

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*

REPLY BRIEF FOR PETITIONER

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Respondent valiantly attempts to minimize the conflict between the rule applied by the Seventh Circuit in this case and the Sixth Circuit’s holding in *Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019). (Br. in Opp. 14-17.) But the Sixth Circuit was emphatic in rejecting the rule applied in this case, stating that the Seventh Circuit had “reached the wrong answer because it asked the wrong questions.” *Id.* at 294.

The Sixth Circuit in *Gallivan* considered and rejected the Seventh Circuit’s rule, first announced in *Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014), that a state law “affidavit of merit” requirement applies to medical negligence claims brought in federal court that are governed by state substantive law. The conflict between the Sixth and Seventh Circuits is inescapable:

What’s more, *Hahn* conflicts with [*Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)]. In *Shady Grove*, the Supreme Court said that the relevant inquiry isn’t whether the federal and state rules can coexist but whether the Federal Rules “answer[] the question in dispute” (as they do here).

559 U.S. at 398 (majority opinion). And *Shady Grove* emphasized that the purpose of the rules is irrelevant when the text is clear (as it is here). *Id.* at 403. So *Hahn* reached the wrong answer because it asked the wrong questions.

Gallivan v. United States, 943 F.3d 291, 296 (6th Cir. 2019).

Respondent also seeks to minimize the conflict between the Seventh Circuit’s rule and the Ninth Circuit’s holding in *Kornberg v. United States*, 692 F. App’x 468, 469 (9th Cir. 2017), stating that “an unpublished decision does not give rise to the sort of circuit conflict that might warrant this Court’s review.” (Br. in Opp. 18.) The Court, however, follows a different standard. *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (granting certiorari to review unpublished Eleventh Circuit decision); *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017) (granting certiorari to review unpublished Seventh Circuit decision); *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000) (granting certiorari to review unpublished Fourth Circuit decision).

Finally, respondent mistakenly seeks to characterize this case as limited to the Seventh Circuit’s interpretation of Illinois law. (Br. in Opp. 10.) This is incorrect. At issue in this case is a conflict between the circuits about the application of *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010) to the “affidavit of merit” now required by 28 states as a prerequisite to adjudication of a medical negligence claim.¹

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 September 7, 2020).

Respondent is mistaken in its contention that the decision below did not analyze whether the state rule could coexist with federal rules. (Br. in Opp. 14.) In fact, the opinion of the Seventh Circuit was animated by the considerations of coexistence rejected by *Shady Grove*: the court below concluded that the federal and state rules “can exist harmoniously.” *Young v. United States*, 942 F.3d 349, 352 (7th Cir. 2019).

The Court should grant certiorari to resolve the issue, framed by Judge Thapar in his opinion for the Sixth Circuit in *Gallivan*: “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?” *Gallivan v. United States*, 943 F.3d 291, 293 (6th Cir. 2019).

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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