No. 24-440

In the
Supreme Court of the United States

HAROLD R. BERK,
Petitioner,

v.

WILSON C. CHOY, *ET AL.*,
Respondents.

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

BRIEF OF PUBLIC JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Rules:

Other Authorities:

INTEREST OF AMICUS CURIAE[1]

Public Justice is a nonprofit legal advocacy organization that specializes in precedent-setting, socially-significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress for their injuries in the civil court system. This case is of interest to Public Justice because it raises questions as to whether state-law procedural barriers to suit can be imposed in federal court, further restricting the ability of individuals to seek justice in the civil courts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Fully agreeing with Petitioner's contentions, Public Justice submits this brief to describe how several Federal Rules answer the same question as Delaware's affidavit-of-merit statute, how a ruling for Respondents would generate satellite litigation over affidavit-of-merit requirements and confusion in other areas of the law, how affidavit-of-merit requirements can cause the dismissal of meritorious claims, and how a ruling for Petitioner would not result in forum shopping or harm to medical care.

Federal Rules 3, 8, 9, 11, 12, 26, 56, and 79 all conflict with Delaware's statute. In turn, they answer

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[1] Pursuant to Rule 37.6, amicus states that no party, counsel for any party, or any person other than amicus and its counsel authored this brief or made any monetary contribution for its preparation or submission.

the same specific questions of what must be filed to commence an action, what a complaint must contain, when affidavits must be included with a complaint, when cases are subject to dismissal, when supporting experts must be identified, when a case must be dismissed for insufficient evidence, and when a case must be docketed. And when looked at as a comprehensive and integrated scheme, the Federal Rules answer the same broad question of when a claim must be dismissed for insufficient factual pleading or evidentiary support. The Federal Rules are also clearly valid under the Rules Enabling Act.

Were the Court to hold that federal courts must apply state affidavit-of-merit requirements, a significant amount of satellite litigation would be inevitable. One example is the "common knowledge" exception, under which victims of medical negligence can proceed in court absent expert testimony when jurors can understand the claim without it. Satellite litigation over the scope of that exception occurs frequently in state courts and would be inevitable in federal courts, too.

Along with satellite litigation, a ruling that state affidavit-of-merit statutes apply in federal courts would create confusion for federal courts in other areas of the law, including anti-SLAPP legislation and pre-suit notice provisions. Five circuits have held that state anti-SLAPP statutes do not apply in federal diversity actions, based on the same reasoning Petitioner advances here: they conflict with the Federal Rules of Civil Procedure, including Rules 8, 12, and 56, and the Rules as a whole, because they answer the same question.

Furthermore, affidavit-of-merit statutes can result in meritorious claims being dismissed, due to technical non-compliance with affidavit requirements or a claimant's inability to retain an expert. Finding an appropriate expert is time-consuming and costly, increasing pre-litigation costs. The requirements are especially harsh on vulnerable populations, such as the elderly, the incarcerated, and military veterans. Victims of medical negligence in rural areas have an especially difficult time finding experts to meet affidavit-of-merit requirements, due to the presence of fewer medical specialists.

Finally, a ruling that state affidavit-of-merit requirements do not apply in federal courts would not result in forum shopping and would not harm medical care. Federal courts have no jurisdiction over most medical negligence claims, which are based on state tort law and between citizens of the same state. That situation will not change. Moreover, there has not been an excess of medical malpractice litigation. To the contrary, the number of claims is much lower than expected, in comparison to the extent of medical negligence. Medical malpractice cases are very expensive to litigate, limiting the availability of attorneys who can take them on.

If affidavit-of-merit statutes do not apply in federal courts, the medical profession will not be harmed. Challenges to the medical profession are not due to malpractice claims. Malpractice claims do not cause doctors to leave the profession, do not cause higher insurance rates, and do not lead to unnecessary medical procedures. In fact, malpractice claims can lead to better medical care, such as by spurring new procedures to prevent wrong-site

surgeries from occurring and to prevent surgeons from leaving objects inside their patients.

ARGUMENT

I. State laws requiring dismissal of complaints because they are unaccompanied by expert affidavits should not apply in federal court.

A straightforward reading of the Federal Rules of Civil Procedure shows that Rules 3, 8, 9, 11, 12, 26, 56, and 79 conflict with Delaware's affidavit-of-merit requirements. Viewed either separately or as a comprehensive scheme, they answer the same questions as Delaware's procedures, and they are valid under the Rules Enabling Act. A holding that federal courts must apply state affidavit-of-merit rules would cause satellite litigation over their applicability and sow confusion in other areas of the law. Moreover, affidavits of merit pose barriers that can prevent meritorious claims from being heard, frustrating the purpose of the Federal Rules. If Petitioner prevails, no forum shopping or harm to medical care would result.

A. Delaware's requirement that plaintiffs file an expert affidavit of merit with their complaint conflicts with the Federal Rules of Civil Procedure.

Delaware's affidavit-of-merit statutory rules should not apply in federal court because multiple Federal Rules of Civil Procedure answer the same questions addressed in Delaware's statute and were properly promulgated under the Rules Enabling Act. It is well-settled law that federal district courts in diversity cases "should not apply a state law or rule if (1) a Federal Rule of Civil Procedure 'answer[s] the

same question' as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act." *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (Kavanaugh, J.) (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010)).

First, as Petitioner explains (Pet. Br. 13-23), Delaware's statute conflicts with both Rule 8 and Rule 9 of the Federal Rules. Rule 8(a) requires a complaint to include only a jurisdictional statement, "a short and plain statement of the claim showing that the pleader is entitled to relief," and a demand for the relief sought. Unlike the Delaware statute, 18 Del. C. § 6853(a)(1), Rule 8(a) does not require an expert witness affidavit, curriculum vitae, or opinion. *See, e.g.*, *Long v. Adams*, 411 F. Supp. 2d 701, 707 (E.D. Mich. 2006) ("As is clear from Rule 8(a)'s language, there is no requirement that *any* affidavit of merit must be filed to commence a medical malpractice case in federal court.").

Rule 9(b) provides a heightened pleading standard, requiring that parties alleging fraud or mistake "must state with particularity the circumstances constituting fraud or mistake." By its plain terms, the federal heightened pleading standard does not apply to healthcare negligence actions.

Second, and similarly, Federal Rule of Civil Procedure 3 answers the question of what is necessary to commence civil actions, stating that they are "commenced by filing a complaint with the court," with no affidavits required. But the Delaware code orders that "no" health care negligence complaint

shall be filed "unless" it is accompanied by an expert witness affidavit. 18 Del. C. § 6853(a)(1).

Third, Federal Rule 11 answers the question of when a complaint must be verified with an affidavit, which Delaware answers differently, requiring an expert witness affidavit in health care negligence actions. 18 Del. C. § 6853(a)(1).

Fourth, Federal Rule of Civil Procedure 12(a)(1)(A)(i) answers the question of when a defendant must answer a complaint unaccompanied by an expert witness affidavit. The rule requires defendants to serve an answer "within 21 days after being served with the summons and complaint," with no delay in answering any complaints served without an affidavit of merit. The Delaware rule is that defendants are "not required to take any action … until 20 days after plaintiff has filed the affidavit or affidavits of merit," 18 Del. C. § 6853(a)(4), which can be well after the complaint is filed when an extension to file the affidavit has been sought.

Fifth, Federal Rule 12 answers the question of when a federal court complaint may be dismissed before the other side responds, but Delaware provides another answer, which is when it lacks an accompanying expert affidavit.

Sixth, Federal Rule of Civil Procedure 26 answers the question of when a plaintiff must first make expert witness disclosures. In all federal court cases, both plaintiffs and defendants make expert witness disclosures during the discovery process following the initial pleadings, pursuant to Federal Rule of Civil Procedure 26. Indeed, the Federal Rules of Civil Procedure use the term "expert" a total of 22 times, and every single use of "expert" is in Rule 26

regarding discovery. In a Delaware state court healthcare negligence action, conversely, at the time of filing the complaint the plaintiff must provide an expert witness affidavit, the curriculum vitae of the expert, and the expert's opinion that the defendant committed "health-care medical negligence." 18 Del. C. § 6853(a)(1).

Seventh, the Delaware affidavit-of-merit statute contradicts the Federal Rules of Civil Procedure by limiting what pleadings the clerk's office may docket. The Delaware statute states that "the clerk of the court shall refuse to file" health care negligence complaints unaccompanied by expert affidavits and that they "shall not be docketed with the court." 18 Del. C. § 6853(a)(1). Federal Rule of Civil Procedure 79(a) ("Civil Docket"), on the other hand, provides that all "papers filed with the clerk" are items that "must be marked with the file number and entered chronologically in the docket." No exception is made for any complaints filed without expert affidavits. Federal court complaints are docketed and subject to dismissal per Federal Rule 12, not per any additional state law requirements.

As noted by Petitioner (Pet. Br. 21-23), decisions by the Second, Fourth, Sixth, and Seventh Circuits hold that affidavit-of-merit requirements conflict with various Federal Rules of Civil Procedure. In addition, several state supreme courts have likewise held that affidavit-of-merit requirements conflict with their states' equivalent rules of civil procedure. *See, e.g.*, *Summerville v. Thrower*, 253 S.W.3d 415, 420-21 (Ark. 2007) (holding that required filing of affidavit of reasonable cause within 30 days of complaint added "legislative encumbrance to commencing a cause of action" not found in Rule 3); *Wimley v. Reid*, 991 So.

2d 135, 138 (Miss. 2008) (holding that required attachment to complaint of an attorney's certificate of expert consultation or an expert disclosure contradicted three provisions in Rule 8); *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 216 P.3d 374, 379 (Wash. 2009) (holding that required certificate of merit from expert conflicted with Rules 8 and 11).

Looking beyond the contradictory terms of individual rules, the Delaware affidavit-of-merit process conflicts with the Federal Rules of Civil Procedure as a whole. The Federal Rules, including Rules 8, 12, and 56, "provide a comprehensive framework governing pretrial dismissal and judgment." *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1351 (11th Cir. 2018) (Pryor, J.). The Federal Rules "impose comprehensive, not minimum, pleading requirements." *Klocke v. Watson*, 936 F.3d 240, 247 (5th Cir. 2019) (Jones, J.). The Federal Rules "contemplate that a claim will be assessed on the pleadings alone or under the summary judgment standard," *Carbone*, 910 F.3d at 1351, not on any affidavit filed with the complaint.

Unlike the Delaware affidavit-of-merit process, "the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-suit dismissal." *Abbas*, 783 F.3d at 1334; *see also Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring) ("Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules.").

Nor does Federal Rule of Civil Procedure 11(a) require federal courts to apply the Delaware affidavit-

of-merit statute. While the rule provides that "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit," it would make little sense to conclude that Rule 11(a)'s drafters meant to impose a patchwork variety of state law verification and affidavit requirements on federal courts. Indeed, circuits that have considered Rule 11(a)'s reference to rules or statutes involving verification or affidavits have concluded that it means *federal* ones. *Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007) (Easterbrook, J.) (concluding that Rule 11(a) "means federal rule or federal statute, because state requirements for pleading do not apply in federal litigation"); *Royalty Network v. Harris*, 756 F.3d 1351, 1360 (11th Cir. 2014) (concluding that Rule 11(a)'s reference to other rules or statutes "means other federal rules or statutes"). That's consistent with the original Advisory Committee Notes to the Rule, which provide as examples only federal statutes and federal rules. *See* Fed. Civ. P. 11(a) Advisory Committee Notes—1937 (citing 28 U.S.C. §§ 381, 762; Fed. R. Civ. P. 23(b), 65).

Finally, if this Court agrees that Federal Rules of Civil Procedure 3, 8, 9, 11, 12, 26, and 79 conflict with the Delaware affidavit-of-merit procedures, then this Court should also conclude that these Federal Rules are valid under the Rules Enabling Act. *See Klocke*, 936 F.3d at 247-48 ("there is really no doubt" that Rules 12 and 56 are a valid exercise of Congress's rulemaking authority under the Rules Enabling Act); *Carbone*, 910 F.3d at 1357 ("We have little difficulty concluding that Rules 8, 12, and 56 comply with the Rules Enabling Act and the Constitution.").

This Court "has rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act." *Abbas*, 783 F.3d at 1336. Every "federal rule that 'really regulates procedure' is valid under the Rules Enabling Act." *Id.* at 1337 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). The Federal Rules described above, individually and as part of an integrated scheme, "really regulate procedure." Accordingly, this Court should reverse the court below and hold that state law affidavit-of-merit requirements do not apply in federal court.

B. Holding that state affidavit-of-merit requirements apply in federal court would produce satellite litigation and cause confusion in other areas.

If the Court holds that the Federal Rules of Civil Procedure conflict with the Delaware affidavit-of-merit procedure and are valid under the Rules Enabling Act, then the question presented is answered and the Court need not conduct an analysis under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Shady Grove*, 559 U.S. at 398 ("We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid.").

If the Court were to rule instead that state affidavit-of-merit requirements apply in federal court, then such a ruling would both spawn satellite litigation and cause confusion in other areas.

1. One example of satellite litigation certain to result would be over the "common knowledge" exception, by which medical malpractice claimants are excepted from presenting expert opinion testimony when a doctor's negligence was within the fact finder's "common knowledge." Courts have recognized this

exception for various types of harm. *See, e.g.*, *Boyd v. Chakraborty*, 550 N.W.2d 44, 49 (Neb. 1996) (leaving foreign object in patient's body after surgery); *Bender v. Walgreen Eastern Co., Inc.*, 945 A.2d 120, 123 (N.J. Super. 2008) (administering wrong medication); *Gold v. Ishak*, 720 N.E.2d 1175, 1179 (Ind. Ct. App. 1999) (causing fire during surgery).

In affidavit-of-merit states, the common knowledge exception has been the subject of costly and time-consuming litigation. *See, e.g.*, *Cowley v. Virtua Health Sys.*, 230 A.3d 265, 269 (N.J. 2020). In *Cowley*, a nurse failed to act after the patient dislodged a feeding tube. *Id.* The trial court held that the exception did not apply; the intermediate court reversed; and then the state supreme court agreed with the trial court that the exception did not excuse compliance with the state's affidavit-of-merit law. *Id.* at 269-70. Thus there was "time and money spent battling over the proper application of the statute" instead of the merits of the medical malpractice claim.[2] *See also See DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139, 1144 (Ill. 1992) (requiring affidavit even when common knowledge exception would apply).

Though a few state legislatures have recognized a common knowledge exception in their affidavit-of-merit statutes, the laws vary widely in their contours. Some recognize the exception only for claims of lack of informed consent. Hawaii Rev. Stat. § 671-12.5(b); Md. Courts & Judicial Proceedings Code Ann. § 3-2A-

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[2] Melinda L. Straub, *The Unforeseen Creation of a Procedural Minefield—New Jersey's Affidavit of Merit Statute Spurs Litigation and Expense in its Interpretation and Application*, 34 Rutgers L.J. 279, 315 (2002).

04(b). Others provide it for claims of lack of informed consent and *res ipsa loquitor*. Ky. Rev. Stat. § 411.167(4); Miss. Code Ann. § 11-1-58(3). Another provides exceptions for "unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body." N.D. Cent. Code § 28-01-46.

Still others establish vague "know it when we see it" exceptions, with no guidance. *See, e.g.*, S.C. Code Ann. § 15-36-100 (exception for "subject matter that lies within the ambit of common knowledge and experience"); Vt. Stat. Ann. tit. 12, § 1042(e) (exception for "the rare instances in which a court determines that expert testimony is not required to establish a case for medical malpractice"); Va. Code § 8.01-20.1 (exception when "the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience"); *see also* N.D. Cent. Code § 28-01-46 (excepting, in addition to the surgical examples noted in the previous paragraph, any "other obvious occurrence"). Like the common law "common knowledge" exception, the generalized terminology in these statutes provides fodder for protracted litigation.

Issues of how to apply the "common knowledge" exception are often litigated in state courts. If federal courts must apply affidavit-of-merit statutes, they too will doubtless face satellite litigation over the "common knowledge" exception. They will have to manage satellite litigation about other aspects of the statutes, too.[3] Such satellite litigation would frustrate

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[3] For other areas of satellite litigation involving affidavit of merit statutes, including expert qualifications and adequacy of

the purpose of the Federal Rules of Civil Procedure. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51 (1991) (stating that a decision serving only "to foster extensive and needless satellite litigation … is contrary to the aims of the Rules themselves").

2. In addition to generating satellite litigation, a ruling that state affidavit-of-merit statutes apply in federal court would also create confusion for federal courts deciding analogous issues, such as whether state anti-SLAPP ("strategic litigation against public participation") statutes apply in federal court. Anti-SLAPP statutes make it "easier to dismiss defamation suits at an early stage of the litigation." *Abbas*, 783 F.3d at 1332. Anti-SLAPP statutes provide a special motion to strike, which allows the court to dismiss an action before discovery if the plaintiff does not establish a probability of prevailing on the claim.[4] There is no federal anti-SLAPP statute. Just as more than half the states have affidavit-of-merit statutes, 35 states and the District of Columbia have anti-SLAPP statutes.[5]

Applying reasoning that is entirely consistent with Petitioner's contentions here, several circuits have concluded that state anti-SLAPP provisions do not apply in federal court. The D.C. Circuit, in an opinion by then-Judge Kavanaugh, held that Federal Rules

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affidavits, see the American Association of Justice amicus brief in this case.

[4] Caitlin Daday, Comment, *(Anti)-SLAPP Happy in Federal Court?: The Applicability of State Anti-SLAPP Statutes in Federal Court and the Need for Federal Protection Against SLAPPs*, 70 Cath. U. L. Rev. 441, 443 (2021).

[5] Reporters Committee for Freedom of the Press, *Anti-SLAPP Legal Guide*, https://www.rcfp.org/anti-slapp-legal-guide/.

12 and 56 conflict with the District of Columbia's anti-SLAPP special motion to dismiss provision. *Abbas*, 783 F.3d at 1333-37.

The Second Circuit similarly held that California's anti-SLAPP motion to strike process does not apply in federal court because federal Rules 12 and 56 answer the same question. *La Liberte v. Reid*, 966 F.3d 79, 87-88 (2d Cir. 2020).

The Fifth Circuit, in an opinion by Judge Jones that relied heavily on Judge Kavanaugh's opinion in *Abbas*, held that Texas's anti-SLAPP statute conflicts with federal Rules 12 and 56 because they answer the same question: "what are the circumstances under which a court must dismiss a case before trial?" *Klocke*, 936 F.3d at 244-48.

The Tenth Circuit held that New Mexico's anti-SLAPP statute does not apply in diversity actions because it is a procedural mechanism designed to expedite disposal of frivolous lawsuits. *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 668-73 (10th Cir. 2018).

Finally, the Eleventh Circuit held that Georgia's anti-SLAPP motion to strike provision conflicts with the Federal Rules of Civil Procedure because "Rules 8, 12, and 56 create an affirmative entitlement to avoid pretrial dismissal that would be nullified by the Georgia anti-SLAPP statute if it were applied in a federal court." *Carbone*, 910 F.3d at 1349-57.

Therefore, a clear majority of circuits to have considered the issue agree that anti-SLAPP provisions—as Petitioner contends regarding affidavit-of-merit provisions—conflict with the

Federal Rules of Civil Procedure and do not apply in diversity actions. Only two circuits disagree, the First and Ninth. *Godin v. Schencks*, 629 F.3d 79, 86-87 (1st Cir. 2010); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999). The Ninth Circuit decided *Newsham* before this Court's decision in *Shady Grove*, which has led some judges to reconsider the circuit's position on the ground that it is inconsistent with *Shady Grove*. *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski, C.J., Paez, J., and Bea, J.) (dissenting from denial of rehearing en banc) ("Just as the New York statute in *Shady Grove* impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleading stage when Rule 12 would allow them to proceed.").

In sum, a ruling in favor of Respondents would call into question the circuit majority rule that anti-SLAPP statutes do not apply in diversity cases, because the reasoning in those cases is directly analogous to how courts have resolved the applicability of affidavit-of-merit statutes in diversity cases.

In addition to anti-SLAPP statutes, a ruling for Respondents would create doubt in other areas. For example, long-settled federal court decisions that state pre-suit notice requirements do not apply in federal court could also be called into question. *See, e.g.*, *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 346 (7th Cir. 1997) (holding that state notice requirement preventing filing of suit for 30 days to encourage settlement was procedural, not substantive, and did not apply in federal court); *Lundgren v. McDaniel*, 814 F.2d 600, 605-06 (11th

Cir. 1987) (holding that state requirement that plaintiffs notify Department of Insurance of claim against state or its agencies six months before filing action was procedural and did not apply in federal court).

All this confusion will be avoided if this Court holds that state affidavit-of-merit requirements conflict with the Federal Rules of Civil Procedure and do not apply in federal diversity cases.

C. Affidavit-of-merit requirements prevent some parties with meritorious claims from seeking justice.

The essence of civil liberty "consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This Court has regularly recognized the right of citizens to access the courts to seek redress for harms. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) ("[D]ue process does prohibit a State from denying, solely because of inability to pay, access to its courts"). Lower courts have also emphasized the central importance of citizen access. *See, e.g.*, *John Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 375 (Wash. 1991) (stating, in medical malpractice case, that access to courts is "the bedrock foundation upon which rest all the people's rights and obligations").

Application of state affidavit-of-merit requirements in federal courts, however, can prevent parties from seeking justice. *See Ericson v. Pollack*, 110 F. Supp. 2d 582, 587 (E.D. Mich. 2000) ("Indeed, a strict interpretation of [affidavit of merit]

requirements risks impinging a plaintiff's right to jury trial.").

A typical justification for affidavit of merit statues is the prevention of "frivolous" medical malpractice lawsuits.[6] But federal courts already weed out any frivolous claims pursuant to federal procedural rules, without costly and time-consuming battles over how to construe and apply preliminary affidavit requirements. That federal courts dismiss frivolous claims is particularly true under *Twombly/Iqbal* pleading standards, which in effect ensure that "frivolous claims filed in federal court can be eliminated at an early stage."[7] But under affidavit-of-merit statutes, valid claims may be dismissed for failure to include an affidavit or for providing an affidavit that does not conform to the statutory requirements. *See Buck v. Henry*, 25 A.3d 240, 243 (N.J. 2011) (reversing dismissal where plaintiff filed affidavit of expert in different specialty than defendant). The dismissal of otherwise meritorious claims frustrates the purpose of the federal procedural rules to seek "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

In addition to causing the dismissal of meritorious medical malpractice claims, affidavit-of-merit statutes can also create serious financial and procedural barriers to accessing court in the first place. Finding and retaining a medical expert to supply an affidavit of merit is expensive, especially

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[6] Meryl J. Thomas, Note, *The Merits of Procedure v. Substance:* Erie*,* Iqbal*, and Affidavits of Merit as MedMal Reform*, 52 Ariz. L. Rev. 1135, 1139 (2010).

[7] *Id.* at 1151.

where the injury may not be obvious or may require multiple experts.[8] Even when an expert is found, increased costs pre-litigation can change the calculus of whether an attorney accepts a case.[9] In essence, these additional requirements create "a costly, meaningless and arbitrary barrier to court access." *John v. St. Francis Hosp., Inc.*, 405 P.3d 681, 688 (Okla. 2017). The requirements can lead to "a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs." *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 869 (Okla. 2006).

Expense is not the only barrier that affidavit-of-merit statutes place on prospective plaintiffs. Particularly vulnerable populations tend to face major challenges navigating these statutes. The elderly, for example, are at risk of submitting incorrect affidavits because they often see multiple doctors, making it difficult to determine "whether the treatment involves a physician's specialty or the field of general practice." *Buck*, 25 A.3d at 243. Incarcerated individuals harmed by doctors must often "'rely on family' . . . for assistance in obtaining an affidavit of merit," complicating their attempts to submit required affidavits. *See, e.g.*, *Fontanez v. United States*, 24 F. Supp. 3d 408, 414 (D.N.J. 2014). And our military veterans, who are often elderly themselves or suffering from various disabilities,

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[8] *The Affidavit of Merit in Medical Malpractice Lawsuits*, Rodman Law Office (July 15, 2024), https://www.rodmanlawoffice.com/blog/the-affidavit-of-merit-in-medical-malpractice-lawsuit.

[9] Straub, *supra* note 2, at 316-17 ("After assessing her fees and the cost of an expert, and comparing them to the likely amount of recovery, an attorney will not take a meritorious malpractice case if it is economically infeasible or just not worth her time.").

must comply with state affidavit-of-merit requirements when suing a Veterans Affairs medical facility under the Federal Tort Claims Act. *Morrow v. United States*, 47 F.4th 700, 702 (8th Cir. 2022).

Finding an expert willing to review a case and provide an affidavit in compliance with state affidavit-of-merit requirements can be challenging.[10] Doctors may consider the time it takes to review a case and submit an affidavit to be a distraction from their primary practice, or they may consider opining on "the potential negligence of a professional colleague"[11] to be detrimental to their reputation. This "conspiracy of silence" has long been recognized. *See, e.g.*, *Brown v. Keaveny*, 326 F.2d 660, 661 (D.C. Cir. 1963) (noting "the refusal on the part of members of the profession to testify against one of their own for fear that one day they, too, may be defendants in a malpractice case"); *Huffman v. Lindquist*, 234 P.2d 34, 45 (Cal. 1951) (noting that doctors may not testify due to "pressure exerted by medical societies and public liability insurance companies").

This difficulty in finding an expert can be especially challenging for plaintiffs in rural areas, because they have fewer medical specialists readily available.[12] Even when available, specialists in rural locations may not assist due to fear of reputational

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[10] *See* David E. Seidelsen, *Medical Malpractice Cases and the Reluctant Expert*, 16 Cath. U. L. Rev. 158, 158 (1966).
[11] *Id.*
[12] *See Why Health Care is Harder to Access in Rural America*, U.S. Government Accountability Office (May 16, 2023), https://www.gao.gov/blog/why-health-care-harder-access-rural-america.

damage, given the relatively small professional circle within their community.[13]

Additionally, a plaintiff can be pressed for time to find an expert by a state's medical malpractice statute of limitations. While most states have a two or three-year statute of limitations, states like Ohio and Tennessee—both requiring affidavits of merit—have only a one-year statute of limitations.[14] Finding a medical expert who is accessible, affordable, and willing to provide an affidavit all within such a relatively short timeline can prove to be insurmountable for some plaintiffs, effectively "clos[ing] the court house doors to those . . . incapable of obtaining a pre-petition medical opinion." *Zeier*, 152 P.3d at 873.

Applying federal procedural rules can reduce some of the disparate impact to low-income and other vulnerable populations, which will limit "encumbrance to commencing a cause of action." *Summerville*, 253 S.W.3d at 421.

Moreover, it is not only plaintiffs who must clear the hurdle of preliminary affidavits of merit. In Michigan, for example, defendants in medical malpractice cases must file preliminary expert witness affidavits attesting to a meritorious defense. Mich. Comp. Laws § 600.2912e.

Applying federal procedural rules in federal courts will lessen these preliminary expert witness obstacles

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[13] Kimberly J. Frazier, *Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?*, 57 Ark. L. Rev. 651, 689 (2004).

[14] *Medical Malpractice Lawsuits: 50-State Survey*, https://www.justia.com/injury/medical-malpractice/medical-malpractice-lawsuits-50-state-survey/ (last accessed May 25, 2025).

caused by state affidavit-of-merit statutes, promoting the goal of "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

D. Allowing Petitioner's case to proceed would neither cause forum shopping nor harm medical care.

A holding that affidavit-of-merit requirements don't apply in federal court would not result in forum shopping or harm to medical care.

1. A ruling for Petitioner would not cause forum shopping in federal courts. Federal courts have no jurisdiction over most medical malpractice cases because they are usually between citizens of the same state. Put simply, most patients see doctors in the state where they both live, preventing diversity jurisdiction.

In 2023, for example, only 636 of the 339,731 civil cases filed in the federal district courts were private medical malpractice suits like this one,[15] and the district courts had diversity subject-matter jurisdiction over most of those.[16] Medical malpractice litigation under state tort law usually does not present a federal question under 28 U.S.C. § 1331,

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[15] Sarah Gibson et al., *CSP STAT Civil, Trial Court Caseload Overview Data Table, Malpractice Medical*, National Center for State Courts (May 3, 2025), https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil; *Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit*, U.S. Cts. (Sept. 30, 2023), https://www.uscourts.gov/data-news/data-tables/2023/09/30/judicial-business/c-2.

[16] *Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit*, U.S. Cts. (Sept. 30, 2023), https://www.uscourts.gov/data-news/data-tables/2023/09/30/judicial-business/c-2.

either. Also, in the circuits concluding that state affidavit-of-merit statutes do not apply in federal court, there has been no flood of medical malpractice litigation. In short, the amount of state tort medical malpractice litigation in federal courts has been, and will continue to remain, small.

Furthermore, there is no excess of medical malpractice litigation and never has been.[17] Some of the first affidavit-of-merit statutes were enacted in New Jersey and Delaware in 1995 and 2003, respectively. *See* N.J. Rev. Stat. § 2A:53A-27; 18 Del. Code § 6853. Lawmakers passed the statutes ostensibly to "control[] nuisance suits that drive up the cost of doing business,"[18] but claims of excessive and frivolous medical malpractice lawsuits were overblown. In 1991, shortly before the first AOM statutes were enacted, fewer than 2% of patients injured due to medical negligence filed a claim.[19] Similarly, in 2013, "[o]nly about 1% of adverse events due to medical negligence result[ed] in a claim."[20]

A fundamental reason for this lower-than-expected amount of medical malpractice claims is the

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[17] *See, e.g.*, Burton Craige, *The Medical Malpractice "Crisis": Myth and Reality*, N.C. State Bar J., Summer 2004, https://www.ncbar.gov/media/121177/journal-9-2.pdf.

[18] News Release, Office of the Governor of New Jersey (June 29, 1995), https://repo.njstatelib.org/server/api/core/bitstreams/fca8ed14-35e8-4f11-a0d3-dfcadf0cad82/content.

[19] A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III*, 325 New Eng. J. Med. 245, 247 (1991).

[20] David E. Newman-Taker, M.D., "Measuring Diagnostic Errors in Primary Care," JAMA Internal Medicine, March 25, 2013, http://jamanetwork.journals.jamainternalmedicine/article-abstract=1656536.

expense of litigating them. Plaintiffs' attorneys often must pay "at least $100,000" out of pocket for litigation expenses in a single case, which makes many medical malpractice claims economically unfeasible to pursue.[21] The expenses are necessary for investigations, depositions, and services from experts.[22] As a result of these expenses, more than 75% of attorneys reject between 95% and 99% of medical malpractice cases that they consider.[23] Therefore, rather than an excess of medical malpractice litigation, there is an excess of medical malpractice victims who cannot find a lawyer. Without representation, of course, few medical malpractice claimants have a chance in court.

Therefore, Petitioner's *pro se* filing of a medical malpractice case in federal court is an outlier, and a ruling in his favor will not lead to forum shopping.

2. Nor would failing to apply state law affidavit-of-merit requirements in federal court harm the health care industry. To the contrary, medical malpractice litigation does not meaningfully contribute to problems in our health care system, including insurance rates, unnecessary procedures, or a shortage of doctors. And litigation can spur improvements in health care.

Evidence shows that where states have legislated to discourage medical malpractice suits—for example,

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[21] *See* Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 Vand. L. Rev. 151, 165-66 (2014) (discussing litigation costs as a cause of the current access to justice problem).

[22] *See id.* at 165 (explaining how quickly medical malpractice litigation becomes expensive).

[23] *Id.* at 185-86.

by capping damages, which is often part of the same "tort reform" package as affidavit of merits requirements—the touted improvements to the health care system do not come to pass. Malpractice insurance premiums do not decrease. [24] Moreover, so-called "defensive medicine" does not drive up the cost of healthcare: In states that adopted tort reforms from 2002 to 2005, health care spending did not decline,[25] and in some instances spending *increased* after the reforms took effect.[26]

Additionally, healthcare providers are not leaving practice due to fears of malpractice liability. The most important factor is age: "[I]t is very likely that more than a third of currently active physicians will retire within the next decade."[27] Besides retirement, other top factors for physicians leaving their current role include seeking a higher paid position, physical and emotional toll from the job, and a lack of support and certainty.[28]

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[24] *See* Bernard Black et al., *How Do Insurers Price Medical Malpractice Insurance?*, IZA – Institute of Labor Economics Discussion Paper No. 15392, at 29 (2022), https://ssrn.com/abstract=4151271 (finding that malpractice insurance premiums do not decrease in parallel with decreases in insurer costs after damage caps are adopted).

[25] Bernard S. Black et al., *Medical Malpractice Litigation: How It Works, Why Tort Reform Hasn't Helped* 208–09 (2021) ("We find . . . no evidence that damage caps have reduced health care spending.").

[26] *Id.*

[27] *The Complexities of Physician Supply and Demand: Projections From 2021 to 2036*, Association of American Medical Colleges viii (Mar. 2024), https://www.aamc.org/media/75236/download.

[28] Laura Medford-Davis et al., *The Physician Shortage Isn't Going Anywhere*, McKinsey & Co. 5 (Sept. 2024),

Rather than harming our nation's health care system, medical malpractice lawsuits can lead to improvements in patient safety. Take the case of Willie King in Florida. In 1995, Mr. King was scheduled to have his right leg amputated because of complications from diabetes.[29] Doctors mistakenly amputated Mr. King's left leg.[30] After Mr. King settled his case, the state legislature amended the Florida Administrative Code to require surgeons and surgical teams to pause before a procedure and "verbally confirm the patient's identification, the intended procedure and the correct surgical/procedure site." Fla. Admin. Code r. 64B8-9.007(2)(b). If not for the publicity generated by Mr. King's case, citizens of Florida might not enjoy the same protection against wrong-site operations that they do today.

Another recurring example of medical negligence that has led to increased patient safety is when surgeons mistakenly leave surgical items inside a patient's body.[31] To account for this, since 2011 Nevada has required medical facilities to create "patient safety checklists." Nev. Rev. Stat. § 429.377. Such checklists must include precautionary protocols, which may include a verification that all items and tools are accounted for after the surgery. *Id.* at (2)-(3).

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https://www.mckinsey.com/industries/healthcare/our-insights/the-physician-shortage-isnt-going-anywhere#/.

[29] *See* Mike Clary, *String of Errors Put Florida Hospital on the Critical List*, Los Aneles Times (Apr. 14, 1995).

[30] *See id.*

[31] *See* Emlilie Munson and Leila Darwiche, *Surgeons continue to mistakenly leave objects in thousands of patients*, Times Union (Apr. 3, 2025), https://www.timesunion.com/projects/2025/hospitals-surgical-objects-patients/.

In short, "The legal system promotes patient safety by holding doctors, hospitals, and nursing homes accountable for their mistakes."[32] While patient safety has seen improvements, better practices are still necessary. A recent study concluded that there are at least 163,156 avoidable medical-error-related deaths each year in United States hospitals,[33] which makes them the third leading cause of death in the United States. If delayed and outpatient deaths are considered, the total climbs to over 200,000 deaths per year.[34] That means a preventable death in a hospital occurs about every three minutes. Thus, on average, for every half hour spent reading briefs, another ten preventable deaths have occurred in hospitals across the nation.[35] As the wrong-site amputation and retained surgical item examples show, medical malpractice claims and corresponding safer practices may reduce this level of unnecessary mortality.

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[32] Craige, *supra* note 20, at 10.

[33] Kavanagh et al., *Estimating Hospital-Related Deaths Due to Medical Error: A Perspective From Patient Advocates*, 13 J. Patient Safety 1, 2 (2017).

[34] *See id.*

[35] Even if preventable hospital-related deaths are as low as 25,000 per year, the most conservative estimate, "that equates to approximately 5 potentially preventable deaths per year per hospital in the United States." *Id.* at 4. Others have calculated the number of preventable hospital deaths at 100,000 per year, which is "enough people each week to fill four jumbo jets." Marty Makary, *How to Stop Hospitals From Killing Us*, Wall. St. J. (Sept. 21, 2012), https://www.wsj.com/articles/SB10000872396390444620104578008263334441352.

CONCLUSION

For these reasons, and the reasons stated in Petitioner's Brief, the judgment below should be reversed.

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JUNE 2025