No. 21-8289

In the

Supreme Court of the United States

OCTOBER TERM 2022

KYLER PARK.,

PETITIONER,

v.

QUICKSILVER STATE UNIVERSITY,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

TEAM 98
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

(1) Whether a university has the discretion to regulate the scope of cross-examination in disciplinary proceedings under the Fourteenth Amendment and Title IX, 20 U.S.C. § 1681 and to protect participants by requiring testifying witnesses to wear face coverings?

(2) Whether the term "costs," as used in Federal Rule of Civil Procedure 41(d), is consistent with the rest of Rule 41 as to include attorneys' fees?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Respondent, Quicksilver State University, defendants in the United States District Court and appellants in the United States Court of Appeals for the Fourteenth Circuit, submit this brief in support of their requests that this Court uphold the Fourteenth Circuit's ruling affirming the District Court's granting of the Respondent's motion to dismiss Petitioner's Due Process and Title IX claims, and the District Court's proper awarding of attorneys' fees under FED. R. CIV. P. 41(d)(1).

OPINIONS BELOW

The opinion of the United States District Court of the District of Quicksilver is reported at *Park v. Quicksilver State University*, D.C. No. 20-cv-7615 (D. Quicksilver 2020). The United States Court of Appeals for the Fourteenth Circuit's decision affirming the District Court's holding for Respondent can be found on pages 1a-62a of the record.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgement on October 18, 2022. The petition was timely filed and granted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The text of Section One of the Fourteenth Amendment to the United States Constitution, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

Statement of Facts: During spring break, on March 14, 2020, Petitioner Kyler Park allegedly sexually assaulted fellow student Jane Roe. R. at 2a. After buying Roe—who was underaged—an alcoholic drink, Park walked Roe back to her dorm room and proceeded to engage in sexual intercourse with Roe. R. at 2a. Ostensibly, Park knew that Roe was too intoxicated to consent to sex before he assaulted her. R. at 2a.

In the three days following the purported assault, Roe called Park various times attempting to figure out what happened the night before. R. at 3a. Roe stated that she remembered seeing Park at the movie theater bar, but was too intoxicated to remember what happened afterward. R. at 3a. Contrarily, Park disputes Roe's account of the phone calls and claims that she called desiring a relationship with him. R. at 3a. Upon informing Roe that the night was just a one-night stand, Park accused Roe of threatening to report him for assaulting her. R. at 3a.

Following Spring Break, Park was notified on March 23, 2020, by Quicksilver State University's (QSU) Division of Student Affairs that he had been accused of violating QSU's Code of Student Conduct (CSC). R. at 3a. Specifically, Park was notified of allegedly committing an act of "sexual abuse, unwanted sexual contact, and dating violence." R. at 3a-4a. QSU informed Park that a student conduct hearing was scheduled for May 20, 2020. R. at 3a. A week after Park was notified by the

Division of Student Affairs, QSU canceled all spring in-person classes due to the outbreak of the COVID-19 pandemic. R. at 4a. Between the filing of the disciplinary proceedings and the scheduled hearing, QSU assigned an investigator to interview both Roe and Park. R. at 4a. Because Park met Roe alone at the bar, no additional witnesses could be located. R. at 4a.

Although QSU canceled in-person spring classes, the university elected to hold the disciplinary hearing in person. R. at 4a. Out of fairness, QSU held the hearing as scheduled so the 2019-20 CSC policies governed. R. at 4a. Both Park and Roe attended the hearing in person. R. at 4a. Throughout the proceedings, Park was accompanied by his attorney. R. at 4a. Due to the ongoing COVID-19 crisis, all individuals at the proceedings were required to wear face coverings. R. at 5a. During the hearing, both Park and Roe were permitted to submit questions to the hearing board to be asked on cross-examination. R. at 5a. To maintain the civility of the hearing, the Board itself questioned the witnesses. R. at 5a.

Despite the severity of the COVID-19 pandemic, Park demanded that Roe be required to remove her face covering when speaking or answering questions. R. at 5a. For the health and safety of all participants, the Board denied Park's request. R. at 5a. Following the Board's denial, Park petitioned to have the Board require Roe to testify remotely without a face covering. R. at 5a. The Board allowed Roe to be physically present at the hearing. R. at 5a.

While prioritizing student comfort, the Board asked a majority of Park's submitted questions. R. at 6a. Excused from the rules of evidence, the Board excluded

"unduly repetitious or irrelevant evidence"—such as Parks request for Roe's ambiguous credit card statements and information regarding Roe's father's occupation. R. at 7a-8a. After questioning both Park and Roe, the Board ultimately found against Park and recommended that he be expelled from QSU for violating the University's CSC by committing acts of sexual misconduct. R. at 8a.

After his expulsion, Park sued QSU in the District Court of Quicksilver. R. at 8a. Park's suit was assigned to Judge John Kreese, a prominent alumnus of QSU. R. at 8a. Despite Judge Kreese fairly questioning the merits of Park's and QSU's arguments, Park moved to voluntarily dismiss the lawsuit in order to avoid a perceived "tactical disadvantage." R. at 8a, 11a. Almost three months later, Park refiled his lawsuit in district court asserting the same claims against QSU. R. at 9a. The case was assigned to Judge Demetri Alexopoulos. R. at 9a. Park's counsel contended that the earlier dismissal of the litigation was to "better study applicable law and to ensure Park's claims were supported by existing law." R. at 10a. However, Park' second filings contained no greater detail than his first lawsuit. R. at 40a. As a result, Judge Alexopoulos found that Park nonsuited in his first action to avoid an unfavorable judgement on the merits. R. at 37a-38a.

Procedural History: Park filed suit against QSU on June 12, 2020, in the District Court of Quicksilver. R. at 8a. Park alleged that the University violated his civil rights under § 1983. R. at 8a. Park's suit was assigned to Judge Kreese. R. at 8a. On June 1, 2020, QSU moved to dismiss Park's lawsuit for a failure to state a claim under

FED. R. CIV. P. 12(b)(6). R. at 9a. After a hearing on the motion, Park moved to voluntarily dismiss his lawsuit under FED. R. CIV. P. 41(a)(1). R. at 9a.

On September 21, 2020, Park refiled his lawsuit against QSU in the District Court of Quicksilver. R. at 9a. QSU again filed a 12(b)(6) motion and actionably filed a motion under FED. R. CIV. P. 41(d), asking Judge Alexopoulos to find that Park acted in bad faith or vexatiously. R. at 10a. QSU asked the court to award its cost of attorneys' fees. R. at 10a. Judge Alexopoulos granted both of QSUs motions. R. at 11a. Park timely appealed to the Court of Appeals for the Fourteenth Circuit. R. at 1a. On October 18, 2021, the Fourteenth Circuit affirmed the judgement of the District Court in favor of QSU. R. at 40a.

SUMMARY OF THE ARGUMENT

In *Mathews v. Eldridge* this Court established that due process is a flexible standard. Recognizing that not all situations require the same procedural safeguards, this Court introduced the *Mathews* balancing test which refines the abstract Due Process Clause into three factors. Due process rights are evaluated on a continuum by weighing the 1) private interest implicated, 2) the risk of a procedural error and the probative value of additional safeguards, and 3) the weight of the government's interest. In accordance with these due process factors, *Goss v. Lopez* requires that schools at least provide the accused notice of the evidence used against them and a meaningful opportunity to be heard in *some kind of hearing*.

Satisfying the notice requirement in this case, QSU adequately provided the Petitioner with a meaningful opportunity to be heard and to conduct some real time

cross-examination during a non-adversarial disciplinary hearing. Despite the Petitioner's position, federal courts have routinely held that students do not have a right to unfettered cross-examination in school disciplinary hearings.

Although the Petitioner has a supposed private interest in this case, the remaining two *Mathews* factors counsel in favor of the Respondent. To the second prong of the *Mathews* test, the Petitioner fails to demonstrate that QSU's hearing process would result in a less accurate outcome than a full-scale adversarial proceeding. In addition, the probative value of asking irrelevant follow-up questions in this case would not have changed the outcome given the hearing board's use of the preponderance of the evidence standard. Furthermore, under the third *Mathews* factor, universities such as QSU, do not have the resources or expertise to conduct a *de facto* criminal trial. Finally, universities have a strong interest in providing a comfortable environment for victims of alleged sexual assault during disciplinary hearings.

Amidst a deadly global pandemic, QSU was forced to adapt to the public health risks that COVID-19 presented. Absent the availability of any vaccines, the University implemented a mask requirement to mitigate the spread of the novel Coronavirus. During pandemic era litigation, courts consistently held that mask requirements did not violate criminal defendants' rights under the Confrontation Clause. Although the Confrontation Clause does not apply to lesser non-criminal hearings, QSU still followed the guidance of the courts and prioritized public safety by requiring testifying witnesses to wear masks in its disciplinary proceedings.

Contrary to the Petitioner's contention, QSU's hearing board was able to adequately assess the victim's testimony and evaluate her demeanor and credibility regardless of the mask requirement.

Relying on the erroneous outcome standard, the Petitioner fails to allege a cognizable Title IX claim. Petitioner has not pled sufficient facts that QSU's disciplinary process was inaccurate and that there was a causal connection between the flawed outcome and alleged gender bias. Under any applicable Title IX standard, QSU appropriately evaluated the evidence and found the victim to be more credible.

With respect to the second issue, the District Court and Fourteenth Circuit appropriately granted Respondent attorneys' fees as Rule 41(d) costs. The Fourteenth Circuit in its decision joined seven other circuits in affirming that Rule 41(d) costs include attorneys' fees. Three of these circuits, the Second, Eighth, and Tenth, provide for the automatic recovery of attorneys' fees under the Rule. Rule 41(d) costs must include attorneys' fees to effectuate the foundational intent of the Rule, to deter frivolous plaintiffs from engaging in forum shopping and vexatious litigation. Without the ability to order attorneys' fees, courts would be powerless to effectively deter frivolous plaintiffs, such as Petitioner. A reading that does not include attorneys' fees as costs would undercut the courts' inherent authority to grant attorneys' fees against vexatious plaintiffs. This reading of costs is further consistent with the totality of Rule 41, which incorporates other sections which courts have recognized to allow for the recovery of attorneys' fees. When considering the textual structure of the rule, by leaving costs undefined and making no mention of it in the

Advisory Committee Notes, the drafters ensured that attorneys' fees were not precluded from the definition. The Third, Fourth, Fifth, and Seventh circuits also recognize attorneys' fees as part of costs, however, they differ on the method of recovery. These circuits permit the recovery of attorneys' fees in a Rule 41(d) action when the underlying substantive claim permits them. Were this Court to adopt a reading of costs that does not include attorneys' fees, courts would be prohibited from appropriately effectuating the intent of Congress in the substantive claim. Thus, regardless of the method for determining recovery, to effectuate the intent and remain consistent with the totality of the Rule as well as substantive statutes, Rule 41(d) costs must be read to include attorneys' fees.

ARGUMENT

Standard of Review: When reviewing a District Courts granting of a 12(b)(6) motion, the reviewing court must "assume all [well-pled facts] to be true" and "draw all reasonable inferences in favor of the plaintiff." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com*, *Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). However, reviewing courts are not required to accept as true "unwarranted inferences, unreasonable conclusions or arguments." *Id.* When conducting a de novo review of the district court's decision, appelate courts may reject wholly conclusory or legal conclusions couched as factual allegations. *Top Flight Entm't, Ltd v. Schuette*, 729 F.3d 623, 630 (6th Cir. 2013);*Hager v. Ark. Dep't of Health,* 735 F.3d 1009, 1013 (8th Cir. 2013).

To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Moreover, an appellate court reviews a district court's award of attorney's fees for abuse of discretion. *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1055 (10th Cir. 2004).

I. QUICKSILVER STATE UNIVERSITY'S DISCIPLINARY PROCEEDINGS PROVIDED ADEQUATE PROCEDURES THAT DID NOT VIOLATE THE DUE PROCESS CLAUSE NOR TITLE IX.

Consistent with this Court's holding in *Mathews v. Eldridge*, Quicksilver State University (QSU) did not violate the Petitioner's due process rights by providing him with a regulated opportunity to cross-examine his purported victim of sexual assault. *See* 424 U.S. 319, 348 (1976). As articulated in *Mathews*, due process is a *flexible standard* that recognizes that not all situations require the same procedural safeguards. *Id.* at 334. Unlike in criminal proceedings, where the due process right to confront and cross-examine witnesses is at its apex—civil proceedings require a lower threshold when determining the potency of due process rights. *See id.* at 349 (citations omitted) (imparting how administrative hearings "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.").

With no universal method to conduct hearings, this Court introduced the *Mathews* balancing test, which distills the vagueness of the Due Process Clause into three factors: the (1) weight of the individual's private interest, (2) risk of an error, and the probative value of an alternative process, and (3) weight of the government's interest. *Mathews*, 424 U.S. at 335.

The first step in a due process analysis is discerning whether a constitutionally recognized property interest exists. *See id.*; *see also Perry v. Sinderman*, 408 U.S. 593, 603 (1972) (holding that a non-tenured professor had a property interest in continued employment because he relied on the implied contractual status); *but see*

Bd. of Regents v. Roth, 408 U.S. 564, 578 (1972) (reasoning that a non-tenured professor having a unilateral expectancy of continued employment is an abstract and unrecognized interest). Even though this Court has held that primary students have a protected property and liberty interest in continued enrollment in *Goss v. Lopez*, this Court has not directly addressed students' interest in the university context. 419 U.S. 565, 574-75 (1975).

When applying the first *Mathews* factor to this case, there is a notable distinction because the Petitioner is facing expulsion from a non-compulsory higher educational institution contrary to the compulsory secondary education in *Goss*. A college student's enrollment is presumed on a good-faith basis to abide by institutional conduct policies akin to an implied contractual obligation. *See Perry*, 408 U.S. at 602; *See also Doe v. Alger*, 228 F.Supp.3d 713, 728-729 (W.D. Va. 2016) (recognizing that students cannot be expelled except for cause and mutual understanding that enrollment is premised on sufficient academic progress, paid tuition, and overall good behavioral standing). While states have a broad authority "to establish and enforce codes of conduct in their educational institutions," QSU recognizes that public school students have a cognizable property interest in their education, which cannot be taken away without "minimum" due process procedures. *Goss*, 419 U.S. at 565. Consequently, lower courts have assumed *arguendo* that continued enrollment at a post-secondary institution is protected. *See Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 633 (6th Cir. 2005) (emphasis added).

Once an interest is identified, the second step is determining what procedures are owed to an individual. *See Mathews*, 424 U.S. at 332. Analyzing the potency of due process rights along the spectrum of criminal to adversarial proceedings, due process in the university disciplinary setting only requires "some opportunity to be heard." *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019). Proper notice should include the date, time, and place of the hearing in order to allow the student to prepare a sufficient defense. *See Goss,* 419 U.S. at 581. Notably, the Petitioner omitted an allegation of notice deficiency because QSU provided the Petitioner with two months' notice of all the pending violations and the hearing date. R. at 3a-4a. Instead, the Petitioner focused on the remaining factors of the opportunity to be heard and conduct cross-examination.

Finally, the third *Mathews* factor evaluates the burden against the government actor, including the financial and societal costs. 424 U.S. at 437. Therefore, public schools must only provide "rudimentary precautions" against "unfair or mistaken findings of misconduct." *Goss*, 419 U.S. at 581. Universities do not have the same ability, expertise, or resources to operate proceedings that "mirror common law trials." *Haidak*, 933 F.3d at 69. Since schools have limited capacity to conduct informal disciplinary hearings, courts should "refrain from *second-guessing* the disciplinary decisions made by school administrators. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (emphasis added).

A. QSU Satisfied The Due Process Clause Because The University Context Only Requires Some Opportunity To Real-Time Cross-Examination

Quicksilver State University operates a specialized disciplinary process that simultaneously maintains the constitutional safeguards of the Due Process Clause without expanding beyond its capacity as an educational institution. The Due Process Clause does not mandate a uniform process, so institutions can tailor their procedures to "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970) (footnote omitted). As such, QSU, like many state universities across the country, has structured its disciplinary proceedings with a neutral hearing board overseeing the process. R. at 4a-5a. The hearing board operates as an impartial tribunal which is an "essential element of a due process hearing." *Miller v. Mission*, 705 F.2d 368, 372 (10th Cir. 1983). Accordingly, QSU's process is consistent with this Court's precedent because a public-school student only needs "some kind of hearing." *Goss*, 419 U.S. at 579. By providing the Petitioner with three months' notice of the pending violations and the scheduled hearing, allowing his attorney to be present, and providing him with a functional form of cross-examination, QSU did not violate the Petitioner's minimum due process rights.

i. QSU provided the petitioner with a meaningful opportunity to be heard

In establishing the protected liberty and property rights, the *Goss* Court never commanded schools to implement a robust disciplinary proceeding, nor did it define *some kind of hearing* to follow one specific process. *See* 419 U.S.at 579 (noting the Due Process Clause is comprised of "cryptic and abstract" words). Universities

maintain discretion in implementing their preferred disciplinary format so long as it is within the parameters of the Due Process Clause. As such, the Fourteenth Circuit properly recognized that QSU did not have an obligation to turn its disciplinary proceedings into a "de facto criminal trial." R. at 18a. Universities are well-within their judgment to create a controlled and standardized disciplinary process that furthers their educational goals without draining limited resources. *See Goss*, 419 U.S. at 580.

For this reason, courts have been reluctant to compel post-secondary institutions to implement extensive processes that mirror their common trial court counterparts. Courts have routinely recognized that universities are not equipped to handle the cost or the administrative burden of managing full trials. For example, courts have rejected to extend the constitutional right of written findings in school proceedings despite the "minimal" additional cost. *See, e.g.*, *Flaim*, 418 F.3d 629 at 642. Other courts have also held that universities are not required to give students a list of witnesses and exhibits before the hearing. *See Nash v. Auburn Univ.*, 812 F.2d 655, 662–63 (11th Cir. 1987). Moreover, universities use a lower evidentiary standard, unlike their criminal counterparts. Following the Department of Education's Dear Colleague Letter (DCL), QSU implemented a preponderance of the evidence standard because more stringent standards are "inconsistent" with the standards of proof established in civil rights laws. R. at 16a; *Lee v. Univ. of N.M.*, 449 F.Supp.3d 1071, 1129 (D.N.M. 2020). Overall, the lack of certain trial formalities does not render the disciplinary proceedings invalid.

1. A neutral hearing board serving as a fact-finder and adjudicator is permissible within school disciplinary hearings.

This Court has held that combining investigative and adjudicative functions does not create a bias. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Allowing an impartial board to serve as the central questioner maintains uniformity and levels the playing field between both parties in the hearing context. *See id.* Using that same line of reasoning to forgo court formalities, several circuit courts have upheld the same hearing board structure used in this case. *See, e.g.*, *Haidak*, 933 F.3d at 69. Courts impute a heavy presumption that a university's judgment in disciplinary actions are honest and impartial. *See Withrow*, 421 U.S at 47, 55; *see also Amundsen v. Chi. Park Dist.*, 218 F.3d 712, 716 (7th Cir. 2000) (explaining the plaintiff must show that the adjudicator had pecuniary interest in the outcome or previously targeted the plaintiff.) The Petitioner relies on a single Sixth Circuit opinion to bolster his argument that QSU should have used an "adversarial cross-examination" system since this case required QSU to "choose between competing narratives." *See Doe v. Baum*, 903 F.3d 578, 582–83 (6th Cir. 2018).

In *Baum*, a student filed a sexual misconduct claim against the accused following a fraternity party. *Id.* at 579. Notably, the accused student's and the alleged victim's stories contradict each other, along with twenty-three other witnesses. *Id.* Nearly all the female witnesses backed the alleged victim, and almost all the male witnesses supported the accused student. *Id.* Initially, the school investigator ruled in the accused student's favor, but the alleged victim appealed before the university's appeals board. *Id.* at 580. The accused student was not permitted to attend the

appeals board's hearing, and the three-member panel abrogated the investigator's finding and found the alleged victim's account more credible. *Id.* The Sixth Circuit concluded that since the accused student's status turned on his "credibility," the university should have hosted *some sort* of hearing to cross-examine the alleged victim. *Id.* at 581-82.

As the Fourteenth Circuit Court rightly determined, this case is distinguishable from *Baum*. First, the university in *Baum* never afforded the accused the opportunity to be heard during the appeal. *See id.* at 582. Rather, the accused student only had the opportunity to submit countering evidence to the investigator. *Id.* Contrarily, the Petitioner was afforded a hearing and had the chance to submit questions directly to the hearing board. R. at 6a. Second, since the accused student in *Baum* never had some form of a live hearing, he was denied the opportunity to confront his accuser directly. *See id.* Even so, the Sixth Circuit recognized the importance of protecting the victim and not transforming the disciplinary system into the same level as criminal prosecution. *See id.* at 583 (citations omitted) (reasoning that the "university must allow for some form of *live* questioning in front of the fact-finder."). Moreover, *Baum* did not overrule *Cummins*, a case where the Sixth Circuit endorsed the same process used by QSU. *See Doe v. Cummins*, 662 F. App'x 437,448 (6th Cir. 2016) (holding that having a panel ask submitted cross-examination questions did not violate the student's due process rights).

Unlike QSU's procedure, the *Baum* court rejected submitted questioning as a form of cross-examination when it was not paired with a live hearing. The *Baum* court

supported some modified version of cross-examination. *See* 903 F.3d at 583. The Respondent's process allows for live questioning from both sides, in which the hearing board can evaluate demeanor evidence as the designated fact-finders. Additionally, the hearing board serves as a questioner akin to a judge or an attorney during cross-examination. The hearing board's combined functions enable a more streamlined and manageable process. Although QSU combines the functions of their criminal counterparts in a less formal manner, having a neutral party facilitate questioning is not so "fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation." *Haidak*, 933 F.3d at 69.

2. There is no right to counsel in school disciplinary hearings

Even though QSU allowed the Petitioner's attorney to attend the hearing, the Petitioner posits that his lawyer's inability to cross-examine the victim directly undermined his due process. Several circuit courts have found that not only are attorneys not required but there is no guarantee for them "to participate in the proceeding… [like] trial counsel…examining or cross-examining and addressing the tribunal. *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993); *see also Newsome v. Batavia Local Sch. Dist.,* 842 F.2d 920, 925-26 (6th Cir. 1988); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988). Even outside the educational context, this Court has remained hesitant to expand the right to counsel in non-criminal hearings. *See Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976) (citations omitted) (holding that inmates have no right to retained or appointed counsel in prison disciplinary hearings).

In *Flaim*, the Ohio medical school had a policy that students only facing criminal charges had a right to counsel. *See* 418 F.3d at 632. In contrast, the medical school permitted students not facing criminal charges to have their attorney present in the room, though the lawyers could not be consulted or participate in the proceedings. *Id.* The Sixth Circuit upheld this policy because the hearing was not "procedurally complex." *Id.* at 640. The court reasoned that since the hearing board did not use formal rules of evidence, there was no indication that the hearing "was so complex that only a trained attorney could have effectively presented his case." *Id.*

Like *Flaim*, the record is silent on the Petitioner's criminal liability, so there would not be an automatic right to counsel. *See id.* Even so, QSU's process exceeded the protections of many universities and still granted the Petitioner the opportunity to have his counsel present at the hearing. R. at 4a. Likewise, QSU's disciplinary proceedings do not adopt the formal rules of evidence. The Respondent trains the hearing board members to enforce the student code of conduct correctly and fairly. While not as complex as any criminal court, the QSU handbook thoroughly details the disciplinary protocols and procedures that the hearing board can adequately enforce without specialized legal expertise.

3. Applying the Mathews factors, there is no significant risk of error, and the school has an interest in prioritizing education instead of draining resources to implement full-scale hearings

When looking at the second *Mathews* factor, the Petitioner fails to provide any evidence that additional safeguards would lessen the risk of an erroneous suspension. This Court in *Goss* recognized that having an "informal" student conduct hearing

within itself served as a "meaningful hedge against erroneous action." 419 U.S. at 565. Notably, the Petitioner fails to supply widespread data proving that an adversarial system would result in more accurate results than the system QSU has implemented. *See Haidak*, 933 F.3d at 69 ("We are aware of no data proving which form of inquiry produces the more accurate results in the school disciplinary setting.")

The third *Mathews* factor also weighs in favor of the Respondent because requiring counsel to fully participate in university hearings "would entail significant expense and additional procedural complexity." *Flaim*, 418 F.3d at 640-41. Here, QSU cannot afford to accommodate every student to have legal counsel and provide the additional materials to satisfy "full-scale adversarial hearings." *Id.* at 640. Universities "are not a court of law," and it is "neither practical nor desirable" for them to act as one. *Gomes v. Univ. of Me. Sys.*, 365 F.Supp.2d 6, 16 (D. Me. 2005) (holding that the law seeks the middle ground between the school's limited resources and a fundamentally fair hearing).

Alternatively, universities' primary focus is to educate students—not to discipline them. Therefore, QSU retains the power to allocate resources for its core pedagogical priorities. *See Goss*, 419 U.S. at 583. Common law courts do not capture the unique educational element infused within public institutions' disciplinary processes. *See id.* As this Court has recognized, "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

ii. The Due Process Clause does not require unfettered adversarial cross-examination

Consistent with the notion of deferring to a university's judgment, QSU's policy of having the hearing board "filter" questions falls within the bounds of the Due Process Clause. *See Gorman,* 837 F.2d at 9. The Petitioner erroneously suggests that *some kind of hearing* entails a process where QSU owes him *unfettered* cross-examination. The Due Process Clause does not confer students the absolute right to cross-examine their accuser in school disciplinary proceedings. *See*, *e.g.*, *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701–02 (5th Cir. 1974); *see also Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) ("The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.").

In *Haidak v. University of Massachusetts-Amherst*, the First Circuit reiterated this longstanding notion that unfettered cross-examination is not mandatory. 933 F.3d. at 71. Similar to this case, Amherst implemented a non-adversarial model where the parties submitted questions to a disciplinary board. *See Haidak*, 933 F.3d at 68. This common form of university disciplinary proceeding is known as the *inquisitorial* system. *See id.* (citations omitted) (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 the extent of the inquiry".). Although not used in the criminal context, the First Circuit noted that this Court has upheld the inquisitorial model's constitutionality in other non-criminal

hearings. *Id.* (citing *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000)) (explaining that Social Security proceedings are inquisitorial rather than adversarial).

The quintessential question in this case is whether the hearing provided the petitioner the "opportunity to answer, explain, and defend" himself. *Haidak*, 933 F.3d. at 67 (quoting *Gorman*, 837 F.2d at 14). The record reflects that the Petitioner had the opportunity to defend his credibility by answering and explaining his recollection of events. R. at 6a-7a. Courts usually recognize a due process deficiency when a hearing board decides ex-parte without the accused student present. *See e.g.*, *Baum*, 903 F.3d at 581-82. Here, QSU allowed the Petitioner to be present at the hearing. Further, QSU's policies required the hearing board to use any relevant questions that the Petitioner submitted for cross-examination. R. at 5a.

In turn, QSU did not deprive the Petitioner of extensive questioning because the hearing board cross-examined Roe "at length on the matters central to the charge." *See Haidak*, 933 F.3d at 70. For example, the hearing board pressed Roe about the number of drinks she consumed and whether she had "ulterior motives" in her decision to report the Petitioner as a form of retaliation. R. at 21a. By not operating under the formalities of a trial, the hearing board retains the discretion to decide relevancy because the complex rules of evidence do not apply. Thus, the Petitioner erroneously proclaims that QSU must ask every question in order to satisfy due process.

1. The filtered questioning satisfies the second Mathews factor because follow-up questions would have provided marginal benefit

The second prong of the *Mathews* test also evaluates the probative value of an alternative system. *See Mathews*, 424 U.S. at 333. The "marginal" benefit of asking follow-up questions that likely would not have altered the outcome forecloses the Petitioner's argument for an exhaustive inquiry. Directed questions are crucial investigative tools employed to challenge the credibility of the claimant, which the board was able to assess during the hearing. Accordingly, the QSU board asked nearly every initial question proffered by the Petitioner and even relied on the Petitioner's requested wording. R. at 6a.

For example, the hearing board pressed Roe and learned she consumed an alcoholic beverage on the alleged night. R. at 6a. The Petitioner wanted the hearing board to inquire further about the specificities of her alcoholic beverage. However, the board rightfully found those lines of questioning irrelevant. Determining the exact alcoholic beverage Roe consumed is irrelevant because regardless of what she consumed, whether it was white wine or vodka, it contained alcoholic content that would have intoxicated Roe. Additionally, the Petitioner's request to access Roe's financial transactions is overly invasive and duplicative because the credit card history would not identify specific beverages purchased. R. at 7a. Moreover, since Roe was underage, the hearing board had already compelled her to admit to the potential unlawful consumption of alcohol, and further questioning about purchasing the alcoholic beverages would implicate her in criminal conduct. R. at 7a. Whether Roe consumed alcohol is relevant to her disposition and vague memory, which the hearing

board determined to be factually plausible, so any further discussion on the particulars is ancillary at best.

Next, the Petitioner contended that the "grainy security-camera footage" exonerated him because Roe did not appear to be intoxicated. R. at 7a. Accordingly, the hearing board probed into Roe's appearance, to which she attributed her excellent balance from "many years of martial arts training" with her father. R. at 7a. The Petitioner decried the hearing board's refusal not to investigate her father's employment because he alleges Roe's father is a car salesman. The hearing board determined that investigating further into her father's employment is unnecessary and would be costly for a non-adversarial process. R. at 7a. Even so, the Petitioner's supposition does not contradict Roe because it is well within reason that Roe's father is both a car salesman and a martial arts instructor.

In addition, QSU relies on a preponderance of the evidence standard. Thus, the hearing board was required to find that the Petitioner committed the alleged act "more likely than not." R. at 16a. Preponderance of the evidence is a lower standard that does not require extensive proof to evaluate the underlying claim. As such, "forcing the claimant to ask" a few more questions does not significantly add to the fact-finder's ability to test their credibility. *Doe v. Mich. State Univ.*, 989 F.3d 418, 431 (6th Cir. 2021). A higher standard would certainly warrant a more exacting scrutiny from cross-examination, but not in the educational disciplinary context. Roe consuming alcohol, notwithstanding the type, made it more likely than not that she

was intoxicated. Likewise, Roe taking a martial arts course, regardless of the instructor, made it more likely than not that she would have good balance.

Although QSU tailors its disciplinary policy to accommodate the student's comfort, the process still forces the victim into uncomfortable circumstances in their journey to seek the truth. Here, the hearing board appropriately examined Roe and learned crucial information about the alleged night, including that Roe consumed several alcoholic drinks at the expense of exposing herself to criminal liability. The hearing board properly concluded that follow-up questions had nominal value in comparison to the presented evidence. In doing so, the QSU board thoroughly cross-examined Roe and sufficiently assessed her credibility.

2. Per the third *Mathews* factor, the Respondent has a compelling interest in protecting victims of sexual assault from inciting further trauma and refraining from operating hostile hearings

In the criminal law context, there is a judicial precedent in protecting victims of sexual crimes during cross-examination. *Maryland v. Craig,* 497 U.S. 836, 841-842 (1990). In *Maryland v. Craig*, this Court permitted video testimony through a one-way closed-circuit television. *Id.* This Court legitimized this policy decision because the state had a compelling interest in protecting "minor victims of sex crimes from further trauma and embarrassment." *Id.* at 852. The Respondent's interest in protecting adolescents from reliving their trauma through aggressive and hostile questioning is no different from the interest upheld in *Craig*.

Following the Department of Education's promulgation of the Dear Colleague Letter, QSU adopted a policy that limits cross-examination in sexual assault hearings

to mitigate the possibility of unnecessary animus and tension. R. at 15a. A sexual crime victim directly facing their accused perpetrator could have adverse effects that will outlast the hearing. H. Hunter Bruton, *Cross-Examination, College Sexual Assault Adjudication, and the Opportunity for Tuning up the "Greatest Legal Engine Ever Invented*, 27 CORNELL J.L. PUB. POL'Y, 145, 176-177 (2017). Studies have shown "unlimited and probing cross-examination causes mental and physical distress during trial…and can exacerbate the psychological harm a victim suffers after the trial." *Id.* at 176-177. As the *Haidak* court feared, "student-conducted cross-examination will lead to displays of acrimony or worse." *See* 933 F.3d at 69. Thus, the Petitioner's demand that Roe "answer all questions" undermines QSU's interest in "protecting victims of alleged sexual assault while on the stand." *Mich. State Univ.,* 989 F.3d at 431. *See* R. at 5a.

Coming forward to report a sexual allegation is already a stressful experience for the victim. Bruton, *supra*, 176. Having to testify in a disciplinary hearing in front of their abuser, exponentially increases that stress. *Id.* To account for this, QSU's policy to start with "easy questions" imparts a sense of calmness and helps build a rapport with the testifying victim. R. at 5a.; *see also* Bruton, *supra*, 175 (highlighting that unfettered cross-examination undermines the assuredness of a sexual assault survivor's "participation and cooperation."). Thus, QSU's policy benefits the Petitioner because the more comfortable an alleged victim feels with the examiner, the more likely she will be transparent and communicative during the hearing.

Protecting students, especially the most vulnerable, is tantamount to holding a fundamentally fair hearing. Universities like QSU frequently engage in disciplinary proceedings. However, while common law courts are equipped with the resources to hear cases routinely, universities are ill-equipped to conduct robust hearings. *See Haidak*, 933 F.3d at 73. The Due Process Clause has never required a judicial or "quasi" judicial trial "before a school may punish misconduct." *Coronado v. Valleyview Pub. Sch. Dist. 365-U*, 537 F.3d 791, 795 (7th Cir. 2008). Since QSU's board provided the Petitioner with two months' notice, allowed him the ability to attend the hearing with his attorney, and asked relevant questions that were submitted for cross-examination—QSU adequately satisfied Petitioner's due process rights.

B. Quicksilver State University's Facemask Requirement Was Reasonable To Further Health And Safety Goals During The Height Of A Historically Deadly Pandemic

To combat the spread of COVID-19, QSU's preventative measures—that required all participants to wear face masks—did not violate the Petitioner's due process rights or unconstitutionally deprive him of meaningful cross-examination. The Respondent, as a public institution, is obligated to protect its students, staff, and faculty. At the time of the hearing, May 2020, the pandemic was on the precipice of becoming a historical public health crisis. Following Center for Disease Control and Prevention's (CDC) guidance, state governments across the country ordered statewide quarantines. By the end of May 2020, the United States' death toll alone surpassed 100,000, among the millions of reported cases. Tim Stelloh, *U.S. coronavirus deaths top 100,000.* NBC NEWS (May 27, 2020),

https://www.nbcnews.com/news/us-news/u-s-coronavirus-deaths-top-100-000-n1214106.

Like the rest of the world, QSU had to adapt to a national lockdown and modify customary practices. The Respondent lacked time to change their policy code of student conduct, given the extremely volatile timeline of the pandemic. As such, QSU relied upon the 2019-2020 policies. R. at 4a. This hearing happened nearly a year before vaccines were available, leaving masks as the most effective protection against the novel coronavirus. *See generally* Kristin Andrejko et. al., *Effectiveness of Face Mask or Respirator Use in Indoor Public Settings for Prevention of SARS-CoV-2 Infection — California, February–December 2021*, 71 MORBIDITY AND MORTALITY WKLY REP. 212 (2022) (CDC finding that wearing a mask in a public setting lowered the likelihood of contracting COVID-19). It is reasonable that the University, like most institutions required by law, implemented low-cost preventative measures. *See id.*

Although a relatively new phenomenon, courts across the country have remained harmonious in ruling that health and safety precautions, such as face masks and social distancing policies, do not undermine a defendant's constitutional rights in a criminal trial. *See United States v. Smith*, No. 21-5432, 2021 WL 5567267, at *1 (6th Cir. Nov. 29, 2021) ("[F]ace mask…and social distancing upend traditional notions of what a 'normal' trial looks like. However, different does not necessarily mean unfair.") Requiring face masks is justified by important public policy interests "to protect the health and safety of those in the courthouse while allowing court

functions to proceed during a pandemic." *United States v. Maynard*, NO. 2:21-cr-00065, 2021 WL 5139514, *2 (S.D. W.VA. 2021). Courts have recognized the unique predicament that COVID-19 presented for routine proceedings and acknowledged mask policies to "ensure the safety of everyone in the courtroom" did not violate the confrontation clause. *United States v. Crittenden*, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *5 (M.D. Ga. Aug. 21, 2020).

Moreover, the Southern District of New York held that the Confrontation Clause did not require the "nose and mouth" of the defendant or jurors to be visible, including during cross-examination. *United States v. Tagliaferro*, 531 F.Supp.3d 844 (S.D.N.Y. 2021). The Petitioner posits face masks will ruin the ability to assess the credibility of witnesses because part of the face is covered but fails to show any authority that "faces must be visible at all times throughout the trial." *See United States v. Trimarco*, No. 17-CR-583, 2020 WL 5211051, at *5 (E.D.N.Y. Sept. 1, 2020) (rejecting the defendant's argument for failing to cite authority that requires jurors to reveal their whole face). Even so, "whatever slight extent masks impinge on the [Petitioner's] ability to see a witness's full facial expressions, face masks do not completely obstruct the defendant's ability to assess a witness's demeanor." *United States v. Maynard*, 2021 WL 5139514, at *2 (S.D. W. Va. Nov. 3, 2021). Here, the Petitioner could still see the victim's eyes, hear the tone of her voice, detect unusual pauses and squirming, and assess overall body language. *See id*.

In fact, this Court has never held that the Confrontation Clause guarantees criminal defendants the "*absolute* right" to face-to-face meetings. *Craig*, 497 U.S at

844 (emphasis in original). This Court allowed cross-examination procedures to be altered so long as there was a valid public policy. *See id*. Although the Confrontation Clause is not implicated in this case because it only applies to criminal cases, the Petitioner's arguments parallel the underlying claims found in criminal cases. QSU had a valid public interest in protecting the hearing attendees from a novel virus that ended up killing over a million Americans. Jiachuan Wu & Nigel Chiwaya, *Coronavirus deaths: U.S. maps shows number of fatalities compared to confirmed cases*, NBC NEWS (March 23, 2020), https://www.nbcnews.com/health/health-news/coronavirus-deaths-u-s-map-shows-number-fatalities-compared-confirmed-n1166966. Thus, if criminal law courts have found masks to be permissible under this sacrosanct constitutional right, this policy consideration should extend to the abbreviated university disciplinary proceedings that do not enjoy the same constitutional weight. Therefore, requiring facemasks during the hearing was an appropriate safety precaution that did not undermine the Petitioner's due process rights to cross-examine.

C. The Fourteenth Circuit Properly Dismissed Parks Title IX Claim.

The Fourteenth Circuit properly affirmed the district court's dismissal of the Petitioner's Title IX claim because there is no evidence in the record that QSU treated him differently during the hearing because of his sex. Title IX explicitly prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Generally, to satisfy a Title IX claim, the plaintiff must allege that a university found him guilty solely based on his sex. *See Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 864 (8th Cir. 2020).

Some circuits, specifically the Second and Sixth, have explicitly adopted two approaches to evaluate a Title IX claim: "erroneous outcome," and the "selective enforcement." *See Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994) (explaining the standard for the erroneous outcome and selective enforcement); *see also Doe v. Miami Univ.*, 882 F.3d 579, 589 (6th Cir. 2018) (adopting a similar standard called the "deliberate indifference test"). Other circuits have followed their sister circuits' categorical approaches. *See Doe v. Valencia Coll.*, 903 F.3d 1220, 1236 (11th Cir. 2018) (assuming a student can show a Title IX violation by satisfying the 'erroneous outcome' test applied by the Second Circuit"); *see also Plummer v. Univ. of Hous.*, 860 F.3d 767, 777-78 (5th Cir. 2017) (each party relies on the "theories adopted in *Yusuf*, so we need not speculate on any other possible theories of Title IX liability."). Finally, a few circuits refuse to adopt any test and instead opt for a simple Title IX analysis. *See Schwake v. Ariz Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020) (quoting *Doe v. Purdue Univ.*, 928 F.3d 652, 667 (7th Cir. 2019)); *See also Doe v. Univ. of the Scis.*, 961 F.3d 203, 209 (3d Cir. 2020) (adopting the Seventh Circuit's "straightforward standard").

i. The Petitioner fails to satisfy the erroneous outcome standard by failing to show a negative causal connection between his gender and the hearing's outcome.

Here, the Fourteenth Circuit considered both mainstream approaches but quickly discarded selective enforcement in favor of the erroneous outcome approach. The selective enforcement standard requires showing that the accused was treated differently from a similarly situated person of the opposite sex with nearly identical

circumstances. *Humenny v. Genex Corp.*, 390 F.3d 901, 906 (6th Cir. 2004). Since the Petitioner failed to allege a history of similarly situated female students treated differently. R. at 28a.

Conversely, the Fourteenth Circuit determined the "erroneous outcome" standard applies, which requires the plaintiff to plead (1) "facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and a (2) "particularized . . . causal connection between the flawed outcome and gender bias." *Yusuf*, 35 F.3d at 715. The summation of this test is to determine if the plaintiff was innocent and wrongly found at fault based on his gender. *See Yusuf*, 35 F.3d at 715.

As the Fourteenth circuit held, the Petitioner failed to demonstrate a particularized causal connection between an erroneous outcome from the hearing and a perceived gender bias. *See Yusuf*, 35 F.3d at 715; *see also Cummins*, 662 F. App'x at 452. The Petitioner must show gender bias as the *motivating factor* in his erroneous outcome. *See Yusuf*, 35 F.3d at 715. Since the Petitioner failed to provide factual support for his Title IX claim, Park relies on conclusory statements that QSU's policies are innately biased against male students "to appease the Department of Education." R. at 28a.

The Petitioner alleges that QSU solely credited female testimony from the victim and rejected all of the male testimony. *See Yusuf*, 35 F.3d at 716 ("patterns of decision-making" could also show the influence of gender bias). In *Yusuf*, the Second Circuit held the plaintiff sufficiently pleaded a Title IX claim in part because he

asserted that males accused of sexual harassment were "historically and systematically" found guilty regardless of the evidence. *Id.* This allegation directly targets the correctness of the proceedings. *Id.* Unlike in *Yusuf*, the Petitioner makes no argument that QSU is engaged in patterned discrimination. *See id.* Additionally, in *Cummins*, the court reasoned that a sample size of nine cases at a particular university was insufficient to draw inferences of gender bias. 662 F. App'x at 454. Therefore, a sample size of one case at QSU is completely meritless.

Moreover, this case is distinguishable from other instances in which the plaintiffs provided some evidence to support their testimony. In *Baum*, the hearing board accepted the testimony from several sorority sisters while discounting many fraternity brothers. 903 F.3d at 586. Here, the situation is different because there is only testimony from one female, the victim, and one male, the Petitioner. As the Fourteenth Circuit labels it, the QSU board faced a" zero-sum game" to rule for either side, which means that the board "necessarily" credited all of the testimony to one sex and rejected all of the testimony from the other sex. R. at 30a. In the end, the board found the victim more credible than the Petitioner based on the available facts.

The Petitioner makes a last-ditch effort to allege gender bias by pointing to various factual allegations about the board's behavior. Petitioner argues that the hearing board exhibited gender bias against him because a member frowned at him and praised the victim's bravery. R. at 38a. This claim fails because it does not *cast doubt* on the hearing board's ability to adjudicate the claim. *See Yusuf*, 35 F.3d at 715. First, the Petitioner's interpretation of a board member's facial expressions is

entirely subjective. The board member could have been temporarily frowning for reasons utterly unrelated to the Petitioner or made a face that the Petitioner mistook for frowning. The Seventh Circuit held that a hearing board member smiling during the reading of the suspension letter was "insufficient to overcome the presumption of the impartiality." *Hess v. Bd. of Tr. of S. Ill. Univ.*, 839 F.3d. 668, 676 (7th Cir. 2016). The court reasoned that smiling could reflect "malice" but realized that one "could smile in sympathy", or to "ease the tension of a difficult moment—or simply out of awkwardness." *Id.* Therefore, a frowning board member here does not suffice to show "bad faith." *See id.*

Second, the hearing board reassuring the victim directly aligns with QSU's objective to "prioritize student comfort." R. at 5a. The Petitioner only infers that this praise is due to the victim's gender and has not considered that the board commended Roe because of her status as an alleged victim. Notably, the Petitioner does not allege that only female victims are praised. The hearing board likely applauds any student victim, regardless of gender, for speaking up as a method for easing them into questioning. School disciplinary boards have a presumption of impartiality until the plaintiff can demonstrate actual bias. *See Cummins*, 662 F. App'x at 449. As such, the Petitioner must do more than merely recite conclusory assertions when alleging gender discrimination. *See Yusuf*, 35 F.3d at 713.

ii. The Petitioner also fails to plead a cognizable claim under the most deferential Title IX standard.

Even under the most plaintiff-friendly approach adopted by the Third, Seventh, and Nine Circuits, the Petitioner's claim of gender discrimination also fails. These courts have bypassed the various "superimposed doctrinal tests." *Purdue Univ.*, 928 F.3d at 667. Instead, they opted for an analysis that "hew[s] most closely to the text of Title IX." *Doe v. Univ. of the Scis.*, 961 F.3d at 209. As such, the resulting question is "whether the alleged facts, if true, raise a plausible inference that the university discriminated [against the plaintiff] on the basis of gender." *Purdue Univ.*, 928 F.3d at 667-68.

In *Purdue University*, the plaintiff attacked the university's reliance on Title IX federal funding and how the Dear Colleague Letter created an incentive for educational institutions to harshly prosecute sexual misconduct cases regardless of the facts. 928 F.3d at 668. The plaintiff revealed a track record of Purdue enforcing sexual misconduct in a discriminatory manner. *Id.* In fact, the Office of Civil Rights, opened up an investigation against the university. *Id.* Though the Seventh Circuit noted that reliance on the Dear Colleague letter is relevant it is "obviously not enough to get the [plaintiff] over the plausibility line. *Id.* at 669.

Instead, the Sixth Circuit firmly considered the fact that the Dean of Students supplied only a "cursory statement" of why she found the alleged victim more credible only after her supervisor forced her to provide a reason. *Id.* The court reasoned that the Title IX coordinator siding with the alleged victim without ever directly speaking to the victim or considering the plaintiff's proffered counterevidence insinuated a

bias. *Id.* Likewise, Purdue's hearing board maintained a similar bias because it accepted the Title IX director's inclination at face-value and "refused to hear from the plaintiff's witnesses" before making the final determination to suspend the plaintiff. *Id.* Additionally, the university never provided the plaintiff the opportunity to review the evidence held against him. *Id.* Despite the university's conduct, the Title IX coordinator found the plaintiff responsible. *Id.* Finally, the school's sexual assault victim support group, shared post on their Facebook that "[a]lcohol isn't the cause of campus sexual assault. Men are." *Id.* The Title IX director was a member of the group that shared the post and also wrote the recommendation to suspend the plaintiff, which the court found to be a crucial factor in showing bias violating Title IX. *Id.* at 670.

The *Purdue University* case demonstrates an egregious display of bias against an accused student. Purdue had a track-record of enforcing sexual misconduct cases so extensive that the Office of Civil Rights opened an investigation. *See id.* at 668. With respect to QSU, there is no such history of discrimination or federal investigations. Opposed to Purdue, Petitioner had the opportunity to submit questions for the board to directly cross-examine Roe. Finally, no QSU board member or employee engaged in prejudicial behavior during or outside the disciplinary hearing that would have undermined the integrity of the process. Thus, even under the most plaintiff friendly pleading standards, the Petitioner fails to provide a cognizable Title IX claim.

II. ATTORNEYS' FEES ARE RECOVERABLE AS COSTS UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(d).

The District Court did not abuse its discretion in granting the Respondent attorneys' fees because the meaning of costs in Federal Rule of Civil Procedure 41(d) includes recovery of attorneys' fees as an appropriate remedy. The overarching purpose of Rule 41(d) is to deter frivolous plaintiffs from engaging in forum shopping and vexatious litigation. *Andrews v. America's Living Ctrs., LLC*, 827 F.3d 306, 309 (4th Cir. 2015). Were courts unable to grant attorneys' fees, the Rule would have no "teeth" to remedy frivolous actions. *See Behrle v. Olshanksy*, 139 F.R.D. 370, 374 (W.D. Ark. 1991). The case before the Court provides a compelling set of facts which illustrate precisely why attorneys' fees must be recoverable, as Petitioner has engaged in a tactical dismissal and refiling to avoid an adverse judgment on the merits. R. at 12a. The power for a lower court to require attorneys' fees in such circumstances under Rule 41(d) is reinforced by district courts' inherent powers to award such fees for vexatious litigation, the very sort of litigation that Rule 41(d) contemplates. *Portillo v. Cunningham*, 872 F.3d 728, 740 n. 29 (5th Cir. 2017)

Further, costs must be read as including attorneys' fees for Rule 41(d) to be read consistently within the context of Rule 41. *Andrews*, 827 F.3d at 311. Finally, the definition of costs, as used in Rule 41(d), should be read consistently with the term's use in 28 U.S.C. § 1988 and 28 U.S.C. § 1927 to effectuate congressional intent to deter and prevent manipulative and vexatious litigation.

A. The Underlying Intent and Statutory Construction of Rule 41(d) Requires the Recovery of Attorneys' Fees

Courts that have undertaken an analysis of costs under Rule 41(d) reach the same conclusion, that attorneys' fees are included as costs, through a variety of mechanisms of statutory interpretation. The Second, Eighth, and Tenth Circuits have all determined that in addition to Rule 41(d) costs including attorneys' fees, they are automatically recoverable. *See e.g.*, *Horowitz v. 148 S. Emerson Assocs.* 888 F.3d 13, 29 (2d Cir. 2018). In making this determination, courts considered the intent of the Rule a strong guidepost for how it must be read. For Rule 41(d), there is a strong consensus among the circuits that its intent is to prevent forum shopping and vexatious litigation, with the recovery of attorneys' fees as the only viable mechanism to effectuate that intent. *Andrews*, 827 F.3d at 309 (quoting *Simeone v. First Bank Nat'l Ass'n*, 971 F.2d 103, 108 (8th Cir. 1992)); *Esposito v. Piatrowski*, 223 F.3d 497 (7th Cir. 2000). Next, courts have ensured that this reading remains consistent with the entirety of Rule 41, holding that, in fact, a reading which incorporates attorneys' fees is necessary to maintain consistency. *Andrews*, 827 F.3d at 311. This conclusion is further consistent with the deterrent purpose of 28 U.S.C. § 1927. *See* 28 U.S.C. § 1927. Finally, courts have maintained that the structure of the Rule does not preclude a definition of costs as attorneys' fees. *Garza v. Citigroup Inc.*, 881 F.3d 277, 282 (3d Cir. 2018).

i. The intent and purpose of rule 41(d) is only served when courts can grant attorneys' fees

The intent to include attorneys' fees is integral to the reading of Rule 41(d). Where a rule is silent, "[t]he absence of specific reference to attorneys' fees is not dispositive if the statute otherwise evinces an intent to provide for such fees." *Key Tronic Corp v United States*, 511 U.S. 809, 814 (1994). In *Horowitz*, the Second Circuit considered the decisions within the circuit implicating Rule 41(d) attorneys' fees and found that "the entire Rule 41(d) scheme would be substantially undermined were the awarding of attorneys' fees to be precluded." *Horowitz*, 888 F.3d at 29. A multitude of circuits have demonstrated that Rule 41(d)'s unquestionable purpose is "to serve as a deterrent to forum shopping and vexatious litigation." *Andrews*, 827 F.3d at 309. (quoting *Simeone*, 971 F.2d at 108); *Esposito*, 223 F.3d at 497.

The court's ability to grant attorneys' fees is a critical tool needed to carry out this intent and effectively deter vexatious litigation. *Horowitz*, 888 F.3d at 29. The court in *Horowitz* cited the compelling need to deter litigants exactly like the Petitioner "that file complaints and quickly dismiss them, perhaps in reaction to initial unfavorable rulings, or hoping for a subsequent case assignment to a judge they view as more favorable." *Id.* In the case at bar, the District Court found that the Petitioner needlessly multiplied litigation to gain a tactical advantage, resulting in the Respondent incurring $74,500 of unnecessary attorneys' fees. R at 10a. Courts rely specifically on attorneys' fees to deter exactly this type of behavior. *See Horowitz*, 888 F.3d at 29.

In *Horowitz,* the court noted that the large monetary sum associated with attorneys' fees played a "substantial" role in deterring vexatious litigation. *Id.* Were the court in *Horowitz* prohibited from awarding attorneys' fees, the court would only have been able to order the manipulative party to pay a $15.00 charge for document delivery and a $60.48 transcript fee to the defendant, which hardly serves as a deterrent compared to attorneys' fees. *Id.* at 30*; Behrle*, 139 F.R.D. at 374 ("Surely, Congress intended that that provision of the federal rules have some 'teeth,' and it simply has none . . . if the costs that would have been recoverable under Rule 54(d) are all that the defendant can receive after years of fruitless litigation.").

Additionally, Rule 41(d) must be read to include attorneys' fees, because a reading to the contrary would supersede and restrict the inherent authority of federal district courts. As a general principle, courts can impose sanctions against a vexatious party due to their inherent authority. *Portillo*, 872 F.3d at 740, n. 29. It is understood that the court's discretion to award attorneys' fees after a specific finding of a plaintiff acting in "bad faith, wantonly, or for oppressive reasons" is a jurisprudentially established exception to the American Rule. *Andrews*, 827 F.3d at 311. This inherent power of the courts underpins a reading of Rule 41(d) which includes attorneys' fees as costs when both the inherent power and Rule 41(d) seek to remedy the same conduct—vexatious litigation.

The need for Rule 41(d) to include attorneys' fees to deter forum shopping and vexatious litigation is demonstrated further by the Petitioner's behavior. When considering Petitioner's filings, the second district court judge found that Petitioner's

"actions, in dismissing his first action and refiling the instant action, were *technically* motivated by a desire to gain a tactical advantage . . . in a different court in which Plaintiff believed (erroneously) that the court favored his opponent from the get-go." R. at 11a. The court further noted that Petitioner did this with an intent to avoid an unfavorable judgment on the merits. R. at 11a.

The Court of Appeals upheld these findings of fact as satisfying a clear error standard, with the record reflecting sufficient facts to yield this inference. R. at 37a-38a. The Court of Appeals particularly highlighted that the critical fact demonstrating a motivation to avoid an unfavorable decision on the merits was that Petitioner voluntarily dismissed his claim the very day of the 12(b)(6) motion hearing, after it concluded. R. at 38a. Because the filings were in the early stages of litigation, there are likely very few other mechanisms under which the Respondent could recover, which highlights the exact concern present in *Horowitz* and *Behrle*. *Horowitz*, 888 F.3d at 29; *Behrle*, 139 F.R.D. at 374. It is clear from the fact-finding done by the District Court that Petitioner behaved impermissibly, and but for the granting of attorneys' fees, Rule 41(d) would have no "teeth" to provide a remedy to Respondent and deter future frivolous filings from Petitioner. *See Behrle*, 139 F.R.D. at 374.

ii. To remain consistent with the entirety of Rule 41, costs require the inclusion of attorneys' fees

This interpretation of the construction of Rule 41(d) "minimizes any inconsistency with Rule 41(a)(2), which courts have interpreted to allow attorneys' fees despite the lack of an express reference." *Andrews*, 827 F.3d at 311. Rule 41(a)(2)

provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." FED. R. CIV. P. 41(a)(2). Rule 41(a) creates the mechanism with which Rule 41(d) plaintiffs dismiss the original claim, before they refile and are subjected to Rule 41(d). FED. R. CIV P. 41. Three circuits have explicitly or implicitly recognized the inclusion of attorneys' fees as costs recoverable under 41(a)(2). *Davis v. USX Corp,* 819 F.2d 1270, 1276 (4th Cir. 1987); *LeBlang Motors, Ltd. v. Subaru of Am., Inc.,* 148 F.3d 680, 686-87 (7th Cir. 1998); *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 440-41 (8th Cir. 1997).

In *Davis v. USX Corp*, the Fourth Circuit implicitly recognized the ability and discretion of lower courts to grant attorneys' fees following a Rule 41(a)(2) dismissal. 819 F.2d at 1276; *Andrews*, 827 F.3d at 311-12. While the Fourth Circuit limited the ability to recover attorneys' fees to cases in which the plaintiff acted prejudicially or in bad faith, the method of enforcement does not dilute a definition of costs in Rule 41 which encompasses attorneys' fees. The Seventh and Eighth Circuits also recognize attorneys' fees as being implicit in the definition of costs in Rule 41(a)(2). *See e.g., LeBlang Motors, Ltd.* 148 F.3d at 686-87; *Painter*, 121 F.3d at 440-41. In *Esposito*, the court held that "[i]t would be inconsistent to award attorneys' fees as a condition of voluntary dismissal under Rule 41(a)(2), but completely prohibit the awarding of such fees when a case that is voluntarily dismissed is refiled under Rule 41(d)." *Esposito*, F.3d at 501. Thus, when considering the rule in its totality, these subsections should be read in tandem and with the same underlying intent to include attorneys' fees, as Rule 41(a)(2) precedes Rule 41(d).

Further analyzing Congress's authorization for courts to impose *costs* as sanctions against any attorney who vexatiously manipulates court proceedings illustrates why including attorneys' fees as cost in Rule 41(d) is critical to advancing Congress's consistent intent to have attorneys' fees function as a deterrent. *See* 28 U.S.C. § 1927. In *Roadway Express v. Piper,* the Court articulated that despite civil rights statutes like § 1988 expressly authorizing attorneys' fees to be recovered as part of the costs of litigation—attorneys' fees were excluded from the term costs under § 1927 and could not be imposed by the courts as sanctions. *See* 447 U.S. 752, 758 (1980). Siding with the dissent in *Roadway Express*, which asserted that attorneys' fees are sanctionable because they are expressly authorized under § 1988, Congress overruled the Court's holding by amending § 1927. *See* 28 U.S.C. § 1927; *Roadway Express v. Piper*, 447 U.S. at 772 (C.J., Burger dissenting).

Following the update to § 1927 (which identifies Counsel's liability for excessive costs), Congress expressly articulated that attorneys' fees are one of the *costs* of litigation that courts can hold attorneys liable for when they unreasonably and vexatiously manipulate litigation. 28 U.S.C. § 1927; *See Dowe v. AMTRAK*, No. 01 C 5808, 2004 U.S. Dist. LEXIS 11377, at *13-14 (N.D. Ill. June 18, 2004) (demonstrating that the meaning of costs was not altered by the post-*Roadway Express* amendments but clarified cost to unequivocally encompass attorneys' fees). Matching the intent behind Rule 41(d), Congress sought to include attorneys' fees as costs under § 1927 to allow courts to deter and rectify vexatious litigation through their inherent equitable power to sanction an attorney under Rule 11. *Wilder v. GL Bus Lines*, 258

F.3d 126, 130 (2d Cir. 2001). In conjunction with the courts inherent power to sanction, Rule 41(d) authorizes the courts to impose *costs* (including attorneys' fees) on a party when they vexatiously multiply litigation to gain a tactical advantage.

iii. The statutory construction of Rule 41(d) does not preclude attorneys' fees as costs

In *Horowitz*, the district court as well as the Second Circuit Court of Appeals engaged in extensive analysis to determine that Rule 41(d) requires courts to grant the prevailing party attorneys' fees. 888 F.3d at 24-25. As a preliminary consideration, the court ensured that the statutory construction of the rule did not preclude attorneys' fees from falling within its scope. The court considered other decisions in which the rules under consideration provided a definition for costs that explicitly did not include attorneys' fees, unlike Rule 41(d). 888 F.3d at 27. The resulting rule for these contrasting cases dictates that "where a rule concerning costs defines them without reference to attorneys' fees, or where the context of the rule suggests the incorporation of such a definition, attorneys' fees are not part of the costs to be taxed under that rule." *Hines v. City of Albany*, 862 F.3d 215, 220-21 (2d Cir. 2017). Thus, as the court in *Horowitz* noted, while attorneys' fees may be precluded, that is simply not the case where the rule, like Rule 41(d), does not include an enumerated list of definitions. 888 F.3d at 25.

This principle is illustrated through the analysis done by various courts on the Federal Rules of Appellate Procedure. The Second Circuit addressed the definition of costs for the purpose of Federal Rule of Appellate Procedure 39 in *Hines v. City of Albany* and concluded that the construction of the rule did not include attorneys' fees

as recoverable because it was excluded from the list of recoverable costs. 862 F.3d at 221. The Rule itself is not silent on the scope of recoverable costs, with subsections (c) and (e) enumerating various administrative costs. *Id.* at 221. The Second Circuit has held explicitly that the nature of the subsections "determines what costs are available." *L-3 Commc'ns Corp. v. OSI Sys., Inc.*, 607 F.3d 24, 29 (2d Cir. 2010). Thus, inherent in the structure of Federal Rule of Appellate Procedure 39 is a definition of the types of costs which may be recovered, and attorneys' fees are not incorporated. 862 F.3d at 221.

Applying this threshold test to Rule 41(d), there is no enumerated list or context that triggers a potential for preclusion. Unlike Federal Rule of Appellate Procedure 39 which excluded attorneys' fees in its list of recoverable costs, Rule 41(d) does not include a list of costs, either explicitly or by reference, thus not precluding attorneys' fees." 888 F.3d at 28. In fact, "[t]he drafters of Rule 41 chose to leave the term 'costs' undefined in both the rule and the Advisory Committee Notes, making no reference to attorneys' fees" and thus not precluding recovery." *Garza* 881 F.3d at 282. This highlights how rules such as the Federal Rule of Appellate Procedure and Rule 41(d) are distinguishable, with the statutory construction functioning entirely different which reinforces a reading that does not preclude attorneys' fees from Rule 41(d) costs. As the Court in *Marek v. Chesny* noted, the drafters of the rules were familiar with the state of jurisprudence the rules function within, and thus demonstrated an intent to differentiate the function of the two rules., with Rule 41(d) including attorneys' fees. *See* 473 U.S. 1, 8 (1984).

B. Even if Recovery is Not Automatic, Courts Must Retain the Discretion to Award Attorneys' Fees Under Rule 41(d)

Even if attorneys' fees are not automatically recoverable under Rule 41(d), the term costs nonetheless includes attorneys' fees, when, as various circuits have held, they are recoverable due to the underlying substantive claim. *Portillo*, 872 F.3d at 728; *Andrews*, 827 F.3d at 306; *Garza* 881 F.3d at 282; *Esposito*, 223 F.3d at 497. The hybrid method for determining recovery is followed by the Third, Fourth, Fifth, and Seventh Circuits. The distinction amongst the circuits regarding attorneys' fees functions more as a difference in the nature of the recovery, not in definition as both "always fees" and "hybrid" jurisdictions necessarily define Rule 41(d) costs to include attorneys' fees. This is demonstrated through the Fourteenth Circuit's holding and reasoning for the case at bar. After concluding that Rule 41(d) incorporates an intent to include attorneys' fees as costs, the court held that it would not decide on a specific recovery mechanism. R. at 36a. The court noted that it need not make a determination on following the "always fees" or "hybrid" rule, as the Respondent would recover under either mechanism. R. at 36a. Thus, the majority of circuits agree that, while recovery may function differently, Rule 41(d) costs is defined to include attorneys' fees.

The circuits that utilize the hybrid rule for recovery base their analysis on this Court's congruent reasoning in *Marek*. 473 U.S at 1. In *Marek*, this Court determined that costs recoverable under Rule 68 include attorneys' fees and distilled the rule that "absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorneys' fees, we are satisfied such fees are to be included."

473 U.S. at 9. The *Marek* court reached this conclusion by historically analyzing when attorneys' fees were recoverable. This history informed the drafters of the Federal Rules of Civil Procedure. *Id.* at 8. While the jurisprudential default "American Rule" required each party to bear its own attorneys' fees, when the Federal Rules of Civil Procedure were drafted, federal statutes had dictated and defined costs for prevailing parties for nearly eighty-five years. *Id.* Set within the scope of the American Rule, both courts themselves, resting on inherent powers, and Congress produced exceptions to the American Rule. *Id.* Many of these exceptions were provided by the underlying substantive statutes and were understood to dictate when a court was directed to award attorneys' fees. *Id.* The Court in *Marek* considered this extensive history as well as the knowledge of the rule drafters to determine that "it is very unlikely that this omission was a mere oversight; on the contrary, the 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." *Id.* at 9. Thus, this intentional vagueness on part of the drafters of Rule 68 requires the term costs to include attorneys' fees.

The analysis done in *Marek* is highly probative for the analysis before the Court regarding Rule 41(d) as the rules share nearly identical characteristics. First, Rule 68 and Rule 41(d) bear identical construction insofar as neither rule explicitly defined the term costs. *Id.* The Seventh Circuit noted the shared characteristics in explaining that Rule 41(d), like Rule 68, refers to costs but provides no further definition in either the text or Advisory Committee Notes. *Esposito,* 223 F.3d at 500; *Portillo*, 872 F.3d

at 739 ("We see no reason to treat Rule 41(d) differently."). While other circuits read an inherent intent to automatically recover attorneys' fees, four circuits have now relied on *Marek* to evaluate the novel question of Rule 41(d) costs within their jurisdiction. *Portillo*, 872 F.3d at 728; *Andrews*, 827 F.3d at 306; *Garza* 881 F.3d at 282; *Esposito*, 223 F.3d at 497. The distinction amongst the circuit split is less one of the definition of costs, and more one of the applicability in recovery. *Portillo*, 872 F.3d at 739 ("categorically forbidding fees makes little sense where the object—costs—is defined to include attorneys' fees.").

Second, the suit before the Court in *Marek* invoked the same underlying substantive claim as Petitioner brought in this litigation. Both cases were based on a substantive § 1983 claim with recovery governed by § 1988, and in *Marek*, the Court noted that Congress expressly authorized the recovery of attorneys' fees under § 1983, thus attorneys' fees needed to be considered in the Rule 68 cost-shifting provision. *Marek*, 473 U.S. at 9. The Court concluded that a "'plain meaning' interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988." *Id.* The Court noted that the underlying intent of § 1988 is to encourage the meritorious enforcement of civil rights protections. *See id.* at 11 (noting the compatibility of § 1988 and Rule 68 permitting recovery of attorneys' fees). In order to incentivize meritorious civil rights suits, and disincentivize frivolous ones, a court needs the ability to provide attorneys' fees. This interpretation is not only consistent with this Court's jurisprudence in assessing a similar rule but is necessary to remain compatible with statutes underlying the suit,

such as § 1988. This reinforces the applicability of the analysis done by the *Marek* court because not only are the contested rules constructed the same, but the underlying substantive claim is identical as well. Thus, by extension, the only appropriate construction of Rule 41(d) which encompasses the substance of both Rule 41(d) and § 1988 is one in which attorneys' fees are included as recoverable costs.

CONCLUSION

Quicksilver State University adequately satisfied the due process requirements put forth by this Court in *Mathews v. Eldridge*. During an unprecedented global pandemic, QSU still allowed the Petitioner to attend an in person hearing with his attorney and provided him with the opportunity to conduct some form of cross-examination. Additionally, QSU did not undermine the Petitioner's due process rights by implementing a mask requirement during a global pandemic. Despite the University fairly evaluating the evidence, the Petitioner baselessly contends that QSU discriminated against him based on his sex. Because the Petitioner advanced meritless claims and voluntarily dismissed his first suit against QSU to gain a tactical advantage, QSU is entitled to attorneys' fees under Rule 41(d). The Respondent respectfully requests that this Court affirm the judgement of the Fourteenth Circuit Court of Appeals.

Respectfully submitted,
/s/ Team *#98*
Team #98
Counsel for Respondents
November 19, 2022

CERTIFICIATE OF SERVICE

By our signature, we certify that a true and correct copy of Respondents' brief on the merits was forwarded to Petitioner, Kyler Park, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 19th day of November 2022.

/s/ Team *#98*
Team #98
Counsel for Respondents
November 19, 2022

CERTIFICIATION OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Respondents, Quicksilver State University, contains 12,619 words, excluding the Certificate of Service and Certificate of Compliance.

/s/ Team *#98*
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Counsel for Respondents
November 19, 2022