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 Supreme Court of the United States

Team No. 48

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QUESTIONS PRESENTED

I. Whether a student facing university disciplinary proceedings has a constitutional right under the Fourteenth Amendment and Title IX to cross-examine their accuser and to ask that their accuser testifies without a face covering to assess credibility properly.

II. Whether Congress intended for the term costs, as used in Federal Rule of Civil Procedure 41(d), to include attorney's fees when Congress has expressly differentiated between attorney's fees and costs in other rules of the FRCP?

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Edward X. Clinton Jr. *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71 St. John's L. Rev. 81, 94 (1997). 36
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OPINION BELOW

The United States District court for the District of Quicksilver granted Respondent's motion for summary judgment and awarded attorney's fees. (R. at 11a). The Petitioner appealed, and the Fourteenth Circuit court of appeals affirmed the district court's decision. (R. at 2a).

JURISDICTIONAL STATEMENT

The Petitioner filed a petition for Writ of Certiorari, and on October 10, 2022, this Court granted Writ. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1). The text of 28 U.S.C. § 1254(1) is set forth in Appendix B of this brief.

CONSTITUTIONAL PROVISIONS AND STATUTES

The case at bar involves the Fourteenth Amendment of the United States Constitution, 20 U.S.C. § 1681 (a), and Federal Rule of Civil Procedure 41 (d). The texts of the Fourteenth Amendment are set forth in Appendix A of this brief. The texts of 20 U.S.C. § 1681 (a) and Federal Rule of Civil Procedure 41 (d) are set forth in Appendix B.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On May 20, 2020, after an improper hearing ("the Hearing") held by a hearing board ("the Board"), Respondent Quicksilver State University ("QSU") unfairly expelled Petitioner Kyler Park ("Park") for an alleged violation of the universities policies prohibiting sexual misconduct. (R. at 2a). Specifically, QSU accused Park of violating the QSU Code of Student Conduct ("CSC"), alleging that he had committed acts of sexual abuse, unwanted sexual conduct, and dating violence. (R. at 3a-4a). Jane Roe ("Roe" or "his accuser"), another QSU student, accused Park of sexually assaulting her while intoxicated. *Id.* Park maintains that on the night in question, he and Roe had consensual sexual relations and that Roe only retaliated against him after he declined her advances to be in a relationship. (R. at 3a).

A. THE QUESTIONABLE CLAIMS BY ROE

On March 14, 2020, Park and Roe ran into each other at a bar inside a movie theater. (R. at 2a). Park and Roe then sat together at the bar, and Park bought Roe one alcoholic drink. *Id.* At that time, Roe was still underage. (R. at 6a). However, she claims that prior to Park approaching her, she had already been drinking alcohol. *Id.* Roe conveniently did not remember how many drinks she had prior to Park arriving and did not retain any receipts from her alleged purchases. *Id.* The credit-card charges would indicate whether she had purchased anything prior to Park's arrival. (R. at 7a) Park has continuously maintained that he only saw Roe drink the one he bought her. (R. at 6a).

After talking for about an hour, Park and Roe walked to the dorms. (R. at 2a). In the footage, Roe had impeccable balance despite claiming she was heavily intoxicated. (R. at 7a). Roe later claimed that she has an excellent balance due to taking unpaid martial arts training at a karate dojo owned by her father, a car salesman. *Id.* Once in the dorms Park and Roe engaged in sexual intercourse. (R. at 2a). For three days after their encounter, Roe called Park repeatedly. (R. at 3a). Park stated that Roe seemed happy and repeatedly expressed interest in pursuing a romantic relationship. (R. at 3a). Once Park told Roe that he was not interested and that things could not progress past the hookup, Roe became irate and threatened to falsely report that Park had assaulted her. *Id.* According to Roe, the multiple calls were to determine if Park had assaulted her that night. *Id.*

After Roe submitted her accusation against Park, QSU assigned an investigator to interview Park, Roe, and other witnesses. (R. at 4a). Unfortunately, the encounter occurred during spring break when most QSU students were not on campus. *Id.* Therefore, the appointed investigator could not locate additional witnesses to corroborate Roe or Park's versions of the events. (R. at 3a-4a). Thus, the merits of the hearing turned on who the Board deemed credible. *Id.* The Board ultimately found against Park and expelled him. (R. at 8a).

B. THE HEARING BOARD AND ITS CONSTITUTIONALLY DEFICIENT PROCEDURES

The Board was composed of five employees and students appointed by the Vice Chancellor for Student Affairs. (R. at 4a). Notwithstanding the COVID-19 outbreak that caused the cancellation of all in-person classes two months prior, the Board

elected to have the hearing in person. (R. at 4a). In addition, the Board decided that the unamended CSC would govern Park's hearing instead of the new Title IX regulations announced by the Department of Education in May 2020. *Id.* Both Park and Roe attended the hearing in person, and Park was accompanied by his attorney. *Id.* All attendees were required to wear a face covering during the hearing. (R. at 5a).

i. WRONGFUL DENIAL OF CROSS-EXAMINATION

Firstly, pursuant to the unamended CSC, the Board denied either party from directly cross-examining the other personally or through an attorney. *Id.* Instead, the Board mandated that the parties submit questions. *Id.* The Board would then make a subjective decision and have absolute discretion on which questions they deemed acceptable to ask the witnesses themselves. *Id.*

On the direction of the QSU manual, the Board intended to prioritize Roe's comfort over thorough questioning to discern the truth. (R. at 5a). The QSU manual directed the Board to begin with easy questions, avoid leading questions, and avoid "pursuing a line of questions" because of the concern that "pressing a traumatized student for too many details can be very adversarial and can increase the risk of trauma to the student." *Id.* Additionally, the QSU manual excused the Board from observing rules of evidence usually followed by the courts. *Id.* The Board could also exclude what they deemed "unduly repetitious or irrelevant evidence." *Id.* Furthermore, in 2011, the Department of Education issued a statement known as the "Dear Colleague" letter. (R. at 15a). QSU relied on this letter to maintain compliance with Title IX requirements pertaining to sexual harassment and violence. *Id.*

Per the Board's request, Park submitted questions initially and in follow-up, specifically about Roe's claim of intoxication. (R. at 6a). The Board was willing to allow some initial questions regarding intoxication; however, the Board refused most of Park's questions that could impeach Roe's statements. *Id.* Specifically, the Board refused to question Roe about the drinks she had prior to Park's arrival. (R. at 7a). The Board also denied Park's request for Roe to provide receipts proving she purchased drinks. *Id.* Additionally, the Board denied allowing any questions on how Roe illegally obtained the alcohol. *Id.* Lastly, the Board refused to investigate Roe's questionable claims that she was trained in martial arts and did not pay for her classes because her dad owned the dojo. *Id.* Specifically, the Board ignored Park's concerns that Roe's dad was a car salesman, not a dojo owner. *Id.* Ultimately, the Board decided that such questions were invasive to Roe's financial privacy and irrelevant, and they wished to protect her from criminal liability. *Id.*

ii. WRONGFUL DENIAL OF PARK'S REQUEST TO REMOVE FACE COVERING

Additionally, Park requested that the Board have Roe remove her face covering while speaking or answering questions. (R. at 8a). However, Roe refused to remove her face covering. (R. at 5a). Park then offered an alternative and safer option to have Roe testify remotely. *Id.* Roe again refused and insisted she wanted to be physically present, and the Board appeased her decision by denying Park's reasonable request. *Id.* Ultimately the Board appeased her decision despite the face covering obscuring most of Roe's face and complicating efforts to assess her credibility. (R. at 8a).

iii. GENDER-BASED DISCRIMINATION AGAINST PARK

Lastly, the Board credited exclusively female testimony and rejected all male testimony in a case with no witnesses other than Park and Roe. (R. at 30a). The Board's conduct during the hearing included frowning at Park and treating him with skepticism whenever he addressed them. (R. at 57a). On the contrary, the Board expressly praised Roe's "bravery" in "stepping forward" in accusing Park. *Id.* The gendered bias was even more evident when one of the Board members, without prompt or request, grilled Park about the statistics of false rape allegations. (R. at 57a). Specifically, they commented that Park's defense was unbelievable because only "two to ten percent" of rape allegations are false. *Id.* Consequently, the Board rejected Park's request because of the Board's gender bias. *Id.*

C. PARK'S FIRST SUIT AGAINST QSU

After Park's improper hearing and subsequent wrongful expulsion, Park sued QSU in the District Court of Quicksilver on June 12, 2020. *Id.* Park brought claims under § 1983(b) for Fourteenth Amendment due process violations and gendered-based discrimination under Title IX. (R. at 8a). Judge Kreese was assigned to the case. *Id.* On July 1, QSU filed a 12(b)(6) motion to dismiss for failure to state a claim. (R. at 9a). On July 22, one of the first hearings Judge Kreese presided over was QSU's 12(b)(6) motion. (R. at 61a). During the motion hearing, Judge Kreese displayed clear signs of bias in favor of QSU. *Id.* Notably, Judge Kreese was a known QSU alumnus, a former member of a QSU fraternity, and an avid supporter of QSU's football team by maintaining a public Twitter account with more than 347,000 followers. *Id.* Most

alarmingly, Judge Kreese began the hearing as he did every day by asking all in attendance to join him in singing "Hail to Thee, Quicksilver State, and Quicksilver A&M Can Go to Hell," QSU's fight song. (R. at 9a). After he displayed support for QSU, Judge Kreese quietly listened to both arguments. *Id.* At the end of the hearing, Judge Kreese took the matter under advisement and told the parties that he would likely make his ruling at the end of the day. (R. at 61a). That night, after not hearing from Judge Kreese, Park voluntarily dismissed his suit pursuant to the Fed. R. Civ. P. 41(a)(1). (R. at 8a).

D. PARK'S SECOND SUIT AGAINST QSU

Two months after Park dismissed his first suit, on September 21, he re-filed his suit against QSU in the same District Court. *Id.* In accordance with Quicksilver's district court ruling, plaintiffs can re-file an action to get a different judge. *Id.* Therefore, Judge Alexopoulos was assigned to Park's new suit. *Id.* In response, QSU filed a 12(b)(6) motion to dismiss. (R. at 10a). QSU also requested that the district court find Park acted in bad faith or vexatiously under Fed. R. Civ. P. 41(d) ("Rule 41(d)"). *Id.* QSU erroneously asked the court to award them costs under Rule 41(d), including $74,500 in attorney's fees. *Id.*

Park and his attorneys promptly responded with affidavits, stating that Park dismissing and re-filing his suit was not motivated by bad faith or desire to engage in vexatious litigation. *Id.* Instead, Park was concerned about the bias presented by Judge Kreese. *Id.* Furthermore, Park's attorneys wanted to ensure Park's claims were well-founded and in line with Fed. R. Civ. P. 11(b). *Id.* Therefore, Park's attorneys

took two months to re-file and study applicable law and ensure compliance with good faith arguments. (R. at 8a).

Judge Alexopoulos granted QSU's motion and erroneously concluded that Park dismissed and re-filed his suit to avoid an unfavorable judgment on the merits. *Id.* Additionally, Judge Alexopoulos mistakenly interpreted Rule 41(d) 'costs' to include attorney's fees. (R. at 10a). However, Judge Alexopoulos correctly held that Park's re-filing was not in bad faith. *Id.*

II. PROCEDURAL HISTORY

Park appealed the district court's mistaken judgment. *Id.* The court of appeals for the fourteenth circuit affirmed the district court's ruling. (R. At 20a). The appellate court held against Park on his due process claims, holding that QSU's refusal to allow Park to cross-examine Roe, the Board's method of questioning Roe, and the Board's decision to allow Roe to keep her mask on throughout the proceedings was constitutional. (R. at 20a, 24a, 26a). Additionally, the appellate court determined that the district court did not err in dismissing Park's Title IX claim. (R. at 31a).

The appellate court also found that Rule 41(d) "evinces an intent to provide for the recovery of attorney's fees at least in some cases." (R. at 36a). The appellate court did not adopt a bright line rule but noted the circuit split on the issue of attorney's fees and Rule 41(d). *Id.* Furthermore, the appellate court found there was no abuse of discretion on behalf of the district court in awarding attorney's fees to QSU because they determined that QSU was a prevailing party, and Park acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." (R. at 38a). Accordingly, the

appellate court affirmed and granted attorney's fees to QSU under Rule 41(d). (R. at 40a).

Park filed a Writ of Certiorari, and this Court granted.

SUMMARY OF THE ARGUMENT

Park suffered continuous violations contrary to this Court's American values and precedent. This Court must rebuke any holding that strays away from providing plaintiffs due process, equality, and justice. Therefore, it is imperative that this Court reverse the lower court's decisions and find that Park had a right to direct and unfettered cross-examination, have his accuser testify without a mask, and not pay QSU's attorney's fees under Rule 41 (d).

I.

QSU stripped Park of his Due Process rights under the Fourteenth Amendment and Title IX by impeding his ability to defend himself from his accuser effectively.

First, the Board inhibited Park from a direct and unfettered cross-examination of the only other witness, his accuser, Roe. Park's life, education, and reputation hinged on the Board's ability to test the credibility and thus required additional safeguards. Those additional safeguards were far from burdensome to QSU and should have been implemented. Furthermore, a mere board-led cross-examination was insufficient as the Board's decision depended on who they deemed more credible. Even if this Court went against its precedent and held that the circumstances at bar did not require a direct and unfettered cross-examination from Park's attorney, the Board's pseudo-cross-examination was not adequate.

These inadequacies are linked to the Board's clear bias and hate towards Park as a man and their paternalistic desire to protect Roe. The Board frequently denied most of Park's requests citing concerns for Roe's safety as superior to truth-finding. In addition, the Board displayed a clear paternalistic bias toward Roe that infringed on Park's rights and precluded him from properly defending himself.

Thirdly, the Board also denied Park's request that Roe testifies without a mask covering or that the hearing is moved online. The Board took this course of action despite their inability to discern credibility due to the face covering. QSU never intended to provide Park with the proper procedure. Instead, QSU was willing to revoke Park's education, life, and reputation in the hopes of being considered more "politically correct" at the expense of Due Process and gender equality. Schools' disciplinary boards must be neutral finders of bad behavior, not makers of politically driven decisions.

II.

Rule 41(d) does not include attorney's fees. The American Rule relating to litigation costs ensures that every party pays for their fees. To carve out an exception without explicit congressional authority would usurp the legislature's power in adopting the Federal Rules of Civil Procedure ("FRCP ") Even if this Court were to adopt the hybrid approach followed by the Third, Fourth, Fifth, and Seventh Circuits, it is incorrect to assert that QSU is a prevailing party under 42 U.S.C. §1988 and that Park's claims were frivolous, unreasonable, or groundless, or that Park acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Accordingly, Park urges this court to reverse the appellate court's holding and deny QSU's 12 (b)(6) motion and to reverse the award of attorney's fees under Rule 41(d) to QSU.

ARGUMENT

This case is before this Court on direct appeal from an order granting QSU's Rule 12(b)(6) Motion to Dismiss. A dismissal for failure to state a claim is subject to *de novo* review. *U.S. Bank NA v. Vill. at Lakeridge, LLC,* 138 S. Ct. 960, 965 (2018). A court must deny a 12(b)(6) motion to dismiss when the plaintiff's allegations are enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 555 (2007); Fed. R. Civ. P. 12(b)(6). A 12(b)(6) motion to dismiss cannot be upheld when the plaintiff's claims are more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* The Court must accept the truth of all well-pled facts and draw all reasonable inferences in the pleader's favor. See *Bell*, 550 U.S. at 556. A "well-pled fact" is non-conclusory and non-speculative. *Id.* at 555.

This Court should reverse the judgment of the appellate court for two reasons. First, the appellate court erred when it affirmed the district court's dismissal under Rule 12(b)(6) for the Fourteenth Amendment and Title IX claims. Second, the appellate court incorrectly awarded QSU attorney's fees under Rule 41(d).

I. THE COURT MUST REVERSE THE APPELLATE COURT'S HOLDING BECAUSE QSU ACTED UNCONSTITUTIONALLY WHEN IT VIOLATED PARK'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT AND TITLE IX.

The founding fathers established The United States of America on the premise of life, liberty, and the pursuit of happiness. The right to due process under the Fourteenth Amendment has long protected these cherished ideals. Due process guarantees U.S. citizens fundamental fairness and justice. More recently, Title IX

has augmented those protections by eliminating gender-based discrimination. Title IX ensures that the next generation has access to equality in education. This Court has held that education is property, and in the words of James Madison, "[a] Government is instituted to protect property of every sort...This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, *On Property,* The National Gazette, (1792). Therefore, this Court must reverse the appellate court's judgment and set a more precise rule in disciplinary hearings to avoid eroding the due process protections the founding fathers intended for citizens to have.

A. THE CASE AT BAR DEMANDS DIRECT AND UNFETTERED CROSS EXAMINATION OF WITNESSES UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

The Due Process Clause of the Fourteenth Amendment provides in part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. This Court has held repeatedly that "education is perhaps the most important function of state and local governments." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). Specifically, this Court has stated that a university student possesses a "constitutional protectible property right" in their continued enrollment in a university." *Regents of the Univ. Mich. v. Ewing,* 474 U.S. 214, 223 (1985). Therefore, the threat of suspension and expulsion implicates a property interest. *Goss v. Lopez,*

419 U.S. 565, 577 (1975). Consequently, due process must apply, and "the question remains what process is due." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

This Court has repeatedly affirmed that the minimum process due to Park was "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) *citing Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). QSU did not allow Park to be heard in a meaningful manner because QSU deprived Park of the opportunity to direct and unfettered cross-examination of his accuser. Therefore, QSU desecrated Park's due process rights delineated by this Court. This Court has clearly stated that not all cases are owed the same due process because due process is fluid and can change on a case-to-case basis. *Morrissey,* 408 U.S. at 481; *See also Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (holding that due process is not rigid but flexible and dependent on the circumstances.) Additionally, the process due depends on the extent to which an individual will be "condemned to suffer grievous loss" without additional procedural protections. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., *concurring*); *see also Goldberg v. Kelly,* 397 U.S. 254, 263 (1970).

While this Court has not provided a common rule on how universities should conduct disciplinary hearings, it has provided a sliding scale that considers three factors: (1) the student's interests that will be affected; (2) the risk of erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the university's interests, including the burden that additional procedures would

entail. *See Mathews,* 424 U.S. at 335. Consequently, not all cases require the right to direct and unfettered cross-examination; however, this one undoubtedly did.

i. PARK'S INTERESTS WERE SO GREAT QSU OWED AUGMENTED DUE PROCESS BEFORE DEPRIVING HIM OF HIS EDUCATION

Firstly, Park's private interests were significant, while the university's burden was minimal. Roe brought forth claims of sexual assault that not only carry criminal liability but have unavoidable and lasting effects on his life, education, employment, and reputation. Park was not facing a few days of suspension but rather a complete expulsion from the school where he had just completed 75% of his degree. (R. at 2a.) QSU accused Park of violating their CSC, alleging that he had committed acts of sexual abuse, unwanted sexual conduct, and dating violence. (R. at 3a-4a). The harms these labels will cause Park are serious, and due process requires additional safeguards to avoid such grievous loss. Although this Court has made it clear that disciplinary hearings do not need to take the form of a judicial or quasi-judicial trial, "an effective opportunity to defend by confronting any adverse witness" is necessary if those "omissions are fatal to the constitutional adequacy of the procedures." *Goldberg v. Kelly,* 397 U.S. 254, 268 (1970).

Additionally, if this Court correctly holds that direct and unfettered cross-examination is necessary for due process in cases like the one at bar, it will prevent countless errors that deprive students of their extraordinary interests. Furthermore, even if this decision favors Park, Park will always be known as the student accused of raping another student. As *She the People,* an organization that elevates the political voice and leadership of women of color, states, "[t]he accused losses his

honour, cannot face his family and is stigmatized for life." Smita Singh, *False Rape Allegations: How It Can Ruin Lives and Affect Real Cases*. Digitalist Tech Media. (June 10, 2022), https://www.shethepeople.tv/top-stories/opinion/false-rape-allegations. Therefore, it is imperative that this Court prevents this from occurring again, as a negative reputation can have infinite ramifications. This Court should reverse and hold that cases as serious as the one at bar deserve a higher level of due process.

ii. THE PROCEDURES USED BY QSU CAUSED ERRONEOUS DEPRIVATION THAT COULD HAVE BEEN COUNTERED BY ALLOWING DIRECT AND UNFETTERED CROSS-EXAMINATION

QSU's case against Park hinged solely on who the Board believed to be more credible, Park or his accuser. (R. at 4a). However, QSU found Roe credible based on uncontested claims that, at best, needed to be clarified. Specifically, there were several facts that the Board refused to question Roe about and instead accepted as accurate.

First, the Board took Roe's claims that she was intoxicated prior to Park's arrival as true without further inspection. Notably, Park testified that to his knowledge, the only alcoholic drink Roe had that night was the one he bought her at the theatre's bar. (R. at 2a). Alternatively, Roe claimed that the clear liquid drink she consumed at Park's arrival was one of many alcoholic drinks she drank that night. (R. at 6a). However, when Park requested that the Board ask Roe what the clear drink was and how many drinks she had before that one, the Board deemed the question "overly aggressive and irrelevant." *Id.*

Park then requested that, at minimum, a receipt of Roe's purchases from that night be provided. (R. at 6a). However, Roe conveniently did not have a receipt, so Park requested that the Board compel Roe to show her credit-card statement on her phone. *Id.* The Board again denied the reasonable line of questioning and stated that it was invasive of Roe's financial privacy. (R. at 7a.) Finally, Park requested that the Board inquire about Roe's ability to buy alcoholic drinks while underage. *Id.* However, the Board, seemingly worried more about Roe's rights against self-incrimination, declined to ask that question. *Id.* Clearly, the Board was willing to provide safeguards from criminal proceedings to Roe but refused to extend such rights to Park. *Id*. Consequently, the Board took Roe's claims that she had been drinking prior to Park's arrival and was intoxicated at face value without allowing for the claim's validity to be refuted. *Id.*

Secondly, the Board erroneously believed Roe's unsupported accusation that Park knew she was intoxicated. The video evidence presented showed Roe walking without difficulty to the dorms despite her claims of having drank several alcoholic beverages. *Id*. Park contended that since Roe had no problem walking and did not appear intoxicated, he did not know she was inebriated. *Id.* The Board allowed Roe to quickly negate this claim by stating that she had "excellent balance from many years of martial arts training." *Id.* Park then requested that the Board validate this declaration by asking that she provide her credit-card statements on her cellphone. *Id.* Despite their previous concerns for Roe's financial privacy, the Board was unexpectedly willing to request Roe's financial statements. *Id.* However, fittingly, Roe

eluded the request by asserting that she trained at her father's dojo for free. (R. at 7a). To confirm this allegation, Park asked that the Board inquire about how her father, a known car salesman, was a dojo owner. *Id*. Again, the Board refused to allow Park to defend himself from Roe's questionable claims, citing relevancy as grounds for their objection. *Id.* Ultimately, QSU found Park guilty based exclusively on Roe's uncorroborated claims aided by the Board's repeated refusal to provide any line of questioning that would allow Park to defend himself from Roe's doubtful assertions.

The Board unquestionably believed Roe's statements and weighed her claims heavily against Park's. The depravations Park faced demanded that, at a minimum, QSU allow him to defend himself against his accuser because Roe's credibility was the deciding factor. Instead, QSU blindly took Roe's words as accurate and all of Park's claims as refutable. Since credibility was disputed and material to the outcome, QSU's failure to provide additional safeguards made the hearing constitutionally inadequate. *Doe v. Baum,* 903 F.3d 575, 581 (6th Cir. 2018).

iii. EVEN IF THIS COURT DEPARTS FROM ITS AFOREMENTIONED PRECEDENT, QSU STILL VIOLATED PARK'S DUE PROCESS RIGHTS WHEN IT FAILED TO COMPLY WITH ITS DUTY TO REASONABLY QUESTION ROE.

This Court must hold that "when a school reserves to itself the right to examine the witnesses, it also assumes for itself the responsibility to conduct reasonably adequate questioning. A school cannot both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student." *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 70 (1st Cir. 2019). QSU failed to reasonably cross-examine Roe when it refused to inquire further about her dubious

statements. On several occasions, Roe made dissonant statements, and the Board refused to follow up by citing several evidentiary objections. However, in denying Park's requests, the Board took Roe's statements as fact without allowing Park to corroborate and defend himself.

The Board continuously accepted Roe's statements as accurate, even in light of Park's rebuttable evidence. QSU's duty to reasonably question Roe was augmented because there were no other witnesses to substantiate any of the claims, and therefore credibility was material to the case against Park. Accordingly, QSU owed Park the highest constitutional right to due process. The record clearly shows that QSU failed to meet this burden and that the due process was deficient. Thus, the Court should reverse the appellate court's finding.

iv. QSU Was Not Burden in Permitting Park to a Direct and Unfettered Cross-Examination of Roe

This Court must hold that because credibility was in dispute and material to the outcome, due process required party-led cross-examination because there was no burden to QSU. Although circuit courts have traditionally held that disciplinary hearings do not need to mirror criminal trials, Park's hearing at QSU closely mirrored one. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005). QSU's CSC prohibits involved students from directly cross-examining witnesses, either personally or through counsel. (R. at 14). Instead, the Board asked that students submit questions to them. *Id.* The Board then decided which questions they deemed

acceptable and examined the witnesses themselves[1]. (R. at 14). However, aside from disallowing cross-examinations, the Board provided grounds for denying questions like in criminal proceedings, allowed testimony, and video evidence, and even afforded Roe the Fifth Amendment right against self-incrimination. (R. at 7a). The Board also conducted its own pseudo-cross examination. *Id.* However, the Board's lack of expertise was so fundamentally flawed that it created a categorically unacceptable risk for erroneous deprivation – precisely what due process intended to counter.

Transferring the cross-examining responsibility from the Board to Park's attorney would not have been burdensome to QSU. It was simply a transfer of responsibility that was better off in the hands of a trained attorney who knew how to cross-examine witnesses. Therefore, any contention that allowing parties to cross-examine would "open up witnesses to potential harassment at the hands of their accusers and their accuser's attorneys" was misguided. Attorneys are trained to show decorum and respect for the systems in place; therefore, any alleged fears of harassment were unfounded. In contrast, a board of five college employees and current students cannot be more secure from the risk of erroneous deprivation. Furthermore, due to the seriousness of the case at bar and the interests at stake, the due process was insufficient because there were only two witnesses with conflicting stories and a panel making a decision based exclusively on who they believed more.

[1] It is unclear how the Board made such determination. At one point they denied Park's request to look at Roe's financial statements citing financial privacy, however later requested to see her financial statements for a different question. (R. at 7a.)

The case at bar is unlike the facts in *Walsh* and *Van Overdam*, where cross-examination through a hearing panel was sufficient. *See Walsh v. Hodge*, 975 F.3d 475, 483 (5th Cir. 2020), *cert. denied.* (The university in question violated a professor's due process right by adjudicating sexual harassment allegations without live testimony and only providing snippets of quotes with no ability to test the accuser's credibility at all and should have received board-led cross-examination.) *Also see Van Overdam v. Texas A&M Univ.,* 43 F.4th 522, 529 (5th Cir. 2022) (Where the accused could submit an unlimited number of questions for the board to ask the accuser.)

In addition, Park faced a quasi-criminal accusation of sexual assault, resulting in the complete loss of his education and reputation. Because the interests and consequences Park was up against were egregious, the Board owed Park more than just a board-led cross-examination. Courts who have found board-led cross-examinations sufficient have only done so when the interest of the accused was significantly lower than the case at bar. For example, the Fifth Circuit in *Walsh* upheld a board-led cross-examination where the allegations were only about sexual harassment. *Walsh,* 975 F.3d at 483. Similarly, the Second Circuit held that a board-led cross-examination was adequate when a student accused of disrupting a class during examinations only received a temporary suspension with the ability for readmission. *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972). Contrastingly, Park was not facing a mere accusation of sexual harassment or a temporary suspension, but rather quasi-criminal liability paired with permanent expulsion. When the appellate court deemed the board-led cross-examination sufficient despite

the severe allegations from Roe and punishment from QSU, it endorsed a direct violation of Park's constitutional rights under the due process clause.

The circumstances in the case at bar required that Park have the right to a direct and unfettered cross-examination of Roe because it was the most serious of cases. Although this Court has expressed concern in "further formalizing the suspension process and escalating its formality and adversary nature," this Court's concern does not apply here because, in *Goss,* this Court was discussing the formality of *suspensions* that are "brief and countless" and not expulsions with quasi-criminal liability. *Goss*, 419 U.S. at 483. Furthermore, the Sixth Circuit has upheld that where cases hinge on "a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing." *Flaim*, 418 F.3d at 636; *see also Baum,* 903 F.3d at 583 (where the Sixth Circuit reiterated that when credibility is at issue, a university must allow a representative of the accused to cross-examine the accuser.) The Second Circuit has also agreed that cross-examination is essential to due process if a board chooses between believing an accuser and the accused. *Winnick*, 460 F.2d at 549 (emphasis added.) Therefore, this Court must expand due process in cases where credibility is material, there are no witnesses outside of the accused and accuser, and any erroneous deprivation of the accused's interests is extraordinary.

When faced with a suspension of this magnitude and allegations of rape, due process must include the direct and unfettered cross-examinations of the witnesses. Anything less than that is a clear violation of the Fourteenth Amendment. There was no burden to QSU in allowing Park to cross-examine the only witness and accuser,

Roe. Especially when Roe's incriminating and dubious testimony was the sole reason the Board found Park responsible and ultimately chose to expel him. This Court has recognized cross-examination as "the greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer,* 482 U.S. 730, 736 (1987) *citing California v. Green,* 399 U.S. 149 158 (1970).

Furthermore, this Court has also held that "Cross-examination takes aim at credibility like no other procedural device." *Maryland v. Craig*, 497 U.S. 836, 846, 110 S. Ct. 3157, 3163 (1990). Although this Court has mainly talked about cross-examination in criminal trials, it's just as crucial in hearings where property rights are at stake, hinging on a witness's credibility. Ultimately, the appellate court gravely failed to apply this Court's precedent by allowing QSU to circumvent the constitutional protections owed to Park.

Therefore, this Court must hold that in cases where there are only two witnesses that each have completely different recollections, and their credibility is material to the outcome, due process demands direct and unfettered cross-examination.

v. QSU'S MISGUIDED INTERESTS DO NOT OUTWEIGH PARK'S DUE PROCESS RIGHTS IN PROTECTING VICTIMS OF SEXUAL ASSAULT

QSU's violated Park's constitutional rights without any reasonable justification. Firstly, while a university maintains the right to protect its students and conduct hearings for student misconduct, it also bears the burden of providing a hearing that aligns with due process. However, QSU argued that they could control how they handled the hearing, notwithstanding due process. (R. at 5a). Specifically,

QSU stated that their failure to comply with constitutional safeguards during Park's hearing was in an attempt to protect potential sexual assault victims like Roe. *Id.* Accordingly, the Board decided to vigorously deny many of Park's follow-up questions under the pretense of protecting Roe from abuse that a direct and unfettered cross-examination would allegedly cause. Therefore, concluding that allowing Park or his lawyer to cross-examine Roe would cause her psychological trauma. *Id.*

However, QSU's interest in protecting potential sexual assault victims did not permit them to negate any due process requirements owed to Park. Park was a young, rising senior with a future, reputation, and life that hinged on the words of just one other student. The circumstances demanded that QSU allow Park to direct and unfettered cross-examination of the person holding his life in her hands. The mere transfer of cross-examining responsibility from a group of college employees to Park's legally trained attorney was not a burden to QSU. Not only would such a transfer have expedited the process, but it would have provided the necessary safeguards that this Court demands under these circumstances.

Furthermore, if QSU's interests were indeed to protect sexual assault victims, QSU would have adhered to constitutionally sound procedures to avoid prolonging the hearing. Bringing justice to victims should not come at the expense of the accused and their constitutional rights. This Court must ensure schools give adequate due process to protect *all* parties involved as it prevents future costly appeals and brings closure to victims of sexual assault. Accordingly, it is imperative that the Court not allow for such abuse and deny the appellate court's holding.

B. QSU Also violated Park's Fourteenth Amendment Due Process Rights When QSU Refused Park's Request for Roe to Remove Her Face Covering

Confronting one's accuser and allowing the trier of fact to assess the witness' demeanor has been described by this Court as a "primary object" used to provide the accused the "opportunity… of testing… the witness…face to face with the jury in order that they may look at him, and judge by his demeanor whether he is worthy of belief." *Mattox v. United States,* 156 U.S. 237, 242-43 (1895) (ellipses added). It has been scientifically proven that credibility judgments are strongly influenced by the emotions shown on a witness' face during cross-examination. Jessica M. Salerno, *The Impact of Experienced and Expressed Emotion on Legal Factfinding,* 17 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 181-203 (2021). Evidently, assessing Roe's credibility was impossible when she wore an opaque face covering. CLRF. ANS. #3. Additionally, Courts have interpreted that the Sixth Amendment requires that the accused get a chance to face their accuser without a face covering. *See Baum*, 903 F.3d at 585. Therefore, the Board's refusal to have Roe remove her face covering violated Park's right to properly face his accuser and Park's due process rights.

It was crucial that during cross-examination, the Board was able to "observe the witness's demeanor under questioning." *Doe v. Mich. State Univ*., 989 F.3d 418, 430 (6th Cir. 2021) *citing Doe v. Univ. of Cincinnati,* 872 F.3d 393, 401 (6th Cir. 2017). In line with the aforementioned *Mathews* test, this motion again reiterates that Park faced egregious consequences and that the due process provided fell below the necessary standard set by this Court. Furthermore, requesting that Roe remove her

mask was not overly burdensome to QSU as QSU had ample time and options to mitigate this situation but refused to do so. Mainly, QSU could have provided transparent masks, gone maskless and add dividers, or moved the hearing online as Park suggested. (R. at 5a). There is no apparent burden in making such adjustments; those adjustments were already being made for the rest of the school as QSU had gone virtual months before the hearing. (R. at 4a).

Any contention by the Board that they were attempting to protect Roe's physical well-being is erroneous, as there was a safer and better option of moving the hearing online. By the time the Hearing was scheduled, it had been two months since the pandemic had begun. *Id*. By then, QSU had successfully canceled and moved all classes to an online platform. *Id.* Additionally, given how important it was for the Board and Park to see Roe's face to assess her credibility, it is questionable that the Board found Roe credible when half of her face was obscured. Seemingly, the Board decided on Roe's credibility before the hearing began. There is no convincing reason that QSU could not provide accommodations for the hearing. Therefore, in light of the circumstances, where credibility was material to the case and Park was facing egregious consequences, failure to remove Roe's facemask was contrary to this Court's precedent and in violation of Park's due process rights. Consequently, this Court must find that QSU violated Park's due process rights.

C. QSU'S REFUSAL TO ALLOW DIRECT AND UNFETTERED CROSS-EXAMINATION OF ROE OR REQUIRE THAT ROE REMOVE HER FACE COVERING WAS GENDER-BASED DISCRIMINATION IN VIOLATION OF TITLE IX.

Park did allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome from his constitutionally inadequate hearing. Title IX partly provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance." 20 U.S.C. § 1681(a). Under *Yusuf*, a plaintiff challenging a university disciplinary proceeding on the grounds of bias must show either an erroneous outcome or that there was selective enforcement. *Yusuf v. Vassar Coll.,* 35 F.3d 709, 715 (2d Cir. 1994).

When a plaintiff alleges an erroneous outcome, they must also allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome. *Id.* However, there must be a causal connection between the flawed outcome and gender bias. *Id.* Causation sufficient to state a Title IX discrimination claim can be shown via "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Doe v. Cummins*, 662 F. App'x 437, 452 (6th Cir. 2016). For selective enforcement, the plaintiff must claim that regardless of their innocence, the severity of the penalty or decision to initiate the proceeding was due to their gender. *Id.* In this case, Park does not contend that there was selective enforcement, as QSU expelled him due to the Board's bias for women and against men. Moreover, there is

no evidence indicating that QSU treated a similarly accused female differently. Therefore, the circumstances surrounding the charge against Park and the conduct of the disciplinary proceeding sufficiently put into question the correctness of the outcome of the Hearing.

The facts presented in the record are sufficient to cast some articulable doubt on the accuracy of the outcome. QSU plainly directed the Board, in adherence to the "Dear Colleague" letter, to mistreat Park. Specifically, QSU instructed the Board to start any examination by calming Roe with "easy" questions to avoid leading questions whenever possible. (R. at 5a). Furthermore, QSU instructed the Board to avoid "pursuing a line of questions" that could traumatize a student if the questions became adversarial. *Id*. QSU also excused the Board from observing the rules of evidence and encouraged the Board to deny any evidence they thought was unduly repetitious or irrelevant. *Id.* The Board staunchly followed these guidelines when Park requested follow-up questions that would clarify Roe's questionable statements. Although on their own, these facts may not be enough to cast articulable doubt, the Board also participated in additional inappropriate and biased behavior.

First, the Board expressly praised Roe for what they considered bravery in stepping forward and accusing Park. (R. at 56a). The Board also displayed apparent antipathy against Park by visibly frowning at him whenever they addressed him. *Id.* The Board treated Park with distrust from the start of the hearing, essentially finding him guilty even before the parties presented evidence. Even when Park offered evidence that rebutted the trust the Board blindly extended to Roe's version of events,

the Board would immediately object to Park's requested line of questioning. (R. at 56a). The Board continuously rejected more of Park's follow-up questions, many of which would have weakened Roe's recollection of events. *Id.* Lastly, and most notably, one of the Board members felt that Park was lying from the beginning. Without an opportunity for Park to disprove the allegations, the Board member interrogated Park about statistics. *Id.* Specifically, the Board member rebuked Park's defense, stating that very rarely were rape allegations false. *Id.* The Board member defended his comment by saying that only "two to ten percent" of rape allegations were proven false. *Id.* The Board believed, from the beginning, that Park was a liar and that Roe needed to be protected. Such strong sentiments can be traced to the Board's clear bias against men and paternalistic instinct to protect females who are potential victims of sexual assault.

Furthermore, the paternalism displayed by the Board went beyond the "basic level of respect that our law demands." *Van Overdam*, 43 F.4th at 528. The Board violated Park's due process rights by limiting Park's reasonable line of questioning. The questions Park requested were far from embarrassing, shameful, or humiliating to Roe. Therefore, the Board's denial of such questions was unfounded. *See Id* (where the district court held that a board's denial in bringing up the accuser's prior sexual activity was correct because the line of the question was harassing and irrelevant.) Here, Park was merely attempting to clarify and defend himself from Roe's problematic statements. However, the Board unfairly denied his reasonable requests.

First, the Board objected to Park's line of questioning regarding Roe's financial statements that would have verified she had purchased drinks at the bar before Park arrived. (R. at 6a). Second, the Board denied Park's request to follow up on Roe's questionable story that her father, a car salesman, owned a dojo where Roe took free classes. (R. at 7a). Again, the Board stated that such questions were irrelevant. *Id.* However, answers to that question would have cast doubt on Roe's statements that she walked straight, despite being heavily intoxicated because she was well-trained in martial arts. Additionally, the Board rejected Park's follow-up question about Roe's ability to buy alcohol while underage. *Id*. The Board contended that an answer to that question would have potentially exposed Roe to criminal liability, but the Board denied Park's request. *Id.* Lastly, the Board's denial to have Roe testify without a mask or attend the hearing virtually indicated that gauging her credibility was unnecessary because they already deemed her more credible than Park. Therefore, the Board's denials of Park's several reasonable and respectful requests can only be attributed to the Board's bias against men. The Board deemed Park more likely to have raped Roe simply because he was a man. The Board misunderstood the "Dear Colleague" Letter to mean that women should be unequivocally believed at the expense of due process for men.

Although some of Park's requests would have caused Roe to share uncomfortable information, the requests for information did not reach a level of humiliation, shaming, or embarrassment. *See Van Overdam*, 43 F.4th at 528. The Board could have also limited the search of Roe's financial statements to just the day

of the incident if financial privacy was so important, without completely denying Park's requests mainly because such proposals would have clarified many of Roe's statements. Furthermore, bringing a claim against someone for sexual assault also opens the accuser up for questioning and uncomfortable situations. However, this is what is necessary to attain justice through due process.

In conclusion, this Court must hold that QSU violated Park's due process rights under the Fourteenth Amendment and Title IX. Accordingly, this Court must reverse the appellate court's judgment.

II. THE APPELLATE COURT ERRONEOUSLY AWARDED QSU ATTORNEY'S FEES UNDER RULE 41(D).

Attorney's costs under Rule 41(d) are a contested circuit-split issue. However, this Court has already laid out a clear rule; congressional authority is necessary to capture attorney's fees. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *See also Key Tronic Corp. v. United States*, 511 U.S. 809 (1994). Rule 41(d) does not and has never had the congressional authority to include attorney's fees as part of costs. Moreover, the FRCP always clearly distinguishes between attorney's fees, monetary awards, expenses, and costs. Therefore, the FRCP does not intend for costs to be used synonymously or interchangeably with attorney's fees.

Rule 41(d) clearly states that "[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: (1) may order the plaintiff to pay all or part of the *costs* of that previous action." Fed. R. Civ. P. 41 (d)(1) (emphasis added). Rule 41(d) purposefully includes the term costs and makes no mention of attorney's fees. This

Court has held that where Congress has omitted language in one section but included it in another section of the same act, courts must presume that Congress acted "intentionally and purposefully." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990); *see Gozlon-Peretz v. United States*, 498 U.S. 395, 404-405 (1991). Accordingly, attorney's fees are always explicitly differentiated from other costs and expenses throughout the FRCP, and therefore, this Court must presume that Congress acted intentionally and purposefully. *See* Fed. R. Civ. P. 11(c)(2); Fed. R. Civ. P. 26(g)(2) and (3); Fed. R. Civ. P. 37 (c) and (d). Therefore, Rule 41(d) cannot include attorney's fees as part of costs. Thus, this Court must reverse the appellate court's award of attorney's fees to QSU.

A. THIS COURT'S PRECEDENT HOLDS THAT ATTORNEY'S FEES ARE EXCLUDED FROM RULE 41(D).

This Court's precedent only allows for an award of attorney's fees where Congress has given their express authority, which does not include Rule 41(d). *See Alyeska*, 421 U.S. at 240. *Key Tronic Corp.*, 511 U.S. at 809. The Sixth Circuit's approach, albeit the minority, is the only circuit that wholly aligns with this Court's precedent. The Sixth Circuit has correctly ruled that Rule 41(d) cannot be used to award attorney's fees because Congress intended for attorney's fees to be separate from costs. *Rogers v. Wal-Mart Stores*, Inc., 230 F.3d 868, 874 (6th Cir. 2000). Because Congress never authorized attorney's fees under Rule 41(d), QSU is not entitled to attorney's fees. Circuit courts rely on three principal cases when awarding attorney's fees.

First, this Court provided the American Rule, a bedrock principle that maintains that each party is responsible for its own attorney's fees. *Alyeska*, 421 U.S. at 245. In *Alyeska*, this Court departed from the English common law rule holding that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation." *Id.* at 247. The Court explained that England's rule in granting attorney's fees to prevailing parties was contrary to American values. *Id.* at 245. Consequently, this Court established the longstanding tradition that courts should only allow attorney's fees where Congress has specified under a statute in the United States. *Id.* at 254.

Secondly, the Court affirmed *Alyeska* in *Key Tronic* when it held that if there is no explicit statutory grant allowing for attorney's fees, courts cannot award attorney's fees. *Key Tronic Corp.*, 511 U.S. at 819. Additionally, awarding attorney's fees requires courts to conclude that Congress intended to set aside the longstanding American Rule. *Id.* at 815. According to this Court, a departure from the American rule is only appropriate in extreme circumstances. *Hughes v. Roe*, 449 U.S. 5, 15 (1980); *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978). This Court has limited a departure from the American Rule only when a plaintiff's claim is frivolous, unreasonable, or groundless or the plaintiff continued to litigate after it clearly became so. *Id.*

Third, some circuit courts rely on *Marek,* which preceded *Key Tronic*. Circuit courts who adhere to *Marek* assert that statutory language supersedes congressional intent. Therefore, under *Marek,* statutes control whether courts award attorney's

fees. *See Marek v. Chesny*, 473 U.S. 1 (1985) (where the Court allowed for attorney's fee under FRCP 68 after the plaintiff failed to take a reasonable settlement offer when bringing a §1988 claim and unnecessarily prolonged litigation.) Circuit courts who rely on *Marek* simply look at the underlying statute for guidance regardless of language provided by Congress when enacting the FRCP. However, members of this Court expressed concern about allowing statutes to supersede congressional intent because such would lead to dramatically different results depending on "very minor variations in the phraseology of the underlying fees-award statutes." *Marek*, 473 U.S. at 23 (Brennan, W., dissenting). It is also highly significant that *Key Tronic* was decided nine years after *Marek* and served to return courts to the American Rule, ensuring that attorney's fees are not generally awarded absent explicit congressional authorization. *Key Tronic*, 511 U.S. at 814. Because of this Court's adherence to departing from English common law and asserting its values, *Marek* cannot stand.

i. THIS COURT CANNOT IGNORE CONGRESSIONAL INTENT FOR THE SAKE OF UNAPPLICABLE PUBLIC POLICY.

Congress already considered the public policy rationale in permitting attorney's fees under Rule 41(d), yet intentionally and purposefully excluded such language from the Rule. Absent this explicit congressional authorization, this Court cannot justify awarding attorney's fees under Rule 41(d).

This Court has made clear that courts are not legislators and cannot engage in policy making because "Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorney's fees in under some, but not others." *Alyeska*, 421 U.S. at 263. This Court has also warned that if courts were

allowed to award fees under some statutes but not others "without legislative guidance," awarding attorney's fees would be arbitrary and unregulated. *Alyeska,* 421 U.S. at 264. Additionally, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *Carcieri v. Salazar*, 555 U.S. 379, 392-393 (2009).

Therefore, since Congress has included attorney's fees and other costs in some FRCP but not in Rule 41(d), this Court must defer to Congress and not allow attorney's fees under Rule 41(d). In fact, this Court in *Marek,* the only binding authority cited by hybrid courts which award attorney's fees under Rule 41 (d), indicated that "given the importance of costs…it is very unlikely that this omission was a mere oversight." *Marek*, 473 U.S. at 9. Additionally, a rule's plain language should be the "primary guide" to Congress's preferred policy. *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017).

Circuits that award attorney's fees under Rule 41(d) incorrectly cite public policy to justify their decision. For example, the Second Circuit always awards attorney's fees under Rule 41(d) to avoid forum shopping and vexatious litigation. *Horowitz v. 148 South Emerson Associates LLC*, 888 F.3d 13 (2d Cir. 2018). However, public policy cannot override the legitimate intentions of Congress and the actual language of Rule 41(d). Awarding attorney's fees under Rule 41(d) is fundamentally at odds with this Court's precedent regarding legislative intent and forbidding lower courts to act as policymakers and usurp the legislature's role. Abiding by this Court's

precedent and the legislature's intention would not render Rule 41(d) toothless but rather respect legislative intent and preserve the concept of separation of powers on which this country was built.

Although experts agree that awarding attorney's fees *would* prevent forum shopping, it is evident that Congress was well-aware of this when it adopted Rule 41 (d). Edward X. Clinton Jr. *Does Rule 41(d) Authorize an Award of Attorney's Fees?*, 71

St. John's L. Rev. 81, 94-94 (1997). However, Congress still purposefully chose not to include attorney's fees as part of the costs despite attorney's fees making up the majority of expenses in defending lawsuits. *Id.* Despite the perceived benefit in including attorney's fees as part of the costs awarded under the Rule, this Court has upheld that policy alone, and any perceived benefit from it cannot justify departing from the American Rule. *Id.* Congressional intent must remain at the root of how the Court applies Rule 41(d).

Most importantly, the circuit courts' policy to justify attorney's fees under Rule 41(d) does not apply to Park because Park did not forum shop. Forum shopping occurs when a plaintiff chooses "the court that will treat his or her claims more favorably." Forum Shopping. *Legal Information Institute*, Cornell U Law School, https://libguides.pvcc.edu/citationstyles/mla9-legal. Courts are particularly critical of forum shopping between state and federal courts located in the same state. *Id.* In the case at bar, Park did not dismiss and re-file his suit to forum shop for a court that would treat his claims more favorably. Instead, Park dismissed his case in the district

court and re-filed two months later in the *same* district court for various reasons. (R. at 9a).

First, Judge Kreese's bias was extremely overt and clearly favored QSU. (R. at 10a). Judge Kreese was an avid supporter of QSU and had amounted a significant following on social media based on that support. (R. at 8a). Judge Kreese also idolatrized QSU by implementing their fight song with the pledge of allegiance. (R. at 9a). Clearly, Judge Kreese felt as passionate about his country as he did about QSU. Secondly, Park did not forum shop because he and his attorneys wished to ensure they were better informed on the law. *Id*. During the two months between the two filings, Park's attorneys had the opportunity to study relevant law. Therefore, Park re-filed to prevent the clear bias exerted by Judge Kreese. Finally, Park exercised the option provided in the District of Quicksilver, allowing plaintiffs to re-file an action to get a different judge. *Id.* Park was not using this rule liberally, but because Judge Kreese displayed an evident bias for the opposing party. Therefore, Park was only seeking an impartial and just ruling.

Accordingly, the district and appellate courts gravely erred in awarding QSU attorney's fees under Rule 41(d) by superseding congressional intent with inapplicable public policy.

B. IF THIS COURT ERRONEOUSLY RELIES ON *MAREK,* QSU IS STILL NOT ENTITLED TO ATTORNEY'S FEES UNDER RULE 41(D).

QSU is still not entitled to attorney's fees if this Court chooses to ignore congressional authority by rejecting its holding *Alyeska* and *Key Tronic.* The Third, Fourth, Fifth, and Seventh Circuits rely on *Marek* to allow for recovery of attorney's

fees under Rule 41(d) only when the underlying substantive statute defines costs to include attorney's fees. *Marek,* 473 U.S. at 9. Park sued QSU under § 1988 (b) *(see* Appendix B*),* and therefore, the court, in its discretion, may allow the prevailing party reasonable attorney's fees as part of the costs. 42 U.S.C. § 1988 (b). Nonetheless, a court cannot award a prevailing defendant attorney's fees unless it finds that the plaintiff's claim was frivolous, unreasonable, or groundless or that the plaintiff continued to litigate after it clearly became so. *Hughes v. Rowe*, 449 U.S. 5, 14–15 (1980) (citation omitted). Therefore, the circumstances in the case at bar call for the exclusion of attorney's fees under Rule 41(d).

i. QSU IS NOT A PREVAILING PARTY UNDER 42 U.S.C. § 1988 (B) BECAUSE PARK DID NOT WITHDRAW TO AVOID A DISFAVORABLE JUDGMENT ON THE MERITS.

To be considered a prevailing party in a suit voluntarily dismissed by a plaintiff, a defendant must show that the plaintiff withdrew to avoid a disfavorable judgment on the merits. *Portillo v. Cunningham*, 872 F.3d 728, 740 (5th Circ. 2017) (citation omitted). In the case at bar, QSU cannot legitimately show that Park withdrew to avoid a disfavorable judgment on the merits. *Id*.

In recognizing the facts in the record as accurate, it is evident that Park was willing to accept Judge Kreese's decision despite his abhorrent bias. On the day of the hearing for the 12(b)(6) motion, Park expected to receive the ruling at the end of the day, as promised by Judge Kreese. (R. at 61a). Park was willing to accept any judgment despite the bias shown during the hearing. Park even waited past the time he expected to receive the ruling to withdraw his suit. *Id.* He even decided not to

withdraw immediately after the biased hearing despite having the option to do so in the District of Quicksilver. (R. at 9a). Therefore, it is evident that Park never attempted to avoid an unfavorable judgment but, rather, withdrew after the time of the expected decision.

As aforementioned, Park and his attorneys clearly stated their reason for withdrawing the first suit, including the desire to study better the applicable law, ensure they provided a good-faith argument, and because of Judge Kreese's bias. (R. at 10a). This Court has supported Park's decision to withdraw because it is rational for a plaintiff to "encounter various changes in his litigation posture during the unpredictable course of litigation." *Christiansburg,* 434 U.S. at 423. That is precisely what happened in the present case. Park filed his first suit and entered the court on the day of the hearing expecting a fair hearing. However, Park had already endured a lack of due process during his disciplinary hearing with QSU. When Park turned to the courts for recourse, Judge Kreese displayed a clear bias for QSU by asking all in attendance to sing the QSU fight song during an expected unbiased judicial hearing. (R. at 9a).

Therefore, Park's attempt to gain a fair and impartial judge is not the same as seeking a judge who will rule in his favor. Judge Kreese's ability to listen to the arguments is the minimum expectation of his duties. No matter how fair or impartial he seemed while listening, Judge Kreese's actions at the start of the trial, his Twitter page, and his obvious allegiance to QSU clearly constitute a prejudiced hearing.

Accordingly, none of the actions QSU forced Park to take indicated a desire to avoid an unfavorable judgment. Therefore, QSU cannot be considered a prevailing party.

In conclusion, if this Court holds that QSU is a prevailing party under § 1998 (b), it will culminate in allowing highly regarded judges to show clear allegiance to one party while completely disregarding their duty as neutral fact finders. Accordingly, this Court should reverse the appellate court's decision because QSU is not a prevailing party under 42 U.S.C. § 1988 (b).

ii. PARK'S CLAIMS WERE NOT FRIVOLOUS, UNREASONABLE, OR GROUNDLESS.

QSU cannot show that Park's claims were frivolous, unreasonable, or groundless or that Park continued to litigate after it clearly became so. *Hughes*, 449 U.S. at 15; *Christiansburg*, 434 U.S. at 422. A claim is frivolous when the claim lacks any arguable basis, either in law or in fact. *Neitze v. Williams*, 490 U.S. 319, 325 (1989). In determining whether a claim is frivolous, unreasonable, or groundless to award attorney's fees, this Court has stated that "it 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." *Christiansburg*, 434 U.S. at 421-22. Therefore, Park's claims were valid and cannot warrant attorney's fees under Rule 41 (d).

Park's claims are not unreasonable, groundless, or frivolous. The district and appellate court's erroneous dismissal of Park's due process and Title IX claims does not show that the claims were frivolous. *Id*. Additionally, Park's claims are supported by this Court's precedent in upholding Due Process and preventing gender-based

discrimination. Moreover, courts have traditionally reserved labeling claims as frivolous, groundless, or unreasonable in instances where the plaintiff does not establish a prima facie case; *see Doe v. Silsbee Indep. Sch. Dist.*, 440 Fed. Appx. 421, 427 (2011) (holding that a plaintiff who did not assert allegations that she received insufficient process, a critical element of a due process claim, had a frivolous case); or when the plaintiff's claims do not have constitutional redress. *See Fox v. Vice*, 594 F.3d 423, 427 (5th Cir. 2010).

Additionally, before deeming a claim as frivolous, courts heavily consider discovery delays and abuses, slothful prosecution, negative rulings, and sanctions against the plaintiffs. *See Dean v. Riser*, 240 F.3d 505, 512 (5th Cir. 2001). In the case at bar, Park provided all the critical elements needed for a due process and Title IX claim. Park repeatedly showed that QSU was biased toward him during his disciplinary hearing. Therefore, Park showed valid claims with constitutional redress. To group Park in the same category as the above plaintiffs would intentionally discourage plaintiffs with valid claims from suing for fear that they would ultimately have to pay attorney's fees.

Accordingly, QSU is not entitled to attorney's fees because QSU has failed to prove that they are a prevailing party under § 1988 (b), and Park's claims were not frivolous, unreasonable, or groundless. Consequently, this Court must hold that QSU is not entitled to attorney's fees under Rule 41(d).

C. THE APPELLATE COURT INCORRECTLY RELIED ON *ANDREWS* TO JUSTIFY AWARDING QSU ATTORNEY'S FEES.

The appellate court relied on Fourth Circuit persuasive authority, *Andrews,* to mistakenly award QSU attorney's fees pursuant to the court's inherent power. (R. at 38a); *see Andrews v. Am.'s Living Ctrs.*, 827 F.3d 306 (4th Cir. 2015). The Fourth Circuit departs from the American Rule when the "court specifically finds the plaintiff acted " 'in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 311. Although this departure from the American Rule is not unique to the Fourth Circuit, the appellate court overly relied on *Andrews* and ignored this Court's precedent in applying the inherent power to award attorney's fees for improper conduct.

For example, this Court has warned that a court's inherent power to award fees must "be exercised with restraint and discretion" for cases in which a party abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (allowing for court-ordered attorney's fees when the petitioner attempted to fraud the court, continuously delay proceedings, was held in contempt of the court, and filed meritless motions). Additionally, this Court has not awarded attorney's fees where the suit was not brought in bad faith or for the purposes of harassment. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371 (2013). Notably, a decision to award fees to a prevailing defendant should be made on a case-by-case basis. *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 751 (1997).

In relying only on the surface-level language of *Andrews* while ignoring this Court's warnings, the appellate court exaggerated Park's actions to justify attorney's fees against a party who did not engage in the type of conduct deserving of this award.

Noteworthily, the district court did not find that Park engaged in bad faith conduct. (R. at 11a). Park's actions were not malicious, without reason, or oppressive[2]. Instead, they were motivated by an attempt to get a fair judge and to ensure good faith arguments supported his suit. (R. at 10a). Park's actions were the exact opposite of bad faith, vexatious, wanton, or oppressive litigation.

Assessing Park's actions on a case-by-case basis, as is mandated by this Court, cannot reasonably justify attorney's fees, especially because the district of Quicksilver allows plaintiffs to re-file an action in an attempt to get a different judge. (R. at 9a). Park, a young college student whose entire career, reputation, and degree were on the line, experienced nothing short of a lack of due process and gender-based discrimination during his school proceedings. He put his faith in the judicial system to bring closure to the situation, only to be confronted with Judge Kreese's bias. His decision to permissibly withdraw his suit and re-file in the same district court cannot be considered vexatious.

Even in following the Fourth Circuit's relaxed application of the court's inherent power to award attorney's fees for bad faith vexatious, wonton, or oppressive tactics, *Andrews* cannot justify awarding attorney's fees to QSU. In *Andrews*, the court found that attorney's fees to the defendant were not warranted because the judge had given the plaintiff the option to dismiss the first suit, which the plaintiff accepted. *Andrews*, 827 F.3d at 308. The court reasoned that they could not punish the plaintiff for taking an option the court provided her. *Id. a*t 313. The same

[2] As defined in *Black's Law Dictionary* (11th ed. 2019).

reasoning applies here. Park cannot be penalized for dismissing a suit and re-filing it in the same district court because this option is available to him in the District of Quicksilver. (R. at 9a).

Moreover, the appellate court failed to assess fees for Park's dismissal and re-filing on a case-by-case basis as mandated by this Court. *L.B. Foster Co.*, 123 F.3d at 751. Just because the plaintiff in *Andrews* re-filed with a slightly different claim does not mean that Park re-filing the same claim warrants attorney's fees for QSU. (R. at 40a). The appellate court ignored that in *Andrews*, the court looked down on the plaintiff for re-filing her suit the same day she dismissed, but still did not award attorney's fees to the defendant. *Andrews*, 827 F.3d at 312. On the other hand, Park did not re-file his suit for almost two months, reaffirming that he and his attorneys were ensuring good faith claims and compliance. Following the appellate court's logic in strictly applying *Andrews*, this should have been a point against awarding QSU attorney fees. (R. at 8a, 10a). However, the appellate court strictly applied the parts of the *Andrews* ruling they felt could justify the attorney's fees while ignoring the case's unfavorable aspects and failing to assess Park's situation on a case-by-case basis.

Courts cannot ignore judicial intent and this Court's precedent. Consequently, Rule 41(d) does not allow awarding of attorney's fees under the term costs. Even if this Court were to apply the hybrid rule and use the underlying statute to award QSU attorney's fees, QSU is not a prevailing party, and Park did not engage in litigation

tactics that warrant an award of attorney's fees. Accordingly, Park urges this Court to reverse the appellate court's holding.

CONCLUSION

This Court has continued to hold that due process is imperative to finding justice. To hold that Park was not entitled to direct and unfettered cross-examination and to face his accuser in light of the gender bias displayed by the Board contrary to Title IX would defy this Court's precedent. Furthermore, awarding attorney's fees under Rule 41(d) is contrary to Congress's intent to adopt and implement the FRCP. This Court cannot award QSU attorney's fees when Park's conduct did not meet the high burden needed to depart from the American Rule. Therefore, Park respectfully asks this Court to reverse the judgment of the appellate Court.

Dated November 21, 2022

Respectfully submitted,

/s/_____

Counsel for Petition

APPENDIX A
Constitutional Provisions Involved

U.S. Const. amen. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

APPENDIX B
Statutory Provisions Involved

28 U.S.C § 1254(1)

Cases in the courts of appeals may be reviewed by the U.S. Supreme Court by the following methods:

(1) By Writ of certiorari granted upon the petitioner of any party to any civil or criminal case, before or after rendition of judgment or decree;

20 U.S.C. § 1681 (a)

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

42 U.S.C. § 1988 (b)

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Fed. R. Civ. P. 41 (d)

(d) Costs of a Previously Dismissed 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.