No. 24-440

In the Supreme Court of the United States

HAROLD R. BERK,

Petitioner,

v.

WILSON C. CHOY, MD, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT WILSON C. CHOY, MD

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QUESTION PRESENTED

This is a medical negligence case governed by Delaware law, filed in federal court under diversity jurisdiction. By statute, Delaware requires a plaintiff contemplating a claim for medical negligence to consult with an appropriate expert and verify there are "reasonable grounds to believe that there has been health-care medical negligence." 18 Del. C. § 6853(a)(1). To confirm this consultation took place, the plaintiff must obtain an "affidavit of merit" from the expert. *Id*. A plaintiff who fails to comply with these requirements cannot pursue a cause of action for medical negligence under Delaware law.

Petitioner filed this litigation without an affidavit of merit. Although the district court gave him nearly five months to obtain one, he failed to do so, and the district court dismissed the case.

The question presented is:

Whether Petitioner's failure to obtain an affidavit of merit under Delaware law requires dismissal, the same outcome that would be required had this case been filed in state court.

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INTRODUCTION

State policymakers have reached the consensus that meritless medical negligence lawsuits are a serious problem. They unjustifiably tarnish physicians' reputations, increase costs, and diminish the availability and quality of healthcare. To address these harms, Delaware has enacted a series of legislative reforms; the affidavit-of-merit requirement at issue here is an integral part of them.

This case is precisely what Delaware's affidavit-of-merit requirement was enacted to address. Petitioner brought this lawsuit—a diversity action arising under Delaware law—without an affidavit of merit, and although he consulted multiple physicians in three States, he could not obtain one. Despite this failure, Petitioner falsely represented to the district court that he had obtained an affidavit; tried to skirt the affidavit-of-merit requirement by repackaging his medical negligence claims as "assault and battery" (a theory barred by Delaware's statute of limitations); and, finally, argued that Delaware's affidavit-of-merit requirement cannot be applied in federal court. The district court and Third Circuit rejected this argument. They concluded that Delaware's law imposes a substantive limit on a state-law right—the right to pursue a medical negligence claim—and determined that the outcome of this litigation must be the same as it would have been in state court: dismissal.

Petitioner asserts that the decisions below contravene "a straightforward application of this Court's jurisprudence" and, if affirmed, will resurrect the "chaotic patchwork of divergent standards" that

existed before promulgation of the Federal Rules of Civil Procedure. Pet. Br. 2-3. None of this is accurate. Rather than faithfully apply decades of precedent under *Hanna v. Plumer*, 380 U.S. 460 (1965), Petitioner misreads a single opinion from a fractured case, *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), as a signal that federalism is now an afterthought under *Hanna*. In Petitioner's view, *Shady Grove* requires state laws to be displaced whenever they "overlap" with the Federal Rules, inviting litigants to conduct broad expeditions across the Rules in search of conflicts that prevent enforcement of state law in federal court. While professing adherence to a "plain text" approach, Petitioner all but ignores key language from one Federal Rule while stretching the meaning of six others beyond their bounds.

This Court's jurisprudence, including *Shady Grove*, forecloses that approach. Fairly read, the Federal Rules do not cause a direct, unavoidable collision with Delaware's affidavit-of-merit requirement; they leave room for that requirement to operate within the federal procedural framework, using federal modes of enforcement.

Because no Federal Rule conflicts with Delaware's affidavit-of-merit requirement, the only remaining question is whether the principles of *Erie* compel enforcement of the requirement in federal court. They do. This litigation should not be allowed to persist in federal court when a state court would have decided that Petitioner does not have a cause of action for medical negligence under Delaware law. By urging the Court to read the Federal Rules to grant him a state-

law cause of action he could not pursue in state court, Petitioner seeks to enlarge his rights under Delaware law, in violation of the Rules Enabling Act.

Hanna provides a "familiar" framework to resolve cases like this one. *Shady Grove*, 559 U.S. at 398. Under that framework, Delaware's affidavit-of-merit requirement must be enforced in federal court.

STATEMENT

A. Delaware enacted various reforms to regulate medical negligence claims, including an affidavit-of-merit requirement to limit meritless *pro se* litigation.

Since the 1970s, policymakers have become increasingly concerned that abusive medical negligence[1] litigation—which reached "crisis" levels in many States—is adversely affecting the availability and quality of healthcare.[2] Congress proposed federal

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[1] Historically, "medical malpractice" has been used to describe what is more accurately called "medical negligence." This brief uses the terms interchangeably.

[2] U.S. General Accounting Office, *Medical Malpractice Case Study on Indiana*, GAO/HRD-87-21S-4, at 8-9 (Dec. 31, 1986) (explaining that "Indiana's health care system was approaching a crisis due to the increasing number of medical malpractice suits"); Fred J. Hellinger, PhD, and William E. Encinosa, PhD, *The Impact of State Laws Limiting Malpractice Damage Awards on Health Care Expenditures*, 96 Am. J. Pub. Health 1375 (Aug. 2006) (explaining that 28 States enacted damages caps to address "the most damaging attribute of our medical malpractice system," i.e., "that it promotes the practice of 'defensive medicine'").

reforms,[3] but medical negligence claims arise from state common law. *Pegram v. Herdrich*, 530 U.S. 211, 236-37 (2000) (explaining that "state malpractice law" is "a subject of traditional state regulation," and declining to "federalize malpractice litigation" through preemption). Reform efforts have thus necessarily focused at the state level.

Delaware, like nearly every State,[4] has addressed the problem through legislation. In 1976, the Delaware General Assembly enacted the Health Care Malpractice Insurance and Litigation Act to curb the rising "number of suits and claims for damages," and the corresponding "tremendous increase in the cost of liability insurance coverage for health care providers," which the General Assembly found was "endangering the ability of the citizens of Delaware to continue to receive quality health care." 60 Del. Laws ch. 373 (1976) (preamble). These concerns led to "major modifications to [Delaware's] current legal system" for medical negligence claims, *id.*, including mandatory medical expert testimony to prove breach of the standard of care and causation, constraints on punitive damages, and a strict statute of limitations, 18 Del. C. §§ 6853-6856.

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[3] *E.g.*, Federal Medical Malpractice Insurance Act, H.R. 3938, 94th Cong. (1975) (proposing a medical malpractice reinsurance program).

[4] U.S. General Accounting Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms*, GAO/HRD-87-21, at 3 (Dec. 31, 1986) (noting that 49 States enacted reforms addressing medical malpractice litigation).

In 2003 and 2004, the General Assembly amended this legislation to further regulate state-law medical negligence claims. 74 Del. Laws ch. 148 (2003); 74 Del. Laws ch. 391 (2004). The amendments were enacted to address lawsuits "by *pro se* Plaintiff patients who were unhappy with the result of treatment." DELAWARE SUPREME COURT HISTORY 274 (Randy J. Holland ed., 2021). These lawsuits often lack merit and are "eventually dismissed out of hand by the courts." *Id*. They nevertheless remain "part of the 'record' of the physician." *Id*.; *see also* 24 Del. C. § 1730(c) (imposing on every licensed physician "a duty to report to the [Delaware] Board [of Licensure and Discipline] within 60 days, all information concerning medical malpractice claims settled or adjudicated to final judgment"). Meritless *pro se* malpractice suits thus cause "huge [medical malpractice insurance] premium increases," because premiums are "often based on the number of lawsuits that a physician face[s] without regard to merit." DELAWARE SUPREME COURT HISTORY, *supra*, at 274.

To deter these frivolous, costly lawsuits, the General Assembly added the requirement that a plaintiff, to pursue a medical-negligence claim under Delaware law, must consult a medical expert to verify that the claim may have merit. 18 Del. C. § 6853(a). The medical expert must (i) be "licensed to practice medicine"; (ii) have been either "engaged in the treatment of patients" or active in academics "in the 3 years immediately preceding the alleged negligent act"; and (iii) be "Board certified in the same or similar field of medicine if the defendant … is Board certified." *Id*. § 6853(c).

Proof of the plaintiff's consultation with this expert, in the form of an "affidavit of merit," must be submitted to the court either with the complaint or, upon a showing of good cause, within 60 days of case initiation. *Id.* § 6853(a)(1)-(2). The affidavit must "stat[e] that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant." *Id.* § 6853(a)(1). Otherwise, the putative plaintiff has no right to pursue a claim for medical negligence under Delaware law. *Id.*; *see also* 74 Del. Laws ch. 148 (2003).[5]

The affidavit of merit does not limit or dictate the allegations in the case, the scope of expert or fact disclosures, or the evidence that may be presented in discovery or at trial. Indeed, if litigation is filed, the defendant cannot even see the affidavit. 18 Del. C. § 6853(a). The affidavit must "remain sealed and confidential" and "shall not be a public record." *Id.* It "shall not be discoverable," nor is it "admissible … in the underlying medical negligence action or any subsequent unrelated medical negligence action in which that expert is a witness." *Id.* § 6853(d). The medical expert that provides the affidavit may not "be questioned in any respect about" the affidavit or its existence. *Id.*; *see also Mammarella v. Evantash*, 93 A.3d 629, 637 (Del. 2014) (explaining that § 6853 "limits the use of an affidavit of merit, barring the defense from even discovering [it] and precluding [its] use … as evidence"). Instead, a court may only review

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[5] An affidavit of merit is not required in cases presenting a "rebuttable inference of medical negligence," for example, when "[a] foreign object was unintentionally left within the body of the patient following surgery." 18 Del. C. § 6853(b), (e).

the affidavit *in camera* to ensure it complies with § 6853's requirements. 18 Del. C. § 6853(d).

Thus, "while the requirements of Section 6853 play an important role in preventing frivolous claims, they are purposefully minimal." *Dishmon v. Fucci*, 32 A.3d 338, 342 (Del. 2011). The affidavit—and the required expert consultation that it substantiates—is simply "a prophylactic measure" to "reduce the filing of meritless medical negligence claims." *Id.*

B. Petitioner filed this litigation in federal court without an affidavit of merit and, despite receiving nearly five months to obtain one, failed to do so.

In November 2022, Petitioner filed this lawsuit *pro se* in the United States District Court for the District of Delaware. J.A. 1. Although his claims were based exclusively on Delaware law, Petitioner, a Florida resident who owns a home in Delaware, invoked diversity jurisdiction. J.A. 1-2.

The complaint accused Respondent Wilson Choy, MD, Respondent Beebe Medical Center, Inc., and a rehabilitation facility[6] of negligence in treating Petitioner after he "fell out of bed and severely injured his left ankle and foot." J.A. 3. While acknowledging Petitioner's preexisting "chronic" ankle and foot problems and various "medical comorbidities," J.A. 4, 9, the complaint alleged that the defendants' asserted negligence caused Petitioner "additional injury," J.A. 2. The complaint's allegations were wide ranging,

[6] After the Third Circuit affirmed dismissal and Petitioner appealed to this Court, the rehabilitation facility, Encompass Rehabilitation Hospital of Middletown, LLC, settled.

including assertions regarding Dr. Choy's purported failure to order additional imaging studies, and a staff member at the rehabilitation facility recommending a "ramp constructing company" that "could not do a ramp at [Petitioner's] house" for his wheelchair. J.A. 8.

Petitioner did not obtain an affidavit of merit before filing suit. Instead, he moved for more time to obtain one. J.A. 21-23. Petitioner asserted that he "anticipated obtaining a medi[c]al opinion" from an orthopedic surgeon, Dr. Raikin, whom Petitioner first consulted in September 2020, two years before filing this case. J.A. 9, 23. But Dr. Raikin had since "retired from medical practice," so Petitioner contacted another physician, Dr. Pedowitz, who had "recently taken over [Dr. Raikin's] practice." J.A. 23. Dr. Pedowitz, Petitioner asserted, "need[ed] additional time to review medical records, including Dr. Choy's medical records," *id.*, before he could "issue an affidavit of merit," J.A. 25. The district court granted the motion, allowing Petitioner 60 additional days "in which to file an affidavit of merit in this medical malpractice case." J.A. 27.

In January 2023, Petitioner submitted a notice stating that he had filed under seal curricula vitae for Drs. Raikin and Pedowitz, along with various "Medical Reports and Documents." J.A. 65, 82. While Petitioner made no mention of an affidavit of merit, he asserted that these submissions "constitute compliance with Delaware Code § 6853." J.A. 65. Defendants, including Dr. Choy, moved the district court to review Petitioner's submissions *in camera* to determine if they complied with Delaware law. *E.g.*, J.A. 76.

To avoid *in camera* review of his submissions, Petitioner raised a new argument: that he was excused from complying with Delaware's affidavit-of-merit requirement because it "is not enforceable in this diversity medical malpractice action." J.A. 101.[7] Petitioner asserted that the requirement conflicts with various Federal Rules of Civil Procedure and, as a result, "the Affidavit of Merit is not required to be filed by a Plaintiff in a diversity action under Delaware law." J.A. 83, 101.

Additionally, in a separate gambit to avoid obtaining an affidavit of merit, Petitioner amended his complaint to raise claims for "assault and battery." Pet. App. 51a, 56a. These new claims, Petitioner asserted, "are not medical malpractice claims" and thus "not subject" to Delaware's affidavit-of-merit requirement. J.A. 121. The new claims, however, were untimely under the relevant Delaware limitations period. J.A. 124-29. After a defendant sought to dismiss the new claims, Petitioner withdrew them, admitting they "really added nothing new to the litigation." J.A. 156.

In the meantime, the litigation unfolded in the normal course under the Federal Rules of Civil Procedure. The district court entered a scheduling order, and the parties began discovery, including filing

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[7] Petitioner made this argument only after falsely asserting, in the same response, that he had "filed the Affidavit of Merit, required by Del Code § 6853, under seal on January 19, 2023." J.A. 82. As his own papers indicate, Petitioner filed only medical records and CVs, not any affidavit. J.A. 65, 167.

initial disclosures under Federal Rule 26(a)(1).[8] After several months—which was "approaching the half-way point to [the] discovery cut-off"—Petitioner had failed to submit any expert disclosures. J.A. 163. This called into question Petitioner's ability to satisfy a separate substantive requirement of Delaware law, 18 Del. C. § 6853(e), which prohibits "liability … based upon asserted negligence" without "expert medical testimony."

The defendants accordingly requested a court conference to set a deadline for Petitioner to serve his expert disclosures, and "to compel the parties' cooperation and collaboration to conduct discovery" under the district court's scheduling order. J.A. 162-63. In response, Petitioner asserted that "[t]his case should have settled before litigation," and "my main problem is getting Dr. Rankin's [sic] cooperation," on whom Petitioner was apparently relying to provide expert testimony. J.A. 164-65.[9]

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[8] *See* Scheduling Order, D. Ct. Doc. 30 (Jan. 23, 2023); *see also, e.g.*, Def. Choy's Initial Disclosures, D. Ct. Doc. 54 (Feb. 28, 2023).

[9] Petitioner also asserted that the district court's previous experience with him as a *pro se* litigant demonstrated that he "cooperate[s] with opposing counsel." J.A. 166. Petitioner, a retired lawyer, is a serial litigant. In addition to this case, he has filed at least three other federal lawsuits. *See* J.A. 175; *Berk v. Terumo Med. Corp.*, No. 23-cv-10 (D. Del.); *Berk v. Equifax, Inc.*, No. 20-v-1279 (N.D. Ga.). In one, Petitioner sued eleven defendants, including Drs. Raikin and Pedowitz, for declining to provide an affidavit of merit for this litigation. J.A. 175-200. Before suing Drs. Raikin and Pedowitz, Petitioner threatened to publish an online "newsletter" about them and made spurious allegations about "paid lobbyists" they used to "insulate doctors

In March 2023, the district court reviewed the sealed materials that, according to Petitioner, constituted an affidavit of merit under 18 Del. C. § 6853. J.A. 167. The court found that those materials included only "internet printouts about two doctors" (i.e., Drs. Raikin and Pedowitz) and "medical records." *Id.* Because Petitioner had not submitted "anything that looks like an affidavit, let alone an affidavit of merit," the court ordered him to show cause "whether there are one or more 'affidavits of merit' compliant with Delaware statute." *Id.*

In April 2023—nearly five months after the lawsuit was filed—the district court still had not received "any relevant response" from Petitioner to the show-cause order. Pet. App. 12a. The court concluded that "filing internet printouts about two doctors and some … medical records" did not satisfy Delaware's "affidavit of merit requirements." Pet. App. 14a. Indeed, there was "nothing to indicate that the two doctors [Raikin and Pedowitz] even know that [Petitioner] ha[d] submitted them as experts in this case." *Id.* Later, in a separate *pro se* lawsuit Petitioner filed against Drs. Raikin and Pedowitz for declining to provide an affidavit of merit for this litigation, Petitioner admitted he had "contact[ed] several *other* doctors in Delaware and Florida" but had been unable to obtain an affidavit of merit from any of them. J.A. 216 (emphasis added).

In response to Petitioner's assertion that Delaware's affidavit-of-merit requirement conflicts

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in general, no matter how poor their practice, from accountability." J.A. 214, 216.

with various Federal Rules of Civil Procedure and cannot be applied in federal court, the district court concluded that "[t]he Delaware statute is substantive law, and I need to apply it." Pet. App. 14a. Because Petitioner had "not complied with Delaware's affidavit of merit statute," the court dismissed his three medical negligence claims. J.A. 168.

C. The Third Circuit affirmed dismissal due to Petitioner's failure to comply with Delaware law.

Petitioner appealed to the Third Circuit, arguing that he was excused from obtaining an affidavit of merit because 18 Del. C. § 6853 does not apply in federal court. The Third Circuit disagreed.

As required by *Hanna* and *Shady Grove*, the Third Circuit began by analyzing whether Delaware's affidavit-of-merit requirement "cause[s] a direct collision" with the Federal Rules—that is, whether the Rules "control the issue before the court," such that there is "no room for the [Delaware statute's] operation." Pet. App. 4a (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987)). Applying this test to Federal Rules 8, 9, 11, and 12, the court concluded that "Delaware's [affidavit-of-merit] statute does not conflict with any Federal Rule." Pet. App. 6a. For example, because the Delaware statute neither "require[s] a plaintiff to state any facts to support his claim" nor has any effect "on the contents of the pleadings or specificity of the allegations," the affidavit-of-merit requirement does not conflict with federal pleading rules. Pet. App. 6a-7a.

Because the Federal Rules and the Delaware affidavit-of-merit requirement do not "directly collide" and may "exist side by side," Pet. App. 5a, the Third Circuit concluded that it "need not engage in [a] Rules Enabling Act and constitutional analysis" to determine whether applying the Federal Rules to the exclusion of Delaware law would impermissibly enlarge, abridge, or modify any state-law right, Pet. App. 4a n.4. The court thus proceeded to evaluate whether Delaware's affidavit-of-merit requirement is "substantive" under *Erie*. Pet. App. 8a.

The court concluded that it is, because failing to apply it "would produce a different outcome than that mandated in [a] state court proceeding," Pet App. 9a (quoting *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 264 (3d Cir. 2011) (internal quotation marks omitted)); would "provide [Petitioner] an advantage that he would lack in state court," encouraging forum-shopping, *id.*; and would be inequitable because "a defendant in federal court would be forced 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 (quoting *Liggon-Redding*, 659 F.3d at 264). The Delaware law therefore "must be enforced by a federal court sitting in diversity," and the district court "correctly dismissed [Petitioner's] complaint." Pet. App. 10a.

SUMMARY OF ARGUMENT

I. Petitioner's characterization of *Hanna*'s "direct collision" test is inaccurate.

A. Step one of *Hanna* analyzes whether a Federal Rule "answers the question in dispute." *Shady Grove*, 559 U.S. at 398 (citation omitted). This does not mean, as Petitioner contends, that a Rule displaces a state-law provision "wherever [the Rule] *overlap[s]* with state law." Pet. Br. 34 (emphasis added). Rather, a Rule must be "sufficiently broad" to cause a "direct collision," leaving "no room for the operation" of the state-law provision. *Burlington*, 480 U.S. at 4.

Under this test, the Rules must be read fairly, not broadly, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980), and any ambiguities must be interpreted to "avoid substantial variations in outcomes between state and federal litigation," *Shady Grove*, 559 U.S. at 405 n.7 (internal citations and quotation marks omitted). Thus, a state-law provision conflicts with a Rule under step one of *Hanna* only if the conflict is "direct," "obvious, "undeniable," and "unavoidable."

B. Petitioner asserts that federal courts must disregard state-law provisions like Delaware's whenever they "refer[] to procedures in state courts." Pet. Br. 43. This Court's longstanding precedent says the opposite, requiring federal courts to "conform" to state law "*as near as may be*" when the law "bear[s] substantially on the question whether the litigation would come out one way in the federal court and another way in the state court." *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 536 (1958) (emphasis added). Thus, while the Federal Rules

prescribe "the *mode* of enforcing state-created rights," state law nonetheless "must govern," because, in diversity cases, "*there can be no other law*." *Hanna*, 380 U.S. at 471-72 (emphasis added); *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996) (requiring federal courts to apply the "substantive thrust" of state law "without untoward alteration of the federal [procedural] scheme"). Lower courts have no difficulty applying this approach. *See, e.g.*, *Young v. United States*, 942 F.3d 349, 351 (7th Cir. 2019) (applying the "substantive thrust" of Illinois's "affidavit-of-merit requirement" while using a federal "mode[ ] of enforcement," i.e., Rule 56). Petitioner's suggestion that this precedent should be overruled is meritless.

II. Delaware's affidavit-of-merit requirement satisfies both steps of *Hanna*: It does not directly collide with any Federal Rule, and applying the requirement in federal court furthers *Erie* principles.

A. Rule 11(a) expressly accommodates the Delaware provision. It states: "Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." Delaware's affidavit-of-merit requirement, to the extent it requires an affidavit to accompany a complaint, falls squarely within this exception. Petitioner suggests that the Rule's "reference to other rules or statutes" actually means "other *federal* rules or statutes." Pet. Br. 24 n.5 (cleaned up; citation omitted). But courts cannot add words to the Federal Rules, and this Court, in construing Rule 11, has refused to do just that. *See Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 544 (1991). Even if Rule 11(a) were ambiguous (and it is not), *Shady Grove* mandates that

any ambiguity be construed in favor of applying the Delaware statute. This is dispositive of *Hanna* step one, and the Court can proceed directly to the *Erie* analysis.

B. In any event, there is no conflict between the Delaware statute and any Federal Rule.

Petitioner reads Rule 3 as displacing all state-law "prerequisites to commencing a suit." Pet. Br. 23. *Walker* forecloses this interpretation. *See Walker*, 446 U.S. at 752 ("Rule 3 does not replace … [such] policy determinations found in state law."). Moreover, an affidavit of merit need not be filed to "commence" a medical negligence case. It can be filed later, as Petitioner did here.

Nor does the statute conflict with Rule 8 or 9. Those Rules apply to pleadings, and Delaware's affidavit of merit is not a pleading.

Rule 11 can also coexist with the Delaware provision. There is no conflict with Rule 11(a) because Delaware's affidavit-of-merit requirement does not apply to pleadings, and the affidavit may be filed independently of, and well after, the complaint. Rule 11(b), meanwhile, defines an attorney's obligations in making "representations to the court," and Rule 11(c) authorizes sanctions if Rule 11(b) "has been violated." The Delaware statute has no bearing on these subjects.

There is no conflict with Rule 12, either. That rule governs the timing and content of responsive pleadings. The Delaware statute says nothing about the timing or content of pleadings in general or responsive pleadings in particular. Instead, it provides an independent ground for dismissal—based

not on anything in Rule 12, but on the failure to obtain an affidavit of merit.

Nor is there a conflict with Rule 26 or 37. An affidavit of merit is not discoverable, 18 Del. C. § 6853(d), so these rules—which govern discovery—do not apply. The affidavit also bears no resemblance to an "expert report." Pet. Br. 26-27. It need not "state the facts that underly [the expert's] determination," *Dishmon*, 32 A.3d at 344, and it does not limit the scope of expert testimony, *Mammarella*, 93 A.3d at 637.

C. Applying the affidavit-of-merit requirement in federal court is compelled by *Erie*: The requirement is outcome determinative, it would be inequitable to exempt plaintiffs from the requirement simply because they choose to sue in federal court, and no federal interest counsels in favor of discarding the requirement in diversity cases.

III. In the alternative, adopting Petitioner's expansive interpretation of the Federal Rules would violate the Rules Enabling Act. The Act prohibits applying the Rules to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). A "substantive right[ ]" under the Act includes a state-law right "to redress infraction." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941). Failing to enforce Delaware's affidavit-of-merit requirement would "enlarge" a substantive right—the right to pursue a medical negligence claim under Delaware law—in violation of the Act.

ARGUMENT

I. Petitioner's characterization of *Hanna*'s "direct collision" test, and *Shady Grove*'s application of it, is inaccurate.

In Petitioner's view, *Shady Grove*—the bulk of which did not command a majority—worked a sea change in *Hanna*'s "direct collision" test, adopting a "bright-line" rule that prohibits broad swaths of state law from applying in federal court. *E.g.*, Pet. Br. 34. The lesson of *Shady Grove*, Petitioner suggests, is that state law is not worthy of enforcement—it is "arcane" and "exotic"; it is based on "nebulous policy concerns"; and it "creat[es] an impenetrable hodgepodge" that "ensnar[es] federal courts in an ever-expanding web," creating mere "traps for the unwary and barriers that hinder relief for litigants." Pet. Br. 11, 34, 36-37. To Petitioner, the principle of federalism—a core concern of the Rules Enabling Act and this Court's *Hanna* jurisprudence—is the last thing to consider when deciding whether a state law conflicts with a Federal Rule. Pet. Br. 41-43 (listing "federalism" as the last in a series of "reasons" supporting Petitioner's arguments).

Petitioner's reading of *Shady Grove* is inaccurate. Neither the *Shady Grove* majority, nor the plurality, nor the concurrence (nor, for that matter, the dissent), signaled a departure from the "familiar" *Hanna* framework and its "direct collision" test, which has governed cases like this one for decades. *Shady Grove*, 559 U.S. at 398. And no *Shady Grove* opinion validates Petitioner's jaundiced view of state law or state policymakers.

After *Shady Grove*, the goal of *Hanna* remains the same: ensure uniform procedures for federal litigation, while interpreting the Federal Rules to provide room for state law to operate in federal court absent a direct, unavoidable collision.

A. The Federal Rules directly collide with a state-law provision only if they leave no room for the provision to operate.

Step one of *Hanna* analyzes whether a Federal Rule "answers the question in dispute." *Shady Grove*, 559 U.S. at 398 (citing *Burlington*, 480 U.S. at 4-5). This does not mean, as Petitioner contends, that a Federal Rule displaces a state-law provision "wherever [the Rule] *overlap[s]* with state law." Pet. Br. 34 (emphasis added). The first step of *Hanna* demands more than an "overlap" before a federal court can start down the road of disregarding a state law like Delaware's affidavit-of-merit requirement.

Instead, to "answer the question in dispute," a Federal Rule must be "sufficiently broad" to cause a "direct collision," leaving "no room for the operation" of the state-law provision. *Burlington*, 480 U.S. at 4. An incidental collision is insufficient—"the clash [must be] unavoidable." *Hanna*, 380 U.S. at 470; *see also Shady Grove*, 559 U.S. at 406 n.8 (plurality).

This test, honed by the Court over decades, strikes a careful balance. It accommodates, as Petitioner emphasizes, Pet. Br. 35-37, a uniform system of federal procedure—"housekeeping rules," as *Hanna* described them, 380 U.S. at 473. But it also affords state laws due respect. The Federal Rules were not

promulgated to "replace … policy determinations found in state law." *Walker*, 446 U.S. at 752.

Thus, *Hanna*'s "direct collision" test recognizes that, "while Congress may have the constitutional power to prescribe procedural rules that interfere with state substantive law in any number of respects, that is not what Congress has done." *Shady Grove*, 559 U.S. at 417-18 (Stevens, J., concurring in part and concurring in the judgment). As Justice Scalia, the author of the *Shady Grove* majority, explained, the goal of *Hanna*'s "direct collision" test is not to evade state policies, but to honor them where possible: "Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicating claims." *Stewart Organization, Inc. v. Ricoh Corp*., 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting).

This means the Federal Rules must be read fairly, in light of their "plain meaning"—not broadly, to create conflicts where none exist. *Walker*, 446 U.S. at 750 n.9. Nor can courts downgrade federalism to an afterthought, as Petitioner suggests. Pet. Br. 41-43. "[I]n deciding whether a federal … Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits." *Stewart*, 487 U.S. at 37-38 (Scalia, J., dissenting).

The Court's application of the "direct collision" test over the past 80 years illustrates these principles.

Pre-*Hanna* decisions took care to avoid applying the Federal Rules to unduly conflict with state laws.

See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949) (holding that a state law requiring a bond at the outset of a case could not "be disregarded … as a mere procedural device"); *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 531-33 (1949) (enforcing a state law determining when a limitations period tolled, because the "cause of action [wa]s created by local law" and, thus, "the measure of it [wa]s to be found only in local law"); *Palmer v. Hoffman,* 318 U.S. 109 (1943) (holding that Federal Rule 8(c), which lists affirmative defenses, does not displace state law governing burdens of proof). In each of these cases, "the scope of the Federal Rule was not as broad as the losing party urged," and the Federal Rule did not "cover[ ] the point in dispute." *Hanna*, 380 U.S. at 470. "[E]nforcement of state law" was thus required. *Id*.

Since *Hanna*, the Court has repeatedly confirmed that the Federal Rules were not promulgated to override state policy judgments. In *Walker*, for example, the Court considered whether Federal Rule 3 displaced a state statute requiring service, rather than filing, to "commence" an action under the state-law limitations period. *Walker*, 446 U.S. at 741. Rule 3 did not conflict with the statute because "[t]here [was] no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules." *Id*. at 750-51. Rule 3, the Court reasoned, "does not replace such policy determinations found in state law." *Id.* at 752. It merely "governs the date from which various timing requirements of the Federal Rules begin to run." *Id.* at 751. The statute and Rule 3 could "exist side by side,"

with "each controlling its own intended sphere of coverage without conflict." *Id.* at 752.

In *Semtek Int'l Inc. v. Lockheed Martin Corp.*, the Court declined to interpret Rule 41(b) to displace state law governing claim preclusion, because applying state law did not undermine "federal courts' interest in the integrity of their own processes." 531 U.S. 497, 509 (2001) (providing, as a counterexample, a state's failure to prohibit "willful violation[s] of discovery orders," which "might justify a contrary federal rule"). And reading Rule 41(b) to accommodate state law furthered the "federalism principle of *Erie*" by avoiding "substantial variations in outcomes between state and federal litigation." *Id.* at 504.

When this Court *has* found a direct collision, it is only because the state-law provision could not coexist with a Federal Rule. In *Hanna*, both the Federal Rule and the state-law provision dictated how a plaintiff was required to effect service (in-hand service vs. serving a party's residence). 380 U.S. at 460. Because both the state law and the Federal Rule answered precisely the same question "with unmistakable clarity," there was no room for both the Rule and the state law to operate. *Id.* at 470. The conflict was "unavoidable." *Id.*

So too in *Burlington*. There, state law imposed a "*mandatory* affirmance penalty" on all unsuccessful appeals. 480 U.S. at 4 (emphasis added). Federal Rule of Appellate Procedure 38, however, foreclosed a mandatory penalty, instead granting discretion to impose sanctions only after an appeal was found frivolous. *Id.* at 4. The Federal Rule's "discretionary mode of operation" thus "unmistakably conflict[ed]

with the mandatory provision of [the State's] affirmance penalty." *Id.* at 7.

Shady Grove is no different. The majority held that Rule 23 displaced a state statute precluding class certification, not because the two "overlap[ped]," Pet. Br. 34, but because they "flatly contradict[ed] each other," *Shady Grove*, 559 U.S. at 405. Both the Rule and the state law "undeniably answer[ed] the same question … [of] whether a class action may proceed for a given suit." *Id.* at 401. This was an "obvious conflict" under *Hanna* step one. *Shady Grove*, 559 U.S. at 403 n.6, 406 n.8. The majority and dissent disagreed on the outcome of the "direct collision" test, but neither suggested it should be altered to expand the universe of state laws displaced by the Federal Rules.

Indeed, a majority of the Justices emphasized that "courts should 'avoi[d] immoderate interpretations of the Federal Rules that would trench on state prerogatives.'" *Id.* at 430 (Stevens, J., concurring) (agreeing with Justice Ginsburg's four-Justice dissent). This echoed Justice Scalia's previous repeated endorsements of that same principle. *Semtek*, 531 U.S. at 504; *Stewart*, 487 U.S. at 37-38 (Scalia, J., dissenting). And, as every member of the *Shady Grove* Court agreed, ambiguities in the Federal Rules should not be read to displace state law, but to "avoid substantial variations in outcomes between state and federal litigation." *Shady Grove*, 559 U.S. at 405 n.7 (internal citations and quotation marks omitted).

Despite disagreements among the various opinions in *Shady Grove*, none evinced the hostility to state law that underlies Petitioner's arguments here.

Federalism remains a central concern, and a state-law provision conflicts with a Federal Rule under step one of *Hanna* only if the conflict is "direct," "obvious," "undeniable," and "unavoidable."

B. The Federal Rules do not directly collide with a state statute merely because it "refer[s] to procedures in state courts."

Petitioner makes another significant error in mischaracterizing the inquiry under *Hanna*. He asserts that federal courts must categorically disregard state-law provisions like Delaware's affidavit-of-merit requirement because the statute in which that requirement is found, 18 Del. C. § 6853, "refer[s] to procedures in state courts." Pet. Br. 43. Petitioner cites nothing to support this notion, and it is fundamentally wrong.

The issue was settled decades ago. Federal courts cannot disregard state laws that grant or limit substantive rights simply because they "refer to procedures in state courts." *Id*. Instead, federal courts must "conform" to a state law "*as near as may be*" when the state law "bear[s] substantially on the question whether the litigation would come out one way in the federal court and another way in the state court." *Byrd*, 356 U.S. at 536 (emphasis added).

In *Byrd*, substantive state law granted immunity from suit if the defendant proved certain facts. *Id*. at 529. But state law required judges, not juries, to determine those facts, contrary to federal procedure. *Id*. 533-34. The solution was not, as Petitioner asserts here, to displace state law. Pet. Br. 43. The solution

was to enforce state substantive law *within the federal procedural framework*. The Court held that the relevant federal procedural mechanism—"assign[ing] the decisions of disputed questions of fact to the jury"—should be used to enforce the State's substantive law on immunity. *Byrd*, 356 U.S. at 537.

This approach both respected state substantive law and maintained "[a]n essential characteristic of [the federal] system," namely, to "distribute[ ] trial functions between judge and jury." *Id*. For that reason, the approach is rooted in foundational *Erie* principles. A "federal court adjudicating a state-created right" must follow state substantive law—"it cannot afford recovery if the right to recover is made unavailable by the State." *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 108-09 (1945). But "the forms and mode of enforcing the [state] right" will "naturally" vary because the federal and state "judicial systems are not identic." *Id*.

Hanna echoed this point. 380 U.S. at 473 (quoting *York*, 326 U.S. at 108). The Court agreed that state procedures cannot "alter[ ] the *mode* of enforcing state-created rights" in federal court. *Id*. (emphasis added). But *Hanna* also made clear that while the "mode of enforcement" is determined by the Federal Rules, "state law must govern because," in diversity cases, "*there can be no other law*." *Id*. at 471-72 (emphasis added). The Court put a finer point on this principle in *Gasperini*, holding that the Federal Rules do not override a state law simply because it "contains a procedural instruction." 518 U.S. at 426-29. If "federal courts can give effect to the substantive thrust" of state law "without untoward alteration of

the federal [procedural] scheme," they must do so. *Id.* at 426.

Petitioner asks the Court to all but overrule *Gasperini* (and, presumably, *Byrd*, on which *Gasperini* heavily relied). Pet. Br. 42. Petitioner claims that the "modes of enforcement" approach endorsed by *Byrd*, *Hanna*, and *Gasperini* is too "difficult and unusual," requiring courts to "rewrite" and "contort[ ]" state laws "from the bottom up" to enforce them in federal court. *Id.* But Petitioner cites nothing to suggest that the "modes of enforcement" principle has given courts any trouble. Indeed, courts routinely apply it, including when enforcing affidavit-of-merit requirements.

In *Young*, for example, Judge Easterbrook determined that an Illinois affidavit-of-merit requirement must be enforced in federal court "to the extent that" it is a rule of substance. 942 F.3d at 351. This meant that, while the requirement could not be enforced at the motion-to-dismiss stage, it could be enforced through federal summary judgment procedures, because there was no conflict between the state goal of resolving "insubstantial medical-malpractice suits … swiftly" and Federal Rule 56. *Id.*; *see also Barrow v. Wexford Health Sources, Inc.*, 793 F. App'x 420, 422 n.1 (7th Cir. 2019) (holding that an affidavit-of-merit requirement "reflects Illinois's 'substantive' law of negligence" but need not be enforced through pleading rules). In other words, *Young* applied the "substantive thrust" of the affidavit-of-merit requirement, while using a federal

"mode[ ] of enforcement"—exactly what *Byrd*, *Hanna*, and *Gasperini* require.[10]

Petitioner's only justification for overruling *Gasperini* and *Byrd* (and cases like *Young*) is a short dissent by Justice Jackson, written over 75 years ago. Pet. Br. 42-43 (discussing *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (Jackson, J. dissenting)). In a single sentence that cited no authority, Justice Jackson expressed concern that the majority in *Woods* had "give[n] the state law a different meaning in federal court than the state courts have given it." *Woods,* 337 U.S. at 539. In other words, Justice Jackson thought the state law should not apply in federal court simply because it referred to "any of the courts of this state." *Id*. But there was nothing remarkable about the analysis of the *Woods* majority—it merely held that if a plaintiff is "barred from recovery in the state court, he should likewise be barred in the federal court." *Id.* at 538. That is consistent with every case in the *Hanna* line of precedent.

Petitioner relies on the *Woods* dissent to suggest that state laws must be disregarded in federal court whenever they "refer to procedures in state courts." Pet. Br. 43. That single dissenting opinion, plucked from 80 years of this Court's *Hanna* precedent, is not sufficient to "cast aside" the "decades-old" modes-of-enforcement principle of *Byrd*, *Hanna*, and *Gasperini*. *See Shady Grove,* 559 U.S. at 413-14 (plurality)

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[10] The district court here did not dismiss Petitioner's case under Rule 12; it dismissed his case after issuing a show-cause order and allowing Petitioner to comply with Delaware law. This approach is compatible with *Young*.

(cautioning against overturning precedent in the *Hanna* line of cases). If this Court were to heed Petitioner's call to overrule that line of precedent, it would "render[] inapplicable many state-law provisions, even those [courts] consider to be substantive." *Pledger v. Lynch*, 5 F.4th 511, 532 (4th Cir. 2021) (Quattlebaum, J., dissenting in part). The result would "engender[ ] substantial variations [in outcomes] between state and federal litigation"—exactly the opposite of *Hanna*'s intent. *Semtek*, 531 U.S. at 504 (quoting *Hanna*, 380 U.S. at 467-68).

Take this case as an example. Although the district court gave Petitioner months to obtain an affidavit of merit, and although Petitioner consulted a number of physicians to obtain one, he could not comply with this requirement of Delaware law. The fact that 18 Del. C. § 6853 "contains … procedural instruction[s]" in addition to substantive requirements, *Gasperini*, 518 U.S. at 429, does not mean § 6853 can be "disregarded" in its entirety as "a mere procedural device," *Cohen,* 337 U.S. at 556. The courts below correctly concluded that they could not ignore the affidavit-of-merit statute and thereby create "substantial variations in outcomes between state and federal litigation." *Shady Grove*, 559 U.S. at 405 n.7 (cleaned up; citation omitted).

It is telling that, to reverse the decisions below, Petitioner finds it necessary to urge this Court to overrule longstanding precedent. Doing so is unnecessary—a faithful application of *Hanna* and *Erie* resolve this case, as explained below.

II. Delaware's affidavit-of-merit requirement must be enforced in federal court.

Delaware's affidavit-of-merit requirement satisfies both steps of the "familiar" *Hanna* framework. *Shady Grove*, 559 U.S. at 398.

First, the Federal Rules do not conflict with Delaware's affidavit-of-merit requirement. Rule 11(a) expressly accommodates the Delaware provision, instructing federal courts to enforce any "statute" that "specifically states" a complaint must be "accompanied" by an affidavit. That is exactly what Delaware's affidavit-of-merit statute says.

Even putting aside the plain text of Rule 11(a), none of the seven Federal Rules invoked by Petitioner answer the same question as the Delaware provision. Fairly read, those rules cause no direct, unavoidable collision; they provide room for the Delaware law to operate in federal court.

Second, *Erie* compels the enforcement of Delaware's affidavit-of-merit requirement in federal court. The requirement is outcome determinative, so failing to apply it will cause forum-shopping; it would be inequitable to exempt plaintiffs from the requirement simply because they choose to sue in federal court; and no federal interest counsels in favor of discarding the requirement in diversity cases.

A. There is no direct collision under *Hanna* because Rule 11(a) expressly instructs federal courts to apply state statutes requiring a complaint to be "accompanied by an affidavit."

Petitioner spends a significant portion of his brief arguing that a "straightforward plain-meaning approach" should govern *Hanna*'s "direct collision" test. Pet. Br. 34. But he is quick to abandon plain-meaning principles when they undercut his arguments.

As Petitioner emphasizes, Rule 11(a) states that "a pleading need *not* be verified or accompanied by an affidavit." Pet. Br. 24 (quoting Fed. R. Civ. P. 11(a) (emphasis Petitioner's)). Yet he relegates to a footnote the key language of Rule 11(a): "*Unless a rule or statute specifically states otherwise*." (Emphasis added); Pet. Br. 24 n.5. To the extent the Delaware statute requires a complaint to be "accompanied by" an affidavit, it is a "statute" that "specifically states otherwise"—i.e., it states that a "health-care negligence lawsuit" under Delaware law must be "accompanied by" an affidavit of merit. 18 Del. C. § 6853(a). By the plain terms of both the Delaware statute and the Rule itself, Delaware's affidavit-of-merit requirement falls squarely within the Rule 11(a) exception.

Petitioner's only response is that Rule 11(a)'s "reference to other rules or statutes means other *federal* rules or statutes." Pet. Br. 24 n.5 (cleaned up; citation omitted). But that is not what Rule 11(a) says. Rule 11(a) refers to "a rule or statute," not a "federal" rule or statute. *Royalty Network, Inc. v. Harris*, 756

F.3d 1351, 1363 (11th Cir. 2014) (Jordan, J., concurring) ("The text of Rule 11(a) is not confined to *federal* rules or statutes ...."); *Thompson by Thompson v. Kishwaukee Valley Med. Grp.*, No. 86 C 1483, 1986 WL 11381, at *2 (N.D. Ill. Oct. 6, 1986) (unpublished) ("There is nothing in Rule 11 which limits the exception only to federal statutes.").

Petitioner's construction of Rule 11(a)—adding a word that the Rule conspicuously omits—violates the plain-text principles he purports to endorse. "It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019); *see also Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346, 358 (2024) (refusing to "add words" to a statute). The Court has applied this "fundamental principle" to Rule 11 specifically, declining to read "attorney or party" in Rule 11(b) as "attorney or *unrepresented* party." *Business Guides*, 498 U.S. at 544 (emphasis in original). That same fundamental principle is dispositive here. "Had the Advisory Committee intended to limit" Rule 11(a) to only federal statutes, "it would surely have said so." *Id.* at 545. It did not, and this Court cannot rewrite the Rule.

Petitioner cites three cases that have adopted his atextual interpretation of Rule 11(a). *See* Pet. Br. 24 n.5. All of them suffer the same flaws. None addresses Rule 11(a)'s text. And none mentions the other Federal Rules that—unlike Rule 11(a)—explicitly distinguish between state and federal statutes.

When the drafters intended a Federal Rule to apply only to *federal* statutes, they said so expressly.[11] For example, when discussing what ultimately became Rule 4, the drafters proposed a change from "when a statute so provides" to "when a *federal* statute so provides." *Meeting Minutes from the Advisory Committee on Rules of Civil Procedure*, 4-7 (Aug. 1936) (emphasis added). They then revised the Rule, so that the phrase "federal statute" was used throughout. *Id.* at 7. That revision survives today in a slightly different form. Fed. R. Civ. P. 4(e), (f), (h) (dictating modes of service on various types of parties "[u]nless *federal* law provides otherwise" (emphasis added)).

The drafters made similar distinctions throughout the Rules. Rule 12(a) allows only "federal statute[s]" to supersede the timing of responsive pleadings. Rule 24(a)(1) allows litigants to intervene if a "federal statute" grants that right. Rule 26(a)(1)(B)(ii) exempts *in rem* actions from initial disclosure requirements if they "aris[e] from a federal statute." Rule 40 mandates that a court "give priority to actions entitled to priority by a federal statute" when scheduling trials. Rule 54(d)(1) prescribes that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs … should be allowed to the prevailing party." And Rule 65(e)(1) clarifies that Rule 65 does

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[11] While "it is the Rule itself, not the Advisory Committee's description of it, that governs," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011), the Advisory Committee's notes to Rule 11 confirm its plain text. The notes explain that Rule 11(a)'s caveat applies to "*any statute* which requires a pleading to be verified or accompanied by an affidavit," not just a "federal statute." Advisory Committee's Notes on Fed. R. Civ. P. 11 (emphasis added).

not modify any "federal statutes related to temporary restraining orders or preliminary injunctions in actions affecting employer and employee."

By contrast, when the drafters intended a Rule to apply to both federal *and* state statutes, they used the broader term "statute"—as they did in Rule 11(a). For example, Rule 16(c) authorizes "special procedures to assist in resolving the dispute when authorized by statute or local rule." "Statute" in Rule 16(c) includes *state* statutes.[12] Rule 17(a), meanwhile, provides that, while any party "authorized by statute" can sue on behalf of the real party in interest, only a party authorized by "*federal* statute" can sue in the name of the United States. (Emphasis added). Again, the former phrase, "authorized by statute," includes state statutes.[13]

The drafters' repeated "specification of 'federal statutes' in some parts of the Federal Rules but not in others would be surplusage if all references to statutes exclusively encompassed federal statutes." *HSBC Bank USA*, 2020 WL 6136213, at *8 n.14 (unpublished); *cf. Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 478 (2017) (the "surplusage canon" means "that each word Congress uses is there

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[12] *E.g.*, *HSBC Bank USA v. Lombardo*, No. 2:19-CV-00291-NT, 2020 WL 6136213, at *8-9 (D. Me. 2020) ("Rule 16 specifically allows the usage of dispute resolution procedures where authorized by statute, and here, a Maine statute … not only allows a court to order mediation but requires it.").

[13] *E.g.*, *Mississippi Phosphates Corp. v. Analytic Stress Relieving, Inc.*, 402 F. App'x 866, 875 (5th Cir. 2010) (unpublished) (applying a Mississippi statute through Rule 17).

for a reason"). Judicially revising Rule 11(a) to engraft the word "federal" into it, as Petitioner urges, is particularly inappropriate given that the drafters showed they knew "how to adopt th[at] omitted language" elsewhere in the Rules. *Rotkiske*, 589 U.S. at 14; *Business Guides*, 498 U.S. at 545 (noting that, "[e]lsewhere in the text, the Committee demonstrated its ability to distinguish between represented and unrepresented parties"). Petitioner's interpretation of Rule 11(a) is an "unnatural reading" of its plain text. *Business Guides*, 498 U.S. at 544. It is therefore "not permissible." Pet. Br. 35 (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024)).

Even if Rule 11(a) were ambiguous (and it is not), the result would be the same. Every member of the *Shady Grove* Court agreed that "we should read an ambiguous Federal Rule to avoid substantial variations [in outcomes] between state and federal litigation." 559 U.S. at 405 n.7 (quotation marks and citations omitted); *see also Stewart*, 487 U.S. at 38 (Scalia, J., dissenting) ("[A]t best, § 1404(a) is ambiguous. I would therefore construe it to avoid the significant encouragement to forum shopping that will inevitably be provided by the interpretation the Court adopts today.").

Petitioner's reading of Rule 11(a) "would create significant disuniformity between state and federal courts." *Stewart*, 487 U.S. at 37-38 (Scalia, J., dissenting). It would permit meritless medical negligence claims like this one to proceed in federal court when they would have terminated in state court. Petitioner's interpretation of Rule 11(a) should thus "be avoided if the text permits." *Id.* Here, the text of

Rule 11(a) not only "permits" the accommodation of Delaware's statute, it demands it.

Given Rule 11(a)'s express accommodation of Delaware's affidavit-of-merit requirement, there is no direct collision under *Hanna*. Just the opposite: Rule 11(a) expressly provides "room for the operation" of the Delaware law. *Burlington*, 480 U.S. at 4. That is dispositive of *Hanna* step one, obviating the need for a conflicts analysis under any other Rule and permitting the Court to proceed to the *Erie* analysis under *Hanna* step two. *Infra* at II.C.

B. To manufacture a direct collision under *Hanna*, Petitioner distorts seven different Federal Rules to create conflicts where none exist.

Even putting aside the express language of Rule 11(a), there is no conflict between Delaware's affidavit-of-merit requirement and any of the Rules Petitioner identifies. Petitioner suggests that *seven* Federal Rules—Rules 3, 8, 9, 11, 12, 26, and 37—collide with the Delaware statute. This "broad expedition[ ]" across the Federal Rules is "inconsistent with a precise wielding of *Shady Grove*" and belies a direct collision between any one Rule and Delaware's affidavit-of-merit requirement. *Pledger*, 5 F.4th at 530 (Quattlebaum, J., dissenting in part). In 80 years of *Hanna* jurisprudence, the Court has never read the Rules so broadly to suggest that one state-law provision could somehow directly collide with seven separate Rules.

Properly understood, Delaware's affidavit-of-merit requirement conflicts with none of these rules and can

exist side-by-side with all of them—just as the statute has existed side-by-side with Delaware's analogous Civil Rules for decades.

Rule 3. Rule 3 states, "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. Petitioner interprets this rule not only to govern how civil litigation is "commenced" in federal court but to displace all other state-law "prerequisites to commencing a suit." Pet. Br. 23.

Walker refused to read Rule 3 this way. *Walker*, 446 U.S. at 752 ("Rule 3 does not replace … [such] policy determinations found in state law."). Under Rule 3, a plaintiff may "commence" a federal civil action by filing a complaint. But that does not mean state-law provisions (like Delaware's affidavit-of-merit requirement) that must be fulfilled to pursue a cause of action no longer apply in federal court. If a plaintiff fails to comply with such provisions, the action is "barred" in federal court, just as it would be in state court. *Walker*, 446 U.S. at 748-49.

In any event, Petitioner is wrong that an affidavit of merit must be filed to "commence" a medical negligence case. It can be filed later, as Petitioner did here. 18 Del. C. § 6853(a)(2). Delaware courts liberally grant leave to file affidavits weeks (or, as here, months) after the complaint. *See, e.g.*, *McBride v. Shipley Manor Health Care*, No. Civ.A.04C-06-291-FSS, 2005 WL 2090695 (Del. Super. Mar. 23, 2005) (unpublished) (allowing 21 days to file an affidavit); *Meloney v. Nanticoke Gastroenterology, P.A. and Mackler*, C.A. No. 06C-05-006 THG, 2006 WL 2329377 (Del. Super. July 18, 2006) (unpublished) (allowing 18 days to file a second affidavit including a

curriculum vitae, which was missing from the first). Thus, even if Petitioner's sweeping interpretation of Rule 3 is correct—and *Walker* says it is not[14]—an affidavit of merit is not required to "commence" a federal civil action for medical negligence under Delaware law. There is no direct collision with Rule 3.

Rules 8 and 9. Rules 8 and 9 apply to pleadings. Delaware's affidavit of merit is not a pleading. It does not fit the description of any "pleading" in Rule 7, it is "outside the pleadings" under Rule 12(d), and it cannot be amended under Rule 15. The Delaware Civil Rules themselves do not consider an affidavit to be a "pleading," Del. Super. Ct. Civ. R. 7, and the Delaware statute has no "effect on what is included in the pleadings of a case or the specificity thereof," *Liggon-Redding*, 659 F.3d at 263. Nor are plaintiffs "held to the theory of the case initially put forward in the affidavit[]," *Jones v. Corr. Med. Servs., Inc.*, 845 F.

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[14] Petitioner's overbroad interpretation of Rule 3 would "render[] inapplicable many state-law provisions." *Pledger*, 5 F.4th at 532 (Quattlebaum, J., dissenting in part). States' pre-suit notice and arbitration requirements would no longer apply. *E.g.*, *id.* at 523 (majority implying it would overrule precedent upholding a pre-suit arbitration requirement); *see also* D.C. Code Ann. § 16-2802 (pre-suit notice requirement for claims against healthcare providers); Md. Code Ann., Cts. & Jud. Proc. § 3-2A-01, *et seq.* (pre-suit arbitration requirement for claims against healthcare providers); Colo. Rev. Stat. § 24-10-101, *et seq.* (pre-suit notice requirement for claims against public entities). Pre-suit review panel requirements would also cease to apply in federal court. *See, e.g.*, N.M. Stat. Ann. § 41-5-14; Ind. Code Ann. § 34-18-8-4. Most tellingly, the Delaware statute granting a 90-day extension of the limitations period upon service of a pre-suit notice of investigation—which Petitioner took advantage of here—would be set aside. *See* 18 Del. Code § 6856(4).

Supp. 2d 824, 855 (W.D. Mich. 2012), as they are in a pleading, Fed. R. Civ. P. 15(b)(1) (requiring an amendment to the pleadings if "a party objects that evidence is not within the issues raised in the pleadings"). And, in contrast to a pleading, which must be served on the opposing party, Delaware law "bar[s] the defense from even discovering the plaintiff's affidavit of merit and preclud[es] the use of the affidavit of merit as evidence or as impeachment material" at trial. *Mammarella*, 93 A.3d at 637.

Petitioner asserts that "[n]one of th[e] requirements" of Rule 8 or 9 "includes an affidavit of merit or other attachment to the pleading." Pet. Br. 16. True, but nothing in those rules precludes an "affidavit or other attachment" either. If Petitioner were correct that Rules 8 and 9 forbid affidavits, Rule 11(a) would not say that a pleading must be "accompanied by an affidavit" if "a rule or statute specifically" requires one.

An affidavit of merit also does not "heighten" the pleading standard in conflict with Rule 9. Pet. Br. 20. The complaint itself must, consistent with ordinary pleading standards, include sufficient allegations to plead a cause of action for medical negligence under Delaware law. *E.g.*, *Tusha v. Pediatric Assocs.*, No. CV 21-494-RGA, 2023 WL 5932921, at *2 (D. Del. Sept. 12, 2023) (applying federal plausibility standards to determine if plaintiff pleaded all elements of Delaware medical negligence claim). The affidavit, in contrast, need not satisfy the plausibility test for the sufficiency of pleadings; it requires only that an expert verify there are "*reasonable grounds* to believe that there has been health-care medical negligence." 18 Del. C.

§ 6853(a)(1) (emphasis added). This is an "important" state law measure that "prevent[s] frivolous claims," but it is "purposefully minimal." *Dishmon*, 32 A.3d at 342. It is not a "heightened" pleading requirement—it is "a prophylactic measure." *Id*.

There is no direct collision with Rules 8 or 9.

Rule 11. As explained above, Rule 11(a) expressly authorizes Delaware's affidavit-of-merit requirement, and that alone is dispositive. But even putting that aside, Rule 11 provides room for Delaware's affidavit-of-merit requirement to operate in federal court.

Rule 11(a) states that a "pleading need not be verified or accompanied by an affidavit." Although 18 Del. C. § 6853(a) references "the complaint," it allows the affidavit to be filed independently of and even well after the complaint (as it was here). There is no direct collision with Rule 11(a).

Rule 11(b) sets forth an attorney's obligations in making "representations to the court." The Delaware statute, however, says nothing about attorneys' obligations—"whether [in] signing, filing, [or] submitting" papers to the court; "advocating" to the court; or otherwise. Fed. R. Civ. P. 11(b). The statute requires a particular filing, but, unlike Rule 11, it imposes no requirement on attorneys to "represent" anything. Nothing about Delaware's affidavit-of-merit requirement conflicts with Rule 11(b).

Rule 11(c), meanwhile, authorizes sanctions if "the court determines that Rule 11(b) has been violated." Because Rule 11(b) does not conflict with the Delaware affidavit-of-merit requirement, nor does Rule 11(c). Indeed, the Delaware statute does not

mention sanctions at all. Dismissal for failure to file an affidavit is no more a "sanction" than is summary judgment for failure to present evidence supporting an essential element of a claim. Neither one is a punishment for misconduct. "Because Rule 11 is about attorney conduct"—not a prerequisite for a medical negligence claim—"it has a sufficiently separate purpose from [the Delaware statute] that no conflict exists between them." *Hahn v. Walsh*, 762 F.3d 617, 632 (7th Cir. 2014). Both the Rule and the Delaware statute "may be applied simultaneously." *Id.*[15]

Rule 12. Rule 12 governs the timing and content of responsive pleadings. It provides mechanisms for clarifying or striking allegations in a complaint, explains how certain defenses must be raised, and describes how certain defenses can be waived.

The Delaware statute does not speak to the timing or content of pleadings in general, much less responsive pleadings in particular. As explained above, an affidavit of merit is not a pleading and need not be filed with a pleading. 18 Del. C. § 6853(a)(2). The statute "has no effect on what is included in the pleadings of a case or the specificity thereof." *Chamberlain v. Giampapa*, 210 F.3d 154, 160 (3d Cir. 2000). And it "says nothing about the contents of the

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[15] In Petitioner's view, Rule 11 subsumes all "mechanisms … to limit frivolous filings," to the exclusion of all others. Pet. Br. 25. But that is not even true across federal law, which includes other "mechanisms" to address frivolous filings in federal court. *E.g.*, *Scott v. Sanders*, 789 F. Supp. 2d 773, 775 (E.D. Ky. 2011) (noting that various avenues of imposing sanctions under federal law "are complementary, not mutually exclusive" (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-50 (1991)).

actual complaint." *Hahn*, 762 F.3d at 631. A defendant need not assert a plaintiff's failure to file an affidavit of merit in a pre-answer motion to dismiss, and Respondents did not do so here. Instead, Respondents filed motions for *in camera* review months into the litigation—well past the deadline for responsive pleadings. The Delaware statute thus provides an independent basis for dismissing a case, based not on the complaint's allegations (or any other ground identified in Rule 12), but on a plaintiff's failure to obtain a required expert verification. On this point, Rule 12 is silent. It makes no mention of any such requirement or how one can (or should) be enforced. The statute and Rule 12 comfortably "can exist side by side," with "each controlling its own intended sphere of coverage." *Walker*, 446 U.S. at 752.

Nor would applying the Delaware statute in federal court allow States to "create entirely parallel systems for pleading claims and testing their sufficiency, and then to impose those bespoke regimes on federal courts." Pet. Br. 32. The federal plausibility standard still applies—to the complaint. It does not apply to the affidavit of merit, because it is not a pleading, does not contain allegations, and is never even disclosed to the defendant.

Rules 26 and 37. The Delaware affidavit-of-merit requirement also does not conflict with the federal rules governing discovery. The reason is simple: An affidavit of merit *is not discoverable*. *Mammarella*, 93 A.3d at 637; 18 Del. C. § 6853(d). All of Petitioner's arguments about Rules 26 and 37 ignore this dispositive point. Pet. Br. 26-27.

Petitioner falsely equates Delaware's affidavit of merit to an "expert report." *Id.* The two share nothing in common, as just a few examples illustrate: An affidavit of merit is not discoverable; an expert report is (that is the point). Affidavits of merit do not require experts to "state the facts that underly their determination." *Dishmon*, 32 A.3d at 344. An expert report, in contrast, requires "a complete statement of" the "basis and reasons" for the expert's opinions" and "the facts or data" underlying them, among many other things. Fed. R. Civ. P. 26(a)(2)(B). And an affidavit of merit does not limit the scope of expert testimony, *Mammarella*, 93 A.3d at 637, while an expert report does, *e.g.*, *Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 641 (7th Cir. 2008).

Delaware's affidavit of merit has nothing to do with discovery. There is no collision with Rule 26 or 37.

* * *

The Federal Rules provide ample room for Delaware's affidavit-of-merit requirement in federal court. Perhaps the best indication is that the requirement exists side-by-side with the *Delaware* rules of civil procedure. Delaware's Rules are "modeled upon the Federal Rules of Civil Procedure," and Delaware "adopted either the letter or the spirit of practically" every Federal Rule. Hon. Daniel L. Herrmann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327, 327-28 (1956). "Most of the Federal Rules" were adopted by Delaware "verbatim," and every Federal Rule that Petitioner relies on here has a Delaware analogue. *Id.* at 328.

Delaware state courts nonetheless "manage to navigate the coexistence of [the State's] Rules of Civil Procedure and its [affidavit] of merit requirement all the time." *Pledger*, 5 F.4th at 532 (Quattlebaum, J., dissenting in part). This raises the question: "How could [Delaware courts] do so if" the Delaware Rules and the statute unavoidably "conflict"? *Id.* The answer is simple, as *Walker* recognized: "[j]ust as [Delaware's civil rules and its affidavit-of-merit provision] can both apply in state court for their separate purposes, so too [the Federal Rules and Delaware's affidavit-of-merit provision] may both apply in federal court in a diversity action." 446 U.S. at 752 n.13.

C. *Erie* requires Delaware's affidavit-of-merit requirement to be enforced in federal court.

No Federal Rule directly collides with Delaware's affidavit-of-merit requirement. Thus, the only remaining question is whether the requirement is substantive under *Erie*. It is.

First, failing to enforce the requirement causes "substantial variations in outcomes between state and federal litigation which would likely influence the choice of a forum." *Semtek*, 531 U.S. at 504 (brackets, quotation marks, and ellipses omitted). The Delaware statute is outcome-determinative on its face and in its purpose. The Delaware General Assembly enacted it to eliminate "meritless medical negligence claims." *Dishmon*, 32 A.3d at 342. That is precisely why Petitioner tried so hard to avoid it—first, by falsely claiming that medical records and CVs "constitute[d] compliance," J.A. 65, 82; then, by raising untimely claims for "assault and battery" that "really added

nothing new to the litigation," J.A. 156; and, finally, by asserting that Delaware's affidavit-of-merit requirement "is not enforceable in this diversity medical malpractice action." J.A. 101.

Petitioner's own conduct demonstrates how failing to apply the requirement makes it "easier to pursue frivolous or meritless professional malpractice cases in federal court … than in [Delaware] state courts." *Liggon-Redding*, 659 F.3d at 264. Plaintiffs "with strong claims may not much care whether they file suit in a forum that requires an affidavit of merit or one that does not," but "plaintiffs with less substantial claims would strongly prefer to file in a court that does not require" one. *Jones*, 845 F. Supp. 2d at 857. "A weak plaintiff in federal court could hope for at least some nuisance-value settlement offer, but the expected value of a frivolous claim brought under an affidavit-of-merit requirement would be much lower, if not zero." *Id.*

Indeed, a quick settlement seems to be precisely what motivated Petitioner here. J.A. 164-65 (Petitioner claiming, "[t]his case should have settled before litigation"). If Dr. Choy were forced to settle this frivolous lawsuit, he would have to report the settlement to the Delaware Board of Licensure and Discipline. 24 Del. C. § 1730(c). And his insurer would have to report the settlement to the National Practitioner Data Bank. *See* 42 U.S.C. § 11131; 45 C.F.R. § 60.7(a). That is exactly what the affidavit-of-merit requirement was enacted to prevent.

If the requirement is not enforced in federal court, medical malpractice plaintiffs will seek that forum as a "safe harbor for those malpractice actions that

[Delaware] aims to preclude." *RTC Mortg.*, 981 F. Supp. at 347. This does not just raise the risk of forum-shopping—it all but guarantees it. *See Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1541 (10th Cir. 1996) (a plaintiff is "likely to seek a forum without the" affidavit of merit requirement "to avoid extra cost, to give himself or herself more time to build a meritorious case, or to increase the settlement value of his or her claims").

Second, applying the Delaware affidavit-of-merit requirement ensures the equitable administration of the law. The unfairness to defendants is obvious. "A defendant facing a meritless claim could find herself either securing a quick dismissal or facing significant defense costs, based only on whether the plaintiff is a citizen of [Delaware] or not." *Jones*, 845 F. Supp. 2d at 857. Just as important, the reputation of the physician-defendant embroiled in federal litigation "would be more likely to suffer the longer the lawsuit went on, putting added pressure on the defendant to settle rather than endure extensive discovery." *Chamberlain*, 210 F.3d at 161.

Failing to apply the Delaware affidavit-of-merit requirement would be unfair to plaintiffs, too. If the Delaware statute "applies in state but not federal court, the inequitable result would be a penalty conferred on state plaintiffs but not on those in federal court under diversity jurisdiction." *Trierweiler*, 90 F.3d at 1541. "[I]t would be fundamentally unfair to subject one set of plaintiffs to the [statute] but not another set solely because of the fortuity of diversity of citizenship." *Kanouse v. Westwood Obstetrical & Gyn. Assocs.*, 505 F. Supp. 129, 131 (D.N.J. 1981).

"There is simply no reason why" a medical negligence action based on Delaware law, "which concededly would be barred in the state courts," should be allowed to "proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants." *Walker*, 446 U.S. at 753. Yet that is precisely what will happen if Petitioner's overbroad interpretation of the Federal Rules is adopted. "The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it." *Id.*

Finally, there is no countervailing "federal interest" that would necessitate ignoring Delaware's affidavit-of-merit requirement for medical negligence cases. *Semtek*, 531 U.S. at 509. Medical negligence is "a subject of traditional state regulation." *Pegram*, 530 U.S. at 236-37. And no "essential characteristic" of the federal system is altered by the Delaware affidavit-of-merit requirement. *Byrd*, 356 U.S. at 537. Federal courts have been applying similar requirements in diversity cases for over 50 years. *See Connolly v. Foudree*, 141 F.R.D. 124, 128 (S.D. Iowa 1992) (surveying cases applying affidavit of merit statutes in federal court dating to 1979).

Moreover, Delaware's affidavit-of-merit requirement is more modest than many states': Unlike the statutes at issue in *Passmore*, *Gallivan*, and

Albright,[16] all of which require the plaintiff to serve an affidavit of merit on the defendant, Delaware prohibits the affidavit from being disclosed, let alone used during discovery or at trial. *Mammarella*, 93 A.3d at 637. The Delaware affidavit-of-merit requirement does not alter or circumscribe federal courts' "mode of enforcement" for pleadings, motions, fact discovery, expert discovery, or trial. *Hanna*, 380 U.S. at 473. Applying it does not undermine "the long-recognized power of Congress to prescribe housekeeping rules for federal courts." *Id.* "[T]here is no conceivable federal interest" in allowing Petitioner to continue this meritless case when he would be barred from doing so in state court. *Semtek*, 531 U.S. at 509.

III. In the alternative, adopting Petitioner's expansive interpretation of the Federal Rules would violate the Rules Enabling Act.

Even if the Court were to find an unavoidable collision between the Delaware affidavit-of-merit requirement and the Federal Rules, that would not end the inquiry. The Court would then be required to decide whether applying the Rules to displace the affidavit-of-merit requirement violates the Rules Enabling Act (the "Act").

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[16] Petitioner lumps Delaware's law together with other States' affidavit-of-merit requirements and "any number of" state laws that Petitioner characterizes as imposing "other unique state-law pleading requirements." Pet. Br. 21-23, 36-37. Like every previous case this Court decided under *Hanna*, this case is about one state-law provision. Other state-law provisions would require a separate analysis.

The Act empowers "[t]he Supreme Court" to "prescribe general rules of practice and procedure," 28 U.S.C. § 2072(a), but forbids those rules from "abridg[ing], enlarg[ing] or modify[ing] any substantive right," *id.* § 2072(b). Thus, the Act ensures the Federal Rules cannot be applied to expand or limit rights defined in state law. *See Semtek*, 531 U.S. at 503 (refusing to interpret a Federal Rule to violate the Act); *see also Shady Grove*, 559 U.S. at 418 (Stevens, J., concurring) (explaining that "federal rules cannot displace a State's definition of its own rights or remedies" (citing *Sibbach*, 312 U.S. at 13-14)).

In *Shady Grove*, Justice Stevens applied *Semtek* to conclude that Federal Rule 23 did not violate the Act in displacing a New York provision prohibiting certification of class actions seeking to recover statutory penalties. This was so because applying Rule 23 did not expand or limit any substantive state-law right. *See* 559 U.S. at 423, 432 (Stevens, J., concurring). The New York provision was not confined to a particular area of law or even claims based on New York law; rather, it governed "claims based on federal law or the law of any other State." *Id.* at 432. It was thus "hard to see how [the state provision] could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies." *Id.*

The Delaware affidavit-of-merit requirement bears no resemblance to the New York provision from *Shady Grove*. The affidavit-of-merit requirement is not a generally applicable procedural rule; it applies only to "health-care negligence lawsuit[s]" that arise under Delaware law. 18 Del. C. § 6853(a). And, far from

"classically procedural," *Shady Grove*, 559 U.S. at 435 (Stevens, J., concurring), the purpose of the affidavit-of-merit requirement is plainly substantive. It was enacted to "reduce the filing of" one particular type of claim that arises under Delaware law: "meritless medical negligence claims." *Dishmon*, 32 A.3d at 342. It serves this substantive end through substantive means, eliminating the right to pursue a medical negligence claim entirely if its requirements are not met. *Id*. Under the Act, the Federal Rules cannot displace a state-law provision that is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring). Here, the affidavit-of-merit requirement is not just "intertwined" with a state right, it is a necessary condition for a plaintiff to even possess that right.

Consistent with its substantive nature, the requirement is found not in the Delaware Civil Rules, but in the chapter on "Health-Care Medical Negligence Insurance and Litigation," where it is immediately preceded by a section on "Informed Consent," 18 Del. C. § 6852, and immediately followed by a section on "Expert Witness[es]," *id.* § 6854. By requiring verification "that there are reasonable grounds to believe that" negligence occurred and caused an injury, *id.* § 6853(a)(1), the Delaware provision makes it "more difficult to bring" a medical negligence claim under Delaware law, *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring). The requirement thus "serv[es] to limit the scope of that claim" and ultimately "defines the scope of [the] substantive right" to pursue medical negligence claims under Delaware law, serving as a defense to

those claims. *Id.* This Court has been careful to preserve "statutory defenses" like Delaware's affidavit-of-merit requirement when applying the Federal Rules. *Dukes*, 564 U.S. at 367 (holding that the Rules Enabling Act prohibited applying Rule 23 to eliminate "statutory defenses to individual claims"). According to *Sibbach*, a "substantive right[ ]" under the Act includes a state-law right "to redress infraction." 312 U.S. at 13. Failing to enforce Delaware's affidavit-of-merit requirement would "enlarge" what is a substantive right under *Sibbach*'s definition—the right under Delaware law to pursue a medical negligence claim.

Though the "bar for finding an Enabling Act problem is a high one," there is "little doubt" that Petitioner's interpretation of Federal Rules 3, 8, 9, 11, 12, 26, and 37 "would alter a state-created right." *Shady Grove*, 559 U.S. at 432. It would entirely *eliminate* a state-law requirement, thereby "limiting" a state-law defense while "enlarging" a state-law claim. *Cf. York*, 326 U.S. at 105 ("Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.").

Petitioner suggests that the Court's work under the Act is done once it determines that the Federal Rules in question regulate procedure. Pet. Br. 28-29. To Petitioner, it does not "matter how bound up a state provision is with the State's own rights or remedies," as "any contrary federal rule that happens to regulate the manner and the means by which the litigants' rights are enforced, must govern." *Shady Grove*, 559 U.S. at 425 n.9 (Stevens, J., concurring).

This reading of the Act contravenes its text. It nullifies Congress's "additional requirement," *Burlington*, 480 U.S. at 5, that a Federal Rule cannot be read to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). It overlooks "the balance that Congress struck" in the Act "between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies." *Shady Grove*, 559 U.S. at 425 n.9 (Stevens, J., concurring). And it disregards "the separation-of-powers presumption" and the "federalism presumption"—both of which "counsel against judicially created rules displacing state substantive law." *Id.* Although Petitioner's approach is perhaps more easily administrable, "Courts cannot ignore [the] text and context" of a statute "in the service of simplicity." *Id.* at 426.[17]

A violation of the Act does not invalidate a Federal Rule in its entirety. It means only that the Rule cannot be applied to the exclusion of the particular state law at issue—here, Delaware's affidavit-of-merit requirement. *Cf. Semtek*, 531 U.S. at 503 (refusing to

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[17] None of the cases Petitioner cites are as broad as he suggests, Pet. Br. 28-29, because none held that the Federal Rules *always* govern, even if they "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). In *Murphree*, for example, the Court noted only that the Federal Rule in question might have "*incidental* effects … upon the rights of litigants." *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946) (emphasis added). But "[t]here was no suggestion" in *Murphree* that, "by affecting the method of enforcing the rights in that case, the federal rules could plausibly abridge, enlarge, or modify the rights themselves." *Shady Grove*, 559 U.S. at 428 n.14 (Stevens, J., concurring).

apply Rule 41 to violate the Act by displacing state preclusion law); *see also Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring) (explaining that, if the Act is violated, a Federal Rule is "invalid" only "as applied in given situations"). Applying the Federal Rules to displace Delaware's affidavit-of-merit requirement, as Petitioner demands, "abridge[s], enlarge[s] or modif[ies] a[ ] substantive right." 28 U.S.C. § 2072(b). The Court cannot do so under the Act.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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