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 THE HONORABLES MARK W. BENNETT AND ROYAL FURGESON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are retired United States District Court judges from around the country. *Amici* submit this brief to emphasize that the vertical choice-of-law analysis that the lower federal courts employ has become unnecessarily complicated to the point of being a burden on the lower courts. *Amici* believe that there is a simple and straightforward solution to this problem, consistent with the Federal Rules of Civil Procedure and decades of this Court's precedent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past nine decades, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and the many cases that followed after it, has achieved somewhat of a mythical status. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974); Craig Green, *Repressing* Erie*'s Myth*, 96 Cal. L. Rev. 595 (2008). *Erie* is "a key part of the rite of passage through which most of us went . . . ; it may have such a hold on us that we can't leave well enough alone." Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 Notre Dame L. Rev. 963, 1015 (1998). At its core, the *Erie* doctrine is rather simple. In a federal case where the court is sitting in diversity jurisdiction, state substantive law and federal procedural law apply.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

But things are never as easy or as simple as they seem. Since *Erie* was decided in 1938, this Court's vertical choice-of-law jurisprudence has evolved and become significantly more complicated. First year civil procedure students dedicate multi-step flow charts to determine what law applies in federal court. Parties spend many hours litigating these issues. Courts then must wade through these murky waters.

Although this Court clarified many of these issues in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), the current state of play still requires a federal court, when a Federal Rule is involved, to engage in a sort of conflict-preemption analysis. This imposes an unnecessary burden on busy federal district judges.

State-law affidavits of merit, like the one here, pose unique problems for an *Erie* analysis. These affidavit requirements are creatures of state statutes. These statutes were all enacted as part of a substantive tort reform movement to curb what state legislatures saw as an influx of frivolous medical-malpractice lawsuits. Some were codified in state codes of civil procedure, others in the sections of the statutes governing the substance of claims. *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, 31-34 (2021) (describing the various state laws).

But these statutes, no matter where they live in the state statute books, attempt to regulate the procedure behind filing a medical-malpractice case. The hurdles these statutes place in front of medical-malpractice plaintiffs do not always line up perfectly with the Federal Rules. This has caused much consternation among the various federal courts. *See* Part IV, *infra*.

Courts have reached inconsistent results by following this Court's ruling in *Shady Grove*. This Court should bring the *Erie* doctrine back to basics and issue a rule that simplifies the analysis in cases that involve the Federal Rules.

ARGUMENT

I. UNTANGLING THE INCREASINGLY COMPLEX *ERIE* ANALYSIS WOULD AID LOWER COURTS AND PROMOTE GREATER UNIFORMITY

The *Erie* doctrine is, at its core, a simple concept: a federal court sitting in diversity jurisdiction must apply state substantive law and federal procedural law. But over the years, as federal courts have dealt with increasingly nuanced choice-of-law issues, courts, including this Court, have gone away from the simplicity in Justice Brandeis's opinion. As Judge Wood put it, "so much has grown up around the decision that it is easy to forget how straightforward it was." Diane P. Wood, *Back to the Basics of* Erie, 18 Lewis & Clark L. Rev. 673, 673 (2014). "What should have been an uncomplicated standard has become bogged down with needless exceptions to exceptions to exceptions, and in the process the doctrine has drifted away from its animating principles." *Id.* at 674.

Erie, of course, was in many ways an easy case for a conflicts analysis because it involved a conflict between state and federal substantive law: the duty owed in a tort case. The simplicity of the *Erie* test did not last long. Although this Court addressed other relatively easy conflict questions in the next decade in cases like *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), things became more complicated from there. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), this Court first espoused its "outcome" determinative test

to determine whether a state law should apply in federal court. *Id.* at 109. Then over the next two decades this Court turned the once-simple *Erie* analysis into a complicated multi-step test.

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), this Court decided whether a federal court should apply a state law that vested fact-finding authority in workers' compensation cases in the judge, rather the Seventh Amendment, which would allow the parties to invoke their right to a jury trial on the question. *Id.* at 527-28. That time, the Federal Rule came out on top. This Court concluded that the *York* outcome-determinative test is not an absolute rule when the state law is "not bound up with rights and obligations." *Id.* at 538. Thus, this Court articulated a balancing test whereby courts should balance the federal and state interests involved to determine whether state or federal law applies. *Id.*

The once-simple *Erie* analysis now involved a three-step process. *See* Alexander A. Reinert, Erie *Step Zero*, 85 Fordham L. Rev. 2341, 2370 (2017). First, federal courts determined whether a conflict existed between federal and state law. If no conflict existed, then there was no need for an *Erie* analysis. If there was a conflict, courts next asked whether the conflict was outcome-determinative, a negative answer to which resulted in the application of federal law. But even outcome-determinative state laws were not always applied under this formula. Courts then engaged in the *Byrd* balancing test to determine whether, even in the face of an outcome-determinative conflict between federal and state law, federal interests dictated that federal law should govern.

The next case was *Hanna v. Plumer*, 380 U.S. 460 (1965), which is "arguably the most significant *Erie*-

doctrine decision of the last seventy years." Adam N. Steinman, *What Is the* Erie *Doctrine? (and what does it mean for the contemporary Politics of Judicial Federalism?)*, 84 Notre Dame L. Rev. 245, 260 (2008) (citing *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (calling *Hanna* a "pathmarking case")).

Hanna presented the first deep dive into a conflict between an ostensibly procedural state law and a Federal Rule. This Court repudiated the "outcome-determination" inquiry from *York* in contexts involving the Federal Rules. *Hanna*, 380 U.S. at 464, 466-67; *see* Wood, 18 Lewis & Clark L. Rev. at 684-85 (noting that the Supreme Court repudiated the "outcome determinati[ve]" test in favor of one that sorted cases by whether the Federal Rule governs a matter that is "arguably procedural"). Instead, it sorted future cases by whether the Federal Rule at issue governs a matter that is "arguably procedural." *Hanna*, 380 U.S. at 476 (Harlan, J., concurring). So this Court held that, if a state rule and Federal Rule are in direct conflict, the Federal Rule prevails, so long as it is constitutionally valid and it meets the requirements of the Rules Enabling Act. *Id.* at 464 (majority). This Court also concluded that, in the absence of a Federal Rule on point, a court should consider the problem with the twin aims of *Erie* in mind: to discourage forum-shopping and to avoid inequitable administration of laws. *Id.* at 468.

The next case to complicate things was *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The question in *Walker* was an amalgamation of *York* and *Hanna*: whether a federal court should follow state law or, alternatively, Federal Rule 3 in determining whether an action is commenced for the purpose of tolling

the statute of limitations. *Id.* at 741. This Court purported to strike a middle ground between these competing interests. Because "actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations," *id.* at 751 (citing *C & C Tile Co. v. Independent Sch. Dist. No. 7 of Tulsa Cnty.*, 503 P.2d 554, 559 (Okla. 1972)), this Court held that Federal Rule 3 did not displace state law, *id.* at 751-52. This Court reasoned that "Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." *Id.* at 751. This Court concluded: "Rule 3 and [the Oklahoma statute] can exist side by side, . . . each controlling its own intended sphere of coverage without conflict." *Id.* at 752.

Then there was the "unusual decision" of *Gasperini v. Center for Humanities*. Wood, 18 Lewis & Clark L. Rev. at 686. *Gasperini* involved the applicability of a New York remittitur statute that contained substantive and procedural elements. 518 U.S. at 426. It was substantive insofar as it governed the standard for assessing excessiveness of a verdict (and thus whether remittitur was warranted), but it was procedural inasmuch that it assigned the decision-making authority as to whether remittitur was appropriate to the appellate court, rather than the trial court. *Id.* Under *Byrd* or *Hanna*, this should have been a straightforward case. But instead of following the easier path, this Court "came up with a Rube Goldberg-like rule . . . that bent over backwards to implement the state's policy." Wood, 18 Lewis & Clark L. Rev. at 686. In declining to reach a middle ground as it did in *Walker*, the *Gasperini* Court suggested that the Federal Rules should be construed narrowly to avoid conflicts with

state interests. *See* Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 Notre Dame L. Rev. 579, 630 (2013); *see also Gasperini*, 518 U.S. at 437 n.22 (noting that this Court "'has continued . . . to interpret the [F]ederal [R]ules to avoid conflict with important state regulatory policies'") (quoting Richard Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 729-30 (4th ed. 1996)).

So in the nearly nine decades following the Court's decision in *Erie*, the calculus went from a relatively straightforward test to a multi-step, multi-factor decision that was the creature of judicial lawmaking.

II. *SHADY GROVE* WAS A SMALL STEP TOWARDS A RETURN TO BASICS

Then came *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). *Shady Grove*, although a fractured and relatively controversial decision, was a course correction in this Court's *Erie* jurisprudence.

Shady Grove involved a conflict between Federal Rule 23 and Section 901(b) of the New York procedural code. *Id.* at 398-99. The New York law contains detailed requirements for maintaining a class-action suit, including a provision that prohibits class actions for statutory damages. *See* N.Y. C.P.L.R. § 901. Federal Rule 23, on the other hand, contains no such limitation. *See* Fed. R. Civ. P. 23.

New York insurance law requires an insurance company to either pay a claim or deny it within 30 days of submission. *See* N.Y. Ins. Law § 5106(a). That law also imposes a statutory penalty of 2% per month on insurance companies that do not comply with the law. *See id.* Shady Grove Orthopedic treated a patient who was insured by Allstate, and, although

Allstate eventually paid the claim, it failed to do so within 30 days and then failed to pay the statutory penalty. *See* Joseph P. Bauer, *Shedding Light on* Shady Grove: *Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 Notre Dame L. Rev. 939, 950 (2011). Shady Grove sued in federal court in New York. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006). Although its individual damages were only around $500, Shady Grove sought to maintain its suit as a class action on behalf of all similarly situated providers. *See* Bauer, 86 Notre Dame L. Rev. at 950. The Second Circuit concluded that the New York statute and Federal Rule 23 addressed different issues, and so there was no conflict for *Erie* purposes, and that the statute was "substantive," and thus controlled in a diversity action. *Shady Grove Orthopedic Assocs, P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 141-42 (2d Cir. 2008).

This Court reversed and concluded that Federal Rule 23 displaced the New York rule, even though the same action could not have been maintained in New York state courts. *Shady Grove*, 559 U.S. at 415-16 (plurality). In so doing, the majority found that Federal Rule 23 and the New York rule were in conflict—"[b]oth of § 901's subsections undeniably answer the same question as Rule 23: whether a class action may proceed for a given suit." *Id.* at 401. This is because Federal Rule 23 provides that a class action may be "maintained" if "two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories of subdivision (b)." *Id.* at 398. The New York rule, on the other hand, disallowed certain

class actions that would be allowed under Federal Rule 23, thus placing the two rules in obvious conflict. In short, Justice Scalia's majority opinion concluded that rules authorized under the Rules Enabling Act "*automatically*" displace state law unless they are "invalid" under the Rules Enabling Act or "inapplicable" because the issue is outside the rule's scope. *Id.*

Shady Grove announced a relatively workable rule: if a state law "answer[s] the same question" as a valid Federal Rule, *id.* at 399, then the Federal Rule wins. But *Shady Grove* was a fractured opinion that came on the heels of decades of inconsistent and convoluted decisions from this Court. And determining whether a Federal Rule "answers the same question" created a host of other problems.

III. CASES INVOLVING AFFIDAVIT-OF-MERIT STATUTES HIGHLIGHT THE COMPLEXITY OF THE CURRENT *ERIE* ANALYSIS

State affidavit-of-merit laws highlight the problem with this Court's current vertical choice-of-law jurisprudence. As of the fall of 2021, 29 States had enacted affidavit-of-merit laws that require medical-malpractice plaintiffs to provide, at some point during the litigation, an affidavit from a physician attesting to the merit of the lawsuit. *See* Gallenstein, 60 U. Louisville L. Rev. at 30-31. These laws, although at their core designed to do the same thing, vary enough that federal courts have been inconsistent in their treatment of these laws. Some state laws are obviously procedural, insofar as they appear in the state codes of civil procedure. *See id.* at 31. Other States codified their affidavit-of-merit statutes in the same section of the code that governs the substance of medical-malpractice claims. *See id.* at 31-32.

Courts have struggled with the best approach to dealing with these statutes when they appear in federal court. *See id.* at 35-40 (collecting cases); *see also* Pet. 12-24 (collecting cases). Indeed, the Seventh Circuit created an intra-circuit split over the treatment of the Illinois affidavit-of-merit statute.

The first case, *Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014), involved a state-law wrongful-death claim against a correctional facility. The district court applied the Illinois statute and dismissed the complaint. *See id.* at 620. The Seventh Circuit affirmed. The Illinois statute requires a plaintiff in a medical-malpractice action to attach to the complaint an affidavit that a healthcare professional has reviewed the facts and believes that there is a "reasonable and meritorious cause for the filing of such action," or a statement as to why the affidavit is unnecessary. *Id.* at 628 & n.27. Hahn contended that the Illinois rule conflicted with Federal Rules 8 and 11, and the State claimed that the Illinois rule was a substantive law that should apply in federal court. *Id.* at 629. The court held that the Illinois rule "comfortably 'can exist side by side'" with the Federal Rules. *Id.* at 631. The Illinois rule, the Seventh Circuit reasoned, concerned only "a pre-suit consultation and related attachments to the complaint," and thus did not regulate the contents of a plaintiff's complaint. *Id.* The court concluded that the state law could coexist with Federal Rule 11 because the Illinois statute was "designed to ensure that a complaint has 'factual validity' and 'reasonable merit,'" whereas Rule 11's "central purpose . . . is to deter baseless filings in district court." *Id.* at 632 (ellipsis in original).

Then in *Young v. United States*, 942 F.3d 349 (7th Cir. 2019), the Seventh Circuit held that the same Illinois statute at issue in *Hahn* did not apply in a medical-malpractice action brought under the Federal

Tort Claims Act. This time, the court concluded that the Illinois rule *does* conflict with Federal Rule 8. Judge Easterbrook concluded that "[Rule 8] specifies what a complaint must contain. It does not require attachments. One can initiate a contract case in federal court 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.* at 351. Thus, the court concluded, "[the Illinois rule] applies in federal court to the extent that it is a rule of *substance*; but to the extent that it is a rule of *procedure* it gives way to Rule 8 and other doctrines that determine how litigation proceeds in a federal tribunal." *Id.*

The ostensible confusion and inconsistent treatment surrounding the affidavit-of-merit statutes likely can be directly attributed to this Court's quasi-conflict-preemption analysis from *Shady Grove*. The plurality in *Shady Grove* reaffirmed the notion that, to determine if a state law should apply in federal court, courts "must first determine whether [a Federal Rule] answers the question in dispute." 559 U.S. at 398.

In the context of affidavit-of-merit statutes (and in myriad other contexts), the various courts of appeals engage in a traditional conflict-preemption analysis that asks whether the state law and a specific federal rule can exist side by side. For example, in *Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019), Judge Thapar discussed whether the Ohio affidavit-of-merit statute conflicted with Federal Rules 8, 9, and 12. *Id.* at 293. In *Young*, Judge Easterbrook determined that the Illinois statute conflicted with Federal Rule 8. 942 F.3d at 351. And in *Corley v. United States*, 11 F.4th

79 (2d Cir. 2021), the Second Circuit held that the Connecticut statute conflicted not only with Federal Rules 8, 9, and 12, but also with Federal Rule 4. *Id.* at 88-89 (citing *Gallivan*, 943 F.3d at 294).

The dueling opinions in *Pledger v. Lynch*, 5 F.4th 511 (4th Cir. 2021), also highlight the problem. The majority determined that West Virginia's affidavit-of-merit statute could not apply in federal court because it conflicted with several Federal Rules. The court painstakingly walked through each of the Federal Rules with which it believed the West Virginia statute conflicted. The majority held that the law conflicted with Federal Rule 8 because, by listing required elements of pleadings in federal court, it "'implicitly excludes other requirements.'" *Id.* at 519 (quoting *Gallivan*, 943 F.3d at 293). The court also determined that the West Virginia law conflicted with Federal Rule 9, which governs heightened pleading standards. *Id.* at 519-20. The Fourth Circuit then held that the West Virginia statute, which mandated dismissal for noncompliance, conflicted with Federal Rule 12, which sets forth the bases on which a complaint can be dismissed. *Id.* at 520. Finally, the majority determined that the West Virginia statute conflicted with Federal Rule 11 because it "seeks to limit frivolous malpractice suits . . . through a mechanism . . . that Rule 11 specifically disclaims." *Id.*

Judge Quattlebaum dissented. He too engaged in a fulsome conflict-preemption analysis but came out the other way. *Id.* at 530-31 (Quattlebaum, J., concurring in part and dissenting in part). At bottom, Judge Quattlebaum concluded, "none of the Federal Rules cited by the majority answer[s] the question of whether an individual bringing [a medical-malpractice suit] must provide a pre-suit certificate of merit." *Id.* at

531. In his view, because "the Federal Rules of Civil Procedure are entirely silent on the subject of hand," the state law must apply in federal court. *Id.* at 532.

The Third Circuit grappled with these same Federal Rules in the decision below. The court determined that, "[b]ecause the [affidavit of merit] is not a pleading and serves a different purpose than pleadings do, there is no conflict between the Delaware statute and Rule[] 8 or 9." Pet. App. 7a. The court also engaged in a conflict-preemption analysis and determined that the Delaware Statute "also does not conflict with Rule[] 11 or 12." *Id.*

As demonstrated by these cases and the others that petitioner identified in his petition for certiorari, federal courts have expended significant resources grappling with the *Shady Grove* conflict-preemption paradigm. And it's not only in cases involving affidavits of merit. This work is burdensome and unnecessary.

IV. THIS COURT SHOULD DECLARE A RULE THAT CLARIFIES AND SIMPLIFIES THE *ERIE* ANALYSIS

This Court should announce a rule that simplifies the *Erie* analysis when the Federal Rules are involved. In those circumstances, the lower courts should not be required to engage in an extensive conflict-preemption analysis to determine whether there is direct conflict between a state law and a specific Federal Rule. Instead, this Court should declare a rule that, if a state law governs a procedural aspect of a case, it cannot apply in federal court.[2]

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[2] Alternatively, the Court should declare a rule that any state law mandating that a plaintiff attach anything to a complaint cannot apply in federal court.

Federal courts have enjoyed broad latitude to regulate the procedure in their courtrooms since the Founding. The Judiciary Act of 1789 "recognized the power of each court to make all necessary rules for the conduct of its business." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1002, at 9 (4th ed. 2015). For nearly a century and a half, Congress largely stayed silent on a uniform set of rules for the federal courts. But in 1922, Chief Justice Taft pushed for such uniformity. *See id.* § 1003, at 18 & n.6 (citing William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A.J. 601, 604, 607 (1922)). Then came the Rules Enabling Act, 28 U.S.C. § 2072, in 1934 and the Federal Rules in 1938. For the first time, there was a uniform set of rules to "govern the procedure in all civil actions . . . in the United States district courts." Fed. R. Civ. P. 1.

Erie was decided in the wake of Congress passing the Rules Enabling Act. With the benefit of hindsight, it is clear that *Erie* was an easy case. It was a conflict between substantive federal and state law. Justice Reed, however, had the foresight to recognize that the broad rule that the Court issued could have a domino effect on federal courts' powers to govern their own procedure. 304 U.S. 64, 91-92 (1938) (Reed, J., concurring in part); *see* Wood, 18 Lewis & Clark L. Rev. at 681 ("Justice Reed thus foresaw the question whether *Erie* might restrict the scope of the authority the Court had just received from the Rules Enabling Act, and in so doing, call into question some or all of the Federal Civil Rules.").

Many of this Court's decisions in the decades following *Erie* signaled the erosion of this uniform federal policy that was so long in the making. *Walker* allowed for a state procedural rule to "exist side by side" with

a Federal Rule. 446 U.S. at 752. *Gasperini* "came up with a Rube Goldberg-like rule . . . that bent over backwards to implement the state's policy." Judge Wood, 18 Lewis & Clark L. Rev. at 686. *Hanna*, for all its faults and intricacies, established a core, workable rule that this Court should accept here. That is the idea that "there are certain irreducible powers that go along with the institution of a court." *Id.* at 685. In the words of Justice Harlan, if a state law is "arguably procedural," it is displaced by the Federal Rules. *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

Affidavit-of-merit statutes, like Delaware's here, are "arguably procedural," *id.*, and should not apply in federal court, regardless of whether there is a Federal Rule directly on point. This Court should adopt a rule that simplifies the vertical choice-of-law analysis in this way. It would lead to less confusion among litigants, less work for the courts, and consistent outcomes in federal courts across the country. This is what the Federal Rules were designed to do.

CONCLUSION

The judgment of this Court of appeals should be reversed.

Respectfully submitted,

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