No. 21-8289

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

Kyler PARK,

Petitioner,

— against —

QUICKSILVER STATE UNIVERSITY,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM 69

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether a student's rights were violated under the Fourteenth Amendment and Title IX when a circumscribed form of cross-examination was used in a disciplinary hearing that restrained direct and unfettered questioning and allowed face coverings to be worn.[1]

II. Whether the term "costs," as used in the Federal Rule of Civil Procedure 41(d) includes attorney's fees when allowing fees is consistent with the rule's purpose and is authorized under 42 U.S.C. § 1988(b) when a plaintiff voluntarily dismisses a suit to avoid a disfavorable judgment on the merits.

[1] The order granting certiorari groups the due-process claim with the Title IX claim as the first question presented. This brief addresses the two issues separately.

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The opinion of the United States District Court for the District of Quicksilver is not yet published. The opinion of the United States Court of Appeals for the Fourteenth Circuit is also unpublished but appears in the record at pages 1a to 62a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit had jurisdiction under 28 U.S.C. § 1291 and entered judgment in this case on October 18, 2021. R. at 1a. Petitioner timely filed a petition for writ of certiorari, which this Court granted pursuant to 28 U.S.C. § 1254(1) on October 10, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution which is reproduced in Appendix A.

This case also involves 42 U.S.C. § 1983, 42 U.S.C. § 1988, and Title IX: 20 U.S.C. § 1681(a), all of which are reproduced in Appendix B.

This case also involves the Federal Rule of Civil Procedure 41, which is reproduced in Appendix C.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case is about a former student who was expelled for sexual misconduct after Quicksilver State University (the "University") held a full disciplinary hearing. Jane Roe accused Petitioner, Kyler Park, of sexual abuse, unwanted sexual

contact, and dating violence. R. at 3a–4a. The Hearing Board (the "Board") questioned each witness and heard evidence from both parties before recommending Park's expulsion. R. at 8a. Park has challenged the expulsion on due process and Title IX grounds.

The Allegations. The alleged sexual misconduct occurred on March 14, 2020, during the University's Spring Break. R. at 2a, 3a. Kyler Park and Jane Roe were students at the University. R. at 2a. The two were casual acquaintances and ran into each other at a movie theater. R. at 2a–3a. Park, who was of legal age, bought an alcoholic drink for the underage Roe. R. at 2a. Roe drank the beverage and after about an hour the pair walked back to Roe's dorm room and engaged in sexual intercourse. R. at 2a.

Roe called Park multiple times in the days following their encounter. R. at 3a. The nature of the phone is disputed. According to Roe, she called Park because her recollection of the night was unclear. R. at 3a. Roe had been intoxicated and faintly remembered seeing Park at the movie theater but could not recall anything until she awoke to Park engaging in intercourse with her. R. at 3a. Park told a different story. He claimed Roe expressed her desire for a romantic relationship during these calls. R. at 3a. Park further claimed that she threatened to report their night together as an assault when he told her he was not interested in pursuing a relationship. R. at 3a.

The University Hearing. Roe raised sexual misconduct allegations to University officials. R. at 3a. Shortly after Spring Break, the University's Division

of Student Affairs notified Park that he had been accused of violating the Code of Student Conduct (the "Code") and allegedly "committed acts of sexual abuse, unwanted sexual contact, and dating violence." R. at 3a–4a.

A hearing was scheduled before the Board, which consisted of five employees and students appointed by the University's Vice Chancellor. R. at 4a. The Hearing was conducted under the Code's rules and policies for the 2019–2020 school year. R. at 4a. The Code instructed the Board to avoid a rigorous examination of witnesses. R. at 5a. Specifically, the Board was advised to avoid leading questions or "pursuing a line of questions" to refrain from inducing an adversarial situation and increasing the risk of trauma to the student. R. at 5a. Additionally, the Code excused the Board from observing rules of evidence followed by courts and specifically permitted excluding "unduly repetitious or irrelevant evidence." R. at 5a–6a. The Code allowed the parties to submit potential written questions but the Board examined the witnesses and could—but was not required to—ask the parties' written questions. R. at 5a.

The hearing took place on May 20, 2020. R. at 5a. The Board, Park, Park's attorney, and Roe attended. R. at 4a. All were required to wear face coverings because the hearing took place at the beginning of the COVID-19 pandemic. R. at 5a.

Park made several requests to modify the hearing procedures, each of which the Board denied. First, he asked that Roe be required to remove her face covering when answering questions or alternatively to testify remotely without a face

covering. R. at 5a. The Board denied the request because of the ongoing health concerns posed by the pandemic. R. at 5a; *see* R. at 24a. Second, he submitted various questions about Roe's claims of intoxication and requested the Board ask each one. R. at 6a. The Board asked most of the questions Park submitted, but not all. R. at 6a. Third, he submitted follow-up questions and again asked that the Board ask each one. R. at 6a. The Board refused to ask many of the follow-up questions, noting that they would be irrelevant and could potentially implicate Roe's constitutional and privacy rights. R. at 6a–7a. Finally, after the questioning concluded, Park requested Roe's statements be disregarded because her face covering obstructed the assessment of her credibility. R. at 8a. The Board denied the request. R. at 8a.

The Board ultimately found that Roe's testimony was more credible than Park's, ruling that Park likely committed sexual misconduct prohibited by the Code and recommending expulsion. R. at 8a. Afterwards, the Vice Chancellor expelled Park from the University. R. at 8a.

II. NATURE OF THE PROCEEDINGS

District Court. Park sued the University in the United States District Court of Quicksilver, alleging that the University violated his civil rights under 42 U.S.C. § 1983 by depriving him of due process and violated Title IX by reaching an erroneous outcome in his disciplinary proceeding because of his sex. R. at 8a. The University then moved to dismiss Park's lawsuit for failure to state a claim upon which relief could be granted. R. at 9a.

A hearing was held on the University's motion to dismiss on July 22, 2020. R. at 9a. The matter was before Judge John Kreese, who happened to be a Quicksilver alumnus. R. at 8a. The transcript reflects that the hearing began with a recitation of the Pledge of Allegiance, the singing of the University fight song, and then a discussion of the merits of the parties' claims and arguments. R. at 8a–9a. At the end of the hearing, Judge Kreese announced he would take the matter under advisement. R. at 9a.

Later that afternoon, Park filed a voluntary dismissal of the lawsuit under Federal Rule of Civil Procedure 41(a)(1). R. at 9a. Two months later, he refiled his lawsuit, which was assigned to Judge Demetri Alexopoulos, another judge in the United States District Court of Quicksilver. R. at 9a. Park asserted the same claims as before with no greater factual detail. R. at 9a, 40a. The University once again responded by filing another motion to dismiss under Rule 12(b)(6). R. at 10a. In addition, the University sought attorney's fees of $74,500.00 under Rule 41(d). R. at 10a.

After a hearing on both motions, Judge Alexopoulos dismissed Park's claim and awarded the University costs of $28,150.00. R. at 11a. Judge Alexopoulos found that the dismissal and refiling of the suit, while not in bad faith, was a maneuver to gain a tactical advantage and to avoid an unfavorable judgment on the merits. R. at 11a. The district court interpreted Rule 41(d) as permitting the court to award attorney's fees as part of "the costs of that previous action." R. at 11a.

Circuit Court. Park appealed to the United States Court of Appeals for the Fourteenth Circuit, which affirmed the district court's judgment in all respects. R. at 40a. Specifically, the circuit court held that the procedures employed in the University's disciplinary proceeding did not violate Park's constitutional due-process rights or his rights under Title IX. R. at 13a–31a. The circuit court also held that Rule 41(d) authorized attorney's fees as costs, because 42 U.S.C. § 1988 specifically authorizes their recovery where the plaintiff dismissed a prior suit to avoid a disfavorable judgment on the merits. R. at 37a–38a.

Judge Fernandez concurred with all parts of the Court's opinion except for the Court's interpretation of Rule 41(d). R. at 41a. Judge Fernandez urged that Rule 41(d) authorizes recovery of attorney's fees as costs in all cases to which Rule 41(d) applies, regardless of whether the underlying statute defines costs to include attorney's fees. R. at 41a.

Judge Walt dissented in all respects from the Court's opinion regarding the due process, Title IX, and attorney's fees issues. R. at 45a–62a.

SUMMARY OF THE ARGUMENT

I.

The court of appeals correctly dismissed Park's due-process claim. He failed to adequately allege that the procedures used during his disciplinary hearing deprived him of the opportunity to be heard at a meaningful time in a meaningful manner.

Following the Code, the University allowed the parties to attend with counsel, to submit written questions that board members would consider asking, to observe

the contemporaneous questioning of witnesses by Board members, and to submit follow-up questions. Although Park wanted procedural safeguards associated with formal criminal trials, they are not constitutionally required in informal university disciplinary proceedings. The Fourteenth Amendment did not obligate the University to allow Park's attorney to directly cross-examine his accuser or to ask every written question he submitted. The Board questioned Roe about Park's central factual concerns, including the beverages she consumed on the night of the incident, her ability to walk normally while intoxicated, and her possible alternative motives for accusing him of sexual misconduct. These procedures were sufficient to avoid any risk of erroneous deprivation.

Moreover, the University's decision not to force Roe to remove her face covering while testifying did not deprive the Board or Park of an opportunity to assess her credibility. Roe was asked questions by the Board in the presence of Park and his attorney. And her face covering did not hinder the ability to hear the tone of her voice, analyze her reactions to questions, interpret her body language, and otherwise judge her demeanor. The facial covering was a necessary precaution, as the disciplinary hearing occurred at the beginning of the COVID-19 pandemic when public fear of the virus was widespread. The policy of wearing face coverings ensured the health and safety of those present while still allowing the University to conduct a disciplinary proceeding consistent with its 2019-2020 Code.

This Court should affirm the dismissal of Park's due-process claims because the hearing procedures were constitutionally permissible.

II.

The court of appeals correctly dismissed Park's Title IX claim. He failed to adequately allege an erroneous outcome in the disciplinary proceeding resulted from gender discrimination.

Park's conclusory allegations that the University adopted a practice of enforcement and investigation biased against male students to appease the Department of Education were insufficient to cast doubt on the accuracy of the proceeding. His argument assumes Title IX liability simply because the University followed hearing procedures described in the Department of Education's Dear Colleague Letter. But factual matters—not conclusions—must be pled to state a plausible claim for relief.

Park also failed to allege a particularized, causal connection between the outcome and gender bias. No facts show that gender bias was a motivating factor for the disciplinary decision. Showing that a university was motivated by gender bias requires more than a general assertion that more males than females are accused of sexual misconduct. Nothing in the record suggests that University administrators made comments demonstrating gender bias or that patterns of decision-making tended to show the influence of gender. Park's claim is based solely on his own claim, which does not meet his burden of showing gender discrimination caused his expulsion.

This Court should affirm the dismissal of Park's Title IX claim because no evidence suggests the University expelled him because he is a male.

III.

The district court acted within its discretion in awarding attorney's fees to the University. The term "costs," as used in Federal Rule of Civil Procedure 41, necessarily includes attorney's fees.

When Park voluntarily dismissed his lawsuit and refiled the same allegations a month later, he subjected himself to liability for an award of attorney's fees under Rule 41(d). Awarding fees to the opposing party prevents forum shopping and burdensome litigation. Rule 41(d) was meant to disincentivize those gaming the system and choosing judges and forums as they wish. Park did just that. He dismissed his original case to avoid adverse rulings and obtain a judge he thought to be more favorable. The University accumulated $74,500.00 in attorney's fees as a result. Requiring Park to pay for all or part of the University's attorney's fees would discourage similar behavior in the future. And the bright-line rule of allowing a district court to award attorney's fees as part of its costs under Rule 41(d) promotes simplicity, predictability, and eradicates the need for a case-by-case inquiry.

Even under a case-by-case inquiry—known as the hybrid approach—the University is entitled to attorney's fees as costs. The underlying statutes involved in this case define "costs" to include attorney's fees. Additionally, the second court to hear Park's claim entered specific fact findings that the dismissal of the original suit was motivated by a desire to gain a tactical advantage, rendering the University a prevailing party within the meaning of the underlying statute involved in this case. Park's dismissal of his original case and refiling of the same action with

the same claims resulted in more litigation and more attorney's fees. This vexatious conduct allows the University to recover attorney's fees as "costs" under Rule 41(d).

This Court should affirm the award of costs because Rule 41(d) authorizes the recovery of attorney's fees as costs.

ARGUMENT AND AUTHORITIES

Standard of Review. This appeal involves a challenge to the granting of a motion to dismiss and a challenge to an award of costs. Each involves a different standard of review.

For Park's challenge to the granting of the motion to dismiss, the standard of review is de novo. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 463 (7th Cir. 2010). The appellate court conducts the same analysis performed by the district court. *Zell v. Ricci*, 957 F.3d 1, 7 (1st Cir. 2020). A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint cannot withstand a motion to dismiss if the plaintiff has not pled enough facts to state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (citing Fed. R. Civ. P. 12(b)(6)). This plausibility standard requires more than labels and conclusions, and a formulaic recitation of the elements of a claim is not sufficient. *Id.* at 555. While a complaint's factual allegations are presumed true, bald assertions, legal conclusions, and conclusory statements are entitled to no such presumption. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is insufficient "if it tenders naked assertion[s] devoid of further factual enhancement." *Id.*

For Park's challenge to the award of costs, the correct standard of review is abuse of discretion. *D.A. Oglethorpe Fam. P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1236 (10th Cir. 2013). But in this specific context, the district court's interpretation of Rule 41(d) is a question of law subject to de novo review. *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 309 (4th Cir. 2016). And to the extent the district court's award of costs involves a finding of fact, they are reviewed for clear error. *United States v. Hardage*, 985 F.3d 1427, 1437 (10th Cir. 1993).

I. PARK FAILED TO STATE A VIABLE DUE PROCESS CLAIM BECAUSE HE HAS NOT ADEQUATELY ALLEGED THAT THE PROCEDURES EMPLOYED DURING HIS DISCIPLINARY HEARING DEPRIVED HIM OF THE OPPORTUNITY TO BE HEARD AT A MEANINGFUL TIME IN A MEANINGFUL MANNER.

Park's first issue addresses the district court's dismissal of his procedural due process challenges to his expulsion. His complaint raised various attacks to the disciplinary process, all of which he contends violated his procedural due-process rights under the Fourteenth Amendment. *See* U.S. Const. amend. XIV. But the lower courts properly recognized that the hearing procedures comported with due process.

To be sure, the Fourteenth Amendment's Due Process Clause requires that universities employ certain "minimal procedures" before expelling a student for misconduct. *Haidak v. Univ. of Mass.–Amherst*, 933 F.3d 56, 65 (1st Cir. 2019) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). In determining what process is due, this Court balances three factors: (1) the nature of the private interest affected by the deprivation; (2) the risk of an erroneous deprivation under the governmental unit's current procedures and the probable value, if any, of additional

or alternative procedures; and (3) the governmental interest, including the burden imposed by additional procedures. *Mathews*, 424 U.S. at 335. Based on the circumstances and the liberty interest at stake, due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

But a university need not "transform its classrooms into courtrooms." *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005). Due process does not contemplate that disciplinary proceedings against students take on the formalities used in criminal trials. *Id.* The minimum procedures required by the Fourteenth Amendment simply obligated the University to provide Park with the opportunity to "respond, explain, and defend." *Id.* The procedures employed in Park's disciplinary hearing afforded him that opportunity.

A. Park Has No Due Process Right to Directly Cross-Examine an Adverse Witness in a Student Disciplinary Proceeding.

Park claims he has a constitutional right to cross-examine his accuser, either directly or through his attorney. He does not. In the disciplinary setting, procedural due process only requires an opportunity for some form of "real-time" cross-examination when witness credibility is at issue. *Haidak*, 933 F.3d at 69. And questioning by the Board satisfied that standard.

This was undoubtedly a he-said, she-said dispute. And the Board was called upon to determine which student was telling the truth. For this reason, some form of examination must allow the factfinder to gauge the witness's credibility. *Doe v. Mich. State Univ.*, 989 F.3d 418, 430 (6th Cir. 2021). Roe's account was challenged,

although not in the specific manner in which Park wanted. He was allowed to give his account of what occurred on the night of the incident, including the content of the telephone calls between the two and his version of what happened on the night in question. R. at 3a–4a. He provided the Board with written questions before the hearing, most of which were asked of Roe during her testimony. R. at 5a. He and his attorney attended the hearing and, after listening to Roe's testimony, provided the Board with follow-up questions, some of which were asked of Roe. R. at 6a–7a; *see also Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (recognizing student's due process rights are not violated by allowing questioning that is not rooted in an "antagonistic nature").

In a dissent below, Judge Walt suggests that direct, adversarial cross-examination is required when a university must decide between competing narratives to ascertain the truth. R. at 46a–48a (citing *Mich. State Univ.*, 989 F.3d at 434 (Nalbandian, J., concurring); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017); *Walsh v. Hodge*, 975 F.3d 475, 484–85 (5th Cir. 2020); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018)). But the cases cited for this proposition had no form of cross-examination whatsoever. For example, in *Baum*, the expelled student was given no opportunity for a university hearing and there was no cross-examination by the board, plaintiff, or his agent. 903 F.3d at 581–82. Likewise in *University of Cincinnati*, the individual bringing the assault claims did not even show up to the disciplinary proceedings. 872 F.3d at 397. While both of these cases cited by Judge Walt extoll the virtues of adversarial cross-examination, they do not

support the proposition that due process requires that cross-examination in a student disciplinary proceeding be conducted by the accused student or his attorney.

The University established the policy to have questioning conducted by the Board for compelling reasons. Questioning victims of sexual assault can deter students from coming forward. Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 Drake L. Rev. 293, 329 (2017) ("Students choose not to report sexual assaults because they are embarrassed, ashamed, and think an investigation would be too difficult emotionally."). The Code emphasizes the University's desire to avoid "pressing a traumatized student for too many details" as it can be overly adversarial. R. at 5a. This policy laid out for the Hearing Board is utilized in all university proceedings. *See Haidak*, 933 F.3d at 69 (holding "kid-gloves approach" satisfies due process requirements if applied evenly to witnesses on both sides of dispute). This limited cross-examination is essential to avoid animosity and prevent the classroom from becoming a criminal interrogation. Disciplinary proceedings are routine in a university setting and imposing a requirement of direct cross-examination would escalate the adversary nature of a regular disciplinary tool. *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

Additionally, the University avoids the cost and burdens of formal criminal trials in student disciplinary proceedings. *Doe v. Univ. of Ark.–Fayetteville*, 974 F.3d 858, 868 (8th Cir. 2020) (recognizing university's process of having board members

question witnesses was constitutionally permissible to advance goal of avoiding ill will and the costs and burdens of a regular trial). This is particularly important in the wake of guidance from the Department of Education. The "Dear Colleague" letter[2] issued in 2011 ushered in a new wave of more stringent sexual harassment policies on school campuses. *See* U.S. Dep't of Educ., *Dear Colleague Letter* (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. It caused universities to lower standards of proof required for affirmative findings. *See id.* at 11 ("[F]or a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred).").

At the time of Park's hearing, universities across the country were dealing with a high volume of Title IX disciplinary cases. For example, in 2019, the University of Nevada, Las Vegas received 204 Title IX complaints and Michigan State University received more than 1300. Heather Hollingsworth, *Campus Sex Assault Rules Fall Short, Prompting Overhaul Call*, Associated Press (June 12, 2022), https://apnews.com/article/politics-sports-donald-trump-education-5ae8d4c03863cf98072e810c5de37048. Park's position is untenable given the sheer volume of disciplinary

[2] The Dear Colleague letter announced requirements for colleges and universities, specifically regarding their response protocol for allegations of sexual harassment and sexual violence. These requirements cracked down mainly on elements of campus judicial procedures, reporting requirements, and staff responsibilities. U.S. Dep't of Educ., *Dear Colleague Letter* (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. Shortly after President Trump took office in 2020 and on the day before the disciplinary hearing (May 19, 2020), the "Dear Colleague" letter was rescinded, and new regulations were put in place for disciplinary proceedings. *See* 34 C.F.R. § 106.45 (2020). But those new regulations did not take effect until August 14, 2020. *Id.*

proceedings universities must conduct on a yearly basis. Universities lack the resources to essentially conduct hundreds of criminal trials with full "adversarial" cross-examinations.

Even though Park did not get to directly cross-examine Roe, the University allowed Park to probe Roe's credibility by asking questions provided by Park in areas where Park disagreed with statements made by Roe. The Board asked relevant questions and gauged her credibility and reactions. This was sufficient to satisfy procedural due-process requirements.

B. The Board Effectively Cross-Examined Park's Accuser Through Its Limited Questioning, Even Though the Board Did Not Ask All the Questions He Submitted.

Park next claims the Board's questioning was constitutionally inadequate. In his estimation, the Fourteenth Amendment obligated the Board to ask Roe each question he submitted. It did not.

The constitutional standard simply calls for reasonably adequate questioning, not all questioning an accused student may want. *Doe v. Cummins*, 662 F. App'x 437, 448 (6th Cir. 2016). To determine if questioning is sufficient, courts examine if the hearing board asked questions on matters central to the charges, asked for clarification when it was deemed necessary, and used the same approach when engaging with all parties. *Id.* This circumscribed form of examination has been

upheld as acceptable by numerous circuit courts.[3] *Nash*, 812 F.2d at 664; *Flaim*, 418 F.3d at 635; *Cummins*, 662 F. App'x at 448; *Haidak*, 933 F.3d at 68.

The questioning employed here is no different from what the First Circuit found to be constitutionally permissible in *Haidak*. There, the accused student submitted thirty-six questions he wanted to be asked of his accuser. *Haidak*, 933 F.3d at 70. But an Assistant Dean decided twenty of those questions would not be asked. *Id.* In rejecting the student's due-process claim based on the refusal to ask all the submitted questions, the court reasoned that the Board probed for details and focused on the matters central to the allegations. *Id.* Furthermore, the court noted that the questioning was fair because both the claimant and the victim were both interrogated in a non-adversarial manner. *Id.*

Here, the Board received all the questions submitted by Park both initially and in follow-up. Most of Park's initial questions were asked. R. at 6a. Some of his follow-up questions were asked. R. at 6a–7a. In addition, the Board questioned Roe on matters central to the issues of the case. The Board questioned her about the beverages she consumed the night of the incident, her ability to walk normally while intoxicated, and her possible ulterior motives. R. at 21a. The Board probed

[3] The First Circuit Court of Appeals in *Haidak* recognized that the system of adjudication employed here can be fairly called inquisitorial. 933 F.3d at 68 (citing *Inquisitorial System*, *Black's Law Dictionary* (11th ed. 2019) (defining "inquisitorial system" as a "system of proof-taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and extent of the inquiry")). While this method was not adopted by the Founders for criminal trials, it is constitutionally adequate in various settings. *Haidak*, 933 F.3d at 68 (noting the inquisitorial model is constitutionally used for critical administrative decisions like whether to award or terminate disability benefits) (citing *Sims v. Apfel*, 530 U.S. 103, 110–11 (2002)).

the areas it felt were necessary and proper to resolve the case. Park and Roe were also scrutinized using the same approach to minimize the risk of trauma and deviate from an adversarial interrogation. R. at 5a; *see Mich. State Univ.*, 989 F.3d at 431–32 (noting allowing hearing board to receive and choose the questions it desires helps avoid intimidation of victim and resulting trauma).

The burdens implicated by Park's argument are considerable. The University has an interest in preserving the mental and emotional composure of its students in the school. An assortment of follow-up questions could open the door to potential harassment from the accused or their attorney. Demanding that the University seek an answer to every follow-up question proffered by Park would lead to a lengthier hearing resulting in greater costs and more extensive knowledge of the law. The goal of allowing universities to engage in a lower level of cross-examination and questioning is to ensure these proceedings do not mirror criminal trials. *Flaim*, 418 F.3d at 635.

The potential benefits are speculative at best. Park had four follow-up questions for Roe regarding her claims of intoxication. First, Roe stated she had an alcoholic drink before Park purchased her first one and Park wanted to inquire about the specific kind of alcohol she was drinking. R. at 6a. But as noted by the Board, the inquiry was irrelevant; Roe admitted to consuming alcohol before Park purchased her drink and therefore there is no need to identify the particular form of alcohol she was drinking. *See* R. at 6a. Second, Park wanted the Board to press Roe for a credit card statement to show she had purchased alcohol. R. at 6a–7a. This too

was improper. This is not only intrusive to Roe's financial privacy but also inconsequential because the movie theater also charged for non-alcoholic drinks; therefore, Roe's statement would not resolve whether the drinks were alcoholic. R. at 7a. Lastly, Park submitted follow-up questions regarding Roe's ability to purchase drinks while underage and her father's ownership of a karate dojo. Both questions dealt with distractions from the heart of the issue—Roe's intoxication. Her ability to purchase the drinks would not refute the fact that the drink was alcoholic. Furthermore, Roe's father's ownership of a karate dojo is irrelevant because, while Roe's claim of excellent balance stems from her martial arts training, her not "appearing" inebriated on video does not refute her claim she was intoxicated.

The follow-up questions requested by Park would not have significantly aided the Board's ability to test Roe's credibility. *Mich. State Univ.*, 989 F.3d at 431. The Board has the discretion to determine what questions to ask and concluded that these questions were not crucial. Although not every follow-up question was asked, the Board examined Roe about facts pivotal to the main issues Park raised. This process provided reasonably adequate questioning to satisfy due process.

C. Permitting Roe to Testify with a Face Covering Did Not Deprive the Board of the Opportunity to Assess Her Credibility.

Park also complains about Roe testifying with a face covering. He contends that the Fourteenth Amendment requires removal of any face covering during her testimony against him. It does not.

The University conducted the hearing in May 2020, at a time when the COVID-19 pandemic was relatively new. Numerous individuals were not only becoming sick but also being hospitalized and passing away.[4] The COVID-19 pandemic gravely affected nearly all aspects of American life. Businesses, governmental bodies, and even lifestyles underwent significant change under rapidly shifting public health protocols. The procedures used in the Hearing ensured the health and safety of those present. At the time, the extent of the risk the COVID-19 pandemic could cause was unknown. As a precaution, all persons in attendance, including Park and Roe, were required to wear face coverings. R. at 5a. Given the unique circumstances, the University's decision not to require her to remove her face covering while she testified was appropriate.

A student accused of misconduct in a disciplinary proceeding has no constitutional right to direct face-to-face confrontation. University hearings require notice and an opportunity to be heard, not the formal procedures and rules ingrained in the criminal justice system. *Flaim*, 418 F.3d at 635.

Nonetheless, this Court has recognized that even the Sixth Amendment's right to physical face-to-face confrontation in criminal trials yields in certain circumstances. *See Maryland v. Craig*, 497 U.S. 836, 851 (1990) (citing U.S. Const. amend. VI). There, this Court upheld a procedure where a six-year-old witness was permitted to testify behind a screen and did not have to testify about her assault in

[4] The Centers for Disease Control provides a summary of COVID-19 ending on May 30, 2020. Ctrs. for Disease Control & Prevention, *COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity* (June 5, 2020), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/pdf/covidview-06-05-2020.pdf.

front of the defendant. *Id.* at 856–57. The right is not absolute and may be modified when compelling circumstances require and measures otherwise ensure reliability. *Id.* at 850. This Court reasoned that reliability is determined by analyzing the extent to which the proceedings respect the four elements of confrontation: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Id.* at 846. This Court also noted the right to face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 848.

Here, Roe testified in front of Park and his attorney, albeit with a face covering. R. at 5a. She was asked questions by the Board in the presence of Park and his attorney. Roe's face covering did not inhibit the Board's ability to observe numerous aspects of Roe's disposition. The Board could hear the tone of her voice, analyze her reactions to questions, and scrutinize her body language. *United States v. Miah*, No. 21-110, 2021 U.S. Dist. LEXIS 227695, at *12 (W.D. Pa. Nov. 29, 2021) (finding no violation of right of confrontation where witness wore glasses and a face mask to disguise identity during ongoing investigation because factfinder could still assess credibility). Courts have rejected constitutional challenges to disguises and masks because a jury can still observe an individual's eyes, facial reactions, and mannerisms. *United States v. De Jesus-Casteneda*, 705 F.3d 1117, 1121 (9th Cir. 2013); *State v. Daniels*, No. E2021-00561-CCA-R3-CD, 2022 Tenn. Crim. App. LEXIS 300, at *19 (Tenn. Crim. App. June 29, 2022). It does not make it any easier to tell a lie to a person's face just because their nose and mouth are covered.

Roe and Park were questioned while wearing face masks, and therefore their demeanor at trial was analyzed in the same way. The University's decision to conduct the disciplinary proceeding in this manner did not deprive Park of due process.

II. PARK FAILED TO STATE A VIABLE TITLE IX CLAIM BECAUSE HE HAS NOT ADEQUATELY ALLEGED AN ERRONEOUS OUTCOME RESULTING FROM GENDER DISCRIMINATION.

Park's second issue addresses the district court's dismissal of his Title IX claim. He alleges that he was wrongly found to have committed student conduct violations in his disciplinary proceeding because of the University's gender bias. But his claim is not plausible under a Title IX erroneous outcome theory.

Title IX prohibits educational institutions that receive federal funds from discriminating against on the basis of gender. 20 U.S.C. § 1681(a)(1). A plaintiff may assert a claim under Title IX based upon an erroneous outcome theory, in which he attacks the university disciplinary proceeding on grounds of gender bias by arguing that the plaintiff was innocent and wrongly found to have committed an offense. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir.1994). To allege a viable erroneous outcome theory, Park was required to plausibly plead: (1) facts sufficient to cast doubt as to the accuracy of the outcome of the disciplinary proceeding and (2) causation. *Id.* He did neither.

A. Park Failed to Plead a Plausible Articulable Doubt in the Outcome of the Disciplinary Proceeding.

Park cannot satisfy the first element of an erroneous outcome claim, which requires specific facts casting an articulable doubt in the outcome of the disciplinary

proceeding. *Id.* Park claims to be innocent but merely recites conclusory allegations that the University adopted a practice of enforcement and investigation inherently biased against male students in an effort to appease the Department of Education. R. at 28a. These conclusory allegations did not plead plausible articulable doubt. *See Twombly*, 550 U.S. at 570 (requiring pleading of factual matters—not conclusions—to state a plausible claim for relief); *Iqbal*, 556 U.S. at 681 (refusing to assume conclusory allegations are true under motions to dismiss). Without plausible articulable doubt, the Title IX claim fails. *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204, 210 (5th Cir. 2019). Such is the case here.

An example of plausible articulable doubt can be found in *Doe v. Columbia University*, 831 F.3d 46, 57–58 (2d Cir. 2016). There, the plaintiff plead specific facts substantiating the claim that federal-government influence had led to gender bias in the university's disciplinary proceeding. *Id.* Columbia University faced substantial criticism from both the student body and the public media regarding its sexual-assault investigations leading up to the plaintiff's hearing. *Id.* The complaint specifically alleged that the public criticism caused Columbia University's Title IX investigator to side with the accusing female in the weeks before the hearing. *Id.* at 58–59. The Second Circuit concluded that these additional facts were sufficient to form an articulable doubt that pressure to avoid Title IX liability led to a disciplinary system that was biased against males. *Id.* at 57–59; *see also Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018) (finding articulable doubt where plaintiff alleged expulsion was result of pressure from a lawsuit brought by a female

student accusing the school of not expelling her attacker); *Baum*, 903 F.3d at 586 (finding articulable doubt where plaintiff alleged expulsion resulted from uproar after federal government investigation into the university's procedures of sexual assault against women).

Here, Park pled only that the University adopted a practice of investigation and enforcement that was biased against male students "to appease the Department of Education." R. at 28a. This—without more—is insufficient. *See Cummins*, 662 F. App'x at 453 (holding appellants' allegation that the university discriminated against males in sexual-assault investigations to comply with the "Dear Colleague Letter" was conclusory and insufficient to create a plausible claim of gender bias under Title IX).

Park's argument assumes Title IX liability simply because a university set up disciplinary hearing procedures following the Dear Colleague Letter. He seeks to hold all universities liable under Title IX by virtue of a general awareness that more males than females are accused of engaging in non-consensual sexual contact. A showing that a particular university was motivated by gender bias requires more. *See Austin v. Univ. of Or.*, 925 F.3d 1133, 1140 (9th Cir. 2019) (rejecting appellant's allegation under the erroneous outcome theory that, because the university disciplined male students for sexual misconduct but never female students, it is biased against men); *Doe v. Univ. of Colo.*, 255 F. Supp. 3d 1064, 1078 (D. Colo. 2017) (finding no "plausible" inference of gender bias in Title IX proceedings just

because the university investigates and disciplines more men for sexual misconduct than women).

Moreover, Park's alleged procedural due-process violations do not in and of themselves state an articulable doubt on the outcome of his disciplinary proceeding. As described above, the hearing procedures complied with due process. *See supra* at § I. For that reason, they show no doubt whatsoever.

No inference can be drawn from Board members noting Roe's "bravery" for "stepping forward," frowning at Park, presenting statistics of rape allegations, and rejecting more of Park's follow-up questions. R. at 56a–57a. These do not establish articulable doubt. *Nash*, 812 F.2d at 665. Park's allegations are nothing more than a disagreement with the outcome of the University's disciplinary proceeding. Without specific facts that, if believed by a factfinder, would cast articulable doubt on the outcome, Park's erroneous outcome claim necessarily fails.

B. Park Failed to Plausibly Allege a Particularized, Causal Connection Between the Outcome and Gender Bias.

Park cannot satisfy the second element of an erroneous outcome claim, which requires specific facts alleging a causal connection between the allegedly improper result and gender prejudice. *Id.* Even though his complaint calls in question the outcome of the disciplinary proceeding, he has not brought forward factual allegations that the alleged procedural flaws were motivated by gender discrimination. As such, he has failed to plead "a particularized causal connection between the flawed outcome and gender bias." *See Yusuf*, 35 F.3d at 715. The Title IX claim fails as a result.

1. Park's conclusory allegations are devoid of facts showing any institutional bias against males.

Park does not set forth particularized facts sufficient to suggest that gender bias was a motivating factor for an erroneous disciplinary decision—namely, that establish University officials made comments that demonstrate gender-biased animus or that there were patterns of decision-making that tended to show the influence of gender. *See Yusuf*, 35 F.3d at 715 ("[S]tatements by members of the disciplinary tribunal, statements by pertinent university officials offer patterns of decision-making . . . [and] tend to show the influence of gender.").

Park was obligated to show "more than a sheer possibility that a defendant acted unlawfully," and cannot rely on mere "labels and conclusions" to support a claim, *Twombly*, 550 U.S. at 555. A complaint may allege particular evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of a complainant or witnesses, particularized strengths of the defense, or other reason to doubt the veracity of the charge. *Yusuf*, 35 F.3d at 715. A complaint may also allege particular procedural flaws affecting the proof. *Id.* But allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss. The fatal gap is the lack of a particularized allegation relating to a causal connection between the flawed outcome and gender bias. *Id.* A plaintiff must thus also allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding, which Park has not done.

2. The Code applies to all students, regardless of gender.

Park cannot point to any bias based on the language of the Code. Nothing suggests it is anything but gender-neutral and applies to all students regardless of sex and prohibits all forms of sexual misconduct. Park has identified no structural deficiencies in the policy that could suggest the University's disciplinary process discriminates against men.

3. The Board's decision to credit one female's testimony and reject one male's testimony is insufficient to reasonably infer that the result was the product of gender bias.

Park claims that the Board discriminated against him as a male because it credited all of Roe's testimony over his testimony. This alone is not proof of gender discrimination.

Courts have inferred gender bias in limited circumstances. For example, a form of gender bias may arise when a party or witness's story is not heard by the factfinder and the other party's testimony is given greater weight. *See Baum*, 903 F.3d at 586 (finding causal connection of outcome and gender bias from evidence that board found male fraternity brothers' testimony not credible while accepting female sorority sisters' testimony credible). But no inference of gender discrimination may be drawn from the Board's decision here. With two witnesses contradicting one another, the circumstances required the Board to rule completely in favor of Roe or completely in favor of Park.

More importantly, Park's allegations cannot establish gender bias because he only points to one case—his own. Park likewise fails to identify any female student,

other than Roe, who he claims was treated more favorably than he was treated. Thus, Park's assertions, "devoid of further factual enhancement," are insufficient to state a claim to relief based on a pattern of decision-making. *See Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015) (stating that in a pleading, "it is not sufficient to tender naked assertions that are devoid of further factual enhancement") (internal quotations omitted). Conclusory allegations without supporting facts of gender bias, like his assertion that the investigation was inherently biased against him as a male to please the Department of Education, are insufficient to survive a motion to dismiss. Without particularized allegations suggesting that gender bias was a motivating factor for an erroneous disciplinary decision, his claim is insufficient to state a Title IX claim upon which relief may be granted.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY'S FEES TO THE UNIVERSITY BECAUSE FEDERAL RULE OF CIVIL PROCEDURE 41(d) AUTHORIZES AN AWARD OF ATTORNEY'S FEES AS COSTS.

Park's third issue concerns the award of attorney's fees to the University. In an effort to avoid the consequences of his own actions, he claims that the district court's inclusion of attorney fees as part of its award of "costs" under Rule 41(d) was improper. This is simply not correct. The term "costs," as used in Rule 41, necessarily includes attorney's fees.

Rule 41 does not specifically mention attorney's fees. It simply provides:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs of the previous action; and

(2) may stay the proceedings until the plaintiff has complied.

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

Rule 41(d)'s failure to specifically mention attorney's fees has caused a three-way circuit split on the issue. The approach adopted by the Second, Eighth, and Tenth Circuit courts hold that Rule 41(d) always allows for the recovery of attorney's fees as costs. *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 24–26 (2d Cir. 2018); *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980); *Meredith v. Stovall*, No. 99-3350, 2000 U.S. App. LEXIS 14553, at *14 (10th Cir. June 23, 2000). These circuit courts based their holdings on the policy underlying Rule 41(d), which seeks to deter forum shopping and vexatious litigation. *Horowitz*, 888 F.3d at 26; *Meredith*, 2000 U.S. App. LEXIS 14553, at * 11; *Evans*, 623 F.2d at 122. The approach adopted by the Sixth Circuit court holds that Rule 41(d) never allows for the recovery of attorney's fees as costs. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000). Its conclusion is that attorney's fees are not recoverable under Rule 41(d) because "the rule does not explicitly provide for them." *Id.* The approach adopted by the Third, Fourth, Fifth, and Seventh Circuit courts adopted a middle ground, known as the hybrid approach, holding that attorney's fees are permitted under Rule 41(d) only if the underlying statute defines costs to include attorney's fees. *Garza v. Citigroup, Inc.*, 881 F.3d 277, 282–83 (3d Cir. 2018); *Andrews*, 827 F.3d at 311; *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017); *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000). These circuits rely heavily on *Marek v. Chesny*, in which this Court interpreted Rule 68 in the

same way. 473 U.S. 1, 9 (1985) ("[T]he most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority.") (citing Fed. R. Civ. P. 68).

The district court awarded $28,150.00 in attorney's fees as costs without specifically mentioning which approach it followed. R. at 10a. The court of appeals affirmed the award and correctly noted that attorney's fees were recoverable under either the always-recoverable approach used by the Second, Eighth, and Tenth Circuit courts or under the hybrid approach used by the Third, Fourth, Fifth, and Seventh Circuit courts. R. at 36a n.9, 37a–40a.

A. Rule 41(d) Provides District Courts with the Discretion to Award Attorney's Fees as Costs in Any Case as a Means of Deterring Forum Shopping and Vexatious Litigation.

Allowing for an award of attorney's fees in all cases in which Rule 41(d) applies prevents possibilities of forum shopping and burdensome litigation. The purpose of Rule 41(d) is to act as a disincentive to individuals gaming the system and choosing judges and forums as they please. *Simeone v. First Bank Nat'l Ass'n*, 971 F.2d 103, 108 (8th Cir. 1992); *see Rogers*, 230 F.3d at 874. This is exactly what Park did. He dismissed his case to avoid adverse rulings, to obtain a judge he perceived was more favorable. *See Andrews*, 827 F.3d at 309; *Horowitz*, 888 F.3d at 26.

Park dodged whom he believed was an unfavorable judge. Park's affidavits for refiling his lawsuit alleged concerns about possible bias in the first court with Judge John Kreese. R. at 10a. Judge Kreese is a proud Quicksilver State alumnus, however, nothing in the record indicates that Judge Kreese showed bias towards

Park or his attorney. In fact, the court of appeals found that Judge Kreese listened attentively to both sides' arguments and asked specific questions regarding both parties' claims. R. at 9a.

Additionally, Judge Demetri Alexopoulos made explicit fact findings about Park's motives. The order granting attorney's fees stated:

> The Court finds that Plaintiff's actions in dismissing his first action and refiling the instant action, were *technically* motivated by a desire to gain a tactical advantage—or more appropriately, to eliminate a perceived tactical *disadvantage* in a different court in which Plaintiff believed (erroneously) that the court favored his opponent from the get-go. The Court finds that Plaintiff likely nonsuited his first action to avoid an unfavorable judgment on the merits.

R. at 37a.

If Park was truly concerned about any potential bias from Judge Kreese, he could have followed the proper procedural route. Rather than dismissing his suit under Rule 41, he should have filed a motion for disqualification of a district judge under 28 U.S.C. § 144. Section 144 requires the party seeking disqualification to file an affidavit explaining the facts and specific reasons for the belief that the judge's personal bias or prejudice exists. 28 U.S.C. § 144. Had Park been able to make a prima facie showing, the Judge's recusal is mandatory when a timely and sufficient affidavit is filed. 28 U.S.C. § 144; *United States v. Sammons*, 918 F.2d 595, 598 (6th Cir. 1990).

Park's voluntary dismissal resulted in minimal court costs but significant attorney's fees. The University noted that its attorney's fees were $74,500.00 and its court costs were likely in the low hundreds of dollars. R. at 42a. The inability to

recover attorney's fees from a litigant would eradicate any deterrence effect that Rule 41(d) was intended to have. Requiring Park to pay for the University's attorney's fees or simply a portion of those fees discourages this type of behavior.

Additionally, the bright-line rule of allowing a district court to award attorney's fees as part of its costs under Rule 41(d) achieves simplicity, provides predictability, and obviates the need for case-by-case inquiry. *Jaske v. Comm'r*, 823 F.2d 174, 176 (7th Cir. 1987). A bright-line rule that allows attorney's fees under Rule 41(d) gives deference to the determination of courts on the front lines of litigation to control the litigants before them. This unambiguous approach will free appellate courts from the "duty of reweighing evidence and reconsidering facts already weighed . . . by the district court; it will also discourage litigants from pursuing marginal appeals." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990).

If "costs" simply means the minimal expenses associated with filing an action rather than the greater expense of attorney's fees there is not much stopping a plaintiff from continually refiling an action. Although Rule 41(d) itself does not mention attorney's fees, the policy underlying the statute provides the best framework to prevent litigants like Park from manipulating the judicial system.

B. Alternatively, 42 U.S.C. § 1988 Provides for the Recovery of Attorney's Fees as Costs Because the District Court Found Park Voluntarily Dismissed His Prior Action to Avoid a Disfavorable Judgment on the Merits.

The district court's award of attorney's fees was also proper under the hybrid approach, which provides that attorney's fees are only available under Rule 41(d) "if

the underlying statute defines 'costs' to include fees." *Portillo*, 872 F.3d at 738; *Garza*, 881 F.3d at 282. And it does. Park has sued under 42 U.S.C. § 1983 alleging that he was deprived of his due process rights. R. at 8a. 42 U.S.C. § 1988 defines costs in § 1983 actions to include attorney's fees. Under § 1988, "any action or proceeding to enforce a provision of section . . . 1983 . . . 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." 42 U.S.C. § 1988(b).

The University is a prevailing party in this action because Park attempted to eliminate a perceived tactical disadvantage. R. at 11a. When a plaintiff has voluntarily dismissed a prior action, a defendant is a prevailing party when "the defendant can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits." *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001). Judge Alexopoulos expressly found that Park by nonsuiting his first action was attempting to avoid an unfavorable judgment on the merits. R. at 11a. Not only should deference be given to the district court's fact finding as they were able to observe the issue more closely, but additional evidence points to the fact that Park was attempting to avoid a negative outcome.

A court can also award fees under Section 1988 if "a showing is made that the underlying civil rights suit was vexatious, frivolous, or otherwise without merit" *Dean*, 240 F.3d at 508. A vexatious suit is a proceeding that results in unnecessary litigation and is "without reasonable . . . excuse." *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999) (quoting *Black's Law Dictionary* 1559 (7th ed. 1999)).

Park, after dismissing his case, refiled the same action with the exact same claims, and the second court dismissed it for failure to state a claim upon which relief may be granted. R. at 11a, 40a. Therefore, Park's original suit suffered from the same infirmities; it failed to state a plausible ground for recovery. Park's actions were vexatious because he voluntarily dismissed the first suit so he would not receive an undesirable judgment. This resulted in more litigation and more attorney's fees.

Park's attempt to gain a tactical advantage allows attorney's fees under the exception to the American Rule as well. This exception provides that attorney's fees are intended to deter vexatious litigation including attempts to "gain any tactical advantage by dismissing and refiling th[e] suit." *Rogers*, 230 F.3d at 874; *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001). Although not the result of bad faith, Park's behavior was still vexatious and done to gain a tactical advantage because his claims were factually indistinguishable. *Compare Robinson v. Bank of Am., Nat'l Ass'n*, 553 F. App'x 648, 652 (8th Cir. 2014) (finding vexatious conduct where refiled suit was factually indistinguishable, despite plaintiff's assertion that voluntary dismissal was to "better study applicable law and ensure that the claims were properly supported"), *with Andrews*, 827 F.3d at 309 (finding no vexatious conduct where amended complaint was much more detailed than the first action). Although Park's counsel's affidavits explained that the dismissal was to better study applicable law and ensure that the claims were properly supported, the same factual claims were filed in the second court. R. at 40a.

Additionally, Park's conduct was vexatious because he manipulated the proceedings to achieve a perceived advantage. Discouraging this judge shopping and assertion of identical claims is an essential purpose of Rule 41(d) and, for this reason, attorney's fees are recoverable as costs.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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APPENDIX A

PERTINENT CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV

Section 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 the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B

PERTINENT STATUTORY PROVISIONS

20 U.S.C. § 1681(a)

(a) Prohibition against discrimination; exceptions
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, except that:

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

(a) Applicability of statutory and common law
The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees
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.

(c) Expert fees
In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX C

PERTINENT FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 41

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(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.