No. _____

In the Supreme Court of the United States

REGINALD YOUNG, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Many states require an "affidavit of merit" to accompany a complaint asserting a claim of medical negligence. The circuits are divided about whether this requirement applies to an action brought in federal court that is governed by state substantive law.

The Sixth and Ninth Circuits view state law "affidavit of merit" requirements as preempted by the Federal Rules of Civil Procedure in accordance with the decision of this Court in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010).

The Third, Fourth, Eighth and Tenth Circuits follow a different rule, routinely applying state law "affidavit of merit" statutes to dismiss any complaint that is not supported by the state law affidavit.

The Seventh Circuit in this case deepened the split by siding with the circuits that apply a state law in federal court and treating the Illinois requirement for an "affidavit of merit" as an affirmative defense that a defendant may raise in a motion for summary judgment.

The question presented is:

In adjudicating a medical negligence claim brought in federal court that is governed by state substantive law, must a district court apply a state law "affidavit of merit" requirement or is such a requirement preempted by the Federal Rules of Civil Procedure?

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Reginald Young respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-6a) is reported at 942 F.3d 349. The order of the district court dismissing the case (App. 14a-18a) and the report and recommendation of the magistrate judge (App. 7a-13a) are both unreported and available at 2018 WL 5904459 and 2018 WL 4217068, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2019. The court of appeals denied rehearing on December 30, 2019. (App. 19a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Rules 8, 9, 11, and 56 of the Federal Rules of Civil Procedure are reproduced in Appendices E-G to this petition. (App. 20a-30a.) The Illinois statute requiring an affidavit of merit for medical negligence complaints, 735 ILCS 5/2-622, is set out in Appendix H. (App. 31a-34a.)

STATEMENT

Petitioner Reginald Young, a federal prisoner, brought this action under the Federal Tort Claims Act seeking damages for harm to his vision allegedly caused by the Bureau of Prisons' multi-year delay in providing him with cataract surgery. (Complaint, District Court Docket 1.) Petitioner explained in his *pro se* complaint that he had been diagnosed with severe cataracts in both eyes in 2008 and was still awaiting surgery on his left eye in 2018. Petitioner maintained that the lengthy delay had left him "basically blind" in that eye. (Plaintiff's Response to Motion to Dismiss, District Court Docket 13 at 4.)

The government responded with a "motion to dismiss or in the alternative motion for summary judgment" (District Court Docket 11), describing petitioner's complaint:

> It appears Plaintiff claims that he requires but has not received this additional surgery. Specifically, Plaintiff states that his "vision problems have been on going since 2011 and currently continue as the filing of this suit, and eight years is far too long."

(*Id.* at 2.) The government asked the district court to dismiss the complaint without prejudice (*Id.* at 8 & n.1) because petitioner had failed to support his complaint with the "affidavit of merit" required by Illinois law in medical negligence actions, 735 ILCS 5/2-622. (*Id.* at 6-7.)

The Illinois statute requires the plaintiff's attorney, or the plaintiff if proceeding *pro se*, to attach to the complaint an affidavit averring,

> That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action.

735 ILCS 5/2-622(a)(1) (App. 31a) The Illinois statute also requires that the written report be attached to the affidavit and authorizes the redaction of the identity of the reviewing health professional. *Id.* (App. 32a.)

The magistrate judge, to whom the government's motion had been referred for report and recommendation, agreed that the Illinois affidavit of merit was required. (App. 11a-13a.) Rather than grant the government's request that the case be dismissed without prejudice, the magistrate recommended dismissal with prejudice. (*Id.*) Petitioner filed timely objections to the magistrate's recommendation. (District Court Docket 17.)

The district court overruled petitioner's objections and dismissed the action with prejudice. (App. 14a-18a.) The district court held "that Young has failed to comply

with 735 ILCS 5/2-622(a), and his case should therefore be dismissed." (App. 17a.)

Petitioner filed a *pro se* appeal and the Seventh Circuit affirmed. The Seventh Circuit had already held that the Illinois "affidavit of merit" requirement applies to medical negligence claims brought under a federal district court's supplemental jurisdiction. *Hahn v. Walsh*, 762 F.3d 617, 633 (7th Cir. 2014). The Court of Appeals concluded that the affidavit requirement "must apply in suits against the national government, just as it applies in suits against private physicians." (App. 2a.) The court below held, however, that the command of the Illinois statute that the "affidavit of merit" be attached to the complaint was inconsistent with Federal Rule of Civil Procedure 8. (App. 3a-4a.)

The Seventh Circuit then fashioned a new rule to transfer the "affidavit of merit" requirement from a pleading requirement to an affirmative defense that could be litigated at summary judgement. (App. 5a.) The Seventh Circuit justified its new rule as permitting the "state substantive goal and the federal procedural system" to "exist harmoniously." (*Id.*)

The Seventh Circuit then applied its new rule and affirmed. (App. 6a.) The court of appeals did not explain why it refused to grant petitioner an opportunity to comply with its new rule on remand.

Three days after the Seventh Circuit filed its opinion, the Sixth Circuit reached the contrary result in *Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019), rejecting outright the government's request to apply the Ohio rule requiring an "affidavit of merit" to a case brought under the Federal Tort Claims Act. The Sixth Circuit noted that it was parting ways with the Seventh Circuit's holding in *Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014), which it described as inconsistent with the decision of this

Court in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010).

Petitioner filed a timely petition for rehearing, asking the Seventh Circuit to reconsider in light of the conflicting decision from the Sixth Circuit or to remand and allow plaintiff to comply with the court's new rule. The Court of Appeals denied rehearing without opinion. (App. 19a.)

REASONS FOR GRANTING THE PETITION

Twenty-seven states require some form of an "affidavit of merit" as a prerequisite to adjudication of the merits of a medical negligence claim.[1] One commentator has computed that these states "represent well over sixty percent of the United States' population."[2]

The circuits are divided over whether an "affidavit of merit" applies to an action brought in federal court but governed by state substantive law, such as this case brought by petitioner under the Federal Tort Claim Act. This case provides the Court with an opportunity to resolve the conflict.

-I-

The Illinois "affidavit of merit" statute is typical; it requires the plaintiff in a medical negligence action to file an affidavit, either from a *pro se* plaintiff or counsel, attesting that, after consultation with an expert, the affiant

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[1] Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 24, 2014), https://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx (visited May 27, 2020).

[2] Benjamin Grossman, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 225 (2010).

believes "there is a reasonable and meritorious cause" for filing the lawsuit. 735 ILCS 5/2-622(a)(1) (reproduced in the Appendix, *infra*, App. 26a.) The statute requires that the affidavit and a report from the expert be filed with the complaint or within 90 days thereafter. 735 ILCS 5/2-622 (a)(2) (App. 27a.) The Illinois courts have construed the statute to allow the late filing of an "affidavit of merit." *Lee v. Berkshire Nursing & Rehab Center, LLC*, 2018 IL App (1st) 171344, ¶ 14, 117 N.E.3d 1172, 1177 (2018).

The Illinois courts view the "affidavit of merit" as "a pleading requirement designed to reduce frivolous lawsuits, not a substantive defense which may be employed to bar plaintiffs who fail to meet its terms." *Schroeder v. Nw. Cmty. Hosp.*, 371 Ill. App. 3d 584, 595, 862 N.E.2d 1011, 1021 (2006); *Ripes v. Schlechter*, 2017 IL App (1st) 161026, ¶ 14, 91 N.E.3d 415, 420 (2017). This "pleading requirement" is inconsistent with the Federal Rules of Civil Procedure.

-II-

Rule 8(a) of the Federal Rules of Civil Procedure (App. 20a-22a) sets out the requirements for a complaint. This rule does not include any special criteria for a claim of medical negligence.

Rule 9(b) of the Federal Rules of Civil Procedure (App. 23a) requires that fraud or mistake be alleged "with particularity." Rule 9(g) requires that any claim for special damages be "specifically stated." (App 24a.) The rule does not apply a heightened pleading standard to any other element of a cause of action. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 169 (1993).

Rule 11(a) of the Federal Rules of Civil Procedure dispenses with the need for verified pleadings or a

supporting affidavit "[u]nless a rule or statute specifically states otherwise." This provision "means federal rule or federal statute." *Farzana K. v. Indiana Dep't of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007) (Easterbrook, J.); *see also Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1360 (11th Cir. 2014).

The Federal Rules of Civil Procedure thus answer "the same question," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010), addressed by "affidavit of merit" statutes.

-III-

At issue in *Shady Grove* was a New York law which prohibited a class action in cases seeking statutory minimum damages. The Court held that the state law did not bar a federal court, sitting in diversity, from entertaining a class action under Rule 23 of the Federal Rules of Civil Procedure: Five members of the Court agreed that because Rule 23 "unambiguously authorizes *any* plaintiff, in *any* civil proceeding, to maintain a class action if the Rule's prerequisites are met," 559 U.S. at 406, the New York statute barring class actions in particular kinds of cases, *id.* at 399, cannot be applied by the federal courts.

Judge Thapar, writing for the Sixth Circuit in *Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019) summarized the analysis mandated by *Shady Grove*:

> The first question we must ask is whether the Federal Rules of Civil Procedure answer the question in dispute: does someone need an affidavit of merit to state a claim for medical negligence? *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (majority opinion). In other words, do the Federal Rules answer "the same question" as the state rule? If the Federal Rules answer that question, we then must ask whether the Federal Rules are valid under the Constitution and the Rules Enabling

> Act. *See id.* If the answers to both those questions are yes, then our work is done. We apply the Federal Rules, not Ohio Rule 10(D)(2).

Gallivan, 943 F.3d at 293. Judge Thapar then turned to the Federal Rules of Civil Procedure and concluded that the affidavit requirement of the Ohio rule is contrary to the Federal Rules. *Id.* at 293-94. As the Sixth Circuit held, the Federal Rules "provide a clear answer: no affidavit is required to state a claim for medical negligence." *Id.* at 293. The same is true for the Illinois statute at issue here.

The Ninth Circuit reached the same conclusion, describing the Nevada "affidavit of merit" requirement as a procedural rule that does not apply in FTCA cases because "[t]he FTCA contains no affidavit requirement." *Kornberg v. United States*, 692 F. App'x 468, 469 (9th Cir. 2017).

-IV-

The Third, Fourth, Eighth, and Tenth Circuits routinely apply state "affidavit of merit" statutes to federal cases raising medical negligence claims governed by state substantive law.

The Third Circuit in *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 264-65 (3d Cir. 2011) followed its earlier decision in *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000), to apply a state "affidavit of merit" rule because the state and federal rules "can exist side by side." *Chamberlain*, 210 F.3d at 160. The Sixth Circuit observed in *Gallivan* that this analysis, which is the fulcrum of the decision of the Seventh Circuit, "conflicts with *Shady Grove*," where the Court wrote "the relevant inquiry isn't whether the federal and state rules can coexist but whether the Federal Rules "answer[ ] the

question in dispute." 943 F.3d at 296, quoting *Shady Grove*, 559 U.S. at 398 (majority opinion).

The Fourth Circuit in *Littlepaige v. United States*, 528 F. App'x. 289 (4th Cir. 2013) relied on unanimous decisions from district courts to conclude that compliance with state law "is required to sustain a medical malpractice action under the FTCA in North Carolina." *Id.* at 292-93.

The Eighth Circuit supported its decision in *Keating v. Smith*, 492 F. App'x 707 (8th Cir. 2012) to require compliance with a state law "affidavit of merit" requirement by citing to its earlier decision in *Mackovich v. United States*, 630 F.3d 1134, 1135 (8th Cir. 2011) (per curiam). That case in turn cited without discussion *Goodman v. United States*, 2 F.3d 291 (8th Cir. 1992). *Mackovich*, 630 F.3d at 1135. *Goodman*, however, did not involve any "affidavit of merit," but was an appeal after trial, where the plaintiff argued for a nation-wide standard of appeal, rather than that applied in South Dakota, where the medical care had been provided. *Goodman*, 2 F.3d at 292-93.

The Tenth Circuit in *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996) employed the "outcome determinative" test that did not survive *Shady Grove* when it chose to apply the state certificate requirement lest it "create a rule of law likely to produce substantially different results in state and federal court." *Id.* at 1540. *Shady Grove*, of course, allowed a class action to proceed in federal court even though the state courts were precluded from granting such relief. 559 U.S. at 436 (Ginsburg, J., dissenting).

These cases, as Judge Thapar summarized in *Gallivan*, "(1) either predate *Shady Grove* or ignore it, (2) don't address Rule 12, and (3) don't offer a satisfactory response to the clear conflict between the federal

pleading rules and the state affidavit-of-merit requirement." *Gallivan*, 943 F.3d at 296-97.

-V-

The Seventh Circuit recognized that the Illinois "affidavit of merit" requirement conflicts with Rule 8 of the Federal Rules of Civil Procedure which "does not require attachments." (App. 4a.) Nevertheless, the Court hewed to its precedent, holding—in direct conflict with the Sixth Circuit—that the requirement applies in federal court. (App. 2a.)

The Seventh Circuit then held that the goal of the state rule "can exist harmoniously" with the federal procedural system if the affidavit requirement is construed as an affirmative defense that can be raised in a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. (App. 5a.)

The rule fashioned by the Seventh Circuit does not comply with Rule 56(a) of the Federal Rules of Civil Procedure. This Rule permits a party to move for summary judgment on any "claim or defense." (App. 28a.) An "affidavit of merit" is not an element of a claim of medical negligence, which requires the plaintiff to show:

> (1) the standard of care in the medical community by which the physician's treatment was measured; (2) that the physician deviated from the standard of care; and (3) that a resulting injury was proximately caused by the deviation from the standard of care.

Watson by Leonard v. West Suburban Medical Center, 2018 IL App (1st) 162707, ¶ 236, 103 N.E.3d 895, 927 (2018). Nor is the absence of an affidavit of merit an affirmative defense under Illinois law, which views the affidavit of merit as a "a pleading requirement." *Ripes v.*

Schlechter, 2017 IL App (1st) 161026, ¶ 14, 91 N.E.3d 415, 420 (2017).

Nor does the Seventh Circuit's new rule actually "harmonize" Illinois's "affidavit of merit" requirement with the federal procedural system. The Seventh Circuit overlooked Illinois law that permits the submission of a physician's report required by 735 ILCS 5/2-622(a)(1) that is inadmissible under Rule 56. The Illinois statute does not require the physician's report to be signed under oath or under penalties of perjury and permits the plaintiff to redact the name and address of the physician who signed the certificate. 735 ILCS 5/2-622(a)(1) ("[I]nformation which would identify the reviewing health professional may be deleted from the copy so attached.") This type of document is not among the items permitted by Rule 56(c)(1)(A) to establish a material fact.

As Judge Thapar explained in his opinion in *Gallivan*, the Seventh Circuit's approach contradicts *Shady Grove* because "the relevant inquiry isn't whether the federal and state rules can coexist but whether the Federal Rules "answer[ ] the question in dispute." *Gallivan*, 943 F.3d at 296.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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MAY, 2020