No. 24-440

In the Supreme Court of the United States

HAROLD R. BERK, PETITIONER,

v.

WILSON C. CHOY, ET AL.

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

BRIEF FOR THE PETITIONER

JAKE W. MURPHY
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 80202
(303) 863-1000

DEVIN M. ADAMS
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 4000
700 Louisiana Street
Houston, TX 77002
(713) 576-2400

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
ANTHONY J. FRANZE
KOLYA D. GLICK
SAMUEL I. FERENC
DANA KAGAN MCGINLEY
JILLIAN M. WILLIAMS
JENNIFER F. KAPLAN
KATIE WENG
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

QUESTION PRESENTED

Whether a state law providing that a complaint must be dismissed unless it is accompanied by an expert affidavit may be applied in federal court.

PARTIES TO THE PROCEEDING

Petitioner Harold R. Berk was plaintiff in the district court and appellant in the court of appeals.

Respondents Wilson C. Choy, MD and Beebe Medical Center, Inc. were defendants in the district court and appellees in the court of appeals.

Respondent Encompass Health Rehabilitation Hospital of Middletown, LLC was a defendant in the district court and appellee in the court of appeals. Pursuant to this Court's Rule 12.6, Encompass no longer has an interest in the outcome of the petition for certiorari.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-11a) is unpublished but available at 2024 WL 3534482. The decision of the United States District Court for the District of Delaware (Pet. App. 12a-15a) is unpublished but available at 2023 WL 2770573.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2024. The petition for a writ of certiorari was filed on October 16, 2024, and granted on March 10, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix.

STATEMENT

Before 1938, the federal courts were consigned to apply the procedural rules of the forum state's courts, yielding a chaotic patchwork of divergent standards in federal diversity cases. But that practice had its day in the sun. With the promulgation of the Federal Rules of Civil Procedure, federal judges and litigants were promised a uniform, comprehensive system of federal procedure.

To maintain uniform procedures in federal courts, this Court has instructed that when a valid federal rule and state law "attempt[] to answer the same question" of procedure, the federal rule alone controls. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). Courts "do not wade into *Erie*'s murky waters unless the Federal Rule is inapplicable or invalid." *Id.* at 398.

Delaware enacted an "affidavit-of-merit" statute that adds an extra pleading requirement for medical malpractice complaints. The statute requires dismissal of a complaint alleging medical negligence if the plaintiff does not include an affidavit stating a qualified expert's opinion that "there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause" of the plaintiff's alleged injuries. Del. Code Ann. tit. 18, § 6853(c); *see id.* § 6853(a)(1).

The question in this case is whether Delaware's affidavit-of-merit statute applies in federal court. It does not. Federal Rules 8 and 9 answer the same question as the Delaware law and set forth what a plaintiff must include in a complaint filed in federal court. And neither requires a medical malpractice plaintiff to attach an affidavit of merit to a complaint to avoid dismissal.

Delaware's law goes beyond imposing more stringent pleading requirements than the Federal Rules. To avoid

dismissal, the Delaware statute demands an expert disclosure and sworn verification of the merit of the claims—questions already answered by Federal Rules 3, 11, 12, 26, and 37. Because these Federal Rules answer the same question and are within the "statutory authorization" of the Rules Enabling Act and "Congress's rulemaking power," they alone apply in federal court. *Shady Grove*, 559 U.S. at 398.

This conclusion is commanded not only by a straightforward application of this Court's jurisprudence, but also the very purposes of the Federal Rules: uniformity, simplicity, and avoiding civil cases turning on mere technicalities. These goals are defeated if judges and parties must stitch together a fifty-state quilt of idiosyncratic procedural preferences. That is why the overwhelming majority of courts of appeals have held that similar state affidavit-of-merit statutes do not apply in federal court. This Court should reverse the Third Circuit's contrary view and hold that Delaware's affidavit-of-merit statute must give way to the Federal Rules of Civil Procedure.

A. Factual Background

In August 2020, petitioner Harold R. Berk injured his left ankle and foot in his Delaware home. Pet. App. 34a-35a (Am. Compl. ¶ 8). He was taken by ambulance to the emergency room at Beebe Healthcare, a facility owned by respondent Beebe Medical Center, Inc. Pet. App. 34a-35a ¶ 8. After an X-ray revealed fractures to his tibia and fibula, respondent Dr. Wilson C. Choy recommended placing petitioner's ankle in a splint. Pet. App. 35a ¶¶ 10-11. Because of chronic injuries in petitioner's lower extremities, however, Dr. Choy opted instead to use a controlled ankle monitor (CAM) boot. Pet. App. 35-36a ¶ 11.

Beebe Healthcare staff attempted to forcibly fit petitioner with the CAM boot. Pet. App. 36a-37a ¶ 13. The

staff repeatedly twisted and turned petitioner's fractured leg and manipulated his ankle in an unsuccessful attempt to force the boot onto his foot. Pet. App. 36a-37a ¶ 13. These efforts aggravated and worsened petitioner's existing fractures and caused him extreme pain. Pet. App. 36a-37a, 45a ¶¶ 13, 55. But Beebe Healthcare staff never performed an additional X-ray of petitioner's ankle. Pet. App. 38a ¶ 21.

Petitioner remained hospitalized following the failed, painful effort to apply the CAM boot. Pet. App. 37a-38a ¶¶ 14-21. Dr. Choy visited petitioner that evening and advised him that surgery would not be required for the fractures. Pet. App. 37a ¶ 16. Dr. Choy also advised that petitioner should not put weight on his left leg for eight weeks. Pet. App. 39a ¶¶ 16, 27. Dr. Choy did not indicate that he had consulted with staff about the botched CAM boot placement, nor did Dr. Choy order additional X-rays. Pet. App. 37a-38a ¶¶ 17-18, 21.

After three days at Beebe Healthcare, petitioner was transferred to a hospital owned by Encompass Health Rehabilitation Hospital of Middletown, LLC. Pet. App. 38a ¶¶ 21-22.[1] While at the Encompass Health facility, petitioner noticed his left leg appeared deformed and was oriented at an unusual leftward angle. Pet. App. 38a ¶ 23. Petitioner informed Encompass Health staff, who recorded that petitioner's left foot was "somewhat rotated externally." Pet. App. 38a, 39a ¶¶ 23, 28. But Encompass staff performed no X-rays or other treatment. Pet. App. 38a ¶ 23. Instead, petitioner underwent physical and occupational therapy requiring

[1] Pursuant to Supreme Court Rule 12.6, Encompass Health and petitioner notified the Court that "Encompass no longer has an interest in the outcome of the petition for certiorari . . . as a result of [Encompass's] settlement" with petitioner. Letter from Andrew Tutt to Hon. Scott S. Harris (Dec. 13, 2024).

him to place weight on his injured left leg, despite Dr. Choy's orders to the contrary. Pet. App. 38a-39a ¶¶ 24, 30.

One week after his discharge from Encompass Health, petitioner went to an appointment at Dr. Choy's office, but Dr. Choy was not present. Pet. App. 40a ¶¶ 32-34. Dr. Choy's physician assistant ordered an X-ray of petitioner's left ankle. Pet. App. 40a ¶ 34. That imaging showed petitioner's leg was severely deformed, as his fractured bones were pointing in three different directions—a serious injury known as a trimalleolar ankle fracture. Pet. App. 40a-41a ¶¶ 34, 37-38. After consulting with Dr. Choy by phone, the physician assistant informed petitioner that he needed immediate surgery to correct these deformities. Pet. App. 41a ¶ 34.

Petitioner contacted Dr. Steven Raikin, then-head of the ankle and foot practice at the Rothman Orthopaedic Institute in Philadelphia. *See* Pet. App. 41a ¶ 36. Reviewing the imaging, Dr. Raikin confirmed that it showed major deformities in petitioner's left ankle that required urgent surgery. Pet. App. 41a-42a ¶¶ 37-38. Petitioner was taken that day to Thomas Jefferson University Hospital. Pet. App. 42a ¶ 39. After conducting a procedure to reduce fluid in petitioner's lungs, Dr. Raikin performed the needed surgery. Pet. App. 43a ¶ 40. At the conclusion of the operation, an external fixator device was installed into petitioner's bones to hold the ankle in alignment while healing. Pet. App. 41a, 43a ¶¶ 38, 40.

After petitioner endured four months of constant pain from the external fixator and repeated treatments for leg ulcers, Dr. Raikin performed a second successful surgery to remove the fixator. Pet. App. 43a-44a ¶¶ 42-47. Months of extensive physical and occupational therapy followed. Pet. App. 44a ¶¶ 48-51. More than a year after the original incident, petitioner was finally able to walk short distances with a cane. Pet. App. 44a ¶ 51.

B. The Proceedings Below

1. Proceeding *pro se*, petitioner filed a federal diversity action in the District of Delaware in November 2022, alleging claims of medical negligence against Dr. Choy, Beebe, and Encompass Health. Attempting to comply with Delaware's affidavit-of-merit statute, petitioner filed with the complaint a motion under Del. Code Ann. tit. 18, § 6853(a)(2) for an extension of time to file an affidavit, which was granted. J.A. 24, 27.

Petitioner sought an affidavit of merit from Dr. Raikin, who had performed the successful surgeries following petitioner's treatment by respondents. Although Dr. Raikin had previously advised petitioner that he had a good malpractice case, Dr. Raikin would not provide an affidavit. J.A. 175-176. Attempting to further comply with the affidavit-of-merit statute, petitioner sought an affidavit from other medical providers who had previously treated him, but several stated that they do not provide affidavits of merit on claims against third parties. J.A. 190-192. Unable to secure an affidavit, petitioner filed under seal his medical records. J.A. 64-65.

2. In opposition to motions by respondents seeking *in camera* review of petitioner's sealed filings, petitioner argued, *inter alia*, that Delaware's affidavit-of-merit statute does not apply in federal diversity actions. J.A. 83-101. The district court dismissed petitioner's claims, concluding that Third Circuit precedent required the court to apply the Delaware affidavit-of-merit statute. Pet. App. 13a-15a.

3. The Third Circuit affirmed in an unpublished opinion. Pet. App. 1a-2a. Relying on its prior decisions holding that similar state affidavit-of-merit laws apply in federal court, the court held that the district court properly dismissed petitioner's complaint for failing to include an affidavit of merit. Pet. App. 5a-10a.

The Third Circuit first addressed whether the Federal Rules and the state law conflicted. The court concluded that the Delaware affidavit-of-merit statute did not conflict with Federal Rules 8 or 9 because an affidavit of merit "is not a pleading and serves a different purpose than pleadings do." Pet. App. 7a.

The Third Circuit also concluded that the Delaware law's requirement of a sworn affidavit attesting that the case is meritorious does not conflict with Federal Rule 11 because "Rule 11 governs attorney conduct, whereas the Delaware statute governs what an expert must do in a particular type of case." Pet. App. 7a. The court concluded that "[t]hese two rules therefore have different 'sphere[s] of coverage' and do not conflict." *Id.* (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)).

Finally, the Third Circuit found no conflict between the Delaware law and Federal Rule 12, concluding that Rule 12 provides "a mechanism to test the sufficiency of the complaint's factual allegations," while the affidavit-of-merit statute "serves an entirely different purpose." Pet. App. 7a-8a.

Finding no conflict with the Federal Rules, the court addressed the second step of the *Erie* inquiry, evaluating: (1) whether the state law is outcome determinative; and (2) whether failure to apply the state law would frustrate the twin aims of *Erie*—discouraging forum shopping and avoiding inequitable administration of the law. Pet. App. 8a-9a. The court held that Delaware's affidavit-of-merit statute is outcome determinative because failure to comply "can result in the dismissal of [a] case." Pet. App. 9a. The court also held that failure to apply Delaware's statute would frustrate the twin aims of *Erie* by (1) encouraging plaintiffs unable to secure an affidavit of merit to forum shop by "seek[ing] relief in a federal court," Pet. App. 9a; and (2) inequitably forcing defendants sued for medical negligence "to engage in

additional litigation and expense in a non-meritorious malpractice suit simply because the plaintiff was from a different state." Pet. App. 9a-10a.

In footnotes, the Third Circuit brushed aside petitioner's arguments that its precedent clashed with the legal framework set forth in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). Pet. App. 4a-5a nn. 5-6. And the court found distinguishable decisions from the overwhelming majority of circuits holding that *Shady Grove* precludes federal courts from applying state affidavit-of-merit laws. *See* Pet. App. 8a n.10.

SUMMARY OF ARGUMENT

I. A straightforward application of *Shady Grove* compels reversal of the decision below.

A. In *Shady Grove*, this Court held that a federal court exercising diversity jurisdiction should not apply a state statute or rule if (1) a Federal Rule of Civil Procedure "answer[s] the same question" as the state provision; and (2) the Federal Rule is within "statutory authorization [and] Congress's rulemaking power." *Id.* at 398-99. If those two conditions are satisfied, the Federal Rule applies—full stop. Courts do not "wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid." *Id.* at 398.

B. Here, Federal Rules of Civil Procedure 8 and 9, which govern the "general" and "special" requirements for pleadings in federal court, answer the same question as Del. Code Ann. tit. 18, § 6853, which imposes a pleading requirement more stringent than the Federal Rules. Federal Rule 8 identifies the three items a complaint "must contain," and none include an accompanying affidavit of merit. And Federal Rule 9 identifies when a complaint must satisfy heightened pleading

requirements, but does not require the heightened allegations of merit imposed by the Delaware law.

C. Delaware's law goes beyond imposing pleading requirements that are more demanding than the Federal Rules; it also imposes expert disclosure and verification requirements under threat of dismissal. But Federal Rules 3, 11, 12, 26, and 37 answer the same question. Rule 3 states what is required to commence a federal action, Rule 11 states when a complaint must be verified, Rule 12 identifies when a complaint must be supported by evidence, and Rules 26 and 37 prescribe the timing of expert opinions and consequences for failing to file them.

D. Because the Delaware law "attempts to answer the same question" as these Federal Rules, the Delaware law does not apply unless the Federal Rules are invalid. *Shady Grove*, 559 U.S. at 399. They are not.

Federal Rules 3, 8, 9, 11, 12, 26, and 37 do not "exceed[] statutory authorization or Congress's rulemaking power," but rather fall squarely within it. *Shady Grove*, 559 U.S. at 398. The Federal Rules enjoy "presumptive validity," *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 6 (1987), and a Federal Rule is invalid "only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule … transgresses neither the terms of the Enabling Act nor constitutional restrictions," *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 552 (1991) (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)). This Court has "rejected every statutory challenge to a Federal Rule that has come before [it]." *Shady Grove*, 559 U.S. at 407 (plurality opinion) (collecting cases). "[A]ny Rules Enabling Act challenge . . . has a large hurdle to get over." *Bus. Guides, Inc.*, 498 U.S. at 552. That hurdle is insurmountable here.

"What matters" in determining a federal rule's validity "is what the rule itself regulates: If it governs only

the manner and means by which the litigant's rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not." *Shady Grove*, 559 U.S. at 407 (plurality opinion) (cleaned up). Here, Rules 3, 8, 9, 11, 12, 26, and 37 undeniably regulate "only the manner and the means" of enforcing substantive rights: They merely specify what a complaint must include at the outset to avoid dismissal and the timing of expert disclosures. *See, e.g.*, *Abbas v. Foreign Pol'y Grp.*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (Kavanaugh, J.) (holding Rule 12 is valid because "pleading standards … are procedural"). That is why multiple courts of appeals considering affidavit-of-merit laws have found "no reason to doubt the validity of the Federal Rules at issue here." *Gallivan v. United States*, 943 F.3d 291, 294 (6th Cir. 2019).

E. The Third Circuit erred in its analysis from start to finish. The court found "no conflict" between any of the Federal Rules and the Delaware affidavit-of-merit statute, explicitly rejecting the argument that requiring plaintiffs to attach an affidavit of merit to a complaint, on pain of dismissal, conflicts with Rules 8, 9, 11, and 12. The Third Circuit reached that erroneous conclusion by failing to identify the question those rules seek to answer. Rules 8 and 9 answer the question: "what must a plaintiff do to state a claim for relief?" Rule 11 answers the question: "what mechanisms does the court use to limit frivolous filings?" And Rule 12 is one of the two rules (the other is Rule 56) that answer the question: "what are the circumstances under which a court must dismiss a case before trial?" Delaware's affidavit-of-merit statute *also* attempts to answer each of these questions, and it provides markedly different answers than the Federal Rules do. The Third Circuit found no conflict because it did not ask these questions.

After finding no conflict, the Third Circuit waded into *Erie*'s murky waters and held that Delaware's statute is the kind of substantive law that must apply in federal court. That, too, was error. Delaware's affidavit-of-merit law is procedural from tip to tail. The provision is addressed to Delaware state courts and specifies procedures *they* should use in certain cases. It does not address what federal courts, or courts applying Delaware law in other states, should do. The affidavit-of-merit law is also trans-substantive, applicable to all health-care negligence suits regardless of the sovereign whose law creates the cause of action. Procedural statutes like Delaware's affidavit-of-merit law are exactly the types of rules that do not apply in federal courts after *Erie*.

II. The plain-meaning approach to the Federal Rules reaffirmed in *Shady Grove* offers the clearest, most faithful method for resolving clashes between the Federal Rules and state procedural statutes. It mirrors this Court's broader practice of interpreting laws according to their ordinary meaning—not by reshaping them to accommodate nebulous policy concerns. It also protects the uniformity of federal procedure by providing that whenever the Rules speak directly to an issue, they control. That bright-line test also enhances efficiency and predictability, sparing litigants and courts from wasteful collateral litigation over which procedural device governs a particular case. And it is the most federalism-protective approach: it applies the Federal Rules as written, leaving within the states' prerogative any procedural regimes they craft for their own courts, without compelling federal courts to shoehorn arcane and incompatible procedures into the federal system and mangle the state provisions in the process. For these reasons, the Court should reaffirm and reapply its straightforward plain-meaning approach to the conflict in this case.

ARGUMENT

I. DELAWARE'S LAW REQUIRING THE DISMISSAL OF A COMPLAINT UNLESS IT IS ACCOMPANIED BY AN AFFIDAVIT ATTESTING TO THE MERIT OF THE CLAIMS CANNOT BE APPLIED IN FEDERAL COURT

A straightforward application of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), compels reversal of the decision below. Delaware's statute has no place in federal court.

A. Under *Shady Grove*, if a Federal Rule and State Law Answer the Same Question, the Federal Rule Controls

Courts employ a multi-step framework for "resolving conflicts between state law and the Federal Rules." *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 4 (1987). The first step is to determine whether the state law "attempts to answer the same question" as any Federal Rule. *Shady Grove*, 559 U.S. at 399. If so, the next step is evaluating whether the Federal Rule is a valid exercise of Congress's rulemaking authority under the Constitution and the Rules Enabling Act, 28 U.S.C. § 2072. *See Shady Grove*, 559 U.S. at 398-99 (citing *Burlington*, 480 U.S. at 5). If both requirements are satisfied, the inquiry is complete and the Federal Rule—not the state law—applies. *See Gallivan v. United States*, 943 F.3d 291, 295 (6th Cir. 2019) ("The Federal Rules have the same status as any other federal law under the Supremacy Clause.").

Only if the Federal Rules and the state provision do *not* answer the same question do courts wade into the perennially troublesome *Erie* analysis. *Id.* In that case, the operative question shifts to whether declining to apply the state's law would "significantly affect[] the result of a litigation." *Shady Grove*, 559 U.S. at 406 (plurality opinion) (quoting *Guaranty Tr. Co. v. York*, 326 U.S. 99, 109 (1945)). That inquiry "must be guided by 'the twin aims of the *Erie* rule: discouragement of forum shopping

and avoidance of inequitable administration of the laws.'" *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 428 (1996) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)). But even if the state provision is outcome determinative, it will be displaced if there is an irreconcilable conflict with "countervailing [federal] considerations" or a "federal policy." *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-38 (1958); *see also Gasperini*, 518 U.S. at 432-33, 437.

The Third Circuit never asked the threshold question under *Shady Grove*: whether the Delaware affidavit-of-merit law and the Federal Rules "answer the same question." They do. Rules 8 and 9 say "implicitly, but with unmistakable clarity" that compliance with their terms is all that is required to state a claim in federal court. *Hanna*, 380 U.S. at 470. And other Federal Rules likewise answer the same questions as the Delaware law.

B. Federal Rules 8 and 9 Answer the Same Question as Delaware's Affidavit-of-Merit Law

1. The question asked by the state law here is: what must a complaint include to state a claim for relief? *See Pledger v. Lynch*, 5 F.4th 511, 519 (4th Cir. 2021); *Gallivan*, 943 F.3d at 293. Federal Rules 8 and 9 answer that question. They list the items a complaint "must contain" and the matters that must be pled with specificity.

Under Del. Code Ann. tit. 18, § 6853, all complaints alleging medical negligence must include an affidavit of merit or face dismissal:

> No health-care negligence lawsuit shall be filed in this State unless *the complaint is accompanied by . . . [a]n affidavit of merit* as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum

> vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant.

Del. Code Ann. tit. 18, § 6853(a)(1) (emphasis added). To comply with the statute, the expert's affidavit must "set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint." *Id.* § 6853(c). "[A]n affiant is under the penalty of perjury for any false assertion." *Dishmon v. Fucci*, 32 A.3d 338, 342 (Del. 2011) (citing Del. Code Ann. tit. 11, § 1223).

Further, "[i]f the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit . . . has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court." Del. Code Ann. tit. 18, § 6853(a)(1). And if the court has granted an extension to file an affidavit of merit and the plaintiff still fails to submit one, the complaint must be dismissed. *See, e.g.*, *Smith v. Kobasa*, 113 A.3d 1081, 2015 WL 1903546, at *2-3 (Del. 2015); *Steward v. Irgau*, 2019 WL 2743714, at *1 (Del. Super. Ct. June 21, 2019).[2]

Put simply, an affidavit of merit is required to "get through the courthouse doors." *Mammarella v. Evantash*, 93 A.3d 629, 637 (Del. 2014). "[W]here a party

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[2] For claims involving negligence per se, not applicable here, "[a]n affidavit of merit shall be unnecessary if the complaint alleges" that "the personal injury or death occurred" because (1) a "foreign object was unintentionally left within the [patient's] body," (2) a "substance used in treatment" caused an "explosion or fire," or (3) a "surgical procedure was performed on the wrong patient or . . . part of the patient's body." Del. Code Ann. tit. 18, § 6853(b), (e); *see Beckett v. Beebe Med. Ctr., Inc.*, 897 A.2d 753, 756-57 (Del. 2006).

fails to file an Affidavit of Merit with the Superior Court, the Court will not entertain the case." *Dishmon*, 32 A.3d at 344-45; *see also, e.g.*, *Sanders v. Centurion L.L.C.*, 319 A.3d 307, 2024 WL 2105545, at *2 (Del. 2024) (affidavit of merit is required "before a medical-negligence lawsuit may proceed"); *Hall v. Sorouri*, 996 A.2d 793, 2010 WL 2255048, at *1 (Del. 2010) (lack of an "affidavit of merit constitutes grounds [for] dismissal of medical negligence claims as a matter of law"); *Duross v. Connections CSP, Inc.*, 2019 WL 4391231, at *3 (Del. Super. Ct. Sept. 13, 2019) (medical malpractice "[c]omplaint is statutorily deficient" if it lacks an affidavit of merit).

Delaware state courts strictly enforce § 6853's requirements. *See, e.g.*, *Nichols v. Christiana Care Health Sys.*, 266 A.3d 976, 2021 WL 5349943, at *2 (Del. 2021) (rejecting affidavit of merit because it stated nurse was "certified," instead of "licensed" as § 6853(c) requires); *Palacio ex rel. Mitchell v. Premier Healthcare, Inc.*, 2015 WL 13697664, at *1 (Del. Super. Ct. Aug. 11, 2015) (rejecting affidavit of merit because it failed to state in "simple, clear language" that the defendant's "negligence proximately caused [the plaintiff's] injuries"); *Kalinowski v. Adams*, 2012 WL 1413999, at *1-2 (Del. Super. Ct. Mar. 9, 2012) (same).

The Delaware statute provides that the court may grant "a single 60-day extension for the time of filing the affidavit of merit," Del. Code Ann. tit. 18, § 6853(a)(2), which is also enforced strictly. *See, e.g.*, *Smith*, 2015 WL 1903546, at *2 (prohibiting a second extension).[3]

[3] The district court granted petitioner the single 60-day extension in this case, but petitioner encountered difficulties in finding a doctor willing to review medical records and prepare the affidavit of merit. For example, petitioner's treating surgeon had retired for medical reasons; the surgeon's former employer adopted a policy against providing affidavits for their own patients in claims against third parties; and other medical practices that treated petitioner

2. The Delaware affidavit-of-merit statute "attempts to answer the same question" as the Federal Rules because it "imposes additional requirements" beyond what the Rules prescribe. *Shady Grove*, 559 U.S. at 399, 401.

Federal Rule 8, titled the "General Rules of Pleading," identifies only three things a complaint "must contain":

> (a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a). None of those requirements includes an affidavit of merit or other attachment to the pleading.

That has been true since the advent of the Federal Rules. When the Rules took effect in 1938, Rule 8 was accompanied by a set of forms—including form complaints—to "illustrate[]" the rules. Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 181 (1958); Adam N. Steinman, *Notice Pleading In Exile*, 41 Cardozo L. Rev. 1057, 1068-71 (2020). Each of the form complaints included only three requirements: an allegation of jurisdiction, a short and plain statement of

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had similar policies. J.A. 190-192. Delaware's statutory extension limitation is unlike federal practice where motions for extension are committed to the discretion of the district court.

the claim showing entitlement to relief, and a demand for the relief sought. Fed. R. Civ. P. 84 (2014) (abrogated 2015). Nothing more, nothing less. And none required the complaint to include an affidavit of merit, nor any other attachment, for that matter.[4]

When the Federal Rules require more than the general requirements under Rule 8, they say so. Rule 9, titled "Pleading Special Matters," sets forth rules for specific matters, including how to plead capacity or authority to sue, fraud, conditions precedent, special damages, and admiralty claims. Perhaps most well-known is Rule 9(b), which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

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[4] The form complaint for a negligence action, for instance, included only the following: "1. Allegation of jurisdiction. 2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway. 3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars. Wherefore plaintiff demands judgment against [defendant] in the sum of _____ dollars and costs." That's it. Further, when the Advisory Committee removed the forms in 2015 because their "purpose of providing illustrations for the rules . . . ha[d] been fulfilled," the Committee noted that the forms were no longer necessary because "there are many excellent alternative sources for forms, including the website of the Administrative Office of the United States Courts" and other sources. Fed. R. Civ. P. 84 advisory committee's note to 2015 amendment. Those forms, too, include only the three requirements of Rule 8. *See, e.g.*, Complaint for a Civil Case Alleging Negligence (Form Pro Se 5), U.S. Courts, https://www.uscourts.gov/forms-rules/forms/complaint-a-civil-case-alleging-negligence (last visited May 26, 2025).

Consistent with the text of the rules, this Court has repeatedly held that Rule 8 includes the *only* requirements for a complaint unless another federal rule, like Rule 9, expressly imposes additional requirements. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), for instance, this Court reversed the Fifth Circuit's application of a pleading rule that complaints alleging § 1983 civil rights claims against municipalities needed to include "factual detail and particularity [of] the basis for the claim," including "why the defendant-official cannot successfully maintain the defense of immunity." *Id.* at 167. This Court held that the Fifth Circuit's "heightened pleading standard" could not stand because it was "more stringent" than Rule 8(a)(2), which "requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 164, 167.

The Court observed that "Rule 9(b) does impose a particularity requirement," and thus the "Federal Rules do address … the question of the need for greater particularity in pleading certain actions." *Id.* at 168. But the Rules "do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*" *Id.* In other words, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriquez*, 583 U.S. 281, 300 (2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012)).

Thus, in case after case, this Court has rejected pleading requirements that go beyond those set forth in Rules 8 and 9. *See, e.g.*, *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002) ("[I]mposing the Court of Appeals' heightened pleading standard … conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only 'a short and plain statement

of the claim showing that the pleader is entitled to relief.'"); *Hill v. McDonough*, 547 U.S. 573, 582 (2006) (rejecting the argument that § 1983 suits challenging a method of execution must identify an acceptable alternative: "Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts."); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (reversing lower court standard requiring complaints to include specific facts of "substantial harm" in Eighth Amendment actions because Rule 8 "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief'"); *Skinner v. Switzer*, 562 U.S. 521, 530 (2011) ("Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short plain' statement of the plaintiff's claim, not an exposition of his legal argument"); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

The principle is so settled that the Court has summarily reversed lower federal courts that imposed requirements beyond those set by Rule 8. In *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam), for example, the Court summarily rejected a lower court requirement that plaintiffs asserting civil rights actions expressly invoke § 1983, reasoning that the text of Rule 8 provides the only requirements for a complaint and "indicates that a basic objective of the rules is to avoid civil cases turning on technicalities." *Id.* (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1215 (3d ed. 2004)); *see also Jones v. Bock*, 549 U.S. 199, 212 (2007) (advising that courts should generally "not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns").

3. The Federal Rules and Delaware law at issue here "answer the same question" on their face. *See* D. Chanslor Gallenstein, *Whose Law Is It Anyway? The Erie Doctrine, State Law Affidavits of Merit, and the Federal Tort Claims Act*, 60 U. Louisville L. Rev. 19, 46 (2021) ("So, do [affidavit-of-merit laws] answer the same question as Rule 8? Undoubtedly so."); *id.* at 47 (similar for Rule 9). Rule 8 identifies what a federal complaint "must contain"; Rule 9 expands on the requirements for special matters; and Delaware's law mandates that a complaint must be accompanied by an affidavit attesting to the claims' merit, or else plead allegations that fall within an exception, Del. Code Ann. tit. 18, § 6853(b), (e).

Indeed, the Delaware affidavit-of-merit requirement is every bit the kind of "heightened pleading standard" this Court has repeatedly held runs afoul of Rules 8 and 9. Unless "the complaint alleges" specific facts supporting a negligence *per se* claim, the Delaware law requires a complaint to include an affidavit that "set[s] forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint." *Id.* § 6853(b), (c). Requiring a complaint to include an affidavit that attests to the legal requirements of breach and proximate causation is materially identical to requiring a complaint to include specific facts as to why the plaintiff suffered cognizable "substantial harm," *Erickson*, 551 U.S. at 93, "why the defendant-official cannot successfully maintain the defense of immunity," *Leatherman*, 507 U.S. 167, or why the conduct alleged violates specific legal requirements or statutes, *Skinner*, 562 U.S. at 530; *see Johnson*, 574 U.S. at 11. Federal courts cannot impose pleading requirements that exceed what a complaint "must contain" under Rules 8 and 9, so it would be passing

strange to allow a state law to impose such elevated requirements in federal court. Federal Rules 8 and 9 and Delaware's affidavit-of-merit requirement cannot coexist.

4. For these reasons, the overwhelming majority of the courts of appeals have held that state affidavit-of-merit laws like Delaware's do not apply in federal court. Applying *Shady Grove*, the Sixth Circuit held that Rule 8 sets forth the requirements for a complaint and thus "implicitly 'excludes other requirements that must be satisfied for a complaint to state a claim for relief.'" *Gallivan v. United States*, 943 F.3d 291, 293 (6th Cir. 2019) (quoting *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1352 (11th Cir. 2018)). The Sixth Circuit further reasoned that "Rule 9 confirms the point by specifying the few situations when heightened pleading *is* required—for instance, when a party alleges fraud or mistake." *Id.* at 293; *accord Albright v. Christensen*, 24 F.4th 1039, 1048-49 (6th Cir. 2022) (finding Michigan's affidavit-of-merit statute does not apply in federal court because *inter alia* Rule 8 answers the same question).

The Seventh Circuit has also held that state affidavit-of-merit requirements mirroring Delaware's conflict with Rule 8. *Young v. United States*, 942 F.3d 349, 351 (7th Cir. 2019). "Rule 8 of the Federal Rules of Civil Procedure specifies what a complaint must contain," and "does not require attachments." *Id.* at 351. The Seventh Circuit emphasized that, in federal court, a plaintiff can "initiate a contract case … without attaching the contract, an insurance case without attaching the policy, a securities case without attaching the registration statement, and a tort case without attaching an expert's report." *Id.* "Many cases hold that federal, not state, rules apply to procedural matters—such as what ought to be attached to pleadings—in all federal suits, whether they arise under federal or state law." *Id.* (quoting *Cooke v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 1024, 1027 (7th Cir. 2019)).

The Second Circuit, too, has held that state affidavit-of-merit laws like Delaware's do not apply in federal court. *Corley v. United States*, 11 F.4th 79, 83 (2d Cir. 2021). "All that Federal Rule of Civil Procedure 8 requires," the Second Circuit explained, "is a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 88-89 (quoting Fed. R. Civ. P. 8(a)(2)). "The Rule embodies a policy of 'notice pleading' that eschews the need to plead specific types of documentary evidence to establish a plausible claim." *Id.* at 89. "This is in direct contrast to the heightened pleading requirement" imposed by affidavit-of-merit statutes. *Id.*

The Fourth Circuit has likewise joined the "growing consensus" of circuits and held that affidavit-of-merit statutes do not apply in federal court because they answer the same questions already answered by Federal Rules 8 and 9, as well as other rules. *Pledger v. Lynch*, 5 F.4th 511, 518-20 (4th Cir. 2021). The Fourth Circuit held that "the Federal Rules governing the sufficiency of pleadings . . . answer the 'question in dispute' here, and thus supplant" state affidavit-of-merit laws. *Id.* at 519; *see also Martin v. Pierce County*, 34 F.4th 1125, 1130 (9th Cir. 2022) ("Rule 8's requirement of a 'short and plain statement' of the plaintiff's claim, jurisdictional statement, and explanation of the relief sought is 'a list of elements that implicitly excludes other requirements.'" (quoting *Pledger*, 5 F.4th at 519)).

The Sixth Circuit, building on its decision in *Gallivan* and drawing further on *Shady Grove* and *Hanna v. Plumer*, has also held that Michigan's affidavit-of-merit requirement does not apply in diversity actions because it conflicts with Rules 8 and 9 (and 11 and 12). *Albright*, 24 F.4th at 1045-46. The court further held that Michigan's "pre-suit notice" provision, which requires prospective plaintiffs to notify providers that they intend to sue before commencing the action, is also inapplicable in diversity

cases. *Id.* at 1043, 1046-48. The Sixth Circuit explained that, per the Michigan Supreme Court, the pre-suit notice and affidavit-of-merit statutes impose mandatory preconditions to filing a complaint. *Id.* at 1046 (citing *Tyra v. Organ Procurement Agency of Mich.*, 869 N.W.2d 213, 226 (Mich. 2015)). Both requirements therefore conflicted not only with Rules 8 and 9, and 11 and 12, but also Federal Rule 3, which imposes no such prerequisites to commencing a suit. *Id.* at 1047-49 (citing *Pledger*, 5 F.4th at 516, 519).

C. Other Federal Rules Answer the Same Question as Delaware's Affidavit-of-Merit Law

Beyond imposing pleading requirements more stringent than Federal Rules 8 and 9, the Delaware affidavit-of-merit statute answers the same questions as other Federal Rules, reinforcing that the judgment below must be reversed.

The Delaware law requires that the affidavit of merit be signed by a qualified expert witness, attach the expert's curriculum vitae, and state that there "are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant." Del. Code Ann. tit. 18, § 6853(a)(1). If a litigant fails to submit the affidavit, the court must dismiss the case. But the questions those provisions attempt to answer are already answered by the Federal Rules. Rule 12 answers the question of on what bases a case may be dismissed before trial. Rule 11 answers the question of when a complaint must be verified with an affidavit. Further, Rule 3 answers the question of what is needed to commence a lawsuit. And Rules 26 and 37 answer the question of when a plaintiff must produce expert testimony or face dismissal.

1. Federal Rule 12 sets forth the grounds for dismissing a complaint before a responsive pleading is filed in federal court, and those grounds do not include

failure to attach an affidavit. *Compare* Fed. R. Civ. P. 12, *with* Del. Code Ann. tit. 18, § 6853(a). Like the Delaware statute, Rule 12 answers the question: under what circumstances must a court dismiss a case before trial? *Abbas v. Foreign Pol'y Grp.*, 783 F.3d 1328, 1333-34 (D.C. Cir. 2015) (Kavanaugh, J.); *see also Pledger*, 5 F.4th at 520. "Rule 12 does not demand any evidentiary support—in an affidavit, certificate, or any other form—for a claim to be plausible and thus survive a motion to dismiss." Gallenstein, *supra*, at 48-49. "State affidavit of merit statutes, on the other hand, *do* require that a plaintiff put forth evidentiary support at the pleading stage in the form of an affidavit or certificate of merit." *Id.* at 49; *see Gallivan*, 943 F.3d at 293 ("Rule 12 does not demand 'evidentiary support'—in an affidavit or in any other form—for a claim to be plausible.").

The Delaware affidavit-of-merit statute attempts to answer the same question as Rule 12 because it "imposes additional procedural requirements not found in the federal rules . . . for a case to proceed at the same stage of litigation." *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019); *Pledger*, 5 F.4th at 520 (similar); *see also Abbas*, 783 F.3d at 1334 (similar).

2. Federal Rule 11 and the Delaware affidavit-of-merit statute also answer the same question. Rule 11 states that "a pleading need *not* be verified or accompanied by an affidavit"—precisely what Delaware demands. Fed. R. Civ. P. 11(a) (emphasis added).[5] Rule 11

[5] Rule 11(a) states that "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." Fed. R. Civ. P. 11(a). But "[t]he rule's reference to other rules or statutes . . . means other *federal* rules or statutes." *Albright*, 24 F.4th at 1045 n.2 (quoting *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1360 (11th Cir. 2014)); *Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007) (holding that Rule 11's reference to a "'rule or statute' . . . means federal rule or federal statute, because

further establishes that "presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it"—is sufficient to verify that the claims are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing" it, and that the "factual contentions have evidentiary support or … will likely have evidentiary support." Fed. R. Civ. P. 11(b)(2)-(3). Delaware's law, by contrast, provides that a pleading must be accompanied by an expert's "state[ment] that there are reasonable grounds to believe that there has been health-care medical negligence." Del. Code Ann. tit. 18, § 6853(a)(1). These are opposing answers to the same question: what mechanisms does the court use to limit frivolous filings?

Rule 11 provides the mechanisms that federal courts must use for that purpose: Rule 11(b)'s certification requirements and Rule 11(c)'s sanctions provisions. Yet affidavit-of-merit statutes like Delaware's attempt to answer the same question as Rule 11 "through a mechanism—an early affidavit from an expert—that Rule 11 specifically disclaims." *Pledger*, 5 F.4th at 520; *Albright*, 24 F.4th at 1045 (finding Rule 11 answers same question as affidavit-of-merit statute); Gallenstein, *supra*, at 48 ("State AOM statutes effectively resurrected an oath requirement by requiring parties to attest to the validity of their claims in addition to what the text of Rule 11 mandates.").

3. Were all this not enough, Federal Rules 3, 26 and 37—though not addressed by the court below—also answer the same questions as the Delaware law.

Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court." It answers the question

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state requirements for pleading do not apply in federal litigation" (quoting Fed. R. Civ. P. 11(a))).

of what must be filed to commence a lawsuit. Delaware's affidavit-of-merit law answers the same question. It says to commence a suit, a complaint must be "accompanied by . . . [a]n affidavit of merit." Del. Code Ann. tit. 18, § 6853(a)(1). "If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit . . . has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court." Del. Code Ann. tit. 18, § 6853(a)(1). *Cf. Albright*, 24 F.4th at 1047 ("Because both [Michigan's pre-suit notice requirement] and Rule 3 govern how a lawsuit is commenced, the two clearly conflict.").

Rule 26 addresses the timing of expert disclosures and the consequences for failing to offer expert support for a claim. That is the same question answered by Delaware's law, which requires an expert affidavit to accompany a complaint. Rule 26 provides that parties must generally disclose required expert testimony "at the times and in the sequence that the court orders"; "[a]bsent a stipulation or a court order, the disclosures must be made (i) at least 90 days before the date set for trial or for the case to be ready for trial; or (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party . . . within 30 days after the other party's disclosure." Fed. R. Civ. P. 26(a)(2)(D); *see, e.g.*, *Passmore v. Baylor Health Care Sys.*, 823 F.3d 292, 298 (5th Cir. 2016) (identifying conflict between Rule 26 and Texas provision that "[i]f applied in federal court" would "significantly interfere with federal control of discovery, an area governed exclusively by federal law"); *Love v. United States*, 17 F.4th 753, 755 (7th Cir. 2021) (finding Rule 26, along with federal evidentiary rules, is the "source of authority to control expert evidence" and "specifies when and how expert evidence must be produced").

Rule 37(c), in turn, states the consequences for a party's failure to comply with requirements of Rule 26(a). In addition to other available sanctions, Rule 37(c) permits federal courts to dismiss an action for failure to comply with Rule 26. An affidavit-of-merit statute requiring an expert disclosure with a complaint or face dismissal thus "answer[s] the same question as Rules 26 and 37," and must give way to the Federal Rules. *Passmore*, 823 F.3d at 297. Rule 37's "discretionary mode of operation unmistakably conflicts with the mandatory" dismissal required by Delaware's law. *Burlington*, 480 U.S. at 7.

The Delaware affidavit-of-merit law "attempts to answer the same question" as each of these Federal Rules. *Shady Grove*, 559 U.S. at 399. Thus, the Federal Rules alone apply as long as they are valid. They are.

D. The Federal Rules Are Valid and Do Not Violate the Rules Enabling Act

Where, as here, a Federal Rule answers the same question as a state law, the Federal Rule applies in federal court unless it is invalid. *Shady Grove*, 559 U.S. at 398. Federal Rules 3, 8, 9, 11, 12, 26, and 37 are valid exercises of Congress's rulemaking authority under the Constitution and the Rules Enabling Act.

"Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure." *Shady Grove*, 559 U.S. at 406 (plurality opinion) (quoting *Hanna*, 380 U.S. at 472). To this end, the Federal Rules enjoy "presumptive validity," *Burlington*, 480 U.S. at 6, and a Federal Rule is invalid "only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions,'" *Bus. Guides, Inc. v. Chromatic Commc'ns*

Enters., 498 U.S. 533, 552 (1991) (quoting *Hanna*, 380 U.S. at 471).

This Court has "rejected every statutory challenge to a Federal Rule that has come before [it]." *Shady Grove*, 559 U.S. at 407 (plurality) (collecting cases). "[A]ny Rules Enabling Act challenge . . . has a large hurdle to get over." *Bus. Guides, Inc.*, 498 U.S. at 552.

In the Rules Enabling Act, Congress authorized this Court to prescribe "general rules of practice and procedure and rules of evidence," with the limitation that rules that "abridge, enlarge or modify any substantive right" are invalid. 28 U.S.C. § 2072(a)-(b). Valid rules regulate "the judicial process for enforcing rights and duties recognized by substantive law," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); "the manner and the means by which a right to recover . . . is enforced," *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946) (quoting *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945)); or are otherwise "reasonably necessary to maintain the integrity of that system of rules," *Burlington*, 480 U.S. at 5; *see also Shady Grove*, 559 U.S. at 407-10 (plurality opinion). "What matters is what the rule itself regulates: If it governs only the manner and means by which the litigant's rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not." *Shady Grove*, 559 U.S. at 407 (plurality opinion) (cleaned up).

The Court has thus upheld as valid Federal Rules regulating service of process, *Miss. Publ'g Corp.,* 326 U.S. at 445-46 (Rule 4(f)); *Hanna*, 380 U.S. at 463-65 (Rule 4(d)(1)); compelled mental or physical examinations, *Sibbach*, 312 U.S. at 14-16 (Rule 35); *Schlagenhauf v. Holder*, 379 U.S. 104, 113-14 (1964) (same); sanctions for frivolous appeals, *Burlington*, 480 U.S. at 8 (Rule 38); and sanctions for signing court papers without reasonable inquiry into the facts asserted, *Bus. Guides*, 498 U.S. at

551-54 (Rule 11). Adding to these decisions, *Shady Grove* found that Rule 23's class action mechanism is "valid" as it "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." 559 U.S. at 408 (plurality opinion) (Rule 23); *see id.* at 416, 436 (Stevens, J., concurring).

The Federal Rules at issue here are likewise valid. Nothing in Rules 3, 8, 9, 11, 12, 26, or 37 changes litigants' substantive rights—*i.e.*, the scope of liability or the available remedies. *See, e.g.*, *Shady Grove*, 559 U.S. at 408; *Burlington*, 480 U.S. at 5-6. Rather, the Rules are at the core of "practice and procedure" in federal district courts. *Miss. Publ'g,* 326 U.S. at 445. The Rules undeniably regulate "the manner and the means" of enforcing substantive rights: They merely specify what a complaint must include at the outset to avoid dismissal and the timing of expert disclosures and consequences for failing to file them. *Id.* at 446 (quoting *Guaranty Tr. Co.*, 326 U.S. at 109); *see Abbas*, 783 F.3d at 1337 (Kavanaugh, J.) (holding Rule 12 is valid because "pleading standards . . . are procedural"); *Bus. Guides,* 498 U.S. at 552 ("Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure").

Courts of appeals considering affidavit-of-merit laws thus have correctly and repeatedly found "no reason to doubt the validity of the Federal Rules at issue here." *Gallivan*, 943 F.3d at 294; *Pledger*, 5 F.4th at 521 (same); *Martin*, 34 F.4th at 1132 (same); *Albright*, 24 F.4th at 1048 (finding this "conclusion comes easily"); *Passmore*, 823 F.3d at 299 (concluding that "Rules 26 and 37 are valid under the Rules Enabling Act").

Because Federal Rules 3, 8, 9, 11, 12, 26, and 37 are valid and answer the question in dispute, this Court should reverse the decision below.

E. The Third Circuit's Conflict Analysis and *Erie* Analysis Were Both Wrong

Shady Grove brought much needed clarity to the framework for deciding whether state provisions conflict with the Federal Rules. The Court emphasized that courts should give the Federal Rules their "reasonable reading." *Shady Grove*, 559 U.S. at 405 n.7. "[F]ederal courts cannot rewrite the rules" to accommodate state interests, nor should the meaning of the Federal Rules be "contorted" to do so. *Id.* at 421 n.5, 431 (Stevens, J., concurring in part and concurring in the judgment); *see also id.* at 403 (plurality opinion) (rejecting an approach that would elevate alleged evidence of nebulous state legislative purposes over the Federal Rules).[6]

1. The Third Circuit below erred by failing to read the Federal Rules to mean what they plainly say. The court relied on circuit precedents predating *Shady Grove* that do not accord the Federal Rules their plain meaning, but instead interpret them to "avoid" "creat[ing] significant disuniformity between state and federal courts . . . if the [Rules'] text permits" that result. *Chamberlain v. Giampapa*, 210 F.3d 154, 159 (3d Cir. 2000); *see* Pet. App. 3a-6a, 9a-11a (relying extensively on *Chamberlain*). *Shady Grove* emphatically rejected that approach. It made clear that when "the literal terms" of a state provision "address the same subject" as a federal

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[6] That mirrored earlier holdings of this Court. The Court had earlier held that the rules should be "fairly construed." *Burlington*, 480 U.S. at 4; *see Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (similar). "The Federal Rules should be given their plain meaning" even if "a direct collision with state law arises from that plain meaning," *Walker*, 446 U.S. at 750 n.9; *see also Stewart*, 487 U.S. at 26 n.4 ("federal [procedural] law and state law [need not] be perfectly coextensive and equally applicable to the issue at hand"; the federal statute need only "be sufficiently broad to cover the point in dispute").

rule, the state provision does not apply in federal court—period. 559 U.S. at 402.

Undeterred by *Shady Grove*, the Third Circuit below did exactly what this Court forbid: reasoned that the Delaware affidavit-of-merit statute does not conflict with Rules 8 or 9 because those Rules can be read to do no more than "dictate the content of the pleadings and the degree of specificity that is required." Pet. App. 6a (quoting *Chamberlain*, 210 F.3d at 160). According to the Third Circuit, there is simply no conflict here because the affidavit of merit is not a pleading and does not affect what is included in the pleadings. Pet. App. 6a.

But the Third Circuit overlooked that when interpreting the Federal Rules, "the step-one inquiry is a functional one, asking whether the scope of the Federal Rules, fairly construed, is broad enough either to 'implicitly . . . control' the same issue addressed by state law or to cause a direct conflict with that law." *Pledger*, 5 F.4th at 522 (quoting *Burlington*, 480 U.S. at 4-5).

The Third Circuit failed to recognize that Rules 8 and 9 and the Delaware affidavit-of-merit statute answer the same question: what must a plaintiff do to state a claim for relief? As a result, Rules 8 and 9 and the Delaware law "flatly contradict each other." *Shady Grove*, 559 U.S. at 405. A plaintiff cannot follow Rules 8 and 9 while also adhering to Del. Code Ann. tit. 18, § 6853(a): plaintiffs who bring a "health-care negligence lawsuit" in Delaware and include the three matters required by Federal Rule 8(a) will have their cases dismissed, notwithstanding that they have met all of Rule 8 and 9's requirements to state a claim. The Federal Rules displace a state procedure when it "imposes additional requirements" beyond those found in the Federal Rules. *Shady Grove*, 559 U.S. at 401. That is exactly what Delaware's affidavit-of-merit statute does.

The same flawed reasoning tainted the Third Circuit's analysis of the interplay between the Delaware

statute and Rule 11. In its effort to read the Federal Rules as narrowly as possible, the Third Circuit ignored the question Rule 11 seeks to answer in the federal procedural scheme. The Third Circuit reasoned that Rule 11 is merely *a* mechanism by which the Federal Rules limit frivolous filings, failing to recognize that it is, in fact, *the* mechanism for doing so. Pet. App. 7a. The Third Circuit thus held that the Federal Rules impose no limit whatsoever on the procedures states may impose on litigants—over and above what Rule 11 requires—in an effort to limit frivolous filings. Such a reading of Rule 11 would license states, in the name of curbing meritless cases, to rewrite the bedrock procedures for initiating litigation in federal court. That cannot be correct.

Perhaps the Third Circuit's most egregious error was its analysis of Rule 12. According to the Third Circuit, Rule 12 tests only a complaint's sufficiency. Pet. App. 7a-8a. But, the Third Circuit reasoned, whether a complaint is sufficient has no bearing on a court's decision to dismiss an action for failure to comply with the Delaware statute. Pet. App. 8a. Thus, the court concluded, Delaware law does not conflict with Rule 12. Pet. App. 8a. That reasoning gravely misunderstands Rule 12. Rule 12 is not *merely* about testing the sufficiency of the complaint. It reflects the Federal Rules' policy that "the sufficiency of a plaintiff's case will be tested prior to discovery only for legal sufficiency." *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, C.J., concurring). And under the Rules, a plaintiff who can survive motions under Rule 12 and Rule 56 "is generally entitled to trial." *Abbas*, 783 F.3d at 1334.

Under the Third Circuit's approach, states are free to create entirely parallel systems for pleading claims and testing their sufficiency, and then to impose those bespoke regimes on federal courts. That is anathema to

the fundamental post-*Erie* premise that federal courts apply state substantive law *and federal procedural law*.

2. The Third Circuit's *Erie* analysis was also fundamentally flawed. Finding no conflict between the Federal Rules and the Delaware law, the Third Circuit moved to the second step of the inquiry—whether the *Erie* doctrine required application of Delaware's law.

The Third Circuit wrongly concluded that Delaware's law must apply in federal court because it is "substantive." Pet. App. 10a. It is not. Delaware's law is plainly a rule of procedure. And "state procedural rules have no application in federal court, no matter how little they interfere with the Federal Rules." *Makaeff*, 715 F.3d at 273 (Kozinski, C.J., concurring). The law is directed to *Delaware*'s courts, not Federal courts, nor the courts of other states. Indeed, it states expressly that an affidavit of merit must be submitted to the court in an envelope that "shall state on its face" that its contents "MAY ONLY BE VIEWED BY A JUDGE OF THE *SUPERIOR COURT*." Del. Code Ann. tit. 18, § 6853(a) (emphasis added). This is not a law meant to govern substance. And it is a trans-substantive rule; it applies to *all* "health-care negligence lawsuit[s]," not merely those arising under Delaware law. *Id.*; *see id.* § 6801(6).

At bottom, affidavit-of-merit requirements are not the type of "substantive" state law that *Erie* requires federal courts to apply. This Court in *Hanna v. Plumer* held that *Erie* would not require federal courts to apply state laws "altering the way in which process was served" because such provisions have so little concrete, practical effect on a litigation. 380 U.S. at 466-69. The same is true of the Delaware affidavit-of-merit statute. Indeed, even the *Shady Grove* dissent would not have applied Delaware's statute in federal court under *Erie*. The *Shady Grove* majority had no reason to reach *Erie* because it found that New York's law answered the same

question as Rule 23, but the dissenters, who found no conflict, did undertake an *Erie* analysis, and they explained that laws like affidavit-of-merit statutes are inapplicable in federal court. *See Shady Grove*, 559 U.S. at 456-57 & n.13 (Ginsburg, J., dissenting). State rules "ostensibly addressed to procedure," like "pleading standards," the dissent wrote, "would not so hugely impact forum choices" as to warrant application of those rules in federal courts. *Id.* at 457 & n.13. The Third Circuit's approach finds no safe harbor in any corner of *Shady Grove*.

II. THE COURT SHOULD STICK TO ITS PLAIN-MEANING APPROACH TO PROCEDURAL CONFLICTS

Shady Grove provides the proper framework for identifying and resolving conflicts between the Federal Rules and state laws. Construing laws according to their ordinary meaning, rather than policy-driven glosses, is consistent with the approach this Court has directed in other areas of interpretation. It also secures uniform federal procedure by applying the Federal Rules wherever they overlap with state law, preventing an inter-jurisdictional patchwork; promotes clarity in the law and efficiency in litigation through a bright-line standard; avoids ensnaring federal courts in an ever-expanding web of state procedural devices by limiting the importation of exotic state procedures into federal practice in the first instance; and respects federalism by keeping procedures directed to state courts *within* those courts and freeing federal courts from the task of distorting or rewriting state laws to force them into federal procedural frameworks, thus protecting federal and state prerogatives alike. For all these reasons, the Court's straightforward plain-meaning approach should continue to govern conflicts analysis.

A. Consistency. *Shady Grove*'s approach to conflicts analysis—which simply asks whether a fairly construed

Federal Rule "answers the same question" as a fairly construed state provision—comports with this Court's general approach to textual interpretation. The Court does not narrowly construe statutes in other areas of law, nor contort or artificially limit their scope in favor of "state regulatory policies," no matter how "important." *Shady Grove*, 559 U.S. at 405 n.7 (cleaned up); *contra id.* at 439 (Ginsburg, J., dissenting) (arguing the Federal Rules should be construed to avoid conflicts with state laws when the "text permits" that construction). As the Court has explained, it "makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). "In the business of statutory interpretation, if it is not the best, it is not permissible." *Id.* "A court cannot advance even a constitutional value at the expense of a statute's plain language." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 181 (2010). That principle holds just as firmly in the construction of the Federal Rules and state laws that potentially conflict with them as it does in other areas.

B. Purpose and History. *Shady Grove*'s approach to conflicts analysis also accords with the original purposes of the Federal Rules: uniformity, simplicity, and avoiding civil cases turning on mere technicalities. The Rules were enacted to create a *uniform* system of federal procedure. The Rules Enabling Act eliminated the Conformity Acts and code pleading, under which "there were forty-nine different categories of procedure in the federal courts in actions at law, one in each of the states, and one in the District of Columbia." Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. Rev. 1057, 1057 (1955). The "chaos" of this patchwork system, *id.*, proved deeply problematic: it was "impossible either under the rules or decisions of the

courts . . . to reach a definite opinion as to what course [was] proper to pursue under [the Conformity Act]."[7] "The confusion and conflicts resulting from this system were so great that federal practice became an activity only for specialists and an abomination for the profession generally." Charles E. Clark, *Practice & Procedure*, 328 Annals Am. Acad. Pol. & Soc. Sci. 61, 64 (1960).

The Federal Rules dispensed with the morass that came before, establishing in its place a single, uniform system of procedure with a goal of increasing ease of access to the federal judiciary. The very first rule, Rule 1, provides that "[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81." Fed. R. Civ. P. 1; *see* Fed. R. Civ. P. 81 (listing limited exceptions). Rule 1 further directs that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Permitting a cavalcade of exotic state procedural rules to invade federal litigation would inevitably result in traps for the unwary and barriers that hinder relief for litigants with substantive rights to a day in court. In particular, allowing state affidavit-of-merit laws into federal court would mean that federal diversity cases involving medical malpractice would import new procedural rules from some twenty-nine states. *See* Gallenstein, *supra*, at 30-34.

That is the opposite of the procedural uniformity the Rules were promulgated to establish. And it is only the tip of the iceberg. In the world as the Third Circuit would have it, any number of other unique state-law pleading

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[7] *Federal Rules of Civil Procedure: Proceedings of the Institute at Washington D.C. October 6, 7, 8 and of the Symposium at New York City October 17, 18, 19, 1938,* at 38 (Edward H. Hammond ed., 1939) (Statement of Chairman D. Lawrence Groner) (also describing Conformity Act procedures as "archaic to the last degree").

requirements could apply in contexts far beyond medical malpractice cases, creating an impenetrable hodgepodge of pleading requirements for different areas of law. State law might require parties to attach contracts to their complaint in insurance cases. *See, e.g.*, *Gates v. L.G. DeWitt, Inc.*, 528 F.2d 405, 411 (5th Cir. 1976) (finding Georgia law requiring plaintiff to attach insurance contract to complaint inapplicable based on conflict with Rule 8). Other states might require affidavits of merit for all suits claiming "professional negligence by a licensed or registered professional," including architects and engineers, as Texas has done. *Est. of C.A. v. Grier*, 752 F. Supp. 2d 763, 765 (S.D. Tex. 2010) (declining to apply Texas affidavit of merit requirement in negligence suit against architect).

The list goes on. *See, e.g.*, *Kirkland v. Guardian Life Ins. Co. of Am.*, 352 F. App'x 293, 297 (11th Cir. 2009) (holding that Georgia law requiring a verified answer when a complaint is verified conflicts with Federal Rule of Civil Procedure 11(a) and thus does not apply in federal court); *Hilderman v. Enea TekSci, Inc.*, 2010 WL 143440, at *1, 3 (S.D. Cal. Jan. 8, 2010) (holding California statute that conditions discovery regarding trade secrets on plaintiff identifying the trade secret "with reasonable particularity" is inapplicable in federal court); *Tutor Time Child Care Sys., Inc. v. Franks Inv. Grp., Inc.*, 966 F. Supp. 1188, 1192 (S.D. Fla. 1997) (declining to apply Florida statute precluding punitive damages claims without certain evidentiary showing because the statute conflicted with and "would upset the notice pleading system constructed by" Rules 8(a) and 9(g)).

C. Clarity and Efficiency. *Shady Grove*'s approach also promotes clarity and efficiency in the resolution of procedural disputes. In the analogous area of rules governing jurisdiction, this Court has consistently recognized the importance of straightforward,

predictable doctrine. In these kinds of matters, the Court has said, "simplicity is a virtue." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013); *see also Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 621 (2002) ("jurisdictional rules should be clear"); *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment) (explaining that "vague boundar[ies]" are "to be avoided" in administering subject-matter jurisdiction). Uncertainty over procedural rules "eat[s] up time and money as the parties litigate" collateral issues instead of the merits of their claims. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Litigation over which procedural rules should govern a dispute, no less than litigation over whether a case is in the proper forum, is "essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980).

Shady Grove's "answers the same question" framework solves for that concern by providing "greater simplicity, consistency, and predictability" than the alternative approach, and helps ensure that "the tail of odd state procedural provisions or practices cannot wag the federal litigation dog." Jeffrey W. Stempel, *Shady Grove & the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 Akron L. Rev. 907, 909 n.7, 973 (2011). It also "avoid[s] judicial debate over the background and merits of state legislation," "lowering adjudication costs and conserving judicial resources," and perhaps "prompting states to more often engage in greater scrutiny of procedural rules and the policies imbedded in them." *Id.* at 970-71; *see also* Jennifer J. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 Wash. U. L. Rev. 103, 138-39 (2011) (similar); Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 Notre Dame L. Rev. 987, 1017 (2011) (similar). *Shady Grove*'s test represents an "easily administrable rule[]"—"instead of engaging in a complex

analysis to determine if there is a conflict, if a state law 'answers the same question' as a valid Federal Rule, then there is a conflict and the Federal Rule wins." Gallenstein, *supra*, at 30 (cleaned up).

The alternative regime some courts followed before *Shady Grove*, and to which the Third Circuit clung below—wherein Federal Rules were twisted to avoid conflict with state laws whenever possible—has been roundly criticized as "structurally incoherent," "unpredictab[le]," and "notoriously difficult for lower courts to apply." Alan M. Trammell, *Toil and Trouble: How the Erie Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 Fordham L. Rev. 3249, 3291 (2014); *accord, e.g.*, Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 232 (2010) ("[D]efining when a Federal Rule is coextensive with state law to the point that the Federal Rule controls is . . . a difficult and abstract question."); Gallenstein, *supra*, at 22-30 (tracing history of difficulties and conflicting decisions through *Shady Grove*).

Shady Grove's benefits for litigation clarity have been illustrated by the decisions of the courts of appeals that have readily applied the straightforward standard to assess affidavit-of-merit provisions and other state laws. *See, e.g., Gallivan*, 943 F.3d at 293; *Pledger*, 5 F.4th at 519; *Corley*, 11 F.4th at 88; *Abbas*, 783 F.3d at 1333; *Klocke*, 936 F.3d at 245 (same); *Carbone*, 910 F.3d at 1352 (same). The Court should not reanimate the confused and confusing approach that it rejected in *Shady Grove*.

D. Simplicity. *Shady Grove*'s approach also saves federal courts from the troublesome task of trying to incorporate state-law procedural frameworks into federal court practice. State procedural rules do not exist in vacuums. To function correctly, state-court procedural

rules require *additional* state-court procedural rules that function alongside them. Affidavit-of-merit laws are a prime example. In addition to the required affidavit of merit, they often include special motions, special discovery procedures, special opportunities to cure deficiencies, special expert qualification requirements, special filing fees, special notices, special forms, special status conferences, and special sanctions. *Cf. Makaeff*, 715 F.3d at 274 (Kozinski, C.J., concurring).

Importing only one or some of these procedures into federal court, without the others, undermines the very purpose of *Erie* to ensure that state and federal courts function similarly.

For example, Pennsylvania has a special procedure governing its special motions to dismiss for failure to file an affidavit of merit that the Third Circuit shoehorned into federal procedure in *Schmigel v. Uchal*, 800 F.3d 113 (3d Cir. 2015). In essence, the defendant is required to give the plaintiff who lacks an affidavit notice and an opportunity to cure before the defendant moves to dismiss. *See id.* at 119. To make the scheme work similarly in federal court as it would in a Pennsylvania state court, the Third Circuit was forced to graft a new procedure onto Rule 12. *See id.* at 117-19; *id.* at 123 n.15 (collecting cases in which this occurred in district courts). As a dissenting judge recognized, this procedural freelancing does not appear permissible under this Court's cases. *See id.* at 126-27 (Rendell, J., dissenting) ("[O]ur Court cannot add a notice requirement to a rule that plainly has none.").

In New Jersey, the affidavit-of-merit law requires a special notation on the State's case-initiating "Information Sheet" to disclose that a case alleges professional malpractice, and further requires a special, early case management conference at which the plaintiff is reminded to file the affidavit. *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith*

Brown, P.C., 692 F.3d 283, 291 (3d Cir. 2012). Yet the Third Circuit has found that district courts should apply the New Jersey law *without* these two components—even though the court deemed them "safeguards to aid plaintiffs in complying with the [affidavit-of-merit] [s]tatute"—because "[t]he protections are procedural" and thus inapplicable in federal court under *Erie*. *Id.* at 304-05. The Third Circuit thereby conjured a modified affidavit-of-merit scheme—solely for use in federal court—that New Jersey never enacted. *Id.* at 305.

Importing state procedural rules all too often "cuts an ugly gash through" the Federal Rules. *Makaeff*, 715 F.3d at 274 (Kozinski, C.J., concurring); *see Klocke*, 936 F.3d at 246. And if a federal court only incorporates *some* of the possible array of special state rules into federal procedure, it creates a Frankenstein's monster that does not resemble the procedural balance sought by either the Federal Rules or state legislatures. Incorporating only some state provisions could in fact make the disparity in outcomes between state and federal courts *worse*.

Shady Grove avoids these absurd results by preventing them at the start. By reading the Federal Rules to prevent the introduction of exotic state rules into federal courts that "answer the same question[s]" they do, *Shady Grove* diminishes the need to introduce into federal court whole parallel procedural schemes of special pleadings and special motions alongside the pleadings and motions authorized by the Federal Rules.

E. Federalism. Defenders of the Third Circuit's conflicts framework sometimes argue that the approach is necessary to show sufficient respect and deference to state interests. But properly understood, it is *Shady Grove*'s approach that best respects state interests. Often the only way to apply state procedural law in a federal court is by distorting it beyond recognition. But "concern for state prerogatives is frustrated rather than furthered

by revising state laws when a potential conflict with a Federal Rule arises; the state-friendly approach would be to accept the law as written and test the validity of the Federal Rule." *Shady Grove*, 559 U.S. at 403-04.

This Court's own cases demonstrate the wisdom of this approach. In *Gasperini v. Center for Humanities, Inc.*, the Court examined a New York law that provided for appellate review of jury verdicts by the state Supreme Court's Appellate Division. 518 U.S. 415, 426 (1996). The law was specifically written as an instruction to that intermediate appellate court. *Id.* To make the statute work in federal court, this Court was compelled to rewrite the statute from the bottom up, assigning the task of reviewing the jury's verdict under the New York Appellate Division standard to the federal district judge who presided over the trial, while assigning a different (and more deferential) standard of review to the federal appellate courts reviewing the district judge's decision. *Id.* at 419. Only in this contorted form could a New York law, written as an instruction to its own appellate courts, apply in federal court. *See* N.Y. C.P.L.R. 5501(c). There is no evidence that New York intended that result. And revising square-peg state statutes to fit in the round hole of federal procedures is a difficult and unusual task for lower federal courts to undertake.

Justice Robert Jackson recognized a similar problem in *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (Jackson, J., dissenting). There, a Mississippi statute provided that if a corporation did not qualify to do business within the state, it would "not be permitted to bring or maintain any action or suit *in any of the courts of this state*." *Id.* at 539. This Court held that both state and federal courts in Mississippi could not entertain any suits by unqualified corporations. *Id.* at 536, 538. Yet the law, *by its own terms*, referred only to *state* courts, not federal courts. The majority "refuse[d] to give the statute that

limited effect." *Id.* at 539. As Justice Jackson noted in dissent, by construing the statute to bar actions in federal court, "we seem to be doing the very thing we profess to avoid; that is, give the state law a different meaning in federal court than the state courts have given it." *Id.*

Shady Grove avoids these pitfalls by reading the Federal Rules to mean what they fairly say, and by reading state laws to mean what *they* fairly say. State laws that refer to procedures in state courts and describe state courts by name should not apply in federal court, for the simple reason that they are by their own terms limited to the state's own courts. States know how to write substantive laws that apply in state and federal court when they want to. And by making the methods of interpretation clear, *Shady Grove* makes it possible for them to do so without having to confront a moving target. If states intend to prescribe substantive law that applies in state and federal courts alike, their statutes can—and generally do—make that clear. And if the Federal Rules are to incorporate state-established rules that do not, by their own terms, apply in federal court, that result should "be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Jones*, 549 U.S. at 213 (quoting *Leatherman*, 507 U.S. at 168).

* * * * *

This case involves a straightforward application of *Shady Grove*. Delaware's affidavit-of-merit law answers the same question as Rules 8 and 9 and several other Federal Rules. Even if it did not, it would not apply in federal court under *Erie*. The Court should stick to the plain-meaning approach to procedural conflicts it applied in *Shady Grove*, because doing so furthers all of the important purposes behind the Federal Rules while respecting state prerogatives to determine the substantive law that applies in diversity actions in federal court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JAKE W. MURPHY
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 8020
(303) 863-1000

DEVIN M. ADAMS
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 4000
700 Louisiana Street
Houston, TX 77002
(713) 576-2400

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
ANTHONY J. FRANZE
KOLYA D. GLICK
SAMUEL I. FERENC
DANA KAGAN MCGINLEY
JILLIAN M. WILLIAMS
JENNIFER F. KAPLAN
KATIE WENG
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

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APPENDIX

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18 Del. C. § 6853
Affidavit of Merit, expert medical testimony

(a) No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:

> (1) An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant. If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (a)(2) of this section has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court. The affidavit of merit and curriculum vitae shall be filed with the court in a sealed envelope which envelope shall state on its face:
>
> "CONFIDENTIAL SUBJECT TO 18 DEL. C., SECTION 6853. THE CONTENTS OF THIS ENVELOPE MAY ONLY BE VIEWED BY A JUDGE OF THE SUPERIOR COURT."

Notwithstanding any law or rule to the contrary the affidavit of merit shall be and shall remain sealed and confidential, except as provided in subsection (d) of this section, shall not be a public record and is exempt from Chapter 100 of Title 29.

> (2) The court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit of merit. Good cause shall include, but not be

limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review.

(3) A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend. The filing of a motion to extend the time for filing an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion.

(4) The defendant or defendants not required to take any action with respect to the complaint in such cases until 20 days after plaintiff has filed the affidavit or affidavits of merit.

(b) An affidavit of merit shall be unnecessary if the complaint alleges a rebuttable inference of medical negligence, the grounds of which are set forth below in subsection (e) of this section.

(c) Qualifications of expert and contents of affidavit.--The affidavit or affidavits of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint. An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has been engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant or defendants, and the expert shall be Board certified in

the same or similar field of medicine if the defendant or defendants is Board certified. The Board Certification requirement shall not apply to an expert that began the practice of medicine prior to the existence of Board certification in the applicable specialty.

(d) Upon motion by the defendant the court shall determine in *camera* if the affidavit of merit complies with paragraph (a)(1) and subsection (c) of this section. The affidavit of merit shall not be discoverable in any medical negligence action. The affidavit of merit itself, and the fact that an expert has signed the affidavit of merit, shall not be admissible nor may the expert be questioned in any respect about the existence of said affidavit in the underlying medical negligence action or any subsequent unrelated medical negligence action in which that expert is a witness.

(e) No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death, except that such expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence; provided, however, that a rebuttable inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances:

> (1) A foreign object was unintentionally left within the body of the patient following surgery;

(2) An explosion or fire originating in a substance used in treatment occurred in the course of treatment; or

(3) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body.

Except as otherwise provided herein, there shall be no inference or presumption of negligence on the part of a health-care provider.

Fed. R. Civ. P. 3.
Commencing an Action

A civil action is commenced by filing a complaint with the court.

Fed. R. Civ. P. 8.
General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

> (1) *In General.* In responding to a pleading, a party must:
>
> > (A) state in short and plain terms its defenses to each claim asserted against it; and
> >
> > (B) admit or deny the allegations asserted against it by an opposing party.
>
> (2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.
>
> (3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or

generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation*. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages— is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;

- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

Fed. R. Civ. P. 9.
Pleading Special Matters

(a) CAPACITY OR AUTHORITY TO SUE; LEGAL EXISTENCE.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) CONDITIONS PRECEDENT. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) JUDGMENT. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the

judgment or decision without showing jurisdiction to render it.

(f) TIME AND PLACE. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) SPECIAL DAMAGES. If an item of special damage is claimed, it must be specifically stated.

(h) ADMIRALTY OR MARITIME CLAIM.

(1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) *Designation for Appeal.* A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

Fed. R. Civ. P. 11.
Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) SIGNATURE. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) SANCTIONS.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction

may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions*. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) INAPPLICABILITY TO DISCOVERY. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Fed. R. Civ. P. 12.
Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General*. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity*. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint,

counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity*. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant,

immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading, or if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person

required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Fed. R. Civ. P. 26.
Duty to Disclose; General Provisions Governing Discovery

(a) REQUIRED DISCLOSURES.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying

as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure*. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items

the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery

outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or

duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it

must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or

disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

> (i) relate to compensation for the expert's study or testimony;
>
> (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
>
> (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

> (i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will

enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) PROTECTIVE ORDERS.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) TIMING AND SEQUENCE OF DISCOVERY.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as

required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Early Rule 34 Requests.*

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made a disclosure under Rule 26(a) —or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record

and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

> (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
>
> (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
>
> (C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
>
> (D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;
>
> (E) what changes should be made in the limitations on discovery imposed under

these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or

both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Fed. R. Civ. P. 37.
Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including

attorney's fees. But the court must not order this payment if:

> (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
>
> (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
>
> (iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) FAILURE TO COMPLY WITH A COURT ORDER.

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)— fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or

from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i) —(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE ANSWERS TO INTERROGATORIES, OR RESPOND TO A REQUEST FOR INSPECTION.

(1) *In General.*

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) FAILURE TO PARTICIPATE IN FRAMING A DISCOVERY PLAN. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.