearing boards to disregard the testimony of a witness who appeared in person.

In 2020, the Department of Education released the following regulation: "If a party or witness does not submit to cross-examination at the live hearing, the

decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility…" 34 C.F.R. § 106.45(b)(6)(i). Although issued on May 19, 2020, this regulation took effect nearly three months later, on August 14, 2020. *See Victim Rights Law Ctr. v. Cardona*, 552 F. Supp. 3d 104, 115, 124 (D. Mass. 2021). Notably, the provision was subsequently held arbitrary and capricious by the *Cardona* court on July 28, 2021, which ultimately vacated the rule. *Id.* 134. Also affecting cross-examination in 2020, the COVID-19 pandemic presented immediate and lasting effects as the court system struggled to navigate new uncertainties while simultaneously attempting to protect the due process rights of defendants and the health and safety of all involved. *See United States v. Young*, No. 19-cr-00496-CMA, 2020 U.S. Dist. LEXIS 122356, at *4-5 (D. Colo. July 13, 2020) (discussing concern of prejudice resulting from juror's inability to assess credibility when witnesses wear facemasks); *accord United States v. Sheikh*, 493 F. Supp. 3d 883, 886 (E.D. Cal. 2020).

However, neither *Young* nor *Sheikh* held that a defendant *would* be prejudiced by a witness testifying while wearing a mask; the cases only expressed concern of such potential *in a criminal trial*. *See* 2020 U.S. Dist. LEXIS 122356, at *3, *4; 493 F. Supp. 3d at 886. In fact, the *Sheikh* court acknowledged that both county courts and federal district courts were actively holding jury trials in person at the time of its decision. 493 F. Supp. 3d at 886. In any event, a basic principle of due process in the context of university disciplinary hearings is the instruction that such hearings should not mirror criminal trials—both *Young* and *Sheikh* concerned criminal trials.

Flaim, 418 F.3d at 635; *See generally* 2020 U.S. Dist. LEXIS 122356; 493 F. Supp. 3d 883.

Accordingly, federal law does not require university disciplinary hearing boards to discredit the testimony of an alleged victim who appeared in person and submitted to inquisitorial cross-examination. Thus, considering that such proceedings are not criminal trials and therefore do not require many of the formalities required of criminal trials, this Court should hold that universities may credit the testimony of an alleged victim who appeared in person while wearing a facemask for purposes of safety.

II. This Court should interpret Rule 41(d) of the Federal Rules of Civil Procedure to include attorney's fees as "costs" to prevent vexatious litigation, forum shopping, and voluntary dismissals for the purpose of a tactical advantage, in alignment with the majority view of circuit courts.

Rule 41(d) of the Federal Rules of Civil Procedure provides, in relevant part, that: "If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court…may order the plaintiff to pay all or part of the costs of that previous action." FED. R. CIV. P. 41(d). Thus, courts charged with deciding a motion under Rule 41(d) may require a plaintiff to pay costs attributable to an action previously dismissed voluntarily. *Id.* However, neither subsection (d) nor any other subsection of the Rule contains a definition of "costs." *See* FED. R. CIV. P. 41. Thus, circuit courts split into three directions as to whether the term "costs" as used in Rule 41(d) may include an award of attorney's fees. *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 24 (2d Cir. 2018). Specifically, while the majority of circuit courts at least permit the recovery of

attorney's fees under the Rule, the Sixth Circuit places a blanket prohibition on such recovery. *See Id.*

As a preliminary matter, some precedential cases for each view may predate the currently operative version of Rule 41(d), amended in 2007 to retain the discretionary "may" language" while eliminating "as it may deem proper." FED. R. CIV. P. 41(d) (1991) (amended 2007); *See Moskowitz v. Am. Sav. Bank, F.S.B.*, 37 F.4th 538, 548 (9th Cir. 2022) (Wardlaw, K., dissenting) (providing that "use of the word 'may' alone implies all the discretion required—'as it may deem proper' is simply redundant as no court would award costs that it thought were improper."). However, these pre-amendment discussions remain viable. *Moskowitz*, 37 F.4th at 548 (Wardlaw, K., dissenting); *See, e.g.*, *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 311 (4th Cir. 2016) (adopting approach laid out by the Seventh Circuit pre-2007 amendment).

The American Rule is the "basic point of reference" of the Supreme Court when considering the permissibility of an attorney's fees award. *Peter v. NantKwest, Inc.*, 140 S. Ct. 365, 370 (2019). Under the American Rule, attorney's fees are paid by each litigant respectively unless otherwise provided by statute or contract. *Id.* Yet the American Rule is only the starting point for determining whether Rule 41(d) authorizes the recovery of attorney's fees. *See Id.* at 372.

A. Permitting the recovery of attorney's fees under Rule 41(d) advances both the purposes of the Rule and congressional intent.

To advance the goals of Rule 41(d) and for further reasons discussed below, this Court should interpret the Rule to always permit attorney's fees as "costs"

recoverable. Alternatively, this Court should adopt the hybrid approach and interpret "costs" as including attorney's fees when the statute underlying the initial action provides therefor.

1. The always-awardable approach advances the purposes of Rule 41(d).

This Court should adopt the "always-awardable" approach to ensure that the deterrent purpose of Rule 41(d) is advanced, to provide a bright-line rule that avoids satellite litigation of attorney's fees, and to reconcile inconsistent interpretations between Rule 41(a)(2) and Rule 41(d).

Permitting the recovery of attorney's fees in all cases as an award of "costs" under Rule 41(d), the Second, Eighth, and Tenth Circuit Courts follow the "always-awardable" approach. *Horowitz*, 888 F.3d at 24; *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980) (per curiam); *Kent v. Bank of Am., N.A.*, 518 F. App'x 514, 517 (8th Cir. 2013); *Meredith v. Stovall*, No. 99-3350, 2000 U.S. App. LEXIS 14553, at *4-5 (10th Cir. June 23, 2000). Under this approach, a district court may award attorney's fees under Rule 41(d) upon proof of forum shopping, vexatiousness, bad faith, or wanton actions in the filing of the initial action. *Horowitz*, 888 F.3d at 25-26. While the Eighth and Tenth Circuits adopted this approach with little discussion, the Second Circuit in *Horowitz* rationalized the approach on two bases applicable to determining the availability of attorney's fees under any provision that allows for "costs" but does not expressly reference attorney's fees. *Id.* at 24, 25.

First, the Second Circuit asserted that attorney's fees are not included in "costs" if the provision incorporates a list of statutorily enumerated "costs" that omits

attorney's fees. *Id.* at 25. The court based this conclusion primarily on the *Hines* case, concerning Rule 39 of the Federal Rules of Civil Procedure and on the Supreme Court case of *Roadway Express*, concerning a federal statute. *Id; See Hines v. City of Albany*, 862 F.3d 215, 221 (2d Cir. 2017) (holding attorney's fees unavailable under Rule 39 because the Rule contains a list of costs awardable and omits attorney's fees); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 760 (1980), *superseded by statute*, Pub. L. No. 96-349, 94 Stat. 1154 (holding attorney's fees unavailable under 28 U.S.C. § 1920 "costs" because the version of 28 U.S.C. § 1927 operative at the time omitted attorney's fees and given the shared history of the two provisions, the provisions "should be read together as part of [an] integrated statute."). Unlike these provisions, Rule 41(d) neither expressly nor by reference incorporates any definition of costs. *Horowitz*, 888 F.3d at 25. Accordingly, the Second Circuit advanced its second basis for adopting the approach: "in this situation—where the term 'costs' is entirely undefined, either expressly or by reference—[the court] look[s] to see if the statute otherwise evinces an intent to provide for [attorneys'] fees." *Id.* (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994), *superseded by statute*, Superfund Recycling Equity Act, Pub. L. No. 106-113, 113 Stat. 1536).

Because the purpose of Rule 41(d) is to deter forum shopping and vexatious litigation, the Second Circuit concluded that precluding district courts from assessing attorney's fees as part of an award of costs would greatly limit the Rule as an effective deterrent. *Horowitz*, 888 F.3d at 25-26; *See Meredith*, 2000 U.S. App. LEXIS at *4 ("[t]he purpose of [Rule 41(d)] is to prevent…vexatious law suits and to secure…

payment of costs for prior instances of such vexatious conduct.") (quoting *United Transp. Union v. Maine Cent. R.R.*, 107 F.R.D. 391, 392 (D. Me. 1985)); *Esquivel v. Arau*, 913 F. Supp. 1382, 1391 (C. D. Cal. 1996) ("if Rule 41(d)'s purpose is to prevent undue prejudice to a defendant from unnecessary or vexatious litigation, there does not seem to be a clear reason why Rule 41(d) would provide only for an award of costs *exclusive* of attorney's fees, since the typical defendant cannot adequately defend a case without incurring such fees."). Especially in the context of Rule 41(d), according to the court, attorney's fees may be critical. *Horowitz*, 888 F.3d at 26.

Specifically, the rule operates to target and deter litigants from filing and quickly dismissing complaints, whether due to initial rulings unfavorable to the litigant or because the litigant hopes to receive a more favorable judge assignment in the subsequent case. *Id.* According to the court, "such actions will rarely incur most of the expenses routinely recoverable as costs." *Id.* For instance, the litigant ordered to pay costs under Rule 41(d) in *Horowitz*, absent attorney's fees, incurred only $75.48—hardly an amount that aligns with the deterrent purpose of the Rule. *Id.* However, there are limits to the always-available approach. *MSP Recovery Claims, Series LLC v. Hartford Fin. Servs. Grp., Inc.*, No. 3:20-CV-00305 (JCH), 2021 U.S. Dist. LEXIS 22775, at *5 (D. Conn. Nov. 29, 2021). First, recovery is limited to a reasonable amount of attorney's fees. *Id.* Second, recovery is limited to only those fees incurred in connection to the initial action voluntarily dismissed. *Id.* at *6.

Given that Rule 41(d) omits any definition of costs, whether expressly or by reference, coupled with its deterrent purpose, Rule 41(d) evinces an intent to permit

the recovery of attorney's fees. *Horowitz*, 888 F.3d at 25-26. Because the Rule is designed to deter forum shopping and vexatious litigation and because an award of costs absent attorney's fees is often slight, to hold otherwise frustrates the purpose of Rule 41(d). *Id.* at 25-26. For instance, in the issue at hand, the United States Court of Appeals for the Fourteenth Circuit affirmed an award to QSU that included $28,150.00 in attorney's fees, reduced from $74,500.00, the total amount incurred. R. at 10a-11a. While the district court decreased the award by nearly $50,000.00 from the amount actually incurred, an award absent even this reduced amount would have consisted of only a few hundred dollars. R. at 10a, 42a.

Conversely, a bright-line rule not only aligns with the intent evinced by Rule 41(d) but advances the purpose of the Rule by noticing litigants that voluntary dismissals carry the potential for attorney's fees. *See Horowitz*, 888 F.3d at 25-26. With this in mind, litigants likely would think twice before unnecessarily filing for a dismissal. Lending support to this proposition are decisions favoring a bright-line rule. *See Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017) (adopting bright-line rule "[g]iven the importance of 'certainty and predictability'" in application); *Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1088 (11th Cir. 2010) (stating that bright-line rules have advantages of "predictability and ease of application."). Notably, the Supreme Court also has warned against encouraging satellite litigation over attorney's fees. *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002).

Moreover, adopting the bright-line rule that district courts have discretion to award attorney's fees under Rule 41(d) upon proof of forum shopping, vexatiousness, bad faith, or wanton actions comports with the discretion inherent in courts to award attorney's fees under Rule 41(a)(2). *See United States v. Cathcart*, 291 F. App'x 360, 361 (2d Cir. 2008); *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 440-41 (8th Cir. 1997); *Spalsbury v. Sisson*, 250 F. App'x 238, 250 (10th Cir. 2007). Specifically, courts permit attorney fee awards under Rule 41(a)(2) despite the Rule containing no reference to attorney's fees nor to costs. *See Cathcart*, 291 F. App'x at 361; FED. R. CIV. P. 41(a)(2). Like Rule 41(d), Rule 41(a)(2) operates to provide compensation to protect a nonmovant from unfair treatment. *See Horowitz*, 888 F.3d at 25-26; *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994). Thus, interpreting Rule 41(d) under the always-awardable approach precludes inconsistent interpretations of the subsections of Rule 41.

Accordingly, this Court should adopt the always-awardable approach adhered to by the Second, Eighth, and Tenth Circuits. First, to advance the purpose of Rule 41(d). Second, to provide the predictability and certainty of a bright-line rule and to avoid satellite litigation of attorney's fees. Lastly, to provide a consistent interpretation between Rule 41(a)(2) and Rule 41(d).

2. The hybrid approach strikes a balance between the American Rule, congressional intent, and the purpose of Rule 41(d).

Alternatively, if this Court declines to adopt the always-awardable approach, this Court should adopt the hybrid approach to further the deterrent purpose of Rule

41(d) while adhering to explicit congressional intent and upholding the American Rule.

The Third, Fourth, Fifth, and Seventh Circuit Courts follow the "hybrid" approach in assessing whether attorney's fees are awardable as "costs" under Rule 41(d). *Garza*, 881 at 283-84; *Andrews*, 827 F.3d at 311; *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017); *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000); *See also Moskowitz*, 37 F.4th at 551 (Wardlaw, K., dissenting) (urging the Ninth Circuit to adopt the hybrid approach). Under this approach, attorney's fees are recoverable as costs under Rule 41(d) if the statute underlying the initial action contained a definition of "costs" as including fees. *Portillo*, 872 F.3d at 738. This is because these courts believe that a general rule permitting the recovery of attorney's fees extends the meaning of the Rule too far yet a categorical prohibition against same is counterintuitive where the underlying substantive statute expressly provides for attorney's fees. *Id.* at 739; *See Garza*, 881 F.3d at 282 (declining to adopt never-awardable interpretation because the term "costs" is ambiguous). Thus, the courts that follow this view consider it an exception to the American Rule. *Portillo*, 872 F.3d at 739.

The American Rule, established before the adoption of the Federal Rules of Civil Procedure in 1938, generally requires each party to pay its own attorney's fees. *Marek v. Chesny*, 473 U.S. 1, 8 (1985), *superseded by statute*, Act of Nov. 21, 1991, Pub. L. No. 102-166, 105 Stat. 1071; *See NCJC, Inc. v. WMG, L.C.*, 960 N.W.2d 58, 67 n.3 (2021) ("Congress, however, left intact [Rule 68] and numerous other federal

statutes that include or tax fees as costs, and *Marek* remains applicable today in civil actions brought under such statutes."). However, tasked with determining whether the term "costs" as used, but undefined, by Rule 68 of the Federal Rules of Civil Procedure included attorney's fees, the Supreme Court held in the affirmative where the underlying statute or other authority so provided. *Marek*, 473 U.S. at 9. In reaching this conclusion, the Supreme Court considered the history of the American Rule, the circumstances surrounding the adoption of Rule 68, and the purpose of Rule 68. *Id.* at 8-9.

First, courts created exceptions to the American Rule by the end of the 1930's. *Id.* at 8. The majority of these exceptions derived from federal statutes that specifically instructed courts to include attorney's fees as an award of costs. *Id.* At other times, courts applied an exception based on the power inherent in courts to award attorney's fees under certain circumstances. *Id.* Second, the drafters of Rule 68, with knowledge of the exceptions to the American Rule and of the inconsistent definitions of "costs" contained in federal statutes—nearly a third of which, at that time, permitted an award of attorney's fees as costs—chose not to define the term. *Id.* at 8-9. The Advisory Committee Notes are also silent. *Id.* at 4. Third, Rule 68 is intended to encourage settlements. *Id.* at 6. Accordingly:

> [G]iven the importance of 'costs' to [Rule 68], it is very unlikely that this omission was mere oversight…the most reasonable inference is that… 'costs'…was intended to refer to all costs properly awardable under the relevant substantive statute or other authority…Thus, absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees…such fees are…included as costs for purposes of Rule 68.

Id. at 9.

Like Rule 68, Rule 41(d) and the relevant Advisory Committee Notes omit a definition of "costs." *Esposito*, 223 F.3d at 501. Moreover, courts that follow the hybrid approach view an award of attorney's fees as furthering the purpose of Rule 41(d). *See Id.* Thus, courts in adopting this approach to Rule 41(d) follow similar reasoning as the Supreme Court in *Marek* to rationalize the result. *See Portillo*, 872 F.3d at 739 ("[w]e see no reason to treat Rule 41(d) differently" than Rule 68); *Andrews*, 827 F.3d at 309-312 ("[t]his rule strikes the right balance between upholding the American Rule and furthering the goal of Rule 41(d) to deter forum shopping and vexatious litigation on the part of the plaintiff."); *Moskowitz*, 37 F.4th at 550 ("the purposes of both Rule 41(d) and the 'bad faith' exception to the American Rule are the same, *i.e.*, to compensate a party who has incurred unnecessary expenditures because of an opponent's vexatious conduct during…litigation.") (quoting *Esquivel*, 913 F. Supp. at 1391); *Esposito*, 223 F.3d at 501 ("awarding…fees as part of costs advances the purposes of Rule 41(d)"); *See also Andrews*, 827 F.3d at 309 ("[s]urely, Congress intended that the provision…have some teeth.") (quoting *Behrle v. Olshansky*, 139 F.R.D. 370, 374 (W.D. Ark. 1991)).

Although the issue presented did not charge the Ninth Circuit with deciding whether to adopt the hybrid approach, the dissent in *Moskowitz*, in approving of the approach, provided a clear illustration of the Rule's deterrent purpose. 37 F.4th at 551 (Wardlaw, K., dissenting). Specifically, Judge Wardlaw compared the non-fee costs of $1,196.23 with the $17,848.20 in attorney's fees accumulated after the

voluntary dismissal. *Id.* From this comparison, Judge Wardlaw asserted that awarding the combined total of the two would "actually deter[] litigants from abusing the system," while awarding only the former "is barely a slap on the wrist." *Id.* Accordingly, Judge Wardlaw explained that "[i]nterpreting Rule 41(d) in a manner that untethers it from its undisputed purpose would lead to absurd results in its application, and statutory interpretations which would produce absurd results are to be avoided." *Id.* (quoting *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004)).

Lastly, as explained previously, courts tend to authorize attorney's fees under Rule 41(a)(2), which omits a reference *both* to attorney's fees and to costs. *Andrews*, 827 F.3d at 311-12; *See* FED. R. CIV. P. 41(a)(2); *See Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987) (recognizing courts' authority to award attorney's fees in context of Rule 41(a)(2)); *LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680, 686-87 (7th Cir. 1998). While the purpose of Rule 41(d) is to deter forum shopping and vexatious litigation, the purpose of Rule 41(a)(2) is, in part, to protect the nonmovant from unfair treatment. *Andrews*, 827 F.3d at 309-312; *Grover by Grover*, 33 F.3d at 718. Thus, permitting the recovery of attorney's fees under Rule 41(d) "minimizes any inconsistency with Rule 41(a)(2)." 827 F.3d at 311.

The hybrid approach therefore theorizes that the drafters of Rule 41(d) intentionally included general terms for Congress to tailor legislation applicable to the Rule to choose whether to provide for attorney's fees in specified circumstances. *Garza*, 881 F.3d at 283. Accordingly, recovery of attorney's fees is not a matter of

right; rather, a movant may only recover same if Congress expressly so provided in the statute of the initial suit. *Andrews*, 827 F.3d at 311.

Based on the foregoing, if this Court declines to adopt the always-awardable approach, this Court should adopt the hybrid approach to further the deterrent purpose of Rule 41(d) while simultaneously adhering to explicit congressional intent and upholding the American Rule. Although not a bright-line rule under Rule 41(d), the ease of application associated with a bright-line rule is simple nevertheless: If the subject statute of the initial action provides for attorney's fees, the court may permit an award of same upon a motion under Rule 41(d) following the voluntary dismissal of a plaintiff. *See Id.* Moreover, the language of the Rule evinces an intent to permit the recovery of attorney's fees. Specifically, just as both the relevant Advisory Committee Notes and the language of Rule 68 omitted a definition of "costs" in the context of Rule 68, the same is true of Rule 41(d). *See Esposito*, 223 F.3d at 501.

Thus, given the importance of "costs" to Rule 41(d) to the deterrent purpose of the Rule, the most reasonable inference is that the drafters of Rule 41(d) intended to refer to all costs properly awardable under the substantive statute or other authority underlying the initial action. *See Marek*, 473 U.S. at 9. As observed by the dissent in *Moskowitz*, an award of costs absent fees is insufficient to deter parties from forum shopping and vexatious litigation. 37 F.4th at 551 (Wardlaw, K., dissenting).

For instance, the cost award affirmed by the United States Court of Appeals for the Fourteenth Circuit, below, included attorney's fees in the amount of $28,150.00. R. at 11a. Absent attorney's fees, QSU only would have received an award

in the low hundreds. R. at 42a. Notably, the time and effort of QSU's attorneys cost QSU a total of $74,500.00, nearly $50,000.00 greater than the award received. R. at 10a. If the purpose of Rule 41(d) is to prevent forum shopping and vexatious litigation, thereby compensating a nonmovant who incurred unnecessary expenditures as a result of such conduct, an award of attorney's fees is vital to the purpose of the Rule. *See Moskowitz*, 37 F.4th at 550. In this manner, the hybrid approach also advances congressional intent. First, because the "bad" faith exception to the American Rule is intended for the same purpose as Rule 41(d). *Id.* Second, because the hybrid approach instructs courts to determine whether Congress included a provision for attorney's fees in the subject statute of the suit—and to adhere to that grant or exclusion. *See Marek*, 473 U.S. at 9; *Garza*, 881 F.3d at 283. Moreover, like the always-awardable approach, the hybrid approach provides consistency with Rule 41(a)(2).

For these reasons, if this Court declines to adopt the always-awardable approach, this Court should adopt the hybrid approach for the assessment of costs under Rule 41(d) to strike a balance between the American Rule, the purpose of Rule 41(d), and congressional intent.

B. Wholly prohibiting the recovery of attorney's fees under Rule 41(d) hinders both the deterrent purpose of the Rule and congressional intent.

Because the language, purpose, and context of Rule 41(d) evinces an intent to allow for the recovery of attorney's fees, this Court should decline to adopt the Sixth Circuit approach to the Rule to avoid hindering both the deterrent purpose of the Rule and congressional intent.

The minority view amongst circuit courts, the Sixth Circuit holds that Rule 41(d) never permits an award of "costs" under Rule 41(d) to include attorney's fees. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). In *Rogers*, the Sixth Circuit referenced a case in which the Supreme Court determined that § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") did not permit the recovery of attorney's fees. *Id.* at 875; *Key Tronic Corp.*, 511 U.S. at 819; *See Moskowitz*, 37 F.4th at 548, n.3 ("in *Rogers*…in which the Sixth Circuit became the only circuit court to conclude that attorney's fees are never available under Rule 41(d), the court did not even mention *Marek*."). The Supreme Court reached its decision in *Key Tronic* on three bases. 511 U.S. at 818.

First, because § 107 only impliedly authorized the cause of action brought and further lacked an express definition of "costs," the Court saw no basis for concluding that the implied cause of action nevertheless permitted the recovery of attorney's fees. *Id.* Second, while § 107 lacked any reference to fee awards, two provisions of the Superfund Amendments and Reauthorization Act ("SARA"), which amended CERCLA, expressly provided for fee awards. *Id.* According to the Court, "[t]hese omissions strongly suggest a deliberate decision not to authorize such awards." *Id.* at 818-19. Third, the Court explained that "the absence of a specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees"; however, "mere 'generalized commands'" are insufficient to authorize such an award. *Id.* at 815. Under the relevant provision of CERCLA, the Court

considered the statute's reference to "enforcement activities" as a mere generalized command insufficient to establish such congressional authorization. *Id.* at 815, 819.

Subsequently, the Sixth Circuit reasoned in *Rogers* that Rule 41(d) never permits an award of costs to include attorney's fees simply because the Rule lacks an express authorization to do so. 230 F.3d at 874. While the court acknowledged the exception laid out by the Supreme Court in *Key Tronic*—that a statute may permit the recovery of attorney's fees even without an express provision if it otherwise evinces such an intent—the Sixth Circuit reached its conclusion *before* conducting a generalized analysis of Rule 41(d) applied to the Supreme Court decision. *Id.* at 874-75; *See* 511 U.S. at 815. Specifically, the Sixth Circuit in *Rogers* held "that attorney fees are not available under Rule 41(d)," explaining that "the reason is simple—*the rule does not expressly provide for them*." 230 F.3d at 874 (emphasis added); *But see Massey v. City of Ferndale*, No. 96-1386, 1997 U.S. App. LEXIS 14837, at *8 (6th Cir. June 16, 1997) (stating that district courts have discretion to award attorney's fees under Rule 41(a)(2); *See also* FED. R. CIV. P. 41(a)(2) (containing no reference to costs nor attorney's fees); *Horowitz*, 888 F.3d at 25 (citing *Key Tronic* and reaching the opposite conclusion).

After making this determination, the court opined that "the structure of the Federal Rules of Civil Procedure is ambiguous at best on the question of attorney fees," rationalizing this as a basis for categorically prohibiting such recovery under Rule 41(d). *Rogers*, 230 F.3d at 875; *But see Garza*, 881 F.3d at 282 (declining to adopt never-awardable interpretation because the term "costs" is ambiguous and subject to

multiple definitions). Demonstrating such ambiguity, according to the Sixth Circuit, are those Rules that do expressly provide for attorney's fees. *Rogers*, 230 F.3d at 875. Acknowledging lastly that courts permit the recovery of attorney's fees under Rule 41(a)(2)—another subsection of the Rule designed to prevent vexatious litigation and forum shopping—and that other courts have rested on this as a basis for holding attorney's fees recoverable under Rule 41(d), the Sixth Circuit did not find this fact sufficiently convincing to evidence an intent to permit attorney's fees awards. *Id.*

Considering the omission of Rule 41(d) applied to the ordinary definition of "costs," the Sixth Circuit's "never-awardable" approach is, concededly, persuasive on its face. *See Costs, Black's Law Dictionary* (11th ed. 2019) ("[t]he expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favor of one party against the other."); *Peter*, 140 S. Ct. at 372 ("[t]he complete phrase 'expenses of the proceeding' is similar to the Latin *expensæ litis*, or 'expenses of the litigation.' This term has long referred to a class of expenses commonly recovered in litigation to which attorney's fees did not traditionally belong."). In *Peter*, the Supreme Court held that the plain text of 35 U.S.C. § 145 evinced no intent sufficient to overcome the American Rule. 140 S. Ct. at 373. However, the statute at issue there expressly contained the term "expenses," unlike the language of Rule 41(d). *Id*; *compare* 35 U.S.C. § 145 ("…[a]ll expenses of the proceedings shall be paid by the applicant."), *with* FED. R. CIV. P. 41(d) ("…the court…may order the plaintiff to pay all or part of the costs of that previous action.").

Moreover, notably, the Sixth Circuit failed to consider the Supreme Court case of *Marek* in reaching its decision. *Moskowitz*, 37 F.4th at 548, n.3. Both *Marek* and *Key Tronic* instructed courts below that a "plain meaning" interpretation of provisions that omit a definition of "costs," considering the purpose and background of the provision, is sufficient to determine whether attorney's fees are awardable absent express language. 473 U.S. at 10; 511 U.S. at 815. While the Sixth Circuit in *Rogers* acknowledged this exception, it failed to compare the language of § 107 of CERCLA pre-SREA amendment, at issue in *Key Tronic*, and failed further to compare the purpose of Rule 41(d) with the purpose of Rule 68, at issue in *Marek*. *See Rogers*, 230 F.3d at 875; 511 U.S. at 815; 473 U.S. at 9.

Unlike the then-operative provision of CERCLA, Rule 41(d) expressly authorizes a movant to request costs and is not necessarily read in conjunction with a separate statute that contains an express reference to fee awards. *See Key Tronic Corp.*, 511 U.S. at 818-19; FED. R. CIV. P. 41(d). Moreover, the language of Rule 41(d) does not constitute a "mere generalized command" as did "enforcement activities" in *Key Tronic*. *See* 511 U.S. at 814; FED. R. CIV. P. 41(d). For instance, the purpose of the CERCLA provision at issue in *Key Tronic* clearly pertained to environmental clean-up, unrelated to the efforts of an attorney, such as by "engineers, chemists, private investigators, or other professionals who are not lawyers." 511 U.S. at 820. Conversely, Rule 41(d) is aimed at, and intended to deter, certain conduct by litigants. *Horowitz*, 888 F.3d at 26.

Thus, although neither Rule 68 nor Rule 41(d) explicitly provide for attorney's fees, "costs" is vital to the purpose of both. *See Id.* at 25; *Marek*, 473 U.S. at 9; *compare* FED. R. CIV. P. 68(d) ("[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.") *with* FED. R. CIV. P. 41(d) ("[i]f 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."). Although Rule 41(d) provides the court with discretion while Rule 68 places a mandatory obligation on an offeree, so too does 35 U.S.C. § 145—which the Supreme Court in *Peter* held not to include attorney's fees. *See* FED. R. CIV. P. 68(d); FED. R. CIV. P. 41(d); 140 S. Ct. at 373. In light of these cases, Rule 41(d) evinces an intent to allow for the recovery of attorney's fees.

Moreover, the Sixth Circuit permits the recovery of attorney's fees under Rule 41(a)(2). *See Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965) (explaining that the purpose of awarding attorney's fees under Rule 41(a)(2) is to "compensate the defendant for expenses in preparing for trial in the light of the fact that a new action may be brought in another forum."); *Ali v. St. John Hosp.*, 836 F.2d 549, 1987 U.S. App. LEXIS 16915, at *6 (6th Cir. 1987) ("[a] great deal of time, money and energy has been expended by all parties to this litigation, and plaintiff's attempt to wipe the slate clean and start over…is unfair to defendants.") (quoting *Spencer v. Moore Business Forms, Inc.*, 87 F.R.D. 118, 122 (N.D. Ga. 1980)); *See also, e.g.*, *DWG Corp. v. Granada Invest., Inc.*, 962 F.2d 1201, 1202 (6th Cir. 1992); *Massey*, 1997 U.S. App.

LEXIS 14837, at *8; *Shipes v. Amurcon Corp.*, No. 10-14943, 2012 U.S. Dist. LEXIS 61381, at *4 (E.D. Mich. May 2, 2012). Whether to award attorney's fees under Rule 41(a)(2) is clearly within the discretion of a district court. *Massey*, 1997 U.S. App. LEXIS 14837, at *8.

Acknowledging this fact, the Sixth Circuit itself in *Rogers* provided no rationale for allowing attorney's fees under Rule 41(a)(2)—a provision that lacks any reference to costs nor attorney's fees—but not under Rule 41(d). 230 F.3d at 875; *See* FED. R. CIV. P. 41(a)(2). Notably, an attorney's fee award under either subsection is the result of a voluntary dismissal without prejudice. *See Rogers*, 230 F.3d at 875. Reconciliation of this inconsistency therefore only follows if an award of attorney's fees is within the discretion of a district court under both Rule 41(a)(2) and Rule 41(d).

Accordingly, this Court should decline to adopt the never-awardable approach under Rule 41(d). Specifically, while the Sixth Circuit rationalized this approach on the basis that the Rule contains no express provision for attorney's fees, Rule 41(d) expresses an intent to provide courts discretion to award such fees. *See Rogers*, 230 F.3d at 874. First, unlike the statute at issue in *Peter*, Rule 41(d) does not contain the term "expenses." *See* 140 S. Ct. at 373; FED. R. CIV. P. 41(d). Second, litigants are the targets of the deterrent purposes of both Rule 41(d), unlike the provision of concern in *Key Tronic*. *See* 511 U.S. at 818-19; FED. R. CIV. P. 41(d). Third, just as *Marek* explained that "costs" is vital to the purposes of Rule 68, the same is true of "costs" as used in Rule 41(d). *See* 473 U.S. at 9. Without an award sufficiently likely to deter forum shopping and vexatious litigation, the deterrent purpose of the Rule is

rendered "toothless." *See Andrews*, 827 F.3d at 309. Finally, courts, including the Sixth Circuit, recognize the inherent discretion of a district court to award attorney's fees under Rule 41(a)(2) despite no explicit reference to costs nor to attorney's fees. *See Smoot*, 353 F.2d at 833. It follows therefore that if Congress intended to provide district courts with discretion to permit attorney's fees to compensate a defendant following a voluntary dismissal under Rule 41(a)(2), Congress also intended to allow such discretion in awarding attorney's fees to compensate a defendant following a voluntary dismissal under Rule 41(d).

Because the language, purpose, and context of Rule 41(d) evinces congressional intent to allow courts discretion to award attorney's fees, this Court should decline to adopt the holding of the Sixth Circuit in *Rogers*.

CONCLUSION

Because courts balance the process afforded to an accused student in a university disciplinary hearing under the *Mathews* test in a fact-intensive inquiry and because neither Title IX nor federal law requires a university to discredit the testimony of an alleged victim who submits to cross-examination in order to comply with the Fourteenth Amendment, due process does not require the direct and unfettered cross-examination of witnesses in misconduct cases. Moreover, interpreting Rule 41(d) as permitting the recovery of attorney's fees advances the purpose of the Rule, comports with congressional intent, and provides a consistent interpretation between Rule 41(a)(2) and Rule 41(d). Therefore, we respectfully request this Court to affirm the decision rendered by the United States Court of

Appeals for the Fourteenth Circuit and hold that the Fourteenth Amendment does not categorically require the direct and unfettered cross-examination of witnesses in a university disciplinary proceeding and that Rule 41(d) permits attorney's fee awards.