No. 21-8289

In The

Supreme Court of the United States

KYLER PARK,

Petitioner,

v.

QUICKSILVER STATE UNIVERSITY,

Respondent.

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

BRIEF FOR THE RESPONDENT

TEAM 87
Counsel for Respondent
November 20, 2022

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment and Title IX confer an absolute right to direct, unfettered, or maskless cross-examination in a university disciplinary proceeding.
2. Whether Federal Rule of Civil Procedure 41(d) includes attorney's fees as "costs" within the broad discretion the Rule entrusts to trial courts to deter vexatious litigants.

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The opinion of the United States District Court for the District of Quicksilver is unpublished and may be found at *Park v. Quicksilver State University*, D.C. No. 20-cv-7615 (D. Quicksilver Dec. 17, 2020). The opinion of the United States Court of Appeals for the Fourteenth Circuit is unpublished and may be found at *Park v. Quicksilver State University*, C.A. No. 21-4601 (14th Cir. 2021).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment on this matter on October 18, 2021. Pet. App. 1a. Petitioner then filed a writ of certiorari, and this Court granted certiorari. Order Granting Cert., Oct. 10, 2022, No. 21-8289. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix contains the pertinent text of the following constitutional and statutory provisions relevant to this case: United States Constitutional Amendment XIV, 20 U.S.C. § 1681, 42 U.S.C. § 1983, 42 U.S.C. § 1988, and Federal Rule of Civil Procedure 41.

STATEMENT OF THE CASE

A. Procedural History

Kyler Park ("Petitioner") was accused of sexually assaulting a fellow Quicksilver State University ("the University") student, Jane Roe, on March 14, 2020. Pet. App. 2a. Ms. Roe reported the assault to the University. Pet. App. 3a. The University then provided for an in-person hearing on May 20, 2020. Pet. App. 4a. The Board found for Ms. Roe. Pet. App. 8a.

On June 12, 2020, Petitioner sued the University in the District Court for the District of Quicksilver, alleging the University violated his civil rights under 42 U.S.C. § 1983 by depriving him of adequate procedural due process and the University violated Title IX, 20 U.S.C. § 1681 *et seq.*, by reaching an erroneous outcome on the basis of sex, specifically, because Petitioner is a male. Pet. App. 8a, 27a. On July 1, 2020, the University moved to dismiss Petitioner's lawsuit for failure to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). Pet. App. 9a; Fed. R. Civ. P. 12.

The motion to dismiss hearing was conducted on the morning of July 22, 2020. Pet. App. 9a. Later that afternoon, Petitioner filed a voluntary dismissal of the lawsuit pursuant to Federal Rule of Civil Procedure 41(a)(1) before the parties received the court's order on the motion to dismiss. Pet. App. 9a; Fed. R. Civ. P. 41.

On September 21, 2020, Petitioner refiled his lawsuit against the University in the same district, asserting the same claims as before. Pet. App. 9a. The University again moved to dismiss under Rule 12(b)(6). Pet. App. 10a. In addition, the University

filed a motion under Federal Rule of Civil Procedure 41(d), requesting the court award the University its costs, including its attorney's fees. Pet. App. 10a. The court heard both of the University's motions on December 17, 2020. Pet. App. 10a. At the conclusion of the hearing, the court granted both of the University's motions, dismissing the lawsuit and awarding the University a reduced fee. Pet. App. 11a.

Petitioner appealed to the Fourteenth Circuit. Pet. App. 11a. The Fourteenth Circuit affirmed the district court's dismissal, holding the University's hearing comported with procedural due process and Petitioner had not pleaded a particularized causal connection between the allegedly flawed outcome of the hearing and gender bias under Title IX. Pet. App. 20a, 24a, 26a, 28a. Moreover, the Fourteenth Circuit affirmed the grant of costs, including partial attorney's fees. The Fourteenth Circuit further held the district court did not abuse its discretion in awarding attorney's fees as costs, and the University was a prevailing defendant under 42 U.S.C. § 1988. Pet. App. 40a. Following Petitioner's appeal of the Fourteenth Circuit's ruling, this Court granted certiorari to address (1) whether a student accused of misconduct in a university disciplinary proceeding has a right, under the Fourteenth Amendment and Title IX, to direct and unfettered cross-examination of witnesses and to insist that such witnesses testify without face coverings and (2) whether attorney's fees are costs within the meaning of Federal Rule of Civil Procedure 41(d). Order Granting Cert., Oct. 10, 2022, No. 21-8289.

B. Statement of the Facts

1. The Assault

On March 14, 2020, Petitioner approached Jane Roe at a bar. Pet. App. 2a. Petitioner nor Ms. Roe knew any other person in the bar. Pet. App. 3a. Ms. Roe was drinking a clear beverage when approached by Petitioner, which she testified was alcoholic. Pet. App. 6a. Petitioner contends that it was not. Pet. App. 6a. Ms. Roe testified that she consumed other alcoholic drinks before Petitioner entered the bar, but she could not remember how many. Pet. App. 6a. Petitioner, who was of legal age, purchased an alcoholic drink and gave it to Ms. Roe, who was underage. Pet. App. 2a. She drank it. Pet. App. 2a. After talking for approximately an hour, Petitioner and Ms. Roe went back to Ms. Roe's dorm room on campus; the facts diverge after that. Pet. App. 2a.

Ms. Roe testified that she vaguely remembered seeing Petitioner at the bar but, due to her intoxication, did not remember what happened after that. Pet. App. 3a. The next memory Ms. Roe has is waking up to Petitioner raping her. Pet. App. 3a. Ms. Roe maintains that her encounter with Petitioner was not consensual because she was too intoxicated to consent to sex, Petitioner knew she was intoxicated, and Petitioner assaulted her. Pet. App. 2a. Petitioner disagrees, concedes the two had sexual intercourse, but claims it was consensual. Pet. App. 2a.

2. The Investigation

On March 23, 2020, the University's Division of Student Affairs notified Petitioner that he faced an accusation under the University's Code of Student

Conduct "specifically, that that he had allegedly 'committed acts of sexual abuse, unwanted sexual contact, and dating violence.'" Pet. App. 3a–4a. The University scheduled a student conduct hearing for May 20, 2020 and notified Petitioner of the hearing concerning the alleged violations. Pet. App. 4a. The University assigned an investigator to investigate the claims in advance of the hearing. Pet. App. 4a. The University's investigator interviewed both Ms. Roe and Petitioner. Pet. App. 4a. The investigator could not locate any witnesses to corroborate either Ms. Roe's or Petitioner's account. Pet. App. 4a. That same week, the University formally canceled all in-person classes for the rest of the semester because of the COVID-19 pandemic. Pet. App. 4a.

3. The Hearing

From 9:00 a.m. to 3:00 p.m. on May 20, 2020, the University held the hearing in-person in accordance with the 2019–2020 school year disciplinary policies. Pet. App. 4a; CLRF. ANS. #5. The Hearing Board consisted of five University employees and students appointed by the Vice Chancellor for Student Affairs. Pet. App. 4a. The University's COVID-19 policies required that all persons in attendance to wear face masks during the hearing. Pet. App. 5a.

Ms. Roe and Petitioner, accompanied by his attorney, attended the hearing in-person. Pet. App. 4a. Petitioner demanded that Ms. Roe be forced to remove her mask whenever speaking or answering questions. Pet. App. 5a. Ms. Roe requested to keep her mask on, and the Board agreed. Pet. App. 5a. Petitioner then asserted that the Board should compel Ms. Roe to testify remotely without a mask. Pet. App. 5a. Ms.

Roe stood firm in her desire to be physically present to give her live testimony during the hearing, and the Board denied Petitioner's request. Pet. App. 5a.

The University provided for Ms. Roe and Petitioner, along with his attorney, to write and submit questions to the Board. Pet. App. 5a. The Board determined which questions were acceptable and then asked the written questions to the witness verbally. Pet. App. 5a. Under the University's policy, the Board could exclude questions that were "unduly repetitious or irrelevant." Pet. App. 5a. In sexual assault proceedings, the Board could also exclude questions "to prioritize student comfort at the expense of rigorous examination." Pet. App. 20a. The Board could avoid "pursuing a line of questions" because of concerns about traumatizing a student-witness. Pet. App. 20a. The University's policy disfavors leading the witness and disallows party-conducted cross-examination of parties, either personally or through an attorney. Pet. App. 5a.

During the hearing, Petitioner submitted numerous initial and follow-up questions to the Board regarding Ms. Roe's claim of intoxication. Pet. App. 6a. While the Board asked most of Petitioner's initial questions about Ms. Roe's intoxication, the Board declined to ask many of Petitioner's follow-up questions and offered explanations. Pet. App. 6a. Petitioner urged the Board to press Ms. Roe about the specific kind of alcohol she claimed to be drinking, but the Board deemed Petitioner's proposed questions overly aggressive and irrelevant. Pet. App. 6a. In response, Petitioner demanded that Ms. Roe produce receipts from the bar to show what she ordered, but she did not have the receipts from that evening. Pet. App. 6a. Petitioner

submitted follow-up questions in which he asked the Board to compel Ms. Roe to produce her credit-card statement, but the Board refused Petitioner's requests. Pet. App. 6a–7a. The Board explained that "such questions would be invasive of Ms. Roe's financial privacy" and that her credit-card statements would not be probative of the alcoholic content of Ms. Roe's drink, only the total amount of her charges. Pet. App. 7a.

Additionally, Petitioner presented "grainy security-camera footage from outside the bar." Pet. App. 7a. Petitioner argued that he did not know Ms. Roe was intoxicated because the fuzzy video showed that she had no difficulty walking. Pet. App. 7a. Ms. Roe replied that she has "excellent balance from many years of martial arts training." Pet. App. 7a. The Board asked Petitioner's follow-up questions as to whether Ms. Roe's credit-card statement would reflect payments for years of martial-arts training; Ms. Roe responded that "she trained in her father's karate dojo and did not have to pay for lessons." Pet. App. 7a. In response, Petitioner submitted questions, revealing to the Board that Ms. Roe's "father could not have operated a karate dojo because it was well known he was a car salesman." Pet. App. 7a. The Board read the questions and deemed questions about Ms. Roe's father's current occupation irrelevant. Pet. App. 7a.

Following Ms. Roe's examination, Petitioner asked the Board to "wholly disregard Ms. Roe's statements" because she wore a mask. Pet. App. 8a. The Board declined this request. Pet. App. 8a.

The Board ultimately found for Ms. Roe at the conclusion of the hearing and concluded Petitioner likely committed acts of sexual misconduct prohibited by the Code of Student Conduct. Pet. App. 8a. The Board recommended expulsion, and the Vice Chancellor expelled Petitioner from the University thereafter. Pet. App. 8a.

4. Petitioner's Suit

On June 12, 2020, Petitioner sued the University, alleging that the University violated his procedural due process rights and reached an erroneous outcome in his disciplinary proceeding on the basis of Petitioner's sex in violation of 42 U.S.C. § 1983 and Title IX respectively. Pet. App. 8a. Petitioner's lawsuit was initially assigned to Judge John Kreese, a well-known University athletics supporter and alumnus, who opens court with the Pledge of Allegiance and the University fight song. Pet. App. 8a–9a.

On July 1, 2020, the University moved to dismiss Petitioner's lawsuit for failure to state a claim upon which relief could be granted. Pet. App. 9a. The trial court held the motion to dismiss hearing on the morning of July 22, 2020. Pet. App. 9a. The hearing transcript indicates "Judge Kreese listened carefully to both sides' arguments, asked numerous probing questions about the merits of each party's claims, and made no comment suggestive of bias toward either party." Pet. App. 9a. Judge Kreese did not announce his ruling at the conclusion of the hearing, but instead took the matter under advisement. Pet. App. 9a. He stated, "You will have my ruling soon, probably later today." Pet. App. 61a. Petitioner filed a voluntary dismissal of

his lawsuit pursuant to Federal Rule of Civil Procedure 41(a)(1) later that afternoon. Pet. App. 9a.

Petitioner refiled his lawsuit against the University on September 21, 2020, in the District Court for the District of Quicksilver, "asserting the same claims as before." Pet. App. 9a. The case was assigned to a different judge. Pet. App. 9a. The University again filed a Rule 12(b)(6) motion to dismiss. Pet. App. 10a. Additionally, the University filed a motion under Federal Rule of Civil Procedure 41(d), asking the trial court to find that Petitioner acted in bad faith and/or vexatiously, and to award the University its costs, including its attorney's fees. Pet. App. 10a. The University's court costs were only a few hundred dollars, but it had incurred attorney's fees of $74,500 during Petitioner's first lawsuit. Pet. App. 42a.

In Petitioner's response to the motions, he denied that his actions in dismissing and refiling his lawsuit were motivated by bad faith or a desire to engage in vexatious litigation. Pet. App. 10a. He claimed the dismissal was prompted by "concerns about possible bias in the first court and counsel's desire to better study applicable law and to ensure [Petitioner's] claims were supported by existing law or presented a good-faith basis for extension or modification of existing law." Pet. App. 10a.

On December 17, 2020, the court heard the University's motions. Pet. App. 10a. At the conclusion of the hearing, the court made a factual finding that Petitioner's actions were motivated by a desire to gain a tactical advantage and to eliminate a perceived tactical disadvantage in which Petitioner believed erroneously that Judge Kreese favored his opponent from the start. Pet. App. 11a. The court also found it was

most likely that Plaintiff nonsuited his first action to avoid an unfavorable judgment on the merits. Pet. App. 11a. The court further found these actions were misguided but not the result of bad faith. Pet. App. 11a. The court then granted both of the University's motions but reduced the University's fee award to $28,150. Pet. App. 11a.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Fourteenth Circuit because Petitioner cannot create a right to direct, unfettered, or maskless cross-examination in an academic disciplinary proceeding. First, and foremost, procedural due process protections do not shift the control of the hearing from the educational institution to the accused. Second, the current protections of Title IX do not impose additional procedures beyond what the University provided for in this case. Therefore, the United States Court of Appeals for the Fourteenth Circuit did not err when it ruled that Petitioner failed to state a claim upon which relief could be granted where the University provided him with an opportunity to be heard and ample opportunity to question his accuser through the Board.

This Court should affirm the judgment of the Fourteenth Circuit and adopt the concurrence's reasoning because the discretion entrusted to trial courts under Federal Rule of Civil Procedure 41(d) is broad enough to include awarding attorney's fees as costs. First, while the plain language of Rule 41(d) does not define costs, it does confer discretion to trial courts to award costs. Second, the purpose of the Rule is to deter vexatious litigants. The purpose of the

Rule cannot be effectuated if trial courts are stripped of the discretion to award costs, including attorney's fees, to deter vexatious litigants like Petitioner. Thus, the United States Court of Appeals for the Fourteenth Circuit did not err in affirming the trial court's award of costs including attorney's fees.

ARGUMENT

I. THERE IS NO ABSOLUTE RIGHT UNDER THE FOURTEENTH AMENDMENT OR TITLE IX TO DIRECT, UNFETTERED, MASKLESS CROSS-EXAMINATION IN A UNIVERSITY DISCIPLINARY PROCEEDING.

The Due Process Clause of the Fourteenth Amendment guarantees due process of law before a government actor may deprive individuals of their life, liberty, or property. U.S. Const. amend. XIV, § 1. The Constitution therefore does not guarantee the government may not rightfully deprive an individual of a liberty or property interest. Rather, it requires fairness guaranteed by certain minimum procedures before an individual may be deprived of a liberty or property interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "Under *Mathews*, a hearing need not include every procedure possible, nor is one entitled to a hearing of one's own design." *Austin v. Univ. of Oregon*, 925 F.3d 1133, 1139 (9th Cir. 2019) (citing *Mathews*, 424 U.S. at 333). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333.

In this case, Petitioner requests a procedural right to direct, unfettered, and maskless cross-examination of witnesses under the Fourteenth Amendment and Title IX. He invokes the protections of procedural due process and Title IX's implementing

regulations. Today, he asks this Court to extend that procedural protection further than ever before.

A. Procedural due process does not require direct, unfettered, or maskless cross-examination.

A student accused of misconduct in a university disciplinary proceeding does not have a right under Fourteenth Amendment procedural due process to direct, unfettered, or maskless cross-examination of witnesses. In a procedural due process challenge, the overarching constitutional question is whether Petitioner had "the opportunity to be heard." *See Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

This Court has declined to set out a universal rule for procedural due process in an administrative hearing and instead instructs lower courts to consider the parties' competing interests. *Mathews*, 424 U.S. at 335. The *Mathews* test determines what level of process the Fourteenth Amendment requires by balancing three factors: (1) the nature of the private interest affected by the deprivation; (2) the risk of an erroneous deprivation in the current procedures used, and the probable value, if any, of additional or alternative procedures; and (3) the governmental interest involved, including the burden that additional procedures would entail. *Id.* In extending due process protections to academic disciplinary proceedings, this Court held that due process does not "afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Goss v. Lopez*, 419 U.S. 565, 583 (1975). On appeal, Petitioner challenges the process due *only* to the extent he was not allowed to conduct a direct and unfettered cross-examination of the victim and to insist that she testify

without a mask. Because Petitioner's interest in not being expelled is a liberty interest recognized in the due process framework, this Court should then weigh the risk of the current procedures, the probative value of the additional procedures, the University's interest, and the additional burden Petitioner seeks to impose. *See Mathews*, 424 U.S. at 335.

The circuit courts have applied the *Mathews* test to determine the extent of cross-examination required in university expulsion proceedings. Of the circuits that have addressed the issue of cross-examination, the University's procedures would satisfy the standard set by *every* court but one. *See, e.g.*, *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 71 (1st Cir. 2019); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); *Walsh v. Hodge*, 975 F.3d 475 (5th Cir. 2020); *Doe v. Michigan State Univ.*, 989 F.3d 418, 432 (6th Cir. 2021); *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858 (8th Cir. 2020); *Austin*, 925 F.3d at 1139; *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 520–21 (10th Cir. 1998); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987). This is because the Constitution simply does not confer a right to direct and unfettered cross-examination of witnesses without protective masks in a university disciplinary proceeding. U.S. Const. amend. XIV; *Austin*, 925 F.3d at 1139 (One is not "entitled to a hearing of one's own design.").

Three overarching principles underscore courts' due process analyses. *First*, due process requires that students have "the right to respond, but their rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial." *Nash*, 812 F.2d at 664 (citing

Goss, 419 U.S. at 583). *Second*, "[w]hether a state university has provided an individual student sufficient process is a fact-intensive inquiry and the procedures required to satisfy due process will necessarily vary depending on the particular circumstances of each case." *Plummer v. Univ. of Houston*, 860 F.3d 767, 777 (5th Cir. 2017). *Third*, and relatedly, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Mathews*, 424 U.S. at 334.

1. Cross-examination need not be directly by the student or his representative.

The right to party-conducted cross-examination "generally has not been considered an essential requirement of due process in school disciplinary proceedings." *Winnick*, 460 F.2d at 549. Not only is direct cross-examination associated with a judicial trial incompatible with university adjudications, but also the accused does not enjoy the constitutional rights to cross-examination implicated in criminal trials. Instead, "due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'" *Haidak*, 933 F.3d at 69. Nevertheless, applying the *Mathews* test to Petitioner's demand for direct cross-examination reveals why an absolute right to direct cross-examination is not and should not be conferred by the Fourteenth Amendment.

First, the Court considers the risk of an erroneous deprivation of Petitioner's interest in continuing in school with University's current disciplinary procedures. *See Mathews*, 424 U.S. at 335. In this case, the current procedures provided for cross-

examination by allowing the accused to submit written questions. Pet. App. 5a. In the circuit courts, students' due process rights were not violated where a hearing board asked questions. *Haidak*, 933 F.3d at 61; *Doe v. Cummins*, 662 F. App'x 437, 448 (6th Cir. 2016) (unpublished); *Univ. of Ark.-Fayetteville*, 974 F.3d at 869; *Nash*, 812 F.2d at 664. Due process was not violated where questions were asked in an administrative conference. *Austin*, 925 F.3d at 1139. Due process was not violated where the university allowed the parties to question witnesses verbally and directly in-person at the hearing, but the victim "was not deposed and did not appear or testify" at the hearing. *Plummer*, 860 F.3d at 772. Only one circuit requires that the person doing the confronting must be the accused student or that student's representative. *See Doe v. Baum*, 903 F.3d 575, 579 n. 3 (6th Cir. 2018); *cf. Haidak*, 933 F.3d at 56 (The Sixth Circuit "took the conclusion one step further than [the First Circuit] care[d] to go.").

Further, in the circuit court cases where a violation of due process occurred, it was a *complete* deprivation of cross-examination compelling those conclusions. There was not enough process where the university's committee or its representative did not directly question the victim nor was the accused permitted to submit questions to be asked. *Walsh*, 975 F.3d at 485 (termination hearing of tenured professor for sexual harassment). There was not enough process where the victim, the only witness, was not required to and did not show up to the hearing; therefore, the procedure of the accused submitting questions to the board was meaningless. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 396–97 (6th Cir. 2017). There was not enough process

where there was no testimonial hearing at all, but only a university investigation reviewed by a closed internal appellate panel. *Baum*, 903 F.3d at 578–79.

In this fact-intensive inquiry and balancing of interests proscribed by this Court in *Mathews*, no circuit court has held that there was an erroneous deprivation of liberty where the alleged procedural deficiency was 'indirect' cross-examination alone. The Sixth Circuit's sweeping language in a footnote does not change this fact. *See Baum*, 903 F.3d at 583, n.3 (mandating that "if the university does not want the accused to cross-examine the accuser under any scenario, then it must allow a representative to do so"). In fact, when a similar procedural due process claim came before the Sixth Circuit three years after *Baum*, the court clarified that *Baum* "held that when the determination of a university disciplinary proceeding depends on credibility, the accused has a constitutional due process right to 'some form of cross-examination' of the claimant at an in person hearing" without mentioning or reaffirming its requirement of a representative. *Michigan State Univ.*, 989 F.3d at 423. Therefore, the risk of an erroneous deprivation of liberty with the University's existing procedures is low, and the Sixth Circuit's footnote should not contravene every other circuit's *Mathews* analysis on this point.

Second, courts weigh the probative value of additional procedures. Here, Petitioner's proposed additional procedures are cross-examination by a representative, rather than by the Board. Importantly, the proposition that a university *must* give an accused student or his attorney an opportunity to cross-examine his accuser—because of cross-examination's alleged probative value—takes

for granted that courts consistently hold that students do not automatically have a right to legal representation in disciplinary proceedings. *See, e.g.*, *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640–41 (6th Cir. 2005); *Haidak*, 933 F.3d at 69–70. If this Court adopts "a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury-waived trial would be near complete." *Haidak*, 933 F.3d at 69–70. Therefore, this Court's decision should not rest on the additional probative value of a skilled attorney cross-examining the accuser because Petitioner's proposed rule will have untrained students cross-examining one another. *See id.* at 71.

Petitioner's proposed rule will, at most, marginally increase cross-examination's probative value because an accused and his representative can already construct and submit questions for cross-examination to the Board. In this model, the Board can question the witness at length on topic areas that the accused student deems important, probe for detail, and require clarification. *See id*. Likewise, this model allows for the trier of fact to observe, in real time, the witness's demeanor while being questioned regardless of who asks the questions. *See Univ. of Cincinnati*, 872 F.3d at 401. Written questions that test the witness's perceptions and memory, expose testimonial inconsistencies, and uncover "'possible biases, prejudices, or ulterior motives' that color the witness's testimony" carry the same probative value as the accused or his representative verbally asking those questions. *See id.* at 402. This is especially the case where, like here, the "Board asked most of [Petitioner's]

initial questions" and allowed with reasonable limitation a number of his "follow-up questions that sought to elicit further details or to impeach Ms. Roe's statements." Pet. App. 6a. Thus, this Court should follow the First and Fifth Circuits, which refused to require "that the questioning of a complaining witness be done by the accused party" because there is a diminutive change in the probative value, and there is "no reason to believe that questioning . . . by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation." *Walsh*, 975 F.3d at 485 (quoting *Haidak*, 933 F.3d at 69).

Third, the Court weighs the University's interest and the additional procedural burdens Petitioner seeks to impose. The University has a paramount interest in "protecting itself and other students from those whose behavior violates the basic values of the school." *Haidak*, 933 F.3d at 66 (citing *Goss*, 419 U.S. at 580). It must also balance "the need for fair discipline against the need to allocate resources 'toward promot[ing] and protect[ing] the primary function of institutions that exist to provide education.'" *Id.*

Universally, courts agree that expulsion proceedings should not rise to the level of adversarial, trial-like proceedings because educational institutions have a strong interest in not turning their classrooms into courtrooms. *See Goss*, 419 U.S. at 583. Education is the most important function of state universities, and their resources cannot be diverted to holding court. *See Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988). Underlying all university proceedings is "an interest in speed and accuracy in the adjudication of charges" against students. *Haidak*, 933

F.3d at 66. Further, courts repeatedly recognize universities' interests in protecting victims of alleged sexual assault while on the stand. *See, e.g.*, *Univ. of Cincinnati*, 872 F.3d at 403; *Baum*, 903 F.3d at 583. Having a student or his representative cross-examine witnesses would transform the classroom into a courtroom, employ the rejected formalistic adversary model, and undermine the University's interest in fairly protecting its students.

The burden of allowing a representative to participate by cross-examining witnesses "in every disciplinary hearing would be significant due to the added time, expense, and increased procedural complexity." *Baum*, 903 F.3d at 590 (J., Gilman, concurring in part and dissenting in part). Imposing "even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness." *Goss*, 419 U.S. at 740–41.

Requiring direct cross-examination would lead to three additional significant burdens. First, the Board's added role of refereeing "an unhelpful contentious exchange or even a shouting match" if students were permitted to personally cross-examine one another would significantly burden its role as the factfinder. *See Walsh*, 975 F.3d at 485; *accord Haidak*, 933 F.3d at 69 (Student-conducted "cross-examination can devolve into more of a debate. And when the questioner and witness are the accused and the accuser, schools may reasonably fear that student-conducted cross-examination will lead to displays of acrimony or worse."). Second, as the First Circuit correctly noted, the creation of an absolute right to party-conducted cross-

examination inevitably leads to the creation of a right to counsel to conduct such examination. *Haidak*, 933 F.3d at 69. This requirement of counsel would be costly for universities to provide and onerous for universities to ensure the quality of counsel in each proceeding. Third, the university's interests in protecting victims of alleged sexual assault while on the stand would be directly burdened by allowing her accuser to be the one doing the confrontation. *See Michigan State Univ.*, 989 F.3d at 431–32.

Because due process does not require cross-examination equivalent to a trial and the *Mathews* balancing weighs in favor of universities here, cross-examination by a Board is constitutionally adequate. *See Goss*, 419 U.S. at 583.

2. Cross-examination *must* be limited.

Cross-examination required by due process is limited, not unfettered. *E.g.*, *Michigan State Univ.*, 989 F.3d at 429. Again applying the *Mathews* test, the risk of an erroneous deprivation because of reasonable limits on cross-examination is low. *Id.* at 432. Petitioner asks for a right that is non-existent under the Constitution and is not recognized even in the criminal courtroom. Courts do not expose witnesses to harassment in the form of unlimited questioning on cross-examination. *Id.* at 431–32; *accord* Fed. R. Evid. 611 ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . avoid wasting time [and] protect witnesses from harassment or undue embarrassment."). Unsurprisingly, no court has "suggest[ed] that the accused in a university disciplinary proceeding is entitled to unlimited questioning of the alleged victims."

Michigan State Univ., 989 F.3d at 431. Thus, the risk of erroneous deprivation of Petitioner's interest is minimal.

Moving still to the second step of *Mathews*, courts analyze the probative value of each topic area the accused alleges was limited on cross-examination. *See id.* at 429 (holding there was no deprivation where the university allowed the victims to refuse to answer a number of questions on cross-examination). In this case, the Board asked some of Petitioner's follow-up questions but reasonably limited them. *See* Pet. App. 6a. Forcing the victim to answer two additional categories of questions over the course of her lengthy testimony—subject to testing by Petitioner's other questions—would not significantly add to the fact-finder's ability to test her credibility.

First, Petitioner proposed further questioning about what and how Ms. Roe was drinking, which the Board deemed "overly aggressive and irrelevant." Pet. App. 6a. The additional probative value of these questions was low because Petitioner already conceded that he purchased Ms. Roe alcohol. *See* Pet. App. 6a. It is reasonable that the Board already had enough information on the issue of whether Ms. Roe was intoxicated at the time she had sex with Petitioner without Petitioner's follow-up questions.

Second, Petitioner requested Ms. Roe's credit-card statements the night of the rape and years earlier for martial arts training. Pet. App. 7a. The additional probative value of these questions is low because it is undisputed that "her credit-card statements would not necessarily identify the beverage [Ms.] Roe had ordered, only the total amount of her charges." Pet. App. 7a. Further, even the dissent agrees,

years-old charges and questions about Ms. Roe's father's current occupation have limited relevance and minimal probative value to this case.

The University's interest is undisputable here. Requiring witnesses to answer every question posed by an accused student would undermine universities' interest in protecting student-witnesses from limitless prodding into a potentially traumatic event and needless probing into their personal lives. *See, e.g.*, *Univ. of Cincinnati*, 872 F.3d at 403. Further, universities must balance the time, expense, and procedural complexity of disciplinary hearings with their primary educational function. *See Haidak*, 933 F.3d at 66.

The additional burden of requiring a disciplinary board to ask every additional question is limitless *and* greater than the burden on courts and victims in criminal matters. If the accused, rather than the arbiter, determined the limits of cross-examination, universities no longer get a say in how to allocate their resources in a disciplinary hearing because the accused gets a right to unfettered questioning with no time or subject matter limitations. If a university board is not allowed to place reasonable limits on cross-examination, the board loses control of the hearing; an accused could elect to question a victim for days, even when a full-day hearing would suffice. The due process threshold cannot require the board to allow every single question the accused poses at the expense of harassment, undue embarrassment, needless repetition, or detours into irrelevant matters. *See* Fed. R. Evid. 611; *Michigan State Univ.*, 989 F.3d at 431.

3. Cross-examination need not be conducted without face masks in a global pandemic .

Although Petitioner's procedural rights are not coterminous with those of a defendant in a criminal trial, the fact that courts have held that a witness testifying with a mask satisfied the Confrontation Clause demonstrates that the risk of erroneous deprivation due to a witness testifying with a face mask here is low. *Goss*, 419 U.S. at 583; *see United States v. Crittenden*, 4:20-CR-7(CDL), 2020 WL 4917733, at *6 (M.D. Ga. Aug. 21, 2020) (holding that face mask-wearing witness did not violate the defendant's Sixth Amendment right to confront witnesses); *United States v. James*, CR1908019001PCTDLR, 2020 WL 6081501, at *2 (D. Ariz. Oct. 15, 2020) (same).

While the pandemic presented unprecedented times, the legal system need not reinvent the wheel. The 'facial covering' Confrontation Clause cases illuminate the risks to Petitioner of an erroneous deprivation due to Ms. Roe's mask-wearing. Pre-pandemic, a witness could wear a disguise. *Moralez v. Artuz*, 281 F.3d 55, 61–62 (2d. Cir. 2002) (no Confrontation Clause violation where the witness wore dark sunglasses); *United States v. de Jesus Casteneda*, 705 F.3d 1117, 1121 (9th Cir. 2013) (no Confrontation Clause violation where the witness wore a mustache and wig). Pre-pandemic, a Muslim woman was not required to reveal her face while testifying. *Commonwealth v. Smarr*, 1179 WDA 2018, 2019 WL 2881487, at *6 (Pa. Super. Ct. July 3, 2019) (no Confrontation Clause violation where the sole eyewitness testified wearing a religious scarf that covered her face except for her eyes). During the pandemic, at least two district courts concluded that mask-wearing witnesses do not

violate a defendant's Confrontation Clause rights. *Crittenden*, 2020 WL 4917733, at *6–7; *James*, 2020 WL 6081501, at *2. Thus, if the risk of depriving criminal defendants of their Confrontation Clause rights is not outweighed by the value of witness's facial covering in certain circumstances, neither should the risk of mask-wearing in the academic disciplinary context be given such weight.

The risk of erroneous deprivation is also low because the obscured view of Ms. Roe's mouth and nose resulted in only minimal impairment in the Board's opportunity to assess credibility. The Board had an entirely unimpaired opportunity to assess the delivery of the testimony in her voice, notice any evident nervousness, and observe her body language. *See Moralez*, 281 F.3d at 61. "Most important, they had a full opportunity to combine these fully observable aspects of demeanor with their consideration of the substance of her testimony, assessing her opportunity to observe, the consistency of her account, any hostile motive, and all the other traditional bases for evaluating testimony." *Id.* at 61–62. All that was lacking was the Board's ability to discern whatever might have been indicated by the movement of her mouth as she spoke. *See id.* Therefore, the probative value of the additional procedure—forcing Ms. Roe to take off her mask—is only minimally increased because of the abundance of ways the panel had to evaluate her credibility.

Importantly, if the Board followed Petitioner's request and required Ms. Roe to testify remotely, Petitioner could challenge that the Board had to assess Ms. Roe's body language in-person to avoid an erroneous deprivation of his liberty interest. *See* Crittenden, 2020 WL 4917733, at *7. "Demeanor includes the language of the entire

body." *Id.* Therefore, Petitioner's proposition that a witness testifying in a mask is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation ignores that in an alternate universe, Petitioner's proposed additional procedures would create the exact same risk of the panel not seeing Ms. Roe's full demeanor and would not add any probative value.

The University's interest in ensuring the safety of students and faculty in the midst of a unique global pandemic is substantial. On April 3, 2020, the White House Coronavirus Task Force and Centers for Disease Control and Prevention ("CDC") formally recommended the universal use of face coverings in public settings to slow the spread of COVID-19.[1] These recommendations remained in place on the date of the hearing, May 20, 2020, and the University followed them, requiring all hearing participants to wear face coverings.[2] Wearing a mask not only protects the wearer, but additionally, protects others in the same room from exposure to a lethal virus—here Petitioner, his attorney, and the hearing board of five employees and students.[3] Thus, the additional procedure of requiring Ms. Roe to remove her mask would burden the University's interest in protecting its faculty, staff, and students from COVID-19 in May 2020.

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[1] *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, CDC (Apr. 3, 2020), https://web.archive.org/web/20200403221424/https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

[2] Kiva A. Fisher, et al., *Factors Associated with Cloth Face Covering Use Among Adults During the COVID-19 Pandemic—United States, April and May 2020*, Morbid & Mortality Weekly Report, CDC (July 13, 2020); Pet. App. 4a–5a.

[3] *Id.*

Petitioner's requested remote testimony implicates the University's interests in conducting a fair proceeding in a separate and distinct way. Alleged victims have a statutory right to attend college without fear of sexual assault or harassment; if they are assaulted, and report the assault, they are also entitled to expect that their university will promptly respond. *See* 20 U.S.C. § 1681(a). It falls on the University to protect this right. *Id.* The University's further interest in "establishing a fair and constitutionally permissible disciplinary system" requires that the accused and the accuser are treated fairly, such as having a right to attend the proceeding in person. *See Doe v. Univ. of Kentucky*, 860 F.3d 365, 370 (6th Cir. 2017) (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

It is an impossible burden on a university to allow an accused student to dictate who attends the proceeding remotely while also protecting a victim's statutory right to bring a claim. Further, if Ms. Roe was not present, Petitioner might have a claim under *Doe v. University of Cinncinati*, where the procedural deficiency was the nonappearance of the accuser at the hearing. *See* 872 F.3d at 401. Therefore, Petitioner's request for remote testimony would add procedural complexity and burden the University's interest in a fair proceeding where Ms. Roe gets a choice in whether to be physically present. Thus, testimony with a mask in this setting is constitutionally adequate and satisfies procedural due process requirements.

B. Title IX does not require direct, unfettered, or maskless cross-examination.

The Fourteenth Circuit correctly held that Petitioner cannot enforce the procedures of Title IX's implementing regulation because the regulation was not in

effect at the time of the hearing. *See* 34 C.F.R. § 106.45(b)(6)(i); Pet. App. 26a. The Fourteenth Circuit also rightly noted that the rule's provision which prohibited the consideration of statements not subject to cross-examination[4] was struck down as arbitrary and capricious on July 28, 2021, and has not been used by university procedures since. *See Victim Rights Law Ctr. v. Cardona*, 552 F. Supp .3d 104, 138 (D. Mass 2021); Pet. App. 26a. In July 2022, the Department of Education issued a notice of proposed rulemaking, recognizing that "the language in the current rule placing limitations on the decisionmaker's ability to consider statements not subject to cross-examination was vacated by *Cardona*" and stating it is "no longer part of the current regulation." *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390-01 (Dep't of Education July 22, 2022) (notice of proposed rulemaking). The notice and comment period for the Department of Education's new regulations implementing Title IX is still ongoing. *See id.* Thus, the Petitioner's individual procedural challenge is not ripe for review until the agency promulgates the new rule. *See Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967) (holding that agency action is not "appropriate for judicial resolution" until it is definite and final).

[4] The exact language of the invalidated rule is "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions." 34 C.F.R. § 106.45.

Even so, Petitioner's suggested rule extends more protection than the rule's provisions that survived the arbitrary and capricious challenge. First, to the extent that Petitioner wanted to cross-examine Ms. Roe himself, that is expressly forbidden in the rule; cross-examination must "never [be] by a party personally." 34 C.F.R. § 106.45(b)(6)(i). The remaining part of the rule allows an accused's 'advisor' to cross-examine witnesses but that advisor is of the university's choice, and may be, but is not required to be, an attorney. *Id.* Second, the rule does not require unfettered cross-examination but requires a determination by the decision-maker as to whether additional questions are relevant and an explanation of any decision to exclude a question as not relevant—just like what the Board did here. *See id.* Third, the rule does not address masks but does allow virtual testimony at the university's discretion. *See id.* This indicates that a limited view of demeanor evidence, a witness's body language, is permissible under the rule. Thus, it logically follows that mask-wearing would be up to the university's discretion as well.

C. Petitioner's request for an absolute right to cross-examine does not comport with the procedural protections afforded by the Fourteenth Amendment or Title IX.

The dissent from the Fourteenth Circuit's opinion contends that courts "consider these due-process issues as a whole, not merely as component parts." Pet. App. 45a. This is unsupported by *Mathews*. *See* 424 U.S. at 335. The *Mathews* analysis requires that courts look at each of the proposed additional procedures' distinct probative value and burdens. *See id.* at 334–35.

Still, focusing on the forest, rather than the trees, is even more troubling; Petitioner seeks to impose a constitutional floor higher than circuit courts have set the ceiling. Petitioner claims he is "entitled to a hearing of [his] own design." *Austin*, 925 F.3d at 1139. Even looking at the sum of the alleged procedural deficiencies, the dissent's proposed test, Petitioner's hearing still comported with the total level of process required by the First, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits[5] and the Title IX implementing regulations *at the time of the hearing*. As such, the dissenting opinion only comments on the merits of Title IX gender bias claim, not the additional procedural protection Petitioner seeks to invoke on appeal. *See* Pet. App. 56a.

Likewise, the dissenting opinion looks to equivocal language in Speedy Trial Act COVID-19 cases rather than the unequivocal language in the Confrontation Clause COVID-19 cases. *See* Pet. App. 54a–55a (relying on *United States v. Sheikh*, 493 F. Supp. 3d 883, 887 (E.D. Cal. 2020) and *United States v. Young*, No. 19-cr-00496-CMA, 2020 WL 3963715, at *2 (D. Colo. July 13, 2020). The Confrontation Clause cases must carry the day. First, the issue of confronting witnesses is more analogous to Petitioner's request for maskless cross-examination in a university proceeding. Second, the protections afforded to criminal defendants by the Confrontation Clause extend further than Petitioner's due process rights in his expulsion proceeding.

[5] The Third, Fourth, and D.C. Circuits have not addressed the precise issue. The Second Circuit has not addressed the cross-examination in the post *Mathews-Goss* era. The procedures here would comport with the narrowed holding of *Baum* articulated in *Michigan State University*. *See supra* Part I.A.1.

Nevertheless, the lengthy hearing, complete with in-person cross-examination, gave the Board ample opportunity to judge the credibility of Ms. Roe's account of events contrary to the dissenting opinion's characterization. Any probative value of forcing a witness to answer every question verbally posed by the accused while exposing herself to the dangers of COVID-19 in May 2020 is outweighed by the University's interests and the additional burden it imposes.

No court has stretched the procedural due process requirements as far as Petitioner wishes to go. "Where basic fairness is preserved," courts do not require direct, unfettered, and maskless "cross-examination of witnesses and a full adversary proceeding." *See Nash*, 812 F.2d at 664 (citing *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975)). Again and again, courts uphold the principle that the "rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial." *E.g.*, *id.*; *Goss*, 419 U.S. at 583; *accord Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88–90 (1978)). This case does not present an occasion to uproot underlying, long-standing principles of procedural due process.

Although Petitioner did not ask questions directly of the adverse witness at the hearing, the Board heard all of the testimony. Petitioner was clearly informed he and his attorney could pose questions to Ms. Roe by directing his questions to the presiding panel, who would then direct the questions to Ms. Roe, and the record does not state that Petitioner asked to question Ms. Roe directly. Therefore, like the First Circuit in *Haidak*, this Court should not fashion an occasion to widen a procedure

that Petitioner, himself, did not assert at the hearing. *See* 933 F.3d at 69. The Board was satisfied in challenging the inferences suggested by the testimony of the accusing witness and did not feel the need to ask Petitioner's questions. This is squarely within the discretion of the University. Lastly, if the Confrontation Clause does not require a witness to remove her mask, it follows that a witness in a disciplinary proceeding need not remove her mask when the Board could clearly hear her answers and see her eye movements and body language.

In conclusion, Petitioner, with existing procedures, had a meaningful opportunity to be heard and the Respondent requests that this Court hold a student accused of misconduct in a university disciplinary proceeding does not have a right, under the Fourteenth Amendment or Title IX, to direct and unfettered cross-examination of witnesses or to insist that such witnesses testify without face coverings.

II. ATTORNEY'S FEES ARE COSTS WITHIN THE MEANING OF FEDERAL RULE OF CIVIL PROCEDURE 41(D).

This Court should affirm the Fourteenth Circuit's judgment and adopt the concurrence's approach that the discretion granted to trial courts in Federal Rule of Civil Procedure 41(d) to deter vexatious litigants is broad enough to include awarding attorney's fees as costs. Federal Rule of Civil Procedure 41(d) states:

> 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.

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

Circuit courts are split on whether or not Rule 41(d) permits trial courts to award attorney's fees as "costs." All but one circuit court that reached the issue agree that attorney's fees are available as costs under the Rule at least under certain circumstances. *See, e.g.*, *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 24 (2d Cir. 2018) (holding that Rule 41(d) grants trial courts the discretion to award attorney's fees as costs); *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000) (holding that trial courts may award attorney's fees as costs under Rule 41(d) if (1) the substantive statute defines costs to include attorney's fees, or (2) the suit was baseless, meritless, vexatious, or made in bad faith).[6] Only the Sixth Circuit holds that attorney's fees can never be awarded as costs under Rule 41(d). *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 874 (6th Cir. 2000).

The Second, Eighth, and Tenth Circuits hold that it is always within trial courts' discretion to award attorney's fees as costs under the Rule, unless the underlying statute defines costs and excludes attorney's fees from that definition.[7] *Horowitz*, 888 F.3d at 25; *Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th Cir. 1980); *Meredith v. Stovall*, 216 F.3d 1087, 2000 WL 807355, at *1, *4 (10th Cir. 2000) (unpublished). Because the plain language of Rule 41(d) does not define "costs," these circuits then look to see if Rule 41(d) evinces an intent to provide for attorney's fees. *Horowitz*, 888 F.3d at 25 (relying on *Key Tronic Corp. v. United States*, 511 U.S. 809,

[6] The Ninth and Eleventh Circuits were presented with the issue but declined to adopt an approach. *Moskowitz v. Am. Sav. Bank, F.S.B.*, 37 F.4th 538, 546 (9th Cir. 2022); *Sargeant v. Hall*, 951 F.3d 1280, 1282 n. 1 (11th Cir. 2020).

[7] Hereinafter the always approach.

815 (1994). These circuits reason that because Rule 41(d)'s intent is to deter vexatious litigation, any other approach would undermine the Rule. *Id.* Because Rule 41(d) does not define or limit "costs" and grants trial courts broad discretion, these circuits construe "costs" broadly to include attorney's fees. *Id.*

The Third, Fourth, Fifth, and Seventh Circuits hold that trial courts have discretion to award attorney's fees under Rule 41(d) if (1) the underlying statute defines "costs" as including attorney's fees or (2) the plaintiff brought a frivolous or meritless suit or acted in bad faith, vexatiously, or for oppressive reasons.[8] *Garza v. Citigroup Inc.*, 881 F.3d 277, 285 (3d Cir. 2018) (affirming the denial of attorney's fees because the underlying statute did not authorize attorney's fees as costs and the moving party made no argument of bad faith); *Andrews v. America's Living Ctrs., LLC*, 827 F.3d 306, 308 (4th Cir. 2016) (reversing award of attorney's fees because the statute did not address prevailing defendants and because the moving party made no argument of bad faith); *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017) (vacating the award of attorney's fees because although the statute authorized attorney's fees for prevailing defendants, the moving party did not argue the additional statutory requirement of bad faith); *Esposito*, 223 F.3d at 501–02 (affirming dismissal of appellee's second suit after he did not pay attorney's fees and affirming award of attorney's fees to prevailing defendants to prevent vexatious litigation). These circuits hold that absent congressional intent to the contrary, where the underlying statute defines costs to include attorney's fees, trial courts have the

[8] Hereinafter the hybrid approach.

discretion to award attorney's fees as costs under Rule 41(d). *Esposito*, 223 F.3d at 501. This approach relies on *Marek v. Chesny*, in which this Court interpreted Federal Rule of Civil Procedure 68 to include attorney's fees as costs if the underlying statute defines costs to include attorney's fees. 473 U.S. 1, 10 (1985). These circuits reason that there must be a compelling basis to set aside the American Rule that all parties pay for their own attorney's fees. *See Esposito*, 223 F.3d at 501.

The Sixth Circuit holds that courts never have the discretion to award attorney's fees as costs under Rule 41(d).[9] *Rogers*, 230 F.3d at 874. The Sixth Circuit reasons that because Rule 41(d) does not define "costs," it must be read narrowly to exclude attorney's fees. *Id.* While there is no explicit authorization for attorney's fees in Rule 41(d), the Sixth Circuit treats this omission as an affirmative command that attorney's fees are never recoverable under the Rule. *See id.* (relying on *Key Tronic*, 511 U.S. at 815).

This Court now has the opportunity to clarify Rule 41(d) and reinforce trial courts' discretionary authority granted by the Rule. This Court should first look to the plain language of the Rule to define costs and then determine if the Rule otherwise conveys an intent to include attorney's fees as costs to execute its deterrent function. This Court should adopt the Second, Eighth, and Tenth Circuits' always approach and hold that the discretion granted to trial courts by Rule 41(d) is broad enough to include awarding attorney's fees as costs because the Rule's plain language and deterrent purpose demand such a bright-line standard. Applying that standard,

[9] Hereinafter the never approach.

this Court should conclude that the trial court here, the United States District Court for the District of Quicksilver, did not abuse its discretion in awarding the University's attorney's fees for the first action because Petitioner was vexatious.

A. Attorney's fees are awardable as costs under Rule 41(d).

Because the plain language of Rule 41(d) grants trial courts broad discretion to effectuate the Rule's purpose of deterring vexatious litigation, attorney's fees are awardable as costs within the meaning of Rule 41(d). *Key Tronic* lays out a three-step inquiry to determine whether attorney's fees can be awarded as costs: (1) Is there explicit authorization by Congress to provide an award of attorney's fees for this specific claim?; (2) If not, does the statute otherwise convey an intent to make attorney's fees awardable?; and (3) Is that intent more than a generalized command? 511 U.S. at 814–15.

Applying this test to Rule 41(d) leads to the proper conclusion that attorney's fees are costs within the meaning of the Rule. First, while there is no explicit authorization of attorney's fees, the plain language grants trial courts discretion to award "all or part of the costs of that previous action." Second, the Rule evinces an intent to award attorney's fees because the Rule grants discretionary authority to trial courts to fulfill its deterrent purpose. Third, the intent is more than a generalized command but, rather, gives trial courts discretion to award costs, including attorney's fees, in a way that would best deter specific vexatious litigants.

1. The plain language of Rule 41(d) grants discretion to trial courts to award attorney's fees as costs.

First, this Court should look to the plain language of Rule 41(d) for authorization to award attorney's fees as costs. *See Key Tronic*, 511 U.S. at 814–15. Here, the plain language states that if "a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant," the court "*may* order the plaintiff to pay *all or part* of the costs of that previous action" and also "*may* stay the proceedings until the plaintiff has complied." Fed. R. Civ. P. 41(d) (emphasis added). While the plain language does not explicitly provide for attorney's fees, it does explicitly provide for costs and does explicitly grant trial courts broad discretion to award costs. *See id.*

Plain language can only be overridden "under rare and exceptional circumstances" where the absurdity of the application is "so gross as to shock the general moral or common sense" or if there is plain intent of the drafter that the plain language is not to prevail. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) (noting that these difficult questions are for the legislature—not courts—to answer). "It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation." *Id.*

Here, there are no grossly absurd results that would shock the moral or common sense when Rule 41(d)'s plain language is applied to include attorney's fees as costs. In fact, a bright-line rule that "costs" include attorney's fees is the most reasonable conclusion. Adopting this bright-line allows trial courts to exercise their

discretion—granted by the Rule's plain language—to award any, all, or none of the costs, including attorney's fees, from a plaintiff's previous action. Fed. R. Civ. P. 41(d) (Courts "*may* order the plaintiff to pay *all or part* of the costs of that previous action"). There is nothing in Rule 41(d) that would require trial courts to award any cost or fee that they did not deem reasonable. Rule 41(d) entrusts trial courts to award costs when and how they think it is necessary. *Meredith*, 2000 WL 807355, at *4 ("Under the language of Rule 41(d), the decision whether to impose costs and attorney's fees is within the discretion of the trial court."). For example, here, the University requested $74,500 for attorney's fees and costs, Pet. App. 10a, but was granted only $28,150 by the trial court, Pet. App. 11a. A definition of costs that includes attorney's fees protects the trial court's discretion to award money to prevailing parties in a way that would best serve the interests of justice.

Adopting a bright-line rule that costs can never be interpreted to include attorney's fees in Rule 41(d) would lead to grossly absurd results that would shock the moral and common sense. It would be unreasonable to conclude that even though trial courts are plainly granted broad discretion to fulfill the purpose of Rule 41(d) that they can only award costs, excluding attorney's fees—amounts that are often so minimal that they cannot serve as a deterrent. *See Horowitz*, 888 F.3d at 25–26.

Adopting the hybrid rule of the Third, Fourth, Fifth, and Seventh Circuits would place "an arbitrary condition on . . . Rule 41(d)." *Id.* at 26 n.6. Not only is the condition arbitrary, but it finds no basis in the plain language. The conditions of the underlying statute defining attorney's fees as costs or of the plaintiff acting in bad

faith goes beyond the drafters' plain language. *See id.* The only requirement of Rule 41(d) is that a plaintiff refile the same or similar claim against the same defendant. Fed. R. Civ. P. 41(d). There is no requirement of bad faith, frivolity, or anything other than the filing of the second claim. *See id.* There is no language in the Rule to limit "costs" to those enumerated in the underlying statute. *See id.* There is no language in the Rule to exclude attorney's fees as "costs" or to limit the discretion of trial courts. *Horowitz*, 888 F.3d at 25 ("Here, Rule 41(d) incorporates no other definition of costs, either expressly or by reference, and therefore attorneys' fees are not precluded . . ..").

If the drafters meant to limit trial courts' discretion to award costs, including attorney's fees, then they would have added additional requirements to the Rule. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) ("it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write"); *Pinares v. United Techs. Corp.*, 973 F.3d 1254, 1262 (11th Cir. 2020). Adding additional requirements beyond what is proscribed in the Rule is a lawmaking act by courts. *See Va. Uranium*, 139 S. Ct. at 1900; *see also Jaske v. C.I.R.*, 823 F.2d 174, 176 (7th Cir. 1987) ("The absence of a possible exception or condition to the application of a statute requires the conclusion that it was intentionally omitted unless the legislative history or other evidence makes it clear that the statute is not to be applied literally."). Courts cannot create law, but rather, must interpret the law as it is written. *See id.*

While there is no explicit authorization to award attorney's fees as costs in Rule 41(d), the plain language of the Rule reasonably leads to the conclusion that trial courts have broad discretion to award costs and that broad discretion extends to

awarding attorney's fees as costs. *See Key Tronic*, 511 U.S. at 814–15; *Crooks*, 282 U.S. at 60. Further, the lack of explicit authorization to award attorney's fees as costs does not exclude the possibility that the drafters intended for attorney's fees to be awardable under the Rule. *See Key Tronic*, 511 U.S. at 815. Thus, courts continue with the *Key Tronic* analysis and determine whether the Rule conveys an intent to award attorney's fees as costs within the broad discretion granted to trial courts. *Id.*

2. The scheme of Rule 41(d) requires defining "costs" to include attorney's fees.

Even if there is no explicit authorization for attorney's fees in the Rule's plain language, this Court should hold that costs include attorney's fees because the Rule "otherwise evince[s] an intent to provide for [attorney's] fees." *See id.* Every circuit court that reached this issue agrees the purpose of Rule 41(d) is to prevent vexatious litigation. *E.g.*, *Horowitz*, 888 F.3d at 25; *Andrews*, 827 F.3d at 312; *Rogers*, 230 F.3d at 874. Courts define vexatious litigation as "at least some attempt to wipe the slate clean after an initial setback," *Rogers*, 230 F.3d at 874, such as nonsuiting to avoid disfavorable judgment, *Andrews*, 827 F.3d at 312, attempting to gain a tactical advantage, *Rogers*, 230 F.3d at 874, forum shopping, *Horowitz*, 888 F.3d at 25, nonsuiting in attempt to be assigned a different judge, *id.* at 26, or acting in bad faith *Garza*, 881 F.3d at 284.

The scheme of Rule 41(d) "would be substantially undermined were the awarding of attorneys' fees to be precluded." *Horowitz*, 888 F.3d at 25. Trial courts must have discretionary authority to award attorney's fees as costs to carry out the deterrent purpose of Rule 41(d) when they reasonably believe it is needed. *See id.* at

26. Court costs, absent attorney's fees, are often small payments, such as the $75.85 in *Horowitz*. *See id.* Trial courts ordering plaintiffs to pay these minor payments will not effectively deter most plaintiffs from forum shopping or bringing vexatious litigation. *Id.* Rule 41(d)'s deterrence effect would be left toothless if attorney's fees were never within a trial court's discretion to award. *Id.* at 25–26; Pet. App. 41a.

Additionally, ruling that attorney's fees are always awardable as costs will reduce further unnecessary satellite litigation about attorney's fees—a practice consistently discouraged and looked down upon by this Court. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation."); *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002) (reasoning that satellite litigation over attorney's fees is not encouraged because judges "are accustomed to making reasonableness determinations in a wide variety of contexts" like the assessment of attorney's fees). Rather than judicial review of whether there was bad faith or looking to every underlying statute for specific instruction, courts can exercise their discretion to award costs, including attorney's fees, in a way that effectuates the purpose of Rule 41(d).

The deterrent purpose of Rule 41(d) guides this approach, rather than the specific purpose of attorney fee provisions in the underlying statutes. *Horowitz*, 888 F.3d at 25. Attorney fee provisions in statutes relate to the purpose of the specific statute and reflect Congress's intentions for the actions that the statute specifically establishes. These statutory provisions are often drafted to be a punitive measure for violators and abusers of the law for claims that otherwise do not allow punitive

damages or lead to minimal compensatory damages. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 576 (1982). Separately, Rule 41(d) does not focus on the outcome of statutory claims or whether or not a party violated a law, but rather provides functional sanctions for abuse of procedure. *See* Fed. R. Civ. P. 41(d). The Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The specific purpose of Rule 41(d) is to deter litigants from abusing the court system and unnecessarily filing multiple claims, clogging up the courts. *Horowitz*, 888 F.3d at 25. Holding that attorney's fees are always recoverable costs under Rule 41(d) best serves the purpose of the Rule: to deter litigants from vexatiously bringing the same claims against the same defendant. *See id.* at 25–26.

Further, the Sixth Circuit's dismissal of *Key Tronic* is troubling. *Rogers*, 230 F.3d at 875 (acknowledging step two of the *Key Tronic* test but refusing to apply it). Again, *Key Tronic*'s three-part test for determining whether "costs" include attorney's fees is: (1) if there is explicit authorization, then costs include attorney's fees; (2) if there is no explicit authorization, then the Rule must convey an intent to provide attorney's fees as costs; and (3) that intent must be more than a generalized command. *See* 511 U.S. at 814–15. The Sixth Circuit begins its analysis with the first step, but does not address the remaining two steps of *Key Tronic*, and then, holds that attorney's fees are never available unless a statute explicitly defines costs to include attorney's fees. *Rogers*, 230 F.3d at 875. Other circuits that continue with the *Key*

Tronic analysis, such as the Second Circuit in *Horowitz*, correctly analyze all three factors. *Horowitz*, 888 F.3d at 24–26. As to the second factor, every court faced with the issue held the purpose of Rule 41(d) was deterrence of vexatious litigation. Because Rule 41(d) explicitly provides for "costs" to deter vexatious litigation, the Rule conveys an intent to provide for attorney's fees. *See id.* Finally, as for the third step of the *Key Tronic* analysis, Rule 41(d)'s intent to provide for attorney's fees as costs is more than a generalized command. The command in Rule 41(d) is specific. Trial courts are granted discretion to award "all or part of the costs of [the] previous action." Fed. R. Civ. P. 41(d). This discretion given to trial courts makes the intent more than a generalized command. All of the *Key Tronic* factors are met by interpreting costs to include attorney's fees.

Because Rule 41(d) indicates an intent to provide attorney's fees as costs to effectuate its deterrent purpose and that intent is more than a generalized command, attorney's fees are included as costs, despite the absence of explicit authorization. *See Key Tronic*, 511 U.S. at 814–15. Rule 41(d) grants trial courts broad discretion to deter vexatious litigants; that discretion must include the ability to award attorney's fees as costs.

B. The trial court did not abuse its discretion in awarding the University their costs, including attorney's fees, for Petitioner's previous suit.

Courts review awards of attorney's fees for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 571 (1988); *Hensley*, 461 U.S. at 437 (1983). Applying the always approach, first, this Court confirms that the underlying statute does not

exclude attorney's fees as costs. Second, this Court determines whether the trial court was reasonable in concluding that Petitioner was a litigant who needed to be deterred from acting vexatiously. Because both elements of the always approach are met, this Court should hold that the trial court did not abuse its discretion in awarding attorney's fees to the University for Petitioner's prior action.

Even applying the hybrid approach, the trial court did not abuse its discretion because the requirements imposed by the hybrid approach are met here. The first hybrid test is satisfied because the underlying statute authorizes attorney's fees as costs. The second hybrid approach test and the third, additional, statute-specific test are satisfied because Petitioner acted vexatiously.

1. 42 U.S.C. § 1988 does not exclude awarding attorney's fees as costs.

The underlying statutes' attorney's fees provision here, 42 U.S.C. § 1988, does not exclude attorney's fees as costs. The threshold inquiry for an abuse of discretion analysis in awarding attorney's fees as costs is whether the underlying statute excludes attorney's fees as costs. *Horowitz*, 888 F.3d at 25. While the underlying statute need not define costs to include attorney's fees, courts must ensure that the statute does not explicitly *exclude* attorney's fees as a recoverable cost. *Id.* The underlying statutes for Petitioner's claim are 42 U.S.C. § 1983 and Title IX. Both § 1983 and Title IX have an attorney's fees provision, § 1988. § 1988 defines costs to include attorney's fees. § 1988(b) ("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."). As this Court noted in *Marek*, Congress was "well aware" of the Federal

Rules of Civil Procedure when it drafted § 1988. 473 U.S. at 11. There is nothing in § 1988 to indicate an intention by Congress to exclude the fee-shifting provision of Rule 41(d). *See* 42 U.S.C. § 1988. Because the underlying statute does not exclude awarding attorneys' fees as costs, this Court can continue the abuse of discretion analysis.

2. The award of attorney's fees serves as an appropriate deterrent for Petitioner and future vexatious litigants.

Because Petitioner acted vexatiously throughout the proceeding, the trial court did not abuse its discretion in awarding partial costs, including partial attorney's fees, to the University. Courts consider a plaintiff's actions to determine if they were a vexatious litigant that Rule 41(d) is meant to deter. *Horowitz*, 888 F.3d at 26. Vexatious litigation within the context of Rule 41(d) means "at least some attempt to wipe the slate clean after an initial setback." *Rogers*, 230 F.3d at 874. The trial court found that (1) Petitioner likely nonsuited his first action to avoid a disfavorable judgment on the merits; (2) Petitioner's actions were motivated by a desire to gain a tactical advantage; and (3) Petitioner's original judge did not favor the University. Pet. App. 11a. Any one of these individual findings is sufficient to justify an award of attorney's fees, and when viewed in the collective, nearly demand an award of attorney's fees.

First, nonsuiting to avoid a disfavorable judgment is commonly cited by courts as justification for awarding attorney's fees as costs. *Andrews*, 827 F.3d at 312; *Horowitz*, 888 F.3d at 26. After the motion to dismiss hearing concluded, Judge Kreese stated "that he would take the matter under advisement," Pet. App. 9a, and

announced that the parties would "have [his] ruling soon, probably later today," Pet. App. 61a. Petitioner filed a voluntary dismissal later that afternoon—notably after all the arguments were fully developed and presented both in motions and at the hearing. Pet. App. 61a. The trial court found that Petitioner "likely nonsuited his first action to avoid an unfavorable judgment on the merits." Pet. App. 11a. This alone is sufficient to support an award of attorney's fees. *See Andrews*, 827 F.3d at 313–14. Petitioner, however, committed even more actions that Rule 41(d) is meant to deter.

Second, actions motivated by a desire to gain a tactical advantage are exactly those which Rule 41(d) intends to deter. *Rogers*, 230 F.3d at 874. "Rule 41(d) is also intended to prevent attempts to 'gain any tactical advantage by dismissing and refiling the suit.'" *Id.* Petitioner nonsuited and then refiled in at least some attempt to "wipe the slate clean." *See id.* The trial court's factual finding that Petitioner's actions were "motivated by a desire to gain a tactical advantage" and "to eliminate a perceived tactical disadvantage" is further evidence that the trial court did not abuse its discretion in awarding attorney's fees as costs. Pet. App. 11a.

Third, nonsuiting in an attempt to be assigned a different judge is a sufficient finding to award attorney's fees as costs. *Horowitz*, 888 F.3d at 26. Petitioner erroneously believed Judge Kreese was biased towards the University and nonsuited to "eliminate [this] perceived tactical *disadvantage*." Pet. App. 11a (emphasis in original). If Petitioner genuinely believed that Judge Kreese was biased towards the University, he could have—and should have—nonsuited earlier in the case in an attempt to be assigned a different judge. In fact, in the United States District Court

for the District of Quicksilver, it is permissible to refile an action in an attempt to be assigned a different judge. Pet. App. 9–10, n. 5. Judge Kreese was well-known as a University athletics supporter and proud alumnus. Pet. App. 8a. While the trial court made a factual finding that Judge Kreese was not biased towards the University, Pet. App. 11a, Petitioner still could have nonsuited and refiled immediately to be assigned a new judge. But he didn't. He waited until the conclusion of the motion to dismiss hearing—when Petitioner thought he would lose on the merits—and nonsuited. Pet. App. 9a.

Fourth, the cost of Petitioner's previous action is too menial to accomplish the deterrent purpose of Rule 41(d). The court costs of Petitioner's previous action added up to a few hundred dollars, excluding attorney's fees. Pet. App. 42a. A few hundred dollars is not sufficient to deter Petitioner from further vexatious actions. Pet. App. 42a. Additionally, the trial court found that the initial request of $74,500 of attorney's fees plus the costs of the proceeding was too harsh of a punishment for Petitioner, and reduced the costs, including attorney's fees to $28,150. Pet. App. 10a–11a. The trial court's exercise of discretion under Rule 41(d) is exactly how the Rule was meant to be applied. Rather than requiring courts to award a set amount or use an all-or-nothing approach, Rule 41(d) grants trial courts the discretion to award costs in a way that would deter specific plaintiffs. Here, the trial court did not abuse its discretion because the costs, absent attorney's fees, were too low to properly deter Petitioner from further vexatious actions.

Here, where Petitioner nonsuited his first action (1) to avoid an unfavorable judgment on the merits; (2) gain a tactical advantage; and (3) be assigned a different judge, the trial court did not abuse its discretion in awarding $28,150 in attorney's fees and court costs to the University.

3. Petitioner's actions justified awarding attorney's fees as costs even under the hybrid approach.

The hybrid approach permits trial courts to award attorney's fees as costs if (1) the underlying statute authorizes attorney's fees as costs *or* (2) the plaintiff acted vexatiously, operated in bad faith, or brought a frivolous or meritless suit. *Andrews*, 827 F.3d at 310–12. Additionally, the hybrid approach requires trial courts to consult the underlying statute for additional procedures or conditions to award attorney's fees under Rule 41(d). *See Esposito*, 223 F.3d at 501. Here, because the underlying statute, § 1988, authorizes attorney's fees as costs and Petitioner acted vexatiously, the trial court did not abuse its discretion in awarding attorney's fees as costs. Further, § 1988 requires prevailing defendants to prove that a plaintiff acted vexatiously or in bad faith. Because this requirement is duplicative of the hybrid approach's second test, the trial court did not abuse its discretion.

First, the underlying statute's attorney's fees provision, § 1988, explicitly authorizes awarding attorney's fees as costs. § 1988(b) ([T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .."). Meeting this requirement alone is sufficient to award attorney's fees as costs under the hybrid approach. *See Esposito*, 223 F.3d at 501.

Second, and alternatively, because Petitioner acted vexatiously, the other hybrid approach test is satisfied. Even though this test does not have to be analyzed because the first test is satisfied, Petitioner's vexatious actions nonetheless pass the second hybrid test. The same actions that made Petitioner the type of vexatious litigant that Rule 41(d) seeks to deter are the actions that make him vexatious here. Petitioner nonsuited his first action to (1) avoid an unfavorable judgment on the merits; (2) gain a tactical advantage; and (3) be assigned a new judge. Pet. App. 11a. This test is mostly duplicative of the always approach. For the always approach, courts look to see if a plaintiff is one that Rule 41(d) seeks to deter, and for the hybrid approach, courts look to see if a plaintiff's actions were vexatious or in bad faith. The always approach is most true to the intent of Rule 41(d), but here, both approaches lead to the conclusion that the trial court did not abuse its discretion in awarding attorney's fees as costs.

Finally, in this specific case, the hybrid approach requires revisiting § 1988 and caselaw interpreting § 1988. This Court held that prevailing defendants under § 1988 must prove that a plaintiff's claim was vexatious, frivolous, or brought to harass or embarrass the defendant. *See, e.g.*, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Even though the trial court made a finding that Petitioner's actions were not the result of bad faith, subjective bad faith is not a requirement to award prevailing defendants attorney's fees under § 1988. *Christiansburg Garment*, 434 U.S. at 421 (holding that prevailing defendant can recover attorney's fees only if the trial court finds "that the plaintiff's

action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). Again, this test is duplicative of both the always approach and the hybrid approach's second test. This statute-specific additional test for § 1988 requires that a plaintiff's claim was vexatious, frivolous, or brought to harass or embarrass the defendant. *Id.* The same actions that prove Petitioner was vexatious in both other tests prove that Petitioner was vexatious within the meaning of § 1988.

Here, because § 1988 authorizes the award of attorney's fees as costs and because Petitioner nonsuited and refiled vexatiously, the trial court did not abuse its discretion in awarding the University's attorney's fees as costs. Nevertheless, even though Petitioner's actions justify an award of attorney's fees under the hybrid approach, that approach proves to be unnecessarily duplicative and unworkable.

In short, the always approach is most compatible with a construction of the Federal Rules of Civil Procedure that secures "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Petitioner is exactly the type of plaintiff Rule 41(d) seeks to deter because, based on the trial court's factual findings, he acted vexatiously. Petitioner's actions are in opposition to the very purpose of the Rules. Accordingly, the plain language and purpose of Rule 41(d) compel the conclusion that the definition of "costs" must include attorney's fees to deter vexatious litigants like Petitioner. Thus, the trial court did not abuse its discretion in awarding $28,150 in attorney's fees to the University.

CONCLUSION

For these reasons, this Court should conclude the University's hearing procedures comported with the Due Process Clause of the Fourteenth Amendment and complied with Title IX. Further, this Court should adopt the always approach, articulated in the concurring opinion below and adopted by the Second, Eighth, and Tenth Circuits. Accordingly, Respondent respectfully requests that this Court affirm the dismissal in favor of Quicksilver State University and affirm the award of costs, including attorney's fees.

Respectfully submitted,

TEAM 87

Counsel for Respondent

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Respondent, hereby certifies that, in compliance with Competition Rule 2.5 and Supreme Court Rule 33.1, Respondent's brief contains 13,351 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

Respectfully submitted,

TEAM 87

Counsel for Respondent

APPENDIX

CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides:

> 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.

Title IX, 20 U.S.C. § 1681(a), provides in pertinent part:

> 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. § 1983 provides in pertinent part:

> 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 provides in pertinent part:

> 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.

Federal Rule of Civil Procedure 41 provides:

(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.