No. 21-8289

In The

Supreme Court of the United States

KYLER PARK,

Petitioner,

v.

QUICKSILVER STATE UNIVERSITY,

Respondent.

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

BRIEF FOR PETITIONER

TEAM #42

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a university infringes upon a student's due process rights under the Fourteenth Amendment and Title IX, 20 U.S.C. § 1681 *et seq*., by expelling the student without providing an opportunity to cross-examine their accuser in a Title IX disciplinary hearing which turns on credibility, and without requiring the accuser to remove an opaque mask which obscured their face while testifying.

2. Whether Congress authorized the awarding of attorney's fees under Federal Rule of Civil Procedure 41(d) considering that Congress opted to use the term "costs" rather than "attorney's fees."

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STATEMENT OF JURISDICTION

Judgment of the Fourteenth Circuit Court of Appeals was entered on October 18, 2021. R. at 1a. On October 10, 2022, the Petition for a Writ of Certiorari to the Fourteenth Circuit Court of Appeals was granted by the United States Supreme Court. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(a).

STATEMENT OF THE CASE

On March 14, 2020, Kyler Park, a junior at Quicksilver State University ("QSU") had a sexual encounter with a "casual acquaintance" and fellow QSU student, Jane Roe. R. at 2a. In Park's mind, this encounter was a consensual one-time "hookup." However, on May 20, 2020, he was expelled from QSU after an improperly conducted Title IX proceeding. R. at 4a, 8a.

On the night in question, Park and Roe saw each other across a movie theater bar and sat down to talk. R. at 2a. They spoke for approximately an hour, with Park buying Roe a single alcoholic drink. R. at 2a. As the night progressed, the pair decided to return to Roe's dorm room where they had sexual intercourse. According to Park, over the next few days Roe called Park several times seemingly happy about the encounter, repeatedly expressing interest in a romantic relationship, and referring to Park as her boyfriend. R. at 3a. Park, however, had no interest in a romantic relationship and eventually told Roe as much. In Park's view, his rejection of Roe's advances led to Roe becoming angry and threatening to report him for sexual

misconduct. R. at 3a. While Roe maintains that these calls were made to determine what happened given her alleged intoxication, R. at 3a, she provided no explanation for the *repeated* calls, nor text messages to back up her version of events. On March 23, 2020, Park received an official notice that he had been accused of violating QSU's Code of Student Conduct and summoning him to a hearing on May 20, 2020. R. at 3a–4a.

Less than a week later, all QSU students were sent home in response to the COVID-19 pandemic. R. at 4a. Between the cancellation of in-person classes and the May hearing, QSU hired an investigator, Ali Mills, who was markedly limited due to the pandemic. Mills could not locate any corroborating witnesses and thus limited their investigation to interviewing Park and Roe. R. at 4a. Despite the continuing pandemic, when the hearing date arrived QSU held it in-person, as scheduled, to avoid compliance with new Title IX policies that would take effect the following school year. R. at 4a. QSU assembled a Hearing Board ("Board") of five employees and students and met with Roe, Park, and his attorney. R. at 4a.

Throughout the hearing, the Board frowned at Park whenever he addressed them, R. at 57a, and made encouraging remarks to Roe, expressly commenting on her "bravery" in "coming forward." R. at 56a. They denied Park's request to have Roe testify without her N-95 mask obscuring her face or allow the proceeding to be held remotely. R. at 5a; CLRF. ANS. #3. The rest of the hearing proceeded pursuant to QSU's policy of "prioritizing student comfort, at the expense of rigorous examination." R. at 5a. Instead of allowing Park, or his attorney, to question Roe, the Board

questioned her themselves, starting with "easy questions" and "avoiding leading questions" out of a concern of "pressing the traumatized student," for "too many details." R. at 5a. Although questions were submitted by the parties, the Board retained discretion to decide what to ask and declined to ask many of Park's follow-up questions while allowing significantly more of Roe's. R. at 6a. The Board refused to press Roe for details on the alcohol she consumed prior to seeing Park. They declined to ask how she procured alcohol as an underaged student or for receipts to corroborate those purchases. R. at 6a–7a. Additionally, the Board declined to press Roe on evidence which corroborated Park's story, i.e., the movie theater surveillance footage, which showed Roe walking without any noticeable signs of impairment. R. at 7a. While Roe testified that her steadiness was due to years of martial arts training at her father's karate dojo, the Board refused to follow-up on this assertion, even though Park knew that Roe's father was a car salesman, and not a karate instructor. R. at 7a.

Board members, without any prompting, "grilled" Park about statistics on false rape accusations. R. at 57a. At the hearing's conclusion, the Board took no time in deliberating Park's guilt, choosing to expel him immediately after the conclusion of the proceedings. CLRF. ANS. #6. The Board not only blindly accepted that Roe was intoxicated, but they also failed to consider whether Park was on notice, given that Roe maintained a high degree of coordination and that Park only seen her consume a single alcoholic beverage. R. at 2a, 7a.

On June 12, 2020, Park sued QSU in Quicksilver District Court, alleging that QSU violated his rights by depriving him of due process and reaching an erroneous outcome because of his sex. R. at 8a. This lawsuit was assigned to Judge Kreese, a well-known QSU alumnus and avid QSU football fan. R. at 8a. QSU filed a 12(b)(6) motion to dismiss; oral arguments were held on July 22, 2020. R. at 9a. Although Judge Kreese had indicated he would make a decision that day, he instead opted to take the matter under advisement. R. at 61a. Later that day, Park voluntarily dismissed his lawsuit pursuant to Federal Rule of Civil Procedure ("FRCP") 41(a)(1) before refiling, months later, on September 21, 2020.

QSU filed another 12(b)(6) motion, this time accompanied with a motion under FRCP 41(d), requesting costs and attorney's fees. R. at 10a. In response, Park explained that he refiled only after taking time to "study applicable law and to ensure [his] claims were supported by existing law or presented a good-faith basis for extension or modification of existing law." R. at 10a. QSU did not object to these explanations. R. at 10a. Ultimately, the district court granted QSU's motion. R. at 11a. Despite the award of fees, the court found that Park's actions were not a result of bad faith, and instead of determining which approach to attorney's fees to use, relied on a finding of "vexatious" litigation. R. at 11a. Park then appealed the decision which, over the dissent of Judge Walt, was affirmed as to both the merits and the fee award. R. at 2a, 45a. Park then filed a writ of certiorari, which was granted by this Court on October 10, 2022.

SUMMARY OF THE ARGUMENT

Park ("Petitioner") was deprived of his protected liberty and property interests by QSU ("Respondent") in a largely pretextual hearing absent the essential safeguards of due process. Park asks this Court to rectify QSU's mistake and ensure that other young students are not denied the opportunity to meaningfully defend themselves against allegations of sexual misconduct.

Specifically, Park asks this Court to recognize his constitutional right to engage in cross-examination of adverse witnesses where the outcome is dependent on a determination of credibility and where the punishment involves a severe deprivation of protected interests, e.g., permanent expulsion. First, Park's protected interests are at their strongest in the Title IX context and may implicate many of the same concerns as in civil and criminal trials. Second, adversarial cross-examination is widely accepted to be the most accurate means of discerning the truth in proceedings based on credibility and cannot be supplanted with written questions by a factfinder. Finally, QSU does not face any substantial burden in allowing for cross-examination—as the procedures are already mandated by federal law and cross-examination by an agent of the accused substantially decreases any risks of trauma to the accuser.

Park's due process right to confront adverse witnesses was also violated by the Board's decision to allow Roe to testify while wearing a facemask. The right to confrontation exists in both the Confrontation and Due Process Clauses and due process is violated where the costs of alternative procedures do not outweigh the risks

of erroneous deprivation. Numerous studies show that facemasks impair the ability to assess the credibility of a witness. In comparison, QSU would not face any appreciable burden by using clear plastic shields in lieu of opaque masks, holding the entire hearing—or just Roe's testimony—remotely, or waiting until the pandemic had subsided to hold Park's hearing. These alternative procedures have been utilized by courts throughout the country to protect the right to confrontation during the pandemic.

Furthermore, the Board was a biased adjudicator in direct violation of Park's due process rights. This Court should mandate the application of the lower pleading standard set out in *Doe v. Columbia Univ.*, or, in the alternative, take note of the totality of the circumstances to find that Park's claims of sex discrimination are sufficiently alleged under the pleading standard of FRCP 12(b)(6). The QSU administration provided Park with a rushed hearing designed to avoid compliance with updated due process standards. The Board made numerous statements that indicated their gender-based bias against Park. Park asks that this Court recognize the insufficiency of his hearing and mandate that universities comply with basic components of due process prior to imposing heavy punishments on their students.

The lower courts expounded upon this injustice by incorrectly extolling attorney's fees onto Park. Determining whether FRCP 41(d) includes attorney's fees in its definition of costs is an exercise in first principles of statutory interpretation. The baseline presumption—known as the American Rule—is that attorney's fees are *not* a recoverable cost of litigation, absent congressional authority. When Congress

wants to authorize the award of attorney's fees, it understands how to do so. In both federal statutes and the FRCP, Congress has used the term "attorney's fees" rather than the word "costs." FRCP 41(d) only contains the term "costs" without any reference to attorney's fees. Thus, against the background of the American Rule, attorney's fees must be presumptively excluded from the definition of costs.

While there are three different approaches to the question, the Sixth Circuit approach is the only approach in line with the American Rule. It prohibits awards of attorney's fees under Rule 41(d) in all circumstances. The Second Circuit approach—which allows courts to award attorney's fees in its discretion—relies on policy arguments that impermissibly expand the scope of Rule 41(d). However, policy decisions, particularly with respect to attorney's fees, are best reserved for Congress. The hybrid approach—which allows courts to award fees depending on the substantive statute that underlies the claim at issue—is preferable to the Second Circuit approach because it maintains some respect for the American Rule. We ask that the Court adopt the Sixth Circuit approach and reverse the lower court's award of attorney's fees.

A reversal of the lower court's judgment is warranted, even if the Court ultimately decides to use the hybrid approach. Using that approach in this case, an award of attorney's fees is only authorized if the litigation was "frivolous" or "vexatious." Park dismissed his first suit precisely to avoid frivolity; his counsel wanted to ensure that his claims were supported by the law or a good faith basis to

extend the law. The lower courts explicitly found that there was no bad faith. Therefore, Park's claims were neither frivolous nor vexatious.

ARGUMENT

I. Due Process in Title IX Disciplinary Proceedings Requires Direct and Unfettered Cross-Examination of Witnesses, the Opportunity to Confront Witnesses Without Face Coverings, and an Unbiased Adjudicator.

The Due Process Clause, U.S. Const. amend. XIV, § 1,[1] ensures that no individual is deprived of their life, liberty, or property, without certain essential procedural safeguards. Park simply asks that he be granted those minimal safeguards before he is expelled from his university. R. at 2a. Specifically, Park prays for this Court to recognize the insufficiency of his rushed and pretextual hearing, and to mandate that Title IX hearings comply with the basic components of due process: the right to engage in direct and unfettered cross-examination of witnesses, the right to witness testimony without the obstruction of facemasks, and the right to an unbiased adjudicator. While Park maintains that each of the above due process violations are independently sufficient to overturn the decision of the QSU Board, this Court should consider their cumulative effect and find that Park was denied a hearing that comports with fundamental notions of due process. In essence, Park asks that this Court recognize his right to defend himself in a meaningful manner,

[1] "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

especially when facing expulsion, the most serious of deprivations in the Title IX setting.

A. Under *Mathews*, Petitioner Has a Right to Directly Cross-Examine Adverse Witnesses.

The Due Process Clause requires certain minimum procedures before an individual can be deprived of a protected interest in liberty or property. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Under *Mathews*, the level of process required in a particular proceeding is determined through a three-part balancing test: (1) the nature of the private interest affected by the deprivation; (2) the risk of an erroneous deprivation in the current procedures used, and the probable value, if any, of additional or alternative procedures; and (3) the governmental interest involved, including the burden that additional procedures would entail. *Id.* at 335. In the context of Title IX disciplinary proceedings, the accused is entitled to *at least* "(1) notice of the charges; (2) an explanation of the evidence against him; and (3) an opportunity to present his side of the story before an unbiased decisionmaker." *Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016). Due process is intended to ensure that the accuser is given, *at a minimum*, "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.*

1. Petitioner Had Strong Liberty and Property Interests at Stake.

Park had substantial property and liberty interests at stake in the outcome of the Title IX proceeding. *See, e.g.*, *Cummins*, 662 Fed. Appx. at 445 (finding that suspension implicates a property interest, and that other adverse disciplinary

decisions may "impugn [a student's] reputation and integrity, thus implicating a protected liberty interest."); *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (noting that "[b]eing labeled a sex offender by a university has both an immediate and lasting impact on a student's life," potentially "forc[ing them] to withdraw from [their] classes and move out of [their] university housing," impacting their personal relationships, and making it difficult to obtain "education and employment opportunities down the road"). Additionally, unlike most other disciplinary proceedings, "[p]ublic college and university sexual violence procedures are different because the information gathered in campus procedures may well be used against the alleged offender in the criminal justice system." J. Brad Reich, *When Is Due Process Due?: Title IX, "The State," and Public College and University Sexual Violence Procedures*, 11 Charleston L. Rev. 1, 22 (2017). Thus, the accused student faces not only academic penalties such as suspension and expulsion, but also the attendant risks of criminal or civil punishments. *See Hogan & Hartson v. Butowsky,* 459 F. Supp. 796, 800 (S.D.N.Y. 1978) (noting that in criminal proceedings "where the 'alleged right involved' is one of liberty, as well as reputation . . . and the 'nature of the proceeding' is designed to determine a person's right to continued liberty . . . then a higher standard of due process is mandated.").

Students facing a more serious deprivation, particularly expulsion, are entitled to the highest level of process. *See Goss v. Lopez*, 419 U.S. 565, 584 (1975) ("Longer suspensions or expulsions . . . may require more formal procedures."); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017) ("The more serious the deprivation, the

more demanding the process."). Given that QSU expelled Park—exercising the most serious of all possible deprivations at their disposal—Park is indisputably entitled to the most formal processes under the *Mathews* balancing test.

2. The Denial of Cross-Examination Substantially Increased Petitioner's Risk of Erroneous Deprivation.

Despite the consensus that expulsion requires heightened procedure, there remains a lack of consensus about how much process is due in a particular Title IX hearing. *Compare Baum*, 903 F.3d at 578 (holding that due process requires an opportunity to directly cross examine witnesses in Title IX proceedings) *with Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68 (1st Cir. 2019) (holding that adversarial cross examination is not required). In determining whether direct and unfettered cross-examination is constitutionally required, this Court should follow the approach expounded by the Sixth Circuit in *Baum*, 903 F.3d at 578, to ensure that no students are arbitrarily deprived of an education and labeled as sex offenders by their schools without first being given a meaningful opportunity to defend themselves.

As the court in *Baum* recognized, where a Title IX case hinges on a question of credibility, "the Due Process Clause *mandates* that a university provide accused students a hearing with the opportunity to conduct cross-examination." 903 F.3d at 578 (emphasis added); *see also Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("[I]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). When a student's fate hinges on a question of believability, cross-examination is essential not only because it has the unique potential to "uncover inconsistencies" in a witness's

testimony, but also because it "takes aim at credibility like no other procedural device." *Baum*, 903 F.3d at 582; *see also Davis v. Alaska*, 415 U.S. 308, 316 (1974) (noting that cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested."); *Watkins v. Sowders*, 449 U.S. 341, 349 (1981) ("[C]ross-examination has always been considered a most effective way to ascertain truth."). Thus, the denial of cross-examination strongly increases the risk of erroneous deprivation because, as courts recognize, "no other procedural device" can compare. *Baum*, 903 F.3d at 582 ("Doe never received an opportunity to cross-examine Roe or her witnesses. . . As a result, there is a significant risk that the university erroneously deprived Doe of his protected interests."). In Park's case, the outcome of the hearing was indisputably dependent on a credibility determination, R. at 46a, and as such, this Court should find that he had a constitutional right to engage in cross-examination prior to being deprived of his education and having his reputation and integrity impugned.

Further, as the court in *Baum* wisely recognized, this constitutional mandate is not satisfied by the simple submission of questions, as occurred in Park's case, R. at 6a, but rather requires "some form of *live* questioning *in front of* the fact-finder." *Baum*, 903 F.3d at 582-83; *see also Doe v. Allee*, 30 Cal. App. 5th 1036, 1061 (2019) (holding that in a Title IX disciplinary proceeding, "[t]he fact finder may not be a single individual with divided and inconsistent roles"). This requirement flows from another pillar of our constitutional system: adversarial questioning to ensure accuracy and fairness. *See* Monroe H. Freedman, *Our Constitutionalized Adversary*

System, 1 Chap. L. Rev. 57 (1998) ("[T]he adversary system 'stands with freedom of speech and the right of assembly as a pillar of our constitutional system.'"); *Baum*, 903 F.3d at 586 ("Few procedures safeguard accuracy better than adversarial questioning" through cross-examination).

While some courts have found the submission of questions to the factfinder to be constitutionally sufficient, they have done so largely in cases with less serious consequences. *See, e.g.*, *Cummins,* 662 F. App'x at 448 (student facing suspension and had an earlier opportunity for cross-examination); *Nash v. Auburn*, 812 F.2d 655, 664 (11th Cir. 1987) (student suspended for academic dishonesty); *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 865 (8th Cir. 2020) (student allowed "to graduate and [the university] required only Title IX training, community service, and an online course"). Submitting questions to a board—as a substitute for cross-examination—fails to adequately replicate the accuracy and fairness that comes with adversarial cross-examination. "Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test [their] memory, intelligence, or potential ulterior motives . . .. Nor can the fact-finder observe the witness's demeanor under that questioning." *Baum*, 903 F.3d at 582. When a university panel is tasked with both factfinding and cross-examining, their dual roles will make them less capable at assessing the witness's credibility. This is particularly true where, as with QSU, the board shies away from the sort of "back-and-forth" "adversarial questioning" that most accurately exposes inconsistencies in witness testimony. *See id.*; R. at 5a (detailing QSU's manual which discourages "rigorous examination," "leading

questions," and "pursuing a line of questions," a requirement that seemingly applies only to the accuser).

Additionally, board members who are intentionally unbiased are less incentivized than the accused to fully probe the accuser's statements. In fact, there may be bias in favor of the accuser. *See* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. Ky. L. Rev. 49, 80–86 (2013) (noting factors leading to pervasive institutional bias against accused students including, *inter alia*, (1) civil liability and the potential loss of federal funding for the school; (2) incentives for school personnel to protect their careers and reputations which are only harmed by mistreating alleged victims and not alleged perpetrators; and (3) fears of negative publicity and the corresponding consequences on the university's enrollment and funding). In comparison, advocates—whose primary concern is the accused student—are not encumbered with these conflicting considerations which prevent school officials from conducting a vigorous investigation into the facts behind an accusation.

Even if university officials manage to shed their bias in favor of the accuser, they would still not be properly positioned to question the accuser. Since they maintain a distanced relationship with the accused to keep their neutrality, they are substantially less likely to know the strategic importance of certain lines of questions as well as their basis in fact. *Cf. Haidak*, 933 F.3d at 70 (noting that preventing the board from knowing all of the accused's proposed questions "created the possibility that nobody would effectively confront [the accuser's] accusations"). Unlike the

tribunal in *Haidak*, the QSU Board appeared to have access to Park's proposed questions. R. at 7a. However, there is no indication that they understood the relevancy of Park's follow-up questions or their importance to the case at hand. For example, the Board dismissed Park's question regarding Roe's father's occupation as "irrelevant." R. at 7a. While this may seem irrelevant on its own, Park knew that Roe's father was a car salesman and questioning her on this topic would expose that Roe had lied when she testified that her father operated a karate dojo. An individual aligned with the accused student could have pursued this line of questioning, exposed inconsistencies in Roe's statements, and allowed the tribunal to view Roe's demeanor in answering, thereby detecting potential falsehoods in her testimony.

3. The Low Costs of Providing Cross-Examination Do Not Outweigh the High Risk of Erroneously Depriving Petitioner's Liberty and Property Interests.

Although Park acknowledges that providing cross-examination in Title IX hearings may require additional costs for QSU, the burden of such procedures does not outweigh the harm to defendant under *Mathews*. 424 U.S. at 335.

First, nothing in the record before the Fourteenth Circuit indicates that QSU lacks procedures for cross-examination in other proceedings, and QSU raised no argument on appeal that they would have had difficulty providing for cross-examination. *See Baum*, 903 F.3d at 582 ("[T]he university identifies no substantial burden that would be imposed on it if it were required to provide an opportunity for cross-examination."); *Univ. of Cincinnati*, 872 F.3d at 406 (noting the limited

administrative burden of cross-examination where the university already has procedures in place).

Even if QSU did not have procedures to facilitate cross-examination during Park's hearing, they now must provide such procedures under federal law. 34 C.F.R. § 106.45 (2020). Under the Department of Education's 2020 Rules, universities must allow the parties an advisor of their choice, or provide one for them, and that advisor must be permitted to cross-examine the other party and any witnesses. 34 C.F.R. § 106.45(6)(i) (2020). Further, there are advocacy organizations available to serve as advisors to accused students, drastically reducing the burden of providing an advisor to conduct cross examination if the student struggles to find one. *See, e.g.*, *FACE: Families Advocating for Campus Equality,* https://www.facecampusequality.org, (last visited Nov. 20, 2022).; *SAVE: Assuring Fairness and Due Process in Schools*, https://www.saveservices.org (last visited Nov. 20, 2022). Thus, securing an advisor to conduct cross-examination in lieu of the student does not pose a significant burden on the university, and certainly does not warrant any infringement on the due process rights of a student.

This alternative procedure also avoids concerns around "retraumatizing" alleged victims as it allows for cross-examination by an advisor, rather than the accused student themselves. *See Baum*, 903 F.3d at 583 ("[A]n individual aligned with the accused student can accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker."). Further, any

possible concerns of "traumatization" through questioning by an attorney[2] are misguided for two reasons. First, while the mental and physical wellbeing of the accuser is important, *Doe v. Mich. State Univ.*, 989 F.3d 418, 431 (6th Cir. 2021), women, who are disproportionately the accusers in sexual misconduct cases, Zoë Seaman-Grant, *Title IX and the Alleged Victimization of Men: Applying Twombly to Federal Title IX Lawsuits Brought by Men Accused of Sexual Assault*, 28 Mich. J. Gender & L. 281, 313 (2022), are not fragile creatures in need of special protection, but instead can reasonably be expected to withstand cross-examination as would any other member of society. *Cf.* Carol Pateman, *The Sexual Contract* 7, 23, 51 (1st ed. 1998) (discussing the role of protectionist and paternalist ideologies in the subjugation of women, views which undercut women's status as autonomous individuals). Further, this overly protectionist view of women's comfort does not justify the denial of the accused's right to meaningful cross-examination. *Univ. of Cincinnati*, 872 F.3d at 403 ("While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns."). Ultimately, although cross-examination is "not a pleasant process for any witness," it is the main and "often only avenue of defense." Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s*? 57 Brit. J. Criminology 551, 553 (2016).

[2] Title IX regulations currently in effect provide that an accused student's advisor does not have to be an attorney. 34 C.F.R. § 106.45(6)(i) (2020).

Second, although attorneys may have historically used dubious tactics in questioning sexual assault victims, today there is little incentive for attorneys allied with the accused to badger, embarrass, or shame the victim. Attorneys have moved past attempts to use irrelevant tactics—such as referencing the accuser's clothing—in part due to the enactment of rape shield laws throughout the country. *See* Zydervelt, *supra* at 553 ("Asking a complainant why two aspects of her account contradict each other, for example, would be considered by many to be a valid tactic. On the other hand, many would consider asking the complainant why she didn't physically resist the defendant to be an unreasonable tactic."); David Bryden, *Criminal Law: Rape in The Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1198 (1997) (noting law reform since the 1970s to remove sexist assumptions and reduce skepticism about the "veracity of women's accusations"); *see also* F.R.E. § 412 (1995) (barring the use of evidence of "other sexual behavior" in a rape case, subject to narrow exceptions). Similarly, board members would likely look unfavorably upon such harassing conduct and may unconsciously turn against the accused if such behaviors occurred.

Further, this case highlights the heightened necessity for adversarial cross-examination and the limited risk of retraumatizing accusers. Although Park requested follow-up questions aimed specifically at credibility, *see* R. at 6a-8a, the Board opted not to ask his questions based on their policy of asking "easy questions" and not pressuring the "traumatized student" for "too many details," a requirement that seemingly applies only to the accuser and not the accused. R. at 5a; *cf*. *Haidak*,

933 F.3d at 70 (describing a similar policy as an "ill-suited kid-gloves approach" to questioning but allowing it because it was applied to *both* parties). Notably, the questions in Park's hearing did not implicate concerns of stereotyping or unnecessarily embarrassing or traumatizing the purported victim. Instead, Park's questions had only two purposes: proving that Park could not have reasonably known Roe's level of impairment given her demeanor during the encounter, and impeaching Roe's credibility given her reluctance to discuss what she had been drinking on the night in question. R. at 6a-7a. Thus, if Park or his agent had been allowed to cross-examine Roe, they could have uncovered inconsistencies which may have changed the outcome of the hearing without unduly burdening Roe or QSU.

Finally, cases denying the right to cross-examination cite fears of transforming campus disciplinary proceedings into criminal trials. *See, e.g., Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 641 (6th Cir. 2005) (holding that a "full scale adversarial hearing" is not required in Title IX proceedings); *Haidak*, 933 F.3d at 69-70 ("If we were to insist on a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury-waived trial would be near complete."). While the "mandated mimicry of a jury-waived trial" could be a concern far in the future, the reality of Title IX hearings is a far cry from resembling a trial.

For one, the time between an initial report of sexual misconduct and the termination of the subsequent criminal trial is significantly longer than the same period in a Title IX proceeding. *See* Mary Wood, *City Attorney Shares the Reality of*

Prosecuting Sexual Assault Cases, available at: https://www.law.virginia.edu/news/2001_02/zug.htm (noting that criminal sexual assault trials are completed, on average, between eight to fourteen months after the incident is reported); Dale Sipes et al., *On Trial: The Length of Civil and Criminal Trials*, National Center for State Courts 11 (1998) (detailing study results that show rape trials lasted on average fourteen hours and twenty minutes, the second longest average duration of a criminal trial). In comparison, QSU scheduled Park's hearing nine days after receiving Doe's complaint, without having conducted any investigation, held the hearing only two months later, R. at 3a-4a, and conducted a hearing of only six hours, issuing the final decision to expel him *immediately* at the conclusion of the proceedings with no evidence of deliberation. CLRF. ANS. #5,6. Additionally, unlike the typical trial, the Board was not, and would not, be bound by rules of evidence or criminal procedure. R. at 6a. Under Title IX rules, the decision to halt lines of questioning, or to permit certain statements remains at the discretion of the decision-maker who can prohibit any irrelevant or harassing questions. 34 C.F.R. § 106.45(6)(i) (2020). This limited requirement is a far cry from the complex and burdensome evidentiary rules of typical court proceedings and remains a stark difference, along with length and voracity of the hearing, between Title IX proceedings and full-scale trials.

Requiring cross-examination as a fundamental component of due process will not force QSU to adopt new and unprecedented procedures, will not require them to disregard the wellbeing of accusers, and will not transform the highly limited Title

IX hearing into a full-scale trial. In comparison, providing cross-examination gives accused students a fighting chance at defending their actions and ensuring that their side of the story is heard in a meaningful way. Park respectfully asks that this Court find that the right to direct and unfettered cross-examination is required by the Due Process Clause in cases, such as this, where credibility is essential, and the potential deprivation of liberty and property interests is at its greatest.

B. Due Process in Title IX Hearings Includes the Right to Confront Adverse Witnesses Without a Mask Obscuring Their Face.

1. The Due Process Clause Contains a Right to Confrontation That, Under *Mathews*, Mandates Alternative Procedures.

The Due Process Clause of the Fourteenth Amendment includes a right to confrontation. *See Morrissey v. Brewer*, 408 U.S. 471, 486–89 (1972) (detailing "the minimum requirements of due process" including "the right to *confront* and cross examine adverse witnesses") (emphasis added). While this right may be less stringent than the Sixth Amendment right to confrontation given the lesser deprivation at stake, had the court below undergone a *Mathews* balancing test, they would have found that the risk to Park was comparatively higher than the cost of alternative procedures. *See* 424 U.S. at 335.

Courts have long recognized the importance of confrontation to adequate process. *See, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82 (1973) (recognizing a constitutional right under the Due Process Clause to confrontation of adverse witnesses in parole hearings); *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (requiring confrontation and cross-examination prior to the deprivation of a government

contractor's position); *Stone v. Prosser Consol. Sch. Dist.*, 94 Wash. App. 73, 78 (1999) (requiring the opportunity to confront and cross-examine adverse witnesses prior to a student's expulsion).

a. Opaque Facemasks Increase the Risk of Erroneous Deprivation.

As noted, Park has substantial liberty and property interests at stake in the Title IX proceeding. While the risk of erroneous deprivation is already quite high given the denial of meaningful cross-examination, this risk is only compounded by the concealment of Roe's face; by allowing Roe to cover her face while testifying, the Board's ability to adequately observe and assess her demeanor under questioning was severely limited. *See Baum*, 903 F.3d at 578, 581–82 (emphasizing the importance of being able to assess a witness's "demeanor and determine who can be trusted," particularly in cases where the "university has to choose between competing narratives to resolve a case"). Where the university's assessment of a witness's credibility becomes determinative of the entire case, the factfinder's unobstructed vision of the witness becomes paramount. The university's main task in such cases is to evaluate not only the statements that come out of a witness's mouth, but also to *observe* the subtle tells that may indicate when a witness is lying. *Id*.

Such central observations are severely limited by the presence of an opaque facemask, a fact which drastically augments the risk of erroneous deprivation. *See* Claus-Christian Carbon, *Wearing Face Masks Strongly Confuses Counterparts in Reading Emotions*, 11 Frontiers Psychol., 1, 1 (detailing the results of a study on the impact of facemasks which revealed "lower accuracy and lower confidence in one's

own assessment of displayed emotions"). Specifically, many subtle tells can be found in the lower half of an individual's face which are difficult, if not impossible to fully suppress while lying. *See* Carolyn M. Hurley & Mark Frank, *Executing Facial Control During Deception Situations*, 35 J. Nonverbal Behav. 119, 121 (2011) (discussing the difficulty of concealing certain facial movements—like smiles—when lying and noting that the "face [reveals] more than the body or voice due to the involuntary nature of human emotion").

Thus, by allowing the obstruction of half of Roe's face during testimony, the Board was deprived of one of the most crucial means of assessing a witness's credibility. Standing alone, this limitation on the Board's ability to assess Roe's demeanor greatly augments the risk that the Board reached the wrong result. When combined with denying Park an unfettered cross-examination of his accuser, the risk of erroneous deprivation exponentially increases. *Cf. United States v. Carter*, 576 F.2d 1061, 1065 (3d Cir. 1978) (reviewing an appellant's due process claims "both individually and collectively").

b. Respondent Had Numerous Low-Cost Alternatives to Permitting Testimony with an Opaque Facemask.

The cost of alternative procedures in this case is strikingly low. Specifically, QSU could have (1) used clear plastic face shields or dividers; (2) required that Roe testify virtually or held the entire hearing virtually; or (3) waited to hold the hearing until the pandemic became more manageable. First, plastic face shields were readily available to QSU. CLRF. ANS. #4 (providing that clear plastic face shields were "worn, within the state of Quicksilver to the same extent as in other states in the

U.S."). By April 2020 news outlets reported that "the face shield has become the [Personal Protective Equipment] ('PPE') of choice" for manufacturers given their efficacy and because the materials were "easy to obtain and can be made quickly." Kif Leswing, *As hospitals beg for protective gear, manufacturers are banding together to churn out plastic ace shields*, Apr. 8, 2020, 1:55 PM, https://www.cnbc.com/2020/04/08/building-plastic-face-masks-to-meet-coronavirus-ppe-shortage.html. There is no reason why QSU could not have provided clear shields to assuage Roe's safety concerns without depriving Park of his due process right to confrontation.

Second, QSU should not have denied Park's request that Roe testify remotely. The majority below simply stated that "remote technology was not as commonplace." R. at 5a, 24a. However, the record provides no reason to believe that QSU, like the vast majority of universities, did not switch to remote learning at the beginning of the pandemic. In fact, the record provides that "QSU canceled all *in-person* classes" for the semester, a statement which readily implies that remote learning continued even after March 2020. R. at 4a. Thus, this alternative presents no clear burden to QSU, which, even assuming they had not made the official switch to remote learning, was more than capable of setting up a meeting on Zoom, Microsoft Teams, or any similar remote technology. Further, even if there were fairness concerns with having one party testify in person and another remotely, there is no reason why QSU could not have held the entire hearing virtually, rather than simply Roe's testimony.

Finally, despite QSU's contention that they allowed the use of the facemask to protect Roe's "physical safety," R. at 5a, 24a, this rationale is undermined by the decision to hold the hearing *in person* in May 2020 when all other in person classes had been canceled due to the pandemic. R. at 4a. While it is certainly a reasonable goal, in normal times, to hold hearings during the same school year, R. at 24a-25a, courts throughout the country closed or shifted to virtual proceedings in light of the COVID-19 pandemic. *See, e.g.*, *United States v. Sheikh*, 493 F. Supp. 3d 883, 844 (E.D. Cal. 2020) (noting in October 2020 that the courthouse had been closed since March of that year). Further, the vast majority of states had stay-at-home orders in place at least until April 20, 2020. Sarah Mervosh, et al., *See Which States and Cities Have Told Residents to Stay at Home*, THE NEW YORK TIMES, last updated April 20, 2020, https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html. Thus, if QSU was truly concerned with the safety of its students, they could have easily provided face shields, allowed virtual testimony, or postponed Park's hearing. Instead, they pushed the hearing forward to avoid the heightened due process requirements they knew were coming in May 2020. *See* 34 C.F.R. § 106.45(2020); *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (noting that universities requested that "the Department issue the final regulations in . . . May so that the requested 90-day implementation window takes place over the summer", thus indicating QSU's knowledge or constructive knowledge that Title IX changes were forthcoming). Given the cancellation of all in-person classes, allowing Park to

continue his studies remotely while awaiting a suitable time to hold the hearing would not have risked traumatizing Roe, or otherwise forced the two students to be near one another, as they had been sent home for the remainder of the semester.

2. The Confrontation Clause Prohibits Adverse Witnesses from Wearing an Opaque Facemask While Testifying.

The dissenting opinion below correctly recognized that the weight of Confrontation Clause jurisprudence holds testimony with opaque masks violates the Confrontation Clause. R. at 54a-55a. Here, Park not only faces the highest possible deprivation of property and liberty in the Title IX context, but also the possibility that Roe's uncrossed statements can later be used in proceedings against him in civil or criminal matters, Reich, *supra* at 22, thus implicating many of the same interests inherent in the Sixth Amendment right to confrontation.

In other pandemic-era cases, courts have consistently held that opaque facemasks, like the one Roe wore, CLRF. ANS. #3, creates an impermissible infringement on a defendant's right to confrontation. *See, e.g., United States v. Robertson*, No. 17-CR-0249-MV-1, 2020 U.S. Dist. LEXIS 212449, at *3 (D.N.M. Nov. 13, 2020) ("[R]equiring testifying witnesses to remove their face masks in lieu of clear face shields does not create an unacceptable health risk given that they will be situated apart from other[s] . . . and . . . will be testifying from behind plexiglass."); *United States v. Sheikh*, 493 F. Supp. 3d 883, 887 (E.D. Cal. 2020) ("[L]awyers have expressed concerns about the ability to effectively evaluate prospective jurors, assess the credibility of witnesses, or communicate with the jury if the participants are wearing masks. The court shares those concerns."); *United States v. Young*, No. 19-

cr-00496-CMA, 2020 WL 3963715, at *2 (D. Colo. July 13, 2020) ("Defendant may be prejudiced by the jury's inability to clearly observe witness reactions to assess credibility because the witnesses would be required to wear masks that cover their face."); *United States v. Auzenne*, No. 2:19-CR-53-KS-MTP, 2020 U.S. Dist. LEXIS 190191, at *25 (S.D. Miss. Oct. 14, 2020) (requiring that parties remove facemasks while speaking given plexiglass barriers throughout the courtroom). These cases make clear that *meaningfu*l confrontation, and thus *meaningful* assessment of a witness's demeanor and truthfulness cannot be achieved while their face is obscured by a mask. They also demonstrate the plethora of alternatives available to courts at the time. As such, this Court should recognize the obligations of the Due Process Clause and hold that allowing Roe to testify with her face obscured by an opaque facemask violated Park's due process rights.

C. Petitioner Made an Initial Showing of Sex Discrimination Sufficient to Survive a Motion to Dismiss.

Finally, even if this Court holds that Park's due process rights were not violated by the denial of cross examination nor the presence of an opaque facemask obscuring Roe's expressions, this Court should overturn the results of the Board based on the bias of the QSU decisionmakers.

"In the school-disciplinary context, an accused student must at least receive . . . an opportunity to present his side of the story before an unbiased decisionmaker." *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 565-66 (6th Cir. 2011); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("It is unquestioned that a fundamental due-process requirement is an impartial and unbiased adjudicator."). This inquiry is

informed by Title IX of the Education Amendments of 1972 which states that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance." 20 U.S.C. § 1681(a) (2022). Here, because Park's gender was a "motivating factor in the decision to discipline," *Doe v. Univ. of the Scis.*, 961 F.3d 203, 209 (3d Cir. 2020), this Court must find that Park's due process right to an unbiased adjudicator was violated.

1. This Court Should Adopt the Pleading Standard Articulated in *Doe v. Columbia University* and Apply a Temporary Presumption in Favor of Petitioner.

As an initial matter, Park maintains that his Title IX sex discrimination claims should have been evaluated under the pleading standard articulated in *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016), given the difficulty of proving that discrimination was a motivating factor without the opportunity for discovery and deposition of witnesses. Pursuant to *Columbia Univ.*, in a Title IX sex discrimination claim, a complaint "is sufficient with respect to the element of discriminatory intent . . . if it pleads specific facts that support a minimal plausible inference of such discrimination." *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 (1973)). This standard "reduces the facts needed to be pleaded under *Iqbal*" in recognition of the substantial similarities between Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e *et seq*. and Title IX discrimination claims. *Columbia Univ.*, 831 F.3d at 56. In this case, Park's allegations of improper statements, negative facial expressions directed at him but not Roe, the Board's discussion of statistics

surrounding false rape allegations, the rushed hearing to avoid updated Title IX regulations, and the overall environment surrounding sexual assault on college campuses, including the threat of OCR investigation and the removal of federal funding, are sufficient to support a "minimal plausible inference of discrimination." *Columbia Univ.*, 831 F.3d at 56.

2. Petitioner's Sex Discrimination Claim Still Survives Under the *Twombly* and *Iqbal* Standard.

Even if this Court declines to adopt the temporary presumption in favor of Park, they must still find that Park's allegations, taken as true, demonstrate a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On a Rule 12(b)(6) motion to dismiss "the court must accept [the allegations in the complaint as true], drawing all reasonable inferences in the plaintiff's favor." *Columbia Univ.*, 831 F.3d at 48. "[D]ismissal . . . is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000).

Here, under the erroneous outcome theory of discrimination, *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994), where the evaluator's decision is against the weight of evidence, "it is plausible to infer . . . that the evaluator has been influenced by bias." *Columbia Univ.*, 831 F.3d at 57. In the present case, the evidence does not indicate that Park knew or should have known Roe's level of intoxication prior to engaging in sexual activity. There is no evidence indicating how much Roe drank or what she was drinking, and the available video footage shows no evidence of

impairment. R. at 7a. Ultimately, the Board's conclusion rests solely on the testimony of Roe, which, for the reasons stated above, is presumptively unreliable. *See Baum*, 903 F.3d at 585–86 (noting that the failure to provide for cross-examination "cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome"). This lack of reliable evidence behind the Board's decision is sufficient to infer "that the evaluator [was] influenced by bias". *Columbia Univ.*, 831 F.3d at 57.

Beyond the insufficiency of the available evidence, there remains a plethora of circumstantial evidence sufficient to find that discrimination against men influenced the Board's decision. For one, the entire proceeding was cast against a background of federal pressure to combat sexual assault on college campuses or else face investigation and the loss of funding. *See* Henrick, *supra* at 80–86; *Doe v. Mia. Univ.*, 882 F.3d 579, 594 (6th Cir. 2018) (upholding a discrimination claim given allegations of "pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if [the university] failed to comply"). Although other sex discrimination cases have often cited to specific pressures, such as protests against the university, *see, e.g., Columbia Univ.*, 831 F.3d at 57, this broad societal pressure may reasonably have incentivized QSU to swiftly punish Park without giving him the presumption of innocence that should underlie such proceedings.

The potentially pretextual nature of the entire hearing can be reasonably inferred solely from the timing of QSU's actions. QSU scheduled Park's hearing prior to even hiring an investigator, R. at 4a, and despite the presence of a global pandemic,

proceeded to hold Park's hearing in person, took a mere six hours to determine guilt, and then expelled Park immediately at the hearing's conclusion. CLRF. ANS. #5,6. While QSU suggests they held the hearing in May to avoid the "prospect of 'applying two different sets of rules to sexual misconduct incidents occurring in the same school year,'" R. at 25a, the more likely rationale for the rushed hearing lies in QSU's desire to avoid the upcoming revisions to Title IX which granted actual, substantive process rights to accused students, and which would have made it more difficult for them to rule against Park without sufficient evidence. As recognized by QSU's stated rationale to avoid "two different sets of rules," R. at 25a, they were aware of the forthcoming regulations and specifically decided to hold the hearing prior to the rules taking effect in August 2020. Thus, the entirety of the rushed process lends support to a finding of gender bias, given that QSU presumptively knew nothing about Park beyond the fact that he was a male who had been accused by a female student.

Beyond the broad circumstances of the hearing, the Board itself made numerous statements and took repeated actions that evidence discrimination against Park on account of his sex. *See Cummins*, 662 F. App'x at 438 ("Causation sufficient to state a Title IX discrimination claim can be shown via statements by members of the disciplinary tribunal, [and] statements by pertinent university officials. . ."). The Board questioned Park about "statistics" showing that only "two to ten percent" of rape allegations ultimately prove to be false. R. at 57a. This indicates that they made up their mind as to Park's guilt, not because of his testimony or the weight of evidence but rather because of their stereotyped assumptions about men and their propensity

for sexual assault. *Cf.* Tracey Owens Patton & Julie Snyder-Yulu, *Any Four Black Men Will Do: Rape, Race, and the Ultimate Scapegoat*, 37 J. Black Stud. 859 (2007) (discussing a false allegation against four Black men at Iowa State which "fed into the national mythology of Black male violence (i.e., Black men are brutes, Black men commit crimes, Black men rape White women) that indirectly justifies the policing of the hyper-visible 'other' to protect the White majority"); The Innocence Project, *Innocent Black people significantly more likely to be wrongfully convicted of sexual assault*, available at: https://mtinnocenceproject.org/innocent-black-people-significantly-more-likely-to-be-wrongfully-convicted-of-sexual-assault/. This predetermined, bias-driven outcome is further evidenced by the Board's treatment of Park compared to Roe. Not only did the Board decline to ask significantly more of Park's follow-up questions, but the Board specifically commended Roe for her "bravery in stepping forward," while simultaneously frowning at Park from the onset of the hearing and whenever he spoke thereafter. R. at 56a-57a. Such statements indicate that Park's expulsion was driven, at least in part, by his sex.

Ultimately, it does not matter if the Board's bias was driven in part by their distaste of alleged perpetrators, so long as his gender was a plausible motivating factor for the discrimination. This Court's obligation is "to draw reasonable inferences *in favor of* the sufficiency of the complaint. *Iqbal* does not require that the inference of discriminatory intent supported by the pleaded facts be *the most plausible* explanation of the defendant's conduct. It is sufficient if the inference of discriminatory intent is plausible." *Columbia Univ.*, 831 F.3d at 57. Thus, given the

minimal pleading requirements at this stage of litigation, this Court should reverse the lower court's holding and find that Park has made out at least an initial showing of discrimination sufficient to survive a motion to dismiss.

Those accused of sexual misconduct are among the most condemned in our society. However, the Constitution exists to protect even "unpopular minorities" and to ensure that any punishment they may rightly face comes only after due process is observed. *See Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) ("[I]t's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law. . . [T]he Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed."). With this duty in mind, Park asks that this Court recognize his fundamental due process rights to direct and unfettered cross examination, to confront witnesses against him without the obstruction of face masks, and to defend himself before an unbiased adjudicator, before he is expelled from his university, potentially subjected to criminal and civil penalties, and maligned as an abuser for the rest of his life.

II. The Term "Costs," as Used in FRCP 41(d) Does Not Include Attorney's Fees.

A. The Circuit Courts Have Developed Three Approaches to Determine Whether FRCP 41(d) Includes Attorney's Fees.

FRCP 41(d) provides that if a plaintiff dismisses an action and then 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 and may

stay the proceedings until the plaintiff has complied." Fed. R. Civ. P. 41(d) (emphasis added). Generally, attorney's fees are not a recoverable cost of litigation "absent explicit congressional authorization." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814–15 (1994) (citing *Runyon v. McCrary*, 427 U.S. 160, 185 (1976)). This presumption against recovery of attorney's fees is known as "the American Rule." *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("*Alyeska*") (distinguishing the American practice from that in England).

Circuit courts have been split as to whether congressional authorization exists to depart from the American Rule and award attorney's fees under Rule 41(d). *See* Edward X. Clinton, *Does Rule 41(d) Authorize an Award of Attorney's Fees*, 71 St. John's L. Rev. 81, 82 nn. 5–6 (1997) (noting the circuit split on the issue); *see also, e.g.*, *Duffy v. Ford Motor Co.*, 218 F.3d 623, 632 (6th Cir. 2000) (emphasizing that whether Congress has authorized the courts to eschew from the American Rule "is far from settled in this circuit or in most others"). The circuit courts have provided three different approaches to the question of whether Rule 41(d) authorizes a departure from the American Rule. *See Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 310 (4th Cir. 2016) (describing how different circuit courts handle attorney's fees under Rule 41(d)). This Court ought to adopt the Sixth Circuit approach as it is the most consistent with the American Rule. In the alternative, this Court ought to adopt the hybrid approach over the Second Circuit approach.

1. The Sixth Circuit Approach.

The Sixth Circuit—consistent with the American Rule—has held that attorney's fees are never available under any circumstances under Rule 41(d) because the rule does not explicitly provide for them. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). The *Rogers* court understood that the law recognizes a distinction between "costs" and "attorney's fees," and it refused to conflate the two terms. *Id.* It therefore adopted its approach assuming that "Congress was aware of the distinction and was careful with its words when it approved Rule 41(d)." *Id.*

2. The Hybrid Approach.

The Third, Fourth, Fifth, and Seventh Circuits have adopted a hybrid approach which partially maintains the American Rule but allows for attorney's fees when the substantive statute which formed the basis of the original suit allows for the recovery of such fees as costs or when such fees are specifically ordered by the court. *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000); *Andrews*, 827 F.3d at 311 (adopting the Seventh Circuit's hybrid approach in the Fourth Circuit); *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017) ("We adopt the position of the Fourth and Seventh Circuits."); *Garza v. Citigroup Inc.,* 881 F.3d 277, 282-83 (3d Cir. 2018) (recognizing "the continued vitality of the American Rule and reaffirm[ing] that there must be statutory authority or other authority to award attorney's fees"). Under the hybrid approach, if the underlying statute does not permit fees, a court may also award attorney's fees where it makes a specific finding that the plaintiff has acted "in bad

faith, vexatiously, wantonly, or for oppressive reasons." *Andrews*, 827 F.3d at 311 (internal citations omitted).

3. The Second Circuit Approach.

The Second Circuit has held that the district court is "free in its discretion to award attorney's fees as part of costs" under Rule 41(d). *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 25 (2d Cir. 2018). While the Eighth and Tenth Circuits have made similar holdings, they have provided little explanation for their holdings. *See, e.g., Meredith v. Stovall*, 216 F.3d 1087, No. 99-3350, 2000 WL 807355, at *1 (10th Cir. 2000); *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980); *see also Andrews*, 827 F.3d at 310 (noting the lack of explanation in the Eighth and Tenth Circuits).

B. The Circuit Court's Choice of Approach Is Reviewed *De Novo*.

1. Determinations on the Scope of Procedural Rules Are Reviewed *De Novo*.

"The proper scope of a rule of procedure is a question of law subject to *de novo* review." *Andrews*, 827 F.3d at 309. Here, the courts below awarded attorney's fees based upon their interpretation of a rule of procedure: namely, which approach to use for attorney's fees under FRCP 41(d). R. at 32a.

2. This Court Must Choose Which Approach to Apply *De Novo* Because the Lower Courts Failed to Choose an Approach.

Upon reviewing the district court's decision to award attorney's fees under Rule 41(d), the Fourteenth Circuit failed to decide which approach to adopt. *See* R. at 36a. The court did not determine whether the statute underlying Park's claim allowed

for attorney's fees; instead, they merely held that attorney's fees were properly awarded, without specifying whether this decision was under the hybrid approach or the Second Circuit approach. R. at 36a. Before this Court can assess whether the lower courts properly awarded attorney's fees, it must first consider the scope of Rule 41(d) *de novo*. *See Andrews*, 827 F.3d at 309 ("We first consider whether and under what circumstances Rule 41(d) permits an award of attorneys' fees as a component of 'costs,'"). This court ought to adopt the Sixth Circuit approach and reverse the lower court's award of attorney's fees.

C. This Court Should Adopt the Sixth Circuit Approach and Exclude Attorney's Fees From "Costs" Under Rule 41(d).

1. The American Rule Presumption Against Awarding Attorney's Fees is Solidified in Supreme Court Precedent.

As early as 1796, the Supreme Court held that "the Judiciary would not create a general rule, independent of any statute, allowing awards of attorney's fees in federal courts." *See Alyeska*, 421 U.S. at 249–250 (citing *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796)). This Court has consistently adhered to the ruling in *Arcambel* because "it is entitled to the respect of the court, till it is changed or modified, by statute." *See Alyeska*, 421 U.S. at 250 (citing multiple cases from 1852 to 1974 which adhere to the rule); *see also Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015) ("Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.") The inclusion of attorney's fees as a recoverable cost of litigation would require a

determination that "Congress intended to set aside the longstanding American rule of law." *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994) (citing *Runyon v. McCrary*, 427 U.S. 160, 185–86 (1976)). Questions regarding attorney's fees must therefore begin with a presumption that the American Rule applies and "any statutory deviations from it must be specific and explicit." *Nantkwest, Inc. v. Iancu*, 898 F.3d 1177, 1182 (Fed. Cir. 2018), *aff'd sub nom. Peter v. Nantkwest, Inc.*, 205 L. Ed. 2d 304, 140 S. Ct. 365 (2019) (citing *Alyeska*, 421 U.S. at 260–62, 269)).

2. Congress Understands How to Provide Explicit Deviations from the American Rule Presumption in Other FRCP Rules and Statutes; Their Decision to Remain Silent Is Intentional.

In all statutory construction cases, the Court begins with the language of the statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). When particular language is used in one section of a statute, but omitted in another section of the same Act, "it is generally presumed that Congress act[ed] intentionally and purposely." *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir, 1972)); *see also Lindley v. F.D.I.C.*, 733 F.3d 1043, 1057 (11th Cir. 2013), *aff'd sub nom. Lokey v. F.D.I.C.*, 608 F. App'x 736 (11th Cir. 2015) ("Where Congress knows how to say something but chooses not to, its silence is controlling.").

The treatment of attorney's fees is no different: where there are express provisions for attorney's fee awards elsewhere in the same statute, omissions of attorney's fees provisions "strongly suggest a deliberate decision not to authorize such awards." *See Key Tronic Corp.*, 511 U.S. at 818–819 (finding that the exclusion of

attorney's fees in the section at issue indicated "a deliberate decision not to authorize such awards" since other provisions in the same act contained explicit authorizations to award attorney's fees). "When Congress wants to provide that that the loser shall pay the winner's attorney fees, it knows how to say so." *Foltice v. Guardsman Prod., Inc.*, 98 F.3d 933, 939 (6th Cir. 1996). Silence cannot be construed as a "specific and explicit" statutory deviation required to overcome the presumption of the American Rule. *See Nantkwest, Inc.*, 898 F.3d at 1182; *Alyeska*, 421 U.S. at 260–62, 269. Furthermore, Congress knows how to provide for attorney's fees in the FRCP. *See, e.g.,* Fed. R. Civ. P. 30(g)(2), 37(a)(4), 37(b), 37(c), 37(d), 56(g) (each Rule containing an explicit attorney's fee provision).

A statute's plain meaning can also be determined by looking to the statutory scheme and placing the provision within context. *See United States v. Epskamp*, 832 F.3d 154, 164 (2d Cir. 2016). For example, FRCP Rule 68 modifies Rule 54(d), which provides for the recovery of costs after judgment. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981) *see also* Fed. R. Civ. P 68 (referencing Rule 54(d) in the 1937 Adoption Committee Notes). Rule 54(d) incorporates a list of statutes which allows for costs and, importantly, includes many statutes that expressly deviate from the American Rule and allow for the recovery of attorney's fees. *See Marek v. Chesny*, 473 U.S. 1, 8 (1985) (using the Advisory Committee Notes of Rule 54(d) to interpret Rule 68). With the knowledge and background of Rule 54(d), the court in *Marek* adopted the hybrid approach to awarding attorney's fees under Rule 68 holding that the authors of the rule incorporated statutory deviations from the American Rule into its

definition of costs and intended to award all costs properly included under the substantive statute, including attorney's fees if applicable. *See id.* at 9, n.2 ("Rule 68 does not come with a definition of costs; rather, it incorporates the definition of costs that otherwise applies to the case.").

The omission of references to other parts of the statutory scheme are presumed intentional when references exist elsewhere in the statute. *See Botosan v. Paul McNally Realty*, 216 F.3d 827, 831 (2000) (holding that 42 U.S.C. § 12188(a)(1) does not incorporate subsection (c) of Title VII because "Congress obviously knew how to adopt provisions of Title VII because it expressly adopted subsection (a) . . . [and it is] unlikely that Congress would absentmindedly forget to adopt a provision that appears a mere two paragraphs below the subsection it adopted"). "[W]here a rule concerning costs defines them without reference to attorneys' fees, or *where the context of the rule suggests the incorporation of such a definition*, attorneys' fees are not part of the costs to be taxed under that rule." *Hines v. City of Albany*, 862 F.3d 215, 220–21 (2d Cir. 2017) (emphasis added). "This remains true even where the underlying substantive statute under which attorneys' fees are sought itself refers to the availability of attorneys' fees as part of costs." *Id.* at 221.

Finally, there is no need for this Court to look beyond the statute's text and context in the broader statutory scheme. *See, e.g., Epskamp*, 832 F.3d at 162; *Botosan*, 216 F.3d at 831 ("[W]here the statutory language is clear and consistent with the statutory scheme at issue, the plain language of the statute is conclusive, and the

judicial inquiry is at an end."). Here the advisory committee notes do not inform Rule 41(d)'s meaning; the Court should look to the rule's unambiguous text.

3. The Sixth Circuit Approach Is the Most Consistent with the American Rule Presumption Because the Plain Language of Rule 41(d) Does Not Provide for Attorney's Fees.

The Sixth Circuit approach is the only one of the three approaches which complies with these rules of statutory interpretation. The text of Rule 41(d) does not contain any reference to attorney's fees.[3] This is unlike other rules in the FRCP. *Compare* Fed. R. Civ. P. 30(g)(2), 37(a)(4), 37(b), 37(c), 37(d), *and* 56(g) *with* Fed. R. Civ. P. 41(d). Importantly, Rule 41(d) was enacted at the same time as the rules which explicitly authorize attorney's fees. *See* Fed. R. Civ. P. 30(g)(2), 37(a)(4), 37(b), 37(c), 37(d), 56(g*) and* 41(d) (1937). "Congress knew how to provide for recovery of attorneys' fees, and its failure to so provide in Rule 41(d) suggests that attorneys' fees are not to be considered as part of 'costs' for purposes of a Rule 41(d) motion." *Simeone v. First Bank Nat. Ass'n*, 125 F.R.D. 150, 155 (D. Minn. 1989); *see also Russello*, 464 U.S. at 23; *Key Tronic Corp.*, 511 U.S. at 818–19.

Rules 30(g)(2), 37(a)(4), 37(b), 37(c), 37(d), and 56(g) indicate that Congress understood how to deviate from the American Rule and its silence on the issue of attorney's fees in Rule 41(d) is controlling. *See Baker Botts L.L.P.*, 576 U.S. at 126;

[3] FRCP Rule 41(d) reads:

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

Foltice, 98 F.3d at 939. Similarly, the Advisory Committee Notes for Rule 41 make no reference to attorney's fees or explain what is meant by the term "costs," and there is no suggestion of incorporating a definition from another statute or rule. *Compare* Fed. R. Civ. P. 41 *with* Fed. R. Civ. P. 68 (incorporating attorney's fees into the rule). The rule's silence, contrasted with the references to Rule 54(d) in Rule 68, can be presumed to be intentional and indicates that prohibiting fees under Rule 41(d)—even when the underlying statute refers to attorney's fees—would be consistent with the overall statutory scheme. *See Botosan*, 216 F.3d at 831; *Hines*, 862 F.3d at 220–21. Thus, this Court should adopt the Sixth Circuit approach: prohibiting the award of attorney's fees under 41(d) in all circumstances. This approach complies with the plain meaning of Rule 41(d) and the American Rule.

4. The Arguments to Include Attorney's Fees in "Costs" Rely on Policy Decisions to Be Made by Congress, Not Courts.

Generalized references to the purposes of a statute will not justify reading a provision "more broadly than its language and statutory scheme reasonably permit." *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (rejecting a private right of action under § 17(a) of the Securities Exchange Act of 1934 even though § 17(a) was designed to protect brokers' customers); *S.E.C. v. Sloan*, 436 U.S. 103, 116 (1978) (rejecting the SEC's interpretation of a statute when their argument was simply a claim that the statute "ought" to operate in a certain way). When the language of a provision is sufficiently clear, it is unnecessary to "examine the additional considerations of policy . . . that may have influenced the lawmakers in their formulation of the statute." *Aaron v. S.E.C.*, 446 U.S. 680, 695 (1980); *see also*

Bellitto v. Snipes, 935 F.3d 1192, 1201 (11th Cir. 2019) ("Since the statutory language is plain and unambiguous . . . we have no occasion to examine statutory purpose."); *Native Am. Arts, Inc. v. J.C. Penney Co.*, 5 F. Supp. 2d 599 (N.D. Ill. 1998) (refusing to consider policy arguments where the plain language of the underlying statute was sufficiently clear).

Even where the purpose of a statute is at odds with the statute's plain meaning, courts use the plain meaning when applying the statute. *See United States v. Lorenzetti*, 467 U.S. 167, 177–78 (1984) (allowing recovery of additional economic damages from an employee under the Federal Employees' Compensation Act despite the argument that recovery would be inconsistent with Congress' declared intent); *Bellitto*, 935 F.3d at 1201 ("[P]urpose . . . cannot be used to contradict text or to supplement it.") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 57 (2012)); *see also W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991) (clarifying that the Court has not held that policy can overcome plain language). Courts should not add features to the statute to further its purpose because statutes propose to achieve certain ends by particular means and "there is often a considerable legislative battle over what those means ought to be." *Dir. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135–36 (1995). The best evidence of Congress' ultimate decision is "the statutory text adopted by both Houses of Congress and submitted to the President." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991). Where the statute's language is plain, "the sole function of the court is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

The American Rule is grounded in the fact that Congress, not courts, is in the best position to make policy decisions with respect to attorney's fees. *See Alyeska*, 421 U.S. at 263 ("Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others."). Where Congress has reserved the policy decision for itself, it would be difficult for courts to decide which statutes warrant the award of attorney's fees and which do not. *See id.* at 263–69. Therefore, courts may not unilaterally "fashion drastic new rules" which determine whether attorney's fees are awarded. *Id.* at 269. Where the plain language does not include a provision for attorney's fees, the courts may not "pick and choose among . . . the statutes . . . to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved . . ." *Id.*

Since the plain meaning of Rule 41(d) is clear, there is no reason for the Court to consider the rule's potential purposes. Nevertheless, the Second Circuit held that a district court is "free in its discretion to award attorney's fees as part of costs," because the maintenance of the American Rule would limit Rule 41(d) as an effective deterrent to forum shopping and vexatious litigation. *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 25–26 (2d Cir. 2018). This Court has consistently refrained from engaging in policy decisions of this type and cannot add features to Rule 41(d) where the text and structure would not permit. *See Alyeska*, 421 U.S. at 263–69; *Touche Ross & Co.*, 442 U.S. at 578. Even assuming the prohibition of attorney's fees would limit the effectiveness of Rule 41(d) as a deterrent, the Second Circuit's

approach is inconsistent with the plain meaning of the rule. *See, e.g., Garza*, 881 F.3d at 281 (3d Cir. 2018) (refusing to use the Second Circuit approach to Rule 41(d) because it runs afoul of the American Rule and nothing in Rule 41(d) provides express authorization for attorney's fees); *see also*, Clinton, Jr., *supra* at 81 (emphasizing that the drafters of Rule 41(d) were aware of the policy concerns when they intentionally chose to use the word "costs" instead of "attorney's fees").

While the Second Circuit approach to attorney's fees under Rule 41(d) is impermissible, the Second Circuit' analysis against using the hybrid approach is instructive. *See Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 26 n.6 (2d Cir. 2018). The *Horowitz* court distinguished between the purpose of Rule 68, to incentivize settlement, and the purposes of Rule 41(d), to deter forum shopping and vexatious litigation. *Id.* Since the incentives to settle in federal court are tied to the size of the recovery available under the substantive statute, while the incentives to forum shop and pursue vexatious litigation are "largely untethered to the merits"; the Second Circuit found that linking the award of fees to the underlying statute made less sense under Rule 41(d) than in Rule 68. *Id.* Thus, even if this Court were to look at the policy rationale underlying the enactment of Rule 41(d), attorney's fees should still not be awarded.

D. If the Court Does Not Adopt the Sixth Circuit Approach, the Court Should Still Reverse the Award of Attorney's Fees in This Case.

1. This Court Should Adopt the Hybrid Approach Over the Second Circuit Approach.

While we urge the Court to adopt the Sixth Circuit approach, in the alternative, the Court should adopt the hybrid approach over the Second Circuit approach. The hybrid approach looks to the substantive statute which underlies the original claim to determine if there is Congressional authorization to depart from the American Rule and award attorney's fees. *See Esposito*, 223 F.3d at 501. The hybrid approach, like the Sixth Circuit approach, recognizes the American Rule presumption and respects the requirement for specific and explicit statutory directives to deviate and award attorney's fees. *See Garza*, 881 F.3d at 282-83. In contrast, the Second Circuit approach is inconsistent with the plain meaning of Rule 41(d) and ignores the American Rule; it cannot be adopted. *See id.* at 281.

2. An Award of Attorney's Fees Under the Hybrid Approach Is Reviewed for Abuse of Discretion.

The decision whether and to what amount attorney's fees are awarded under the hybrid approach is reviewed for abuse of discretion. *See Andrews*, 827 F.3d at 312 (citing *United Food & Com. Workers, Loc. 400 v. Marval Poultry Co.*, 876 F.2d 346, 350–51 (4th Cir. 1989)). "An abuse of discretion occurs where the district court fails to consider an important factor, gives significant weight to an irrelevant or improper factor, or commits a clear error of judgment in weighing those factors." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). The use of discretion

in awarding attorney's fees typically relies on findings of fact which are reviewed for clear error. *See Marval Poultry Co.*, 876 F.2d at 351; *see also United States v. Hardage*, 985 F.2d 1427, 1436–37 (10th Cir. 1993); *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 800 (5th Cir. 2006). For example, a determination of bad faith or vexation is a finding of fact. *Andrews*, 827 F.3d at 312.

Both the district and circuit courts below relied on a finding that Park's conduct amounted to vexatious litigation: a finding of fact reviewed for clear error. *See* R. at 39a; *Andrews*, 827 F.3d at 312. This Court ought to reverse the circuit court's award of attorney's fees because its finding of vexatious litigation was clear error.

3. An Award of Attorney's Fees Would Require a Finding of Frivolous or Vexatious Litigation.

Defendants generally cannot recover attorney's fees under 42 U.S.C. § 1983 nor Title IX, 20 U.S.C. § 1681 et seq. unless two conditions are met. *See Portillo*, 872 F.3d at 739–40 (5th Cir. 2017). First, attorney's fees are only available to a "prevailing party." 42 U.S.C. § 1988(b). Defendants are typically not considered prevailing parties unless the defendant actually obtains relief on the merits or can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment. *See Portillo*, 872 F.3d at 740; *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001). Even if this first condition is satisfied, a defendant cannot be awarded attorney's fees via § 1988(b) unless there is a finding that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)).

The only other circumstance under which a court may award attorney's fees under the hybrid approach is "where it makes a specific finding that the plaintiff has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Andrews*, 827 F.3d 306, 311 (4th Cir. 2016) (internal quotations omitted). For example, manipulating proceedings to gain a tactical advantage in combination with reckless misstatements of law and fact amount to bad faith and warrant the award of attorney's fees. *See Fink v. Gomez,* 239 F.3d 989, 994 (9th Cir. 2001) (remanding to the district court to further consider whether to impose sanctions).

Here, the district court specifically held that Park's actions did not amount to bad faith. R. at 11a. ("[T]he Court finds that Plaintiff's actions, although misguided, were not the result of bad faith."). Therefore, an award of attorney's fees under the hybrid approach is only warranted if there is a finding of frivolous or vexatious litigation.

4. The Bar for Frivolous or Vexatious Litigation is High.

For an action to be frivolous, it must be "so lacking in arguable merit as to be groundless or without foundation. . ." *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140–41 (5th Cir. 1983) (quoting *Jones v. Tex. Tech Univ.*, 656 F.2d 1137, 1145 (5th Cir.1981)). A determination of frivolousness should not consider whether the claim is ultimately successful. *See Plemer*, 713 F.2d at 1140–41; *Christianburg Garment Co.*, 434 U.S. at 421–22 ("[I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable

or without foundation."). Rather, a determination of frivolousness amounts to a determination that the claim was baseless and made without a reasonable and competent inquiry into whether the claim is "grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990). Factors important to a frivolity determination include whether the plaintiff established a prima facie case and whether the district court dismissed the case. *See United States v. State of Miss.*, 921 F.2d 604, 609 (5th Cir. 1991) (citing *E.E.O.C. v. Kimbrough Inv. Co.*, 703 F.2d 98, 103 (5th Cir. 1983)).

The bar for 'vexatiousness' is similarly high: even if a court finds that the plaintiff had withdrawn their claim to avoid a negative ruling, a court may still find that the underlying claim was not 'vexatious.' *See Andrews*, 827 F.3d at 312–13 (finding that the plaintiff's conduct was not vexatious despite the district court's finding that the plaintiff had dismissed the action to avoid a negative ruling on the defendant's motion). The Supreme Court has treated the words vexatious and frivolous interchangeably. *See Christianburg Garment Co.*, 434 U.S. at 421 (discussing the definition of vexatious before announcing a standard using the word frivolous.)

5. The Lower Courts' Finding of Vexatious Litigation Constitutes Clear Error.

The lower court's ruling should be reversed because its finding of vexatious litigation was clear error. *See United States v. Hardage*, 985 F.2d 1427, 1436–37 (10th Cir. 1993).

The court below relied on its finding that Park's nonsuit was "motivated by a desire to gain a tactical advantage." R. at 38a. While the district court concedes that a more accurate description of Park's conduct is an attempt to "eliminate a perceived tactical disadvantage," the inquiry is inconsequential; even if this motivation existed, it is not sufficient to justify an award of attorney's fees. *See Andrews*, 827 F.3d at 312–13. The court below relied on the Ninth Circuit's decision in *Fink* for the proposition that manipulation of proceedings to gain a tactical advantage is sufficient to award attorney's fees. R. at 39a. However, this is an incorrect reading of *Fink*; the Ninth Circuit held that improper purposes—such as gaining a tactical advantage—when paired with reckless misstatements, justified an award of fees to the extent that the behavior amounted to bad faith. *See* 239 F.3d at 994. Here, there is nothing in the record to indicate reckless misstatements of law or fact, and the district court explicitly held that there was no bad faith on the part of Park. R. at 11a ("[T]he Court finds that Plaintiff's actions, although misguided, were not the result of bad faith."). Thus, while a motivation to avoid a tactical disadvantage may establish that a defendant is a prevailing party under § 1988(b), it does not bear on the question of whether the claim was frivolous or vexatious. *See Portillo*, 872 F.3d at 740; *Andrews*, 827 F.3d at 312-313.

Park's claims cannot be regarded as "so lacking in arguable merit as to be groundless or without foundation." *See Plemer*, 713 F.2d at 1140–41 (5th Cir. 1983). Although the first district judge stated that he would rule on Respondent's motion to dismiss on the same day as the hearing, he declined to do so and opted to take the

matter under advisement. R. at 9a, 61a. The lack of dismissal suggests that Park's claim was not frivolous and, without a dismissal, Park would not have any indication otherwise. *See Kimbrough Inv. Co.*, 703 F.2d 98, 103 (finding no vexation where a prima facie case existed and proceeded to trial); *State of Miss.*, 921 F.2d 604 at 609 (listing dismissal as a factor to consider in a frivolity determination); *Christianburg Garment Co.*, 434 U.S. at 422.

Moreover, Park waited almost two months to refile his lawsuit after voluntarily dismissing his first. R. at 9a. This delay was because of his counsel's stated desire to "better study applicable law and to ensure Park's claims were supported by existing law or presented a good-faith basis for extension or modification of existing law." R. at 10a. In this respect, the Fourteenth Circuit's holding that Park's conduct was vexatious is clear error; a reasonable and competent inquiry into the law's support for a claim is precisely how to avoid frivolity. *See Townsend*, 929 F.2d at 1362 (9th Cir. 1990). As discussed in Part I of this brief, there is support for Park's Due Process and Title IX claims; his claims were not frivolous or vexatious. Attorney's fees are not authorized under § 1988(b) and the court may not award fees under its discretion. *See Christianburg Garment Co.*, 434 U.S. at 422; *Andrews*, 827 F.3d at 311.

CONCLUSION

Petitioner respectfully asks the Court to reverse the lower court's judgment, including its award of attorney's fees; reinstate Petitioner's complaint; and remand to the district court for further proceedings.

Respectfully submitted,
/s/ Team #42
Team 42
Counsel for Petitioner
November 21, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 33.1 and Competition Rule 2.5, the undersigned hereby certifies that the Brief for Petitioner, Kyler Park, contains 13,997 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Compliance.

/s/ Team #42
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November 21, 2022