No. 24-440

In the Supreme Court of the United States

HAROLD R. BERK,

Petitioner,

v.

WILSON C. CHOY; BEEBE MEDICAL CENTER, INC.,

Respondents.

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

BRIEF FOR RESPONDENT BEEBE MEDICAL CENTER, INC.

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QUESTION PRESENTED

Section 6853 of the Delaware Code requires certain plaintiffs bringing medical negligence claims to submit "[a]n affidavit of merit … signed by an expert witness, … stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant." Del. Code Ann. tit. 18, § 6853(a)(1). The Delaware Supreme Court has construed Section 6853 as imposing a "*prima facie* evidentiary requirement[]." *Dishmon v. Fucci*, 32 A.3d 338, 344 (Del. 2011). That requirement can be satisfied by filing an affidavit separate from—and, in some cases, including this one, substantially later than—the complaint. The question presented is:

Whether a federal court sitting in diversity should apply Delaware Code Section 6853's evidentiary requirement that a plaintiff asserting a medical malpractice claim submit an affidavit early in his or her case to establish a *prima facie* showing of medical negligence.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Beebe Medical Center, Inc. states as follows: Respondent Beebe Medical Center, Inc. is a wholly owned subsidiary corporation of Beebe Healthcare, Inc., a not-for-profit Delaware nonstock corporation. No publicly held corporation holds 10% or more of Beebe Healthcare, Inc.'s stock.

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INTRODUCTION

Medical negligence liability is traditionally the province of state law. Legislating in that sphere, the Delaware General Assembly grew concerned by the proliferation of meritless malpractice lawsuits—and with it, rising insurance costs and threats to patient care. In response, the General Assembly struck a balance. It continued to offer a state-law cause of action for true victims of medical negligence. But it conditioned that claim on what the Delaware Supreme Court calls an evidentiary requirement: early in a case, a plaintiff must submit an affidavit by a medical expert making a *prima facie* showing that medical negligence caused the plaintiff's harm. A majority of States have addressed similar concerns through similar "affidavit of merit" requirements.

Petitioner seeks to recover based on Delaware law—but free of the evidentiary requirement Delaware imposed. Because his primary residence is outside of Delaware, Petitioner is entitled to a federal forum for his suit against the community healthcare center that treated him. On that basis, Petitioner considers himself exempt from the legislative balance the General Assembly struck. To secure this special treatment, Petitioner misinterprets a host of Federal Rules of Civil Procedure, distorts the applicable Delaware law, and seeks to upend this Court's long-settled framework for evaluating alleged conflicts between state law and federal rules.

Far from creating a conflict, the Federal Rules accommodate laws like Delaware's. Rule 11 provides that "a pleading need not be ... accompanied by an affidavit," "[u]nless a rule or statute specifically states otherwise." Fed. R. Civ. P. 11(a). Section 6853 of the Delaware Code is "a … statute." To the extent that statute requires an

affidavit of merit to accompany the complaint, it falls squarely within Rule 11's savings clause. For that reason alone, there is no conflict, and this Court need not follow Petitioner on the remainder of his tour through the Rules.

Petitioner is also wrong to consider the Delaware law a pleading requirement. It is an evidentiary requirement that can be satisfied apart from and subsequent to the filing of the complaint. Indeed, the district court did not dismiss Petitioner's case because he failed to "attach an affidavit of merit to [his] complaint," Pet'r Br. 2, but because he was unable to obtain such an affidavit for several months after filing his complaint (something Petitioner to this day does not claim he could do). Delaware's evidentiary requirement does not collide with rules governing what "[a] pleading … must contain," Fed. R. Civ. P. 8(a), what "facts" a complaint must "allege" with particularity, Fed. R. Civ. P. 9(b), or any of the myriad other rules Petitioner invokes. And to the extent the Rules are at all ambiguous, the Court should adhere to the approach endorsed by every Justice in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*: where reasonably possible, the Rules should be read "to avoid substantial variations in outcomes between state and federal litigation." 559 U.S. 393, 405 n.7 (2010) (internal quotation marks and brackets omitted).

At minimum, even though some procedural aspects of Delaware's law do not apply in federal court, its substantive core conflicts with no rule and properly applies. That is the position of the United States, which regularly relies on the substantive protections of state affidavit-of-merit laws as a defendant. And it requires judgment for the defendant where, as here, it is undisputed that the plaintiff is "[u]nable to secure an affidavit." Pet'r Br. 6.

If Petitioner wishes to recover under Delaware law, he must take substantive Delaware law as he finds it, including the evidentiary requirements the General Assembly imposed. A sovereign State's legislative balance, aiming to protect the fiscal health of its hospitals and the physical health of its citizens, warrants the respect of federal courts sitting in diversity. Delaware's response to the challenge of rising insurance costs is not a "mere technicalit[y]" or "idiosyncratic procedural preference[]." Pet'r Br. 3. It is substantive law. That state law conflicts with no federal procedural rule, and is binding on federal courts under the Rules of Decision Act. In the twenty-nine States that have enacted affidavit-of-merit laws, important aspects of state medical negligence law should not be checked at the federal courthouse doors. This Court should accordingly affirm.

STATEMENT

A. Statutory Background

1. Beginning in the 1970s, a boom in medical malpractice litigation triggered "rapidly increasing [insurance] premium rates." U.S. Gov't Accountability Off., GAO-03-702, Medical Malpractice Insurance 5 (2003) ("GAO Rep."). Around the time Delaware passed the law at issue here in 2003, these challenges "reached crisis proportions," with insurance premiums again "increasing at a rapid rate," and "excessive litigation … impeding efforts to improve quality of care." U.S. Dep't of Health & Hum. Servs., *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* 1 (2002); *see also* Bernadette Fernandez, Cong. Rsch. Serv., RL33358, Medical Malpractice: An Overview 7 (May 5, 2006) (stressing rising premiums' "impact on access to health

services, quality of care provided, and health spending overall").

In response, States have legislated limits on healthcare providers' exposure to malpractice suits. Many States enacted "affidavit of merit" (or "certificate of merit") laws like Delaware's. Although the details vary, such laws generally require a medical malpractice plaintiff to obtain a sworn statement from a medical professional attesting that the plaintiff has a meritorious claim, and to submit it early in the case. They are "designed" to "keep cases without merit … out of court," facilitate early "settlement discussions," and make it "unnecessary to take as many cases to trial, thus decreasing the claims-handling costs of the case." GAO Rep. 53. And they have succeeded. In Maryland, for example, malpractice suits fell by 36% the year after the State enacted its affidavit-of-merit law. Terry L. Trimble, *The Maryland Survey: 1994-1995*, 55 Md. L. Rev. 529, 907 (1996). Pennsylvania achieved a 41% reduction in malpractice cases after adopting an affidavit-of-merit requirement.[1]

States have continued to implement these laws, with Kentucky most recently enacting its version in 2019. Today, twenty-nine States have enacted some kind of affidavit-of-merit statute.[2]

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[1] *Latest Medical Malpractice Data Shows Stable Decline in Number of New Cases and Verdicts*, Unified Jud. Sys. of Pa. (Apr. 9, 2009), https://www.pacourts.us/news-and-statistics/news/news-detail/513/latest-medical-malpractice-data-shows-stable-decline-in-number-of-new-cases-and-verdicts.

[2] Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, Nat'l Conf. of State Legislatures (Aug. 11, 2021), https://www.ncsl.org/financial-services/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.

2. In 1976, the Delaware General Assembly enacted the Delaware Medical Malpractice Act, 60 Del. Laws, ch. 373 (1976), to address the "problems of increased costs in medical malpractice insurance premiums." Report of the Delaware Medical Malpractice Commission 1 (Feb. 26, 1976). The Assembly amended the Act in 2003 to add the affidavit-of-merit requirement at issue here. Del. Code Ann. tit. 18, § 6853.

Section 6853 of the Delaware Code requires a plaintiff to submit an "affidavit of merit" signed by an expert who "is familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify." *Id.* §§ 6853(a)(1), 6854. The Delaware Supreme Court construes Section 6853 as imposing a "*prima facie* evidentiary requirement[]." *Dishmon v. Fucci*, 32 A.3d 338, 344 (Del. 2011). The affidavit must state "that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant," that "there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant," and "that the breach was a proximate cause of injury or injuries claimed in the complaint." Del. Code Ann. tit. 18, § 6853(a)(1), (c). Such an affidavit is required only when expert testimony would be necessary to prove a medical negligence claim at trial. *Id.* § 6853(b), (e).[3]

Although, as a default rule, a medical negligence complaint should be "accompanied by" an affidavit, a court may grant a "60-day extension" upon a showing of good cause. *Id.* § 6853(a)(2). "Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review." *Id.*

[3] Neither expert testimony at trial nor an affidavit of merit is required in cases involving a "rebuttable inference" of negligence based on statutorily defined circumstances. *Id.* § 6853(b), (e).

And "[t]he filing of a motion to extend the time for filing an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion." *Id.* § 6853(a)(3). If a plaintiff fails to file either an affidavit or an extension motion, the statute directs the court clerk to "refuse to file the complaint." *Id.* The statute also provides that a defendant is "not required to take any action with respect to the complaint" in a medical negligence case "until 20 days after plaintiff has filed the affidavit." *Id.* § 6853(a)(4).

The statute does not impose any requirements on the complaint's contents. Rather, courts look to the complaint to determine only whether the affidavit requirement applies. When required, a plaintiff submits the affidavit, along with the expert's curriculum vitae, to the court in a sealed envelope. *Id.* § 6853(a)(1). The statute specifies that both the affidavit and curriculum vitae "shall remain sealed and confidential" and may be viewed only by a judge. *Id.* The statute further specifies that such an affidavit is not "discoverable." *Id.* § 6853(d). The affiant may, but need not, be the plaintiff's testifying expert at trial, but a trial expert may not "be questioned in any respect about the existence of said affidavit in the underlying medical negligence action." *Id.* Since a defendant cannot assess whether a filed affidavit complies with the statute, a defendant can ask the court to conduct an "in *camera*" review of the plaintiff's submission. *Id.*

B. Factual and Procedural Background

1. Respondent Beebe Medical Center, Inc. ("Beebe") operates a non-profit community healthcare system serving Sussex County, Delaware. Petitioner Harold R. Berk, a Florida resident who owns a home on the Delaware shore, J.A.1, injured his foot on August 20, 2020, and visited Beebe's emergency room. Pet.App.35a-36a.

Petitioner alleges that his treatment by Beebe staff and Respondent Dr. Wilson Choy worsened his injury. Pet.App.38a.

2. Proceeding *pro se*, Petitioner filed a complaint on November 18, 2022, against Beebe, Dr. Choy, and another healthcare provider no longer in this case. J.A.1. Petitioner sued in the United States District Court for the District of Delaware, invoking diversity jurisdiction, 28 U.S.C. § 1332, and asserting Delaware-law medical negligence claims. J.A.2, 13-19. The same day, Petitioner moved to extend the time to file the required affidavit of merit. J.A.21. In a memorandum in support filed on November 23, Petitioner asserted that Dr. Choy had not provided his medical records and that his other doctor had "recently retired from medical practice." J.A.25.

The district court docketed the action promptly after Petitioner filed his complaint. The day that Petitioner filed his memorandum, the district court granted the requested extension, giving Petitioner until January 23 (66 days after Petitioner filed his complaint) to submit an affidavit of merit. J.A.27.

On January 12, 2023, Beebe answered the complaint. Dkt. 20.[4] On January 19, Petitioner filed under seal his medical records and the curriculum vitae of two doctors, asserting that these documents "constitute[d] compliance with Delaware Code [§ 6853]." J.A.64-65. The district court then issued a scheduling order setting deadlines for discovery and dispositive motions. Dkt. 30.

On January 24, Beebe moved for *in camera* review of Petitioner's purported affidavit to determine whether it complied with Section 6853. J.A.67-80. Petitioner

[4] All docket cites refer to the district court docket. *See Berk v. Choy*, No. 1:22-cv-1506-RGA (D. Del.).

responded by arguing that Section 6853 cannot be applied in federal court because it conflicts with the Federal Rules, and that he had satisfied Section 6853 in any event. J.A.81-101.

Meanwhile the proceedings continued. On January 30, Petitioner filed an amended complaint, adding claims for assault and battery and failure to train. Pet.App.33a-58a. Beebe moved to dismiss the new claims as time-barred and for failure to state a claim; it did not request dismissal of any claim on grounds related to the affidavit-of-merit requirement. Dkt. 47. Petitioner subsequently withdrew the new claims. J.A.155-57. The parties also filed their Rule 26 witness disclosures, *see* Dkt. 54, 55, 56, and notified the district court of discovery disputes, *see* Dkt. 60, 61.

On March 9, following a "flurry of activity" on the docket, the district court reviewed the materials Petitioner submitted in purported compliance with Section 6853. J.A.167. The court did "not see anything that looks like ... an affidavit of merit." *Id.* It therefore ordered Petitioner to show cause "as to whether there are one or more 'affidavits of merit' compliant with [the] Delaware statute," noting that it would "dismiss the case" if Petitioner did not comply. *Id.*

Petitioner did not respond. Accordingly, the district court dismissed the case, observing that "internet printouts about two doctors and some of [Petitioner's] medical records" did not fulfill Delaware's requirement. Pet.App.14a; *see also* J.A.168.

3. Now with counsel, Petitioner appealed, arguing that Delaware's law cannot apply in federal court because it conflicts with the Federal Rules. In an unpublished opinion, the Third Circuit affirmed.

First, the Third Circuit held that Delaware's requirement does not conflict with the Federal Rules. It does not conflict with Rules 8 or 9 because an affidavit of merit "is not a pleading." Pet.App.7a. The court explained that an affidavit of merit "(1) does not require a plaintiff to state any facts to support his claim and (2) has no impact on the contents of the pleadings or specificity of the allegations." Pet.App.6a. Further, such an affidavit "does not provide notice of a claim or seek court intervention," and a plaintiff may file an affidavit of merit 60 days after his or her complaint, "thereby demonstrating it is separate and distinct from the pleading." Pet.App.6a-7a.

The Third Circuit also held that Section 6853 does not conflict with Rules 11 or 12. Whereas Rule 11 "requires an attorney to sign a pleading, thereby attesting that the complaint is meritorious," Delaware's law "requires a statement by 'an expert witness' attesting to the meritoriousness of a plaintiff's claims." Pet.App.7a (quoting *Liggon-Redding v. Est. of Sugarman*, 659 F.3d 258, 263 (3d Cir. 2011)). Similarly, Rule 12 "provides litigants a mechanism to test the sufficiency of a complaint's factual allegations and whether they provide a basis for relief," whereas the pleadings' sufficiency "has no bearing on a court's decision to dismiss an action for failure to comply" with an affidavit-of-merit requirement. Pet.App.7a-8a (quoting *Liggon-Redding*, 659 F.3d at 264).

Second, the Third Circuit held that the affidavit-of-merit requirement is substantive and thus applicable in federal court. The requirement is "outcome determinative" because "a plaintiff's failure to comply with the [affidavit-of-merit] requirement can result in the dismissal of his case." Pet.App.9a. And applying the requirement promotes *Erie*'s twin aims to "(a) 'discourage forum shopping' and (b) 'avoid inequitable administration of the law,'" since malpractice plaintiffs would otherwise be

"encourage[d]" to "find a way to seek relief in a federal court" rather than state court. Pet.App.9a (quoting *Schmigel v. Uchal*, 800 F.3d 113, 119 (3d Cir. 2015)).

SUMMARY OF ARGUMENT

I. There is no conflict between any Federal Rule and Delaware's affidavit-of-merit statute.

A. The Federal Rules disclaim any intent to preempt laws like Delaware's. Rule 11 provides that "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." Fed. R. Civ. P. 11(a). To the extent Delaware's statute requires an affidavit to accompany a pleading, it is "a ... statute" that "specifically states otherwise" under the plain text of Rule 11. When the Federal Rules mean to limit their application to "federal statutes," they say so expressly. There is no such qualifier in Rule 11. Even if Rule 11's savings clause were ambiguous, it is at least reasonable to read it as encompassing state statutes (as the leading civil procedure treatise agrees). Accordingly, the Court "should read [Rule 11] to avoid 'substantial variations [in outcomes] between state and federal litigation.'" *Shady Grove*, 559 U.S. at 405 n.7 (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001)).

B. Even setting aside Rule 11's anti-preemption language, there is no direct collision between Delaware's law and Rules 3, 8, 9, 11, 12, 26, or 37.

1. Petitioner distorts both this Court's test for conflicts and Delaware's law. This Court traditionally considers whether, "when fairly construed, the scope of [the Federal Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law." *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987) (quoting *Walker v. Armco Steel Corp.*, 446 U.S.

740, 749-50 & n.9 (1980)). *Shady Grove* applied, and did not abandon, *Burlington*'s "direct collision" test. Petitioner's approach, by contrast, frames the relevant question at such a high level of generality that a federal rule will virtually always be implicated, contrary to this Court's longstanding precedent.

Petitioner also misconstrues Delaware's law. Section 6853 is a substantive evidentiary requirement, not a pleading requirement. It does not require the affidavit to be attached to the complaint, and permits courts to allow the affidavit to be filed substantially after the complaint.

2. Section 6853 does not conflict with Rules 8 and 9 because it is not directed at the requirements for a complaint to state a claim for relief. The affidavit is not a "pleading," and Section 6853 says nothing about what a complaint must "contain." Consistent with Delaware law, the district court afforded Petitioner extra time to file an affidavit, confirming that it applied a requirement that is both substantively and temporally distinct from any pleading.

Because Section 6853 allows a plaintiff to file the affidavit separately from the complaint, there is also no conflict with Rule 11 (even setting aside the savings clause). Rule 11 does not preempt every law with the same abstract purpose of "limit[ing] frivolous filings." Pet'r Br. 25. And, like Rules 8 and 9, Rule 12 does not conflict with Section 6853 because the affidavit is not a pleading, and indeed the district court dismissed the case well after Beebe answered. In any event, Rule 12 is not the exclusive means for dismissing a case before trial—courts routinely dismiss cases on grounds not listed in Rule 12, such as forum non conveniens and failure to prosecute.

Finally, there is no conflict with Rules 26 and 37 because the affidavit-of-merit requirement has nothing to do with disclosure of testifying experts.

C. At minimum, federal courts sitting in diversity should grant judgment to defendants where a plaintiff cannot satisfy the statute's core substantive requirement, even as procedural elements of Delaware's law cannot be applied. As the Seventh Circuit has explained and the United States agrees, "[t]he state substantive goal and the federal procedural system thus can exist harmoniously." *Young v. United States*, 942 F.3d 349, 352 (7th Cir. 2019). Consistent with this approach, the district court correctly applied Delaware's substantive evidentiary requirement while disregarding components of Section 6853 that have no proper application in federal court.

II. Although there is no conflict between Section 6853 and the Federal Rules, interpreting and applying the Rules in a way that creates conflict would violate the Rules Enabling Act. The Enabling Act requires two distinct inquiries: whether a rule regulates "practice and procedure," 28 U.S.C. § 2072(a), and whether it "abridge[s], enlarge[s] or modif[ies]" substantive rights, *id.* § 2072(b). In asking this Court to disregard the way a rule is actually applied, and to look only at whether the rule actually governs procedure, Petitioner renders the Enabling Act's second part superfluous. In other contexts, this Court rejects particular *applications* of a federal rule that would affect substantive rights. Here, Delaware's affidavit-of-merit requirement forms an integral part of Delaware medical negligence law that effectuates its policy of lowering insurance costs. Applying a federal rule to disrupt the balance Delaware has struck would abridge, enlarge, and modify substantive rights.

III. There is little question Section 6853 is substantive under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Section 6853 is outcome-determinative because plaintiffs who do not produce an affidavit cannot proceed with their medical negligence claims. Failing to apply Section 6853 in federal court would encourage forum shopping because plaintiffs unable to acquire an affidavit would surely seek to file in federal court rather than state court. And if Section 6853 applies in state court, but not federal court, there will be inequitable administration of the laws as defendants sued by diverse plaintiffs in federal court will face additional litigation time and expense while defendants sued by non-diverse plaintiffs will not. Although Petitioner acknowledges *Erie*'s twin aims, he makes no attempt to show how Section 6853 could be procedural by reference to them.

ARGUMENT

The district court correctly applied Delaware's evidentiary requirement that medical negligence plaintiffs submit an affidavit of merit early in their case. Because that requirement does not conflict with any Federal Rule and is substantive, it applies in federal court.

Federal courts sitting in diversity apply "[t]he laws of the several states ... as rules of decision." 28 U.S.C. § 1652; *see also Erie*, 304 U.S. at 78. When a party argues that a Federal Rule preempts state law, the first question is whether "the applicable Federal Rule is in direct collision with the law of the relevant State." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). If it is, the Court "measur[es] [the] Federal Rule against the standards contained in the [Rules] Enabling Act." *Id.* If a valid Federal Rule governs, the analysis ends and the state law does not apply. If "the Federal Rule is inapplicable or invalid," the next question

is whether the state law is substantive or procedural. *Shady Grove*, 559 U.S. at 398. If the non-conflicting state law is substantive, federal courts apply it. *Id.*

No Federal Rule—much less all seven Petitioner invokes—conflicts with the Delaware affidavit-of-merit requirement the district court applied. Reading the Rules so broadly as to create such a conflict would violate the Enabling Act. And failing to apply Delaware's requirement would encourage forum shopping and result in inequitable administration of the law, confirming it is substantive under *Erie*. Because the district court and Third Circuit correctly applied Delaware's substantive affidavit-of-merit requirement while properly disregarding the law's procedural aspects, this Court should affirm.

I. The District Court's Application of Delaware's Affidavit-of-Merit Requirement Did Not Conflict with the Federal Rules.

This Court has consistently required a "direct collision" between a Federal Rule and state law before finding a conflict between them. *Hanna*, 380 U.S. at 460; *see also Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437 n.22 (1996); *Burlington*, 480 U.S. at 4; *Walker*, 446 U.S. at 749. Just as consistently, the Court has avoided reading the Rules so "broad[ly]" as to create "[]avoidable" conflicts. *Hanna*, 380 U.S. at 470. In its most recent case on the subject, every Member of this Court "agree[d]" that it "should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation.'" *Shady Grove*, 559 U.S. at 405 n.7; *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting) ("common ground" that "in deciding whether a federal procedural statute or 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").

The question here, therefore, is whether any Federal Rule conflicts with the Delaware affidavit-of-merit requirement that the district court applied. For three reasons, none does. *First*, Rule 11's text affirmatively disclaims any intent to preempt the Delaware law to the extent it requires an affidavit to accompany a pleading. *Second*, because the Delaware law is an evidentiary requirement that may be satisfied separate from and later than the complaint's filing, it conflicts with no Rule governing pleadings (or any of the other Rules Petitioner raises). *Third*, the Delaware law at minimum contains a substantive core, which the district court properly enforced without applying any procedural aspect of state law that could even arguably conflict with the Federal Rules.

A. Rule 11 Makes Clear that the Federal Rules Neither Impose Nor Preempt Any Requirement that a Plaintiff File an Affidavit Accompanying a Complaint.

As an initial matter, Petitioner asks the Court to decide a question that is not actually presented: "Whether a state law providing that a complaint must be dismissed unless it is accompanied by an expert affidavit may be applied in federal court." Pet'r Br. i. As discussed *infra* pp. 23-25, Section 6853 does not require that such an affidavit accompany a complaint on pain of dismissal. But even if it did, it would not conflict with any Federal Rule. Rule 11's plain text makes clear that the Federal Rules do not impose—but also do not preempt—requirements that a pleading be accompanied by an affidavit.

1. Rule 11(a) provides that, "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." Fed. R. Civ. P.

11(a). That provision does not itself require that an affidavit accompany any pleading. Just as plainly, it shields from preemption any such requirement in a separate statute or rule. Although Petitioner brushes aside this clear anti-preemption language by asserting it applies only to federal laws, *see* Pet'r Br. 24 n.5, there is no textual basis for that limitation.

"[S]tatute" in Rule 11 is modified by the indefinite article "a," not the word "federal" or any other qualifier. "When used as an indefinite article, 'a' means '[s]ome undetermined or unspecified particular.'" *McFadden v. United States*, 576 U.S. 186, 191 (2015) (quoting *A*, *Webster's New International Dictionary* 1 (2d ed. 1954)). The word "a" is most "often used in the sense of 'any.'" *Citizens for Resp. & Ethics in Washington v. FEC*, 971 F.3d 340, 355-56 (D.C. Cir. 2020) (quoting *A*, *Black's Law Dictionary* (5th ed. 1979)). The phrase "a rule or statute" is not naturally read to mean some rules or statutes to the exclusion of others. An ordinary speaker of the English language would recognize Section 6853 of the Delaware Code as "a ... statute."

That straightforward conclusion is confirmed by "reviewing [Rule 11's] text in context." *Pulsifer v. United States*, 601 U.S. 124, 133 (2024). When the Federal Rules mean to refer exclusively to "federal" statutes, they say so. Rule 12 prescribes the time for serving a responsive pleading "[u]nless another time is specified by a federal statute." Fed. R. Civ. P. 12(a). Rule 54 sets the rule for allowing costs "[u]nless a federal statute … provide[s] otherwise." Fed. R. Civ. P. 54(d)(1). Further examples abound. *See, e.g.*, Fed. R. Civ. P. 4(e) ("Unless federal law provides otherwise"); Fed. R. Civ. P. 17 ("When a federal statute so provides"); Fed. R. Civ. P. 38(a) (preserving jury trial right where "provided by a federal statute"); Fed. R. Civ. P. 40 (entitling cases to scheduling priority when "a

federal statute" so provides); *see also, e.g.*, Fed. R. Civ. P. 43(a) (using "these rules" to refer narrowly to the Federal Rules).[5] If the drafters had meant Rule 11 to disallow all affidavit requirements unless a *federal* rule or statute states otherwise, they "knew how to say so." *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 216 (2018); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another section, … it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Far fewer Rules use the open-ended phrase "a statute." And at least two that do make plain that they mean to encompass state statutes. Rule 5.1(b) requires certification to "the appropriate attorney general" when the constitutionality of "a statute has been questioned." Fed. R. Civ. P. 5.1(b); *see also* Fed. R. Civ. P. 5.1(a) (Rule applies to "a federal or state statute"). And Rule 24(b)(2) permits intervention by "a federal or state governmental officer" if the "claim or defense is based on[] a statute ... administered by the officer." Fed. R. Civ. P. 24(b)(2). These "contextual clues" underscore that "differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017).[6]

"[L]ike a statute, the promulgated Rule says what it says." *Tome v. United States*, 513 U.S. 150, 168 (1995)

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[5] The following Federal Rules also reference a "federal statute," "federal statutes," or "federal law": Fed. R. Civ. P. 4(k)(1)(C); 4(n)(1); 4.1(a); 5.1(a); 24; 26(a)(1)(B)(ii); 39(c)(2); 41(a)(1)(A); 43(a); 64(a); 65(e)(1); 69(a)(1); 71.1(h)(1)(A); 81(a)(3); 83(b).

[6] The handful of other Federal Rules referencing "a statute" give no textual indication that the phrase is meant restrictively. *See* Fed. R. Civ. P. 6(a)(4); 23(g)(1); 53(a)(1); 54(d)(2)(B).

(Scalia, J., concurring in the judgment). Rule 11 says that an affidavit need not accompany a complaint unless "a ... statute" so provides. Section 6853 of the Delaware Code is a statute. So Rule 11's savings clause expressly disavows preemption of such a statute.

2. Even if the phrase "a … statute" were deemed ambiguous, it should still be interpreted to encompass state statutes. As every Justice agreed in *Shady Grove*, whenever possible, the Rules should be interpreted to "avoid 'substantial variations [in outcomes] between state and federal litigation.'" 559 U.S. at 405 n.7; *see also id.* at 421 (Stevens, J., concurring); *id.* at 442 (Ginsburg, J., dissenting). When there is more than "one reasonable reading" of a Rule, this Court favors the conflict-avoiding interpretation, because it "assume[s] … that 'Congress is just as concerned as [the Court has] been to avoid significant differences between state and federal courts in adjudicating claims." *Id.* at 405 n.7 (majority op.) (citation omitted). Like other background assumptions about congressional intent, this one has a proper "place in statutory interpretation." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 399 (2024); *see, e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (assuming Congress does not intend to regulate extraterritorially); *Sackett v. EPA*, 598 U.S. 651, 679 (2023) (assuming Congress does not intend to significantly alter the federal-state balance); *contra* Pet'r Br. 35.[7]

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[7] "[A] majority of this Court" in *Shady Grove* further "agree[d] that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns." 559 U.S. at 442 n.2 (Ginsburg, J., joined by Kennedy, Breyer, and Alito, JJ., dissenting); *see also id.* at 418 (Stevens, J., concurring in part and in the judgment) ("[F]ederal rules must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies.'" (quoting (continued…)

The leading treatise on civil procedure regards Rule 11 as "ambiguous," explaining that "inasmuch as the word 'statute' in Rule 11 is not qualified by the words 'of the United States,' one could plausibly argue that state statutes are within its scope." 5A *Wright & Miller's Federal Practice & Procedure* § 1339, at 584 & n.7 (3d ed. 2018); *see also id.* at 586 ("Rule 54 modifies the word 'statute' with the word 'federal,'" and "Rule 11's failure to do the same could be feasibly interpreted as warranting a broader scope for its 'rule or statute' exception"). That interpretation is not just plausible; it is compelled by the text. But it is at least a "reasonable reading," so the Court should adopt it as the construction that best avoids significant disuniformity between federal and state court litigation. *Shady Grove*, 559 U.S. at 405 n.7; *see also Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1363 (11th Cir. 2014) (Jordan, J., concurring) (agreeing the "text of Rule 11(a) is not confined to *federal* rules or statutes," "[b]ut even if Rule 11(a) were ambiguous," *Shady Grove* compels "reading Rule 11(a)'s text … [to] avoid a conflict").

3. In arguing to the contrary, Petitioner's terse footnote does not address Rule 11's plain language, or this Court's guidance for interpreting ambiguous rules. Instead, he simply asserts that "the rule's reference to other rules or statutes ... means other *federal* rules or statutes." Pet'r Br. 24 n.5 (quoting *Albright v. Christensen*, 24 F.4th 1039, 1045 n.2 (6th Cir. 2022)). This Court should decline that invitation to "read an absent word into the [Rule]." *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004).

Petitioner cites three thinly reasoned decisions adopting his interpretation. Pet'r Br. 24-25 n.5. None is

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Gasperini, 518 U.S. at 427 n.7)). Ultimately, every Justice agreed that ambiguous rules should be given conflict-avoiding constructions.

persuasive. The Seventh Circuit's one-sentence explanation was that "rule or statute" must mean "federal rule or statute" "because state requirements for pleading do not apply in federal litigation." *Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007). That anemic explanation just assumes its conclusion. Nothing prevents a Rule from disclaiming preemption of a state requirement (whether a pleading requirement, an evidentiary requirement, or something else), and whether Rule 11 does that is answered by its text, not an assumption. The Eleventh Circuit merely followed a footnote from an earlier decision stating the "general rule" that pleadings need not be accompanied by affidavits, without even mentioning Rule 11's exception. *See Royalty Network*, 756 F.3d at 1360 (citing *Follenfant v. Rogers,* 359 F.2d 30, 32 n.2 (5th Cir. 1966)). And the Sixth Circuit just followed the Eleventh Circuit without analysis. *Albright*, 24 F.4th at 1045 n.2.[8]

With nothing to say about Rule 11's text, Petitioner devotes ten pages of his brief (at 34-44) to policy arguments. In his view, "bright-line rules" are best, federal courts should not be "ensnar[ed]" by "the importation of exotic state procedures," and denying effect to state laws best "respects federalism." Pet'r Br. 34. But the best way to determine the policy preferences reflected in the Rules is to read their text—and the text of Rule 11 reflects both that the Rules do not themselves require affidavits accompanying pleadings and that federal courts should

[8] Several other courts have correctly recognized that "[t]here is nothing in Rule 11 which limits the exception only to federal statutes." *See Thompson by Thompson v. Kishwaukee Valley Med. Grp.*, No. 86 C 1483, 1986 WL 11381, at *2 (N.D. Ill. Oct. 6, 1986); *RTC Mortg. Tr. 1994 N-1 v. Fidelity Nat'l Title Ins. Co.*, 981 F. Supp. 334, 345 (D.N.J. 1997) (citing *Kishwaukee*); *Velazquez v. UPMC Bedford Mem'l Hosp.*, 328 F. Supp. 2d 549, 556 (W.D. Pa. 2004); *see also Royalty Network*, 756 F.3d at 1363 (Jordan, J., concurring).

honor such requirements imposed by another source of law. All agree that when Congress has policy reasons to require affidavits in connection with particular claims, courts should apply such requirements. Rule 11's drafters reasonably extended the same grace to state legislatures. And if that turns out to be too taxing on federal courts, the answer is not an atextual policy-driven interpretation, but amending the Rule through the "process Congress ordered." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).[9]

B. The Federal Rules Do Not Answer Whether an Affidavit Must Be Submitted Early in a Case.

Because Rule 11 specifies that "a … statute" may require that a pleading be "accompanied by an affidavit," Fed. R. Civ. P. 11(a), no other rule can implicitly provide otherwise. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). But even under Petitioner's atextual reading of Rule 11, neither that Rule nor the six other Rules Petitioner invokes preempts Section 6853's affidavit requirement. In arguing otherwise, Petitioner distorts both this Court's longstanding legal framework and Delaware law. When both are properly understood, no Federal Rule conflicts with Section 6853.

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[9] Where (as here) there is no conflict with a Rule, state law still applies only if it is substantive. Different state-law requirements—for instance, a blanket rule requiring verification of pleadings in civil cases—might not be substantive under *Erie*. Unlike Delaware's affidavit-of-merit requirement, *see infra* § III, litigants would not likely forum shop to federal court merely to avoid a verify-all-pleadings requirement, which is not substantially more burdensome than Rule 11's certification requirement.

1. Petitioner Mischaracterizes the Governing Legal Framework and the Delaware Law.

a. In deciding whether a federal rule conflicts with state law, this Court has long considered whether "the scope of [the Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law." *Burlington*, 480 U.S. at 4 (quoting *Walker*, 446 U.S. at 749-50 & n.9). There was such a collision when state law required service by hand, while a Federal Rule said "[s]ervice shall be made" a different way. *Hanna*, 380 U.S. at 461, 470-71. Similarly, a state-law "mandatory affirmance penalty" collided with a Rule's "discretionary" approach for penalizing frivolous appeals. *Burlington*, 480 U.S. at 7. In both cases, the Federal Rule and state law could not "exist side by side." *Walker*, 446 U.S. at 752.

Petitioner suggests that *Shady Grove* introduced a more aggressive form of preemption. *See* Pet'r Br. 34. But when the Court summarized the inquiry as whether the federal rule and state law "answer the same question," 559 U.S. at 398, it was applying—not jettisoning—the pedigreed direct-collision inquiry. The Court described its framework as "familiar," citing *Burlington*. *Id.* And the collision it found could not have been more direct. Rule 23 "creat[ed] a categorical rule entitling a plaintiff … to pursue his claim as a class action." *Id.* But New York law provided that certain actions, even if they met the Rule 23 criteria, "may *not* be maintained as a class action." *Id.* at 399 (quoting N.Y. C.P.L.R. § 901(b) (emphasis added)). The Court found a conflict because it saw no fair reading of the rule that could "avert a collision with state law." *Id.* at 406. It did not invite litigants to frame the relevant question at such a high level of generality—"[U]nder what circumstances must a court dismiss a case before trial?"

(Pet'r Br. 24); "[W]hat mechanisms does the court use to limit frivolous filings?" (Pet'r Br. 25)—that an answer can always be found somewhere in the Federal Rules.

b. In addition to misconstruing the governing legal framework, Petitioner offers a distorted view of Delaware's law. On Petitioner's telling, Delaware "requires a medical malpractice plaintiff to attach an affidavit of merit to a complaint to avoid dismissal." Pet'r Br. 2; *see also id.* at 10, 16, 17, 21, 23-24. That is not what Delaware's law says, it is not how the Delaware Supreme Court has interpreted it, and it is not how the district court here applied it.

First, Petitioner is wrong that Section 6853 demands that an affidavit be attached to a complaint. The law instead imposes a "*prima facie* evidentiary requirement[]," *Dishmon*, 32 A.3d at 344, which is satisfied by filing an affidavit separate from the complaint. Even when the two documents are filed contemporaneously, Section 6853 does not require the affidavit be "attach[ed]" to it, Pet'r Br. 2, or become part of the complaint. Section 6853 instead provides for the affidavit to be filed in a separate "envelope." Del. Code Ann. tit. 18, § 6853(a)(1).

Second, Section 6853 does not invariably require a plaintiff to file the affidavit at the same time as the complaint. For "good cause shown," a court may allow a plaintiff to file the affidavit up to 60 days after filing the complaint. *Id.* § 6853(a)(2). The Delaware Supreme Court, whose interpretation of Section 6853 is authoritative, *see West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940), has given that provision a "liberal construction," recognizing a "discretionary authority" to allow untimely filings. *Beckett v. Beebe Med. Ctr., Inc.*, 897 A.2d 753, 758 (Del. 2006); *see also Dishmon*, 32 A.2d at 345 (reversing trial court for

failure "to allow the plaintiff a reasonable time" to cure deficient affidavit).[10]

Significantly, the district court *in this case* did not require Petitioner to "attach an affidavit of merit to [his] complaint to avoid dismissal." Pet'r Br. 2. Instead, the district court required Petitioner to file the affidavit within 66 days of filing of his complaint. J.A.27. When Petitioner did not do so, the district court did not dismiss the case for another three months. J.A.168. During the five months between Petitioner filing his complaint and the district court's dismissal, Beebe answered the complaint and discovery commenced. J.A.48, 162-66. Ultimately, the district court did not dismiss until Petitioner had spoken with "several" experts and yet was "[u]nable to secure an affidavit." Pet'r Br. 6. The district court did not require Petitioner's complaint be "accompanied by an expert affidavit." *Id.* at i.

In short, Section 6853 says not a word about what a complaint must include to state a claim, and courts

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[10] Ignoring the Delaware Supreme Court's liberal construction, Petitioner characterizes Delaware courts as applying Section 6853 "strictly." Pet'r Br. 15. In two of the cases Petitioner cites, the affidavits failed to clearly state that the defendant caused the plaintiff's injuries—but the courts still afforded plaintiffs weeks to file amended affidavits. *See Kalinowski v. Adams*, No. CIV.A. 12C-01063 FSS, 2012 WL 1413999, at *1-2 (Del. Super. Ct. Mar. 9, 2012); *Palacio for Mitchell v. Premier Healthcare, Inc.*, No. CV N15C-04-207 FSS, 2015 WL 13697664, at *1 (Del. Super. Ct. Aug. 11, 2015). Indeed, Delaware trial courts may accept affidavits that do not strictly comply with certain statutory requirements. *See Dishmon*, 32 A.3d at 345 (holding trial court erred by dismissing case for failure to include *curriculum vitae* with affidavit); *see also Vareha v. Beebe Med. Ctr., Inc.*, No. S10C-04-021-ESB, 2011 WL 2361270, at *4 (Del. Super. Ct. May 26, 2011) (declining to require an amended affidavit naming proper defendant after plaintiff named new defendant in amended complaint).

evaluate whether a complaint adequately states a Delaware malpractice claim without reference to the affidavit's contents. An evidentiary requirement that is substantively and temporally distinct from the complaint is not a pleading requirement.

2. Delaware's Affidavit-of-Merit Requirement Does Not Conflict with Any Federal Rule.

Petitioner marches indiscriminately through the Federal Rules, inferring conflicts. The alleged conflicts rest on overbroad readings of the Rules and misunderstandings of Section 6853. Properly understood, Delaware's affidavit-of-merit requirement does not conflict with any Federal Rule.

a. Petitioner's principal argument is that Delaware's affidavit-of-merit statute conflicts with Rules 8 and 9 because Delaware law dictates what must be included in or with the complaint or imposes a heightened pleading standard. But as explained above, Section 6853 does no such thing, either in its plain text or as authoritatively construed by the Delaware Supreme Court. Unlike Rules 8 and 9, Section 6853 is not directed to what is necessary or sufficient for a *pleading* to state a claim. Section 6853 comfortably "exist[s] side by side" with Federal Rules governing pleadings, "each controlling its own intended sphere of coverage without conflict." *Walker*, 446 U.S. at 752.

Rule 8 establishes what "[a] pleading that states a claim for relief must contain." Fed. R. Civ. P. 8(a). Petitioner argues that Rule 8 "implicitly 'excludes other requirements that must be satisfied for a complaint to state a claim for relief.'" Pet'r Br. 21 (quoting *Gallivan v. United States*, 943 F.3d 291, 293 (6th. Cir. 2019)). That may be—but Section 6853 does not add requirements to state a claim. And Rule 8's text does not dictate everything a

plaintiff must do to proceed with a civil action, separate and apart from what the complaint must "contain."

An affidavit of merit is not a pleading. A "pleading" is "a[] formal document in which a party to a legal proceeding ... sets forth or responds to allegations, claims, denials, or defenses." *Pleading*, *Black's Law Dictionary* 1394 (12th ed. 2024); *accord* Fed. R. Civ. P. 7 (identifying complaint, answer, and similar filings as the "only" pleadings). An affidavit of merit does not set forth allegations or claims; it is part of a plaintiff's required "evidentiary" showing. *Dishmon*, 32 A.3d at 344. As such, it "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).

Nor does Section 6853 say anything about what a pleading must "contain," Fed. R. Civ. P. 8, *i.e.*, what a complaint must "have in it," *Contain*, *Oxford English Dictionary* 807 (2d ed. 1989). *See also Contain*, *American Heritage Dictionary* 396 (4th ed. 2000) ("[t]o have within"). A Delaware affidavit of merit is neither part of nor attached to a complaint and may be "temporally distinct" from it. *Pledger v. Lynch*, 5 F.4th 511, 530 (4th Cir. 2021) (Quattlebaum, J., concurring in part and dissenting in part); *see also Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 303 (3d Cir. 2012) (highlighting "temporal separation" between complaint and affidavit); *supra* pp. 23-25. Because the required affidavit "is not a pleading, nor is it attached to a pleading," nor does it specify what must be in any pleading, "[h]ow then, could it be governed by a Rule on pleadings?" *Pledger*, 5 F.4th at 530 (Quattlebaum, J., concurring in part and dissenting in part). It cannot.

Rather than establish a pleading requirement, Section 6853 imposes a state-law condition on allowing suits to

proceed—of precisely the kind that this Court has long found applicable in federal court. In *Cohen v. Beneficial Industrial Loan Corp.*, the Court held that a federal court sitting in diversity must apply a state law requiring plaintiffs to post a bond at the outset of litigation "as a condition of further prosecution of the suit." 337 U.S. 541, 556-57 (1949). And in *Woods v. Interstate Realty Co.*, the Court reached the same conclusion for a state law requiring out-of-state corporations to designate an agent for service of process as a precondition to suit. 337 U.S. 535, 538 & n.1 (1949). Unsurprisingly, this Court never suggested any conflict with Rule 8, because these laws add no extra requirements for what a complaint must contain. Like Section 6853, they establish outside-the-complaint preconditions to proceeding with certain civil actions.[11]

Rule 9 adds nothing to Petitioner's argument. Rule 9(a) identifies certain facts that "a pleading need not allege"—but a Delaware affidavit of merit is not a "pleading" and makes no "allegations." Fed. R. Civ. P. 9(a). And Rule 9(b) identifies certain types of allegations that must be pled with particularity. Petitioner argues that together those provisions foreclose applying a "heightened pleading standard" for matters not identified in Rule 9(b). Pet'r Br. 18 (quoting *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 167-68 (1993)). But that is no help to Petitioner because, again, Delaware's affidavit-of-merit statute imposes an

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[11] *Cohen* and *Woods* also foreclose Petitioner's reliance on **Rule 3**. *See* Pet'r Br. 25-26. Rule 3 does not "govern[] the manner in which an action is commenced in federal court for all purposes," but instead merely "governs the date from which various timing requirements of the Federal Rules begin to run." *Walker*, 446 U.S. at 743, 750-51. Rule 3 (together with Rule 12) does establish the time to answer, so the district court properly did not apply any state law excusing a defendant from filing an answer. *See infra* pp. 35-36.

"evidentiary requirement," not a pleading burden. *Supra* p. 23. Indeed, Section 6853 does not require an affidavit to "state the facts" at all. *Dishmon*, 32 A.2d at 344.

b. Petitioner's assertions of conflict with Rules 11 and 12 are similarly misplaced.

As discussed *supra* pp. 15-21, **Rule 11** expressly disclaims overriding any law (state or federal) requiring that a pleading be accompanied by an affidavit. But even setting aside Rule 11's savings clause, its general rule is merely that "a pleading need not be … accompanied by an affidavit." Fed. R. Civ. P. 11(a). To "accompany" something is "to go along with" it. *Accompany*, *Oxford English Dictionary* 80 (2d ed. 1989); *see also Accompany*, *American Heritage Dictionary* 11 (4th ed. 2000) ("[t]o coexist or occur with"). At most, that could be relevant if a state law could be satisfied only by filing an affidavit contemporaneously with the complaint. But where, as here, state law requires physical separation, and permits "temporal separation," between "the filing of the complaint and the affidavit," *Nuveen*, 692 F.3d at 303, it does not require that a pleading be "accompanied" by anything. *See Pledger*, 5 F.4th at 531 (Quattlebaum, J., concurring in part and dissenting in part) (no Rule 11 conflict where state law requires certificate of merit "separate from a pleading").

Abstracting even further away from the Rule's text, Petitioner posits that Rule 11 establishes the exclusive "mechanism[]" a federal court may "use to limit frivolous filings." Pet'r Br. 25. Yet this Court has rejected the notion that Rule 11 has such field-preemptive sweep—the Rule does not, for instance, "reflect a legislative intent to displace the inherent power" of courts to impose sanctions not specifically contemplated by the Rule. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42-43 (1991). Nor has this Court ever found a "direct collision," *Burlington*, 480 U.S. at 5, by

framing a federal rule's purpose at such a high level of abstraction. It is one thing for state law and a federal rule to address the same discrete issue (*e.g.*, when damages should be awarded for pursuing an unsuccessful appeal) in inconsistent ways (*e.g.*, mandatory damages for all failed appeals versus discretionary damages for only frivolous appeals). *Id.* at 4. Here, by contrast, Rule 11's sanctions provisions "govern[] attorney conduct, whereas the Delaware statute governs what an expert must do in a particular type of case." Pet.App.7a. Nothing in Rule 11's text suggests a more sweeping ambition to be the sole tool for "curbing meritless cases." Pet'r Br. 32; *see also Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1540 (10th Cir. 1996) ("By protecting a particular class of defendants, and by expediting such cases, the [affidavit-of-merit] statute vindicates substantive interests of Colorado not covered by Rule 11.").

Similarly, Section 6853 creates no conflict with **Rule 12**. As an initial matter, it is irrelevant to this case whether Rule 12 sets forth the exclusive "grounds for dismissing a complaint before a responsive pleading is filed." Pet'r Br. 23. The district court dismissed Petitioner's case several months *after* Beebe filed its responsive pleading. *See* J.A.48, 168.

More broadly, Rule 12 sets the defendant's obligations to respond to a complaint and governs the ways in which a complaint's contents can be insufficient. Section 6853 is not directed at either of those subjects. To be sure, plaintiffs asserting claims of medical negligence cannot proceed past a certain point without filing an affidavit of merit—just like plaintiffs bringing other claims cannot proceed if they have not posted a bond, *Cohen*, 337 U.S. at 557, or designated an agent, *Woods*, 337 U.S. at 536. But in all of these circumstances, the inability to proceed has

nothing to do with the *complaint*'s deficiencies, so there is no conflict with Rule 12(b).

Petitioners also ignore that federal courts "traditionally have entertained certain pre-answer motions that are not expressly provided for by the rules or by statute." 5C *Wright & Miller's Federal Practice & Procedure* § 1360, at 26 (3d ed. 2025). For instance, motions to dismiss "on forum non conveniens grounds" or a plaintiff's "lack of capacity to sue or be sued" are not enumerated under Rule 12(b). *Id.* Similarly, a motion for "failure to prosecute"—grounded in Rule 41 or a court's inherent authority, not Rule 12—"can be a vehicle for seeking early dismissal of an action on an array of grounds." *Id.* Indeed, dismissal for failure to prosecute is one natural disposition where a plaintiff fails to satisfy a prerequisite to suit. *See Liggon-Redding*, 659 F.3d at 261 (reviewing dismissal for failure to prosecute based on non-compliance with affidavit-of-merit requirement). And such a disposition was amply justified here, given Petitioner's non-compliance followed by his non-response to the district court's show-cause order. Ultimately, given that federal courts must sometimes enforce a state-law "condition of further prosecution of [a] suit," *e.g.*, *Cohen*, 337 U.S. at 557, there must be some means to dismiss a case for non-compliance with such a requirement.

While Rule 12 does not comprehensively govern every "circumstance[]" in which "a court [must] dismiss a case before trial," Pet'r Br. 24, narrower conflicts are possible. For instance, in addressing whether a complaint "state[s] a claim upon which relief can be granted," Rules 8 and 12 limit a district court to considering whether a complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not

countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations."). Rule 12 might be read to preempt state Anti-SLAPP laws insofar as they require a pleadings-stage assessment of a suit's "likelihood of success on the merits." *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015). But the Court need not reach that question to recognize that Rule 12 does not speak to, much less preclude, dismissal for failure to meet a state-law evidentiary requirement as a pre-condition to suit. *Contra* Pet'r Br. 24; Br. of Public Justice as Amicus Curiae 13-15.

c. Continuing his tour through the Federal Rules, Petitioner maintains that Section 6853 also manages to collide with federal discovery rules. These arguments, too, are misplaced.

Petitioner first asserts, without support or explanation, that **Rule 26** addresses "the consequences for failing to offer expert support for the claim." Pet'r Br. 26. But Rule 26 says nothing about that. It is directed exclusively at the timing and mechanics of *disclosing* to other parties information regarding any expert "witness it may use at trial." Fed. R. Civ. P. 26(a)(2).

Section 6853, by contrast, has nothing to do with disclosing testifying experts. It provides that an affidavit of merit "shall remain ... confidential" and "shall not be admissible" at trial; an affiant expert may not even be "questioned in any respect about the existence of said affidavit." Del. Code Ann. tit. 18, § 6853(a)(1), (d). A testifying expert need not be the expert who signed the affidavit; if the plaintiff uses the same expert, the expert must be separately "identified as a trial witness." *Mammarella v. Evantash*, 93 A.3d 629, 637 (Del. 2014). Thus, Section 6853's requirement of a *prima facie* evidentiary showing early in a case is separate and

independent from the disclosures a party must make regarding a "witness it may use at trial." Fed. R. Civ. P. 26; *see also Passmore v. Baylor Health Care Sys.*, 841 F.3d 284, 286 (5th Cir. 2016) (Jones, J., dissenting from denial of rehearing) (explaining the "unique purpose" of Texas's affidavit-of-merit requirement "separate and apart from the procedural rules relating to discovery and typical expert reports").

Petitioner admits that **Rule 37** merely "states the consequences for a party's failure to comply with [the] requirements of Rule 26(a)." Pet'r Br. 27. Because Delaware's affidavit-of-merit statute addresses a different question than Rule 26, a rule concerned with violations of Rule 26 is irrelevant.

d. In sum, Petitioner identifies no "direct collision" between Section 6853 and any of the seven Federal Rules he invokes. *Burlington*, 480 U.S. at 4. Section 6853 requires an early evidentiary showing. It says nothing about what a complaint must contain or what a plaintiff must disclose in discovery. The best reading of the Federal Rules is that they present no conflict with such a law. And it is certainly not the case that the "only ... reasonable reading" of the Rules is one that creates "significant differences between state and federal courts in adjudicating claims." *Shady Grove*, 559 U.S. at 405 n.7.

Applying Delaware's affidavit-of-merit statute does not mean that federal courts will be overrun by "exotic" state requirements. Pet'r Br. 34, 36-37. Some such requirements might be preempted by a true conflicts analysis, without resorting to Petitioner's field preemption approach. *See Abbas*, 783 F.3d at 471 (identifying narrower conflict between anti-SLAPP law and Rule 12). Others would fall away as non-substantive under *Erie*. *See supra* p. 20 n.8. Federal interests are properly safeguarded

at each step of the traditional analysis without needing to interpret the "scope of the Federal Rule[s] ... as broad[ly]" as Petitioner urges. *Hanna*, 380 U.S. at 470. After all, the Tenth Circuit has applied state affidavit-of-merit requirements for 30 years, *see Trierweiler*, 90 F.3d at 1538, and the Third Circuit for 25, *see Chamberlain*, 210 F.3d at 161. Those circuits have apparently not suffered "a cavalcade of exotic state procedural rules ... invad[ing] federal litigation." Pet'r Br. 36.

C. At Minimum, Federal Courts Properly Grant Judgment to a Defendant When a Plaintiff Is Unable to Secure an Affidavit of Merit.

While there are procedural elements of Delaware's law that cannot be applied in federal court, there is at least a substantive core that can be: the requirement to submit an affidavit establishing a *prima facie* case of medical negligence. Even if a federal court cannot apply a State's requirements governing when and how to file that affidavit, it can and should enter judgment for a defendant when a plaintiff is unable to obtain one. That is the case here.

The Seventh Circuit adopted such an approach in *Young v. United States*, 942 F.3d 349 (7th Cir. 2019) (Easterbrook, J.). Petitioner relies on *Young*'s conclusion that an affidavit-of-merit statute conflicts with Rule 8 insofar as it "require[s] attachments" to a complaint. Pet'r Br. 21 (quoting *Young*, 942 F.3d at 351). But *Young* immediately went on to recognize that the Illinois law at issue "applies in federal court to the extent that it is a rule of *substance*." *Young*, 942 F.3d at 351. It noted that the Illinois law—like Delaware's—"itself allows delay in filing the affidavit ... when, for example, ... records needed for evaluation are unavailable." *Id.* And it suggested that Illinois's "goal" of "insubstantial medical-malpractice suits

[being] resolved swiftly" "can be achieved in federal court under summary-judgment practice." *Id.* Specifically, because Rule 56(b) "allows such a motion to be filed 'at any time,'" a "defendant may submit a motion with its answer and ask the court to grant summary judgment because the plaintiff has not supplied the required affidavit." *Id.* And "just as" the Illinois law (like the Delaware law) "allows extra time if necessary" for the plaintiff to obtain an affidavit, "so Rule 56(d) allows a district court to grant extra time to the nonmovant to gather essential evidence." *Id.* at 351-52. In this way, "[t]he state substantive goal and the federal procedural system thus can exist harmoniously." *Id.* at 352; *see also, e.g.*, *Nuveen*, 692 F.3d at 304 n.13 (giving effect to affidavit-of-merit requirement through summary judgment while refusing to "dismiss" a complaint filed without affidavit).

The United States agrees. The federal government has an interest in the proper application of state affidavit-of-merit requirements in cases under the Federal Tort Claims Act ("FTCA"). *See FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (state law is "the source of substantive liability under the FTCA"). And the United States has argued that the "core requirement" of affidavit-of-merit laws is that "a plaintiff seeking to prove medical malpractice must support his claim with a 'written report' from a 'health professional' attesting that 'a reasonable and meritorious cause for the filing of [a malpractice] action exists.'" Brief in Opposition at 9, *Young v. United States*, No. 19-8587 (U.S. Aug. 24, 2020) (quoting 735 Ill. Comp. Stat. Ann. 5/2-622(a)(1)), *cert. denied*, 141 S. Ct. 295 (2020) (mem.). The United States has thus maintained that federal courts should give this "core requirement" effect through "the appropriate federal procedures," *i.e.*, "the summary judgment procedures established by Rule 56," under which a court evaluates whether the plaintiff has met "the substantive evidentiary

standards that apply to the case." *Id.*; *see also* Brief in Opposition at 10-11, *Balter v. United States*, No. 20-217 (U.S. Nov. 25, 2020) (same for Virginia certificate of merit requirement), *cert denied*, 141 S. Ct. 1050 (2021) (mem.).

Such an approach is consistent with what this Court instructed federal courts to do in *Gasperini*. The Court confronted a statute that was "both 'substantive' and 'procedural'" under *Erie*. 518 U.S. at 426. New York law directed state appellate courts to assess whether a jury award is "excessive or inadequate" based on whether the award "deviates materially from what would be reasonable compensation." *Id.* at 423 (quoting N.Y. C.P.L.R. § 5501(c)). As this Court explained, the law was "substantive" insofar as its standards "control[led] how much a plaintiff c[ould] be awarded," and "procedural" to the extent it "assign[ed] decisionmaking authority to New York's Appellate Division." *Id.* at 426. This Court directed federal courts sitting in diversity to apply the State's substantive standard, without abiding by the law's "procedural" elements.[12]

The approach adopted by the Seventh Circuit and advocated by the United States is broadly consistent with the above approach to determining whether a conflict exists, *see supra* pp. 14-15, and with how the district court proceeded here. Although Delaware law states that a complaint "shall not be docketed" if an affidavit has not been filed, Del. Code Ann. tit. 18, § 6853(a)(1), the district

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[12] Petitioner treats *Gasperini* as so self-evidently wrong that a description of its holding "demonstrate[s] the wisdom" of abandoning it. Pet'r Br. 42. But this Court has never overruled *Gasperini*. It has long instructed federal courts "to apply state substantive law and federal procedural law," *Hanna*, 380 U.S. at 465, and there is no reason to abandon that principle when the same law happens to have both substantive and procedural aspects.

court properly treated the action as "commenced" upon filing of the complaint. Fed. R. Civ. P. 3; *see also* J.A.1. Similarly, although Delaware law provides that an answer need not be filed "until 20 days after plaintiff has filed the affidavit," Del. Code Ann. tit. 18, § 6853(a)(4), the district court adhered to Rule 12, Beebe answered the complaint when it was due under the Federal Rules, *see* J.A.48, and discovery commenced, *see, e.g.*, J.A.162-66.

Without straying from the Federal Rules, the district court entered judgment only after Petitioner had ample opportunity to submit an affidavit but could not do so. Petitioner had time to speak with "several" medical providers but was "[u]nable to secure an affidavit." Pet'r Br. 6. He admits that the problem was not a lack of time or opportunity, but "difficulties in finding a doctor willing to review medical records and prepare the affidavit of merit." *Id.* at 15 n.3. Since it was undisputed that Petitioner could not make the substantive evidentiary showing required by the law that governs his claim, judgment against him was proper.[13]

* * *

The State of Delaware, as a sovereign, created the medical negligence claim Petitioner invokes. The same sovereign, concerned with rising insurance costs facing

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[13] Beebe disagrees with the Seventh Circuit on one minor point: dismissal is no less appropriate than summary judgment in these circumstances. *See supra* pp. 29-31. But if the Court views summary judgment as the proper disposition, it can and should still affirm. *See* 5A *Wright & Miller's Federal Practice & Procedure* § 1366, at 84 (3d ed. 2025) ("[W]henever outside matters are presented to and not excluded by the court, the motion will be considered by the appellate court as one for summary judgment even though the district court designates it a motion to dismiss."); *see also Romero v. Int'l Terminal Operating Co.*, 79 S. Ct. 468, 472 n.4 (1959) (treating proceedings below as motions for summary judgment even if "inartistically labeled").

healthcare providers like Beebe, imposed an evidentiary requirement to prevent misuses of its own law. The district court gave effect to Delaware's policy choice, while staying true to the Federal Rules on the procedural details. It is too clever by half to demean this balanced approach as a "Frankenstein's monster" that "distort[s] [state law] beyond recognition." Pet'r Br. 41. It is presumptuous to demand the benefits of Delaware's malpractice law free of the evidentiary burdens Delaware has attached to it. It is unfair to the district court's capable handling of this case to suggest that its task was so "troublesome" that important state prerogatives should be sacrificed on the altar of "[s]implicity." *Id.* at 39. And it is simply upside-down to insist that disrupting the balance struck by the Delaware General Assembly "best respects state interests." *Id.* at 41.

II. Petitioner's Proposed Application of the Rules Would Violate the Rules Enabling Act.

By reading the Rules naturally, and resolving any ambiguity to avoid conflict as this Court has long instructed, the Court can and should hold that the district court's application of Delaware's affidavit-of-merit requirement did not conflict with the Federal Rules. But adopting Petitioner's reading of the Rules would require the Court to confront the difficult and unsettled questions about the Rules Enabling Act that fractured the Court in *Shady Grove*. If the Court reaches those questions, it should hold that Petitioner's proposed application of the Federal Rules would impermissibly abridge, enlarge, or modify substantive rights under Delaware law.

1. Through the Rules Enabling Act, Congress delegated to this Court the power to "prescribe general rules of practice and procedure." 28 U.S.C. § 2072(a). But

"Congress has made clear its disinclination to delegate anything remotely resembling the entirety of its constitutional power to federal courts." John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 706 n.77 (1974). Specifically, it provided that any Rules prescribed by this Court "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

By its plain text, the Enabling Act requires two distinct inquiries: whether a rule regulates "practice and procedure," *id.* § 2072(a), and whether it "abridge[s], enlarge[s] or modif[ies]" substantive rights, *id.* § 2072(b). Petitioner would collapse these inquiries into one, contending that if a rule "governs only the manner and means by which the litigant's rights are enforced," then "it is valid." Pet'r Br. 28 (quoting *Shady Grove*, 559 U.S. at 407 (plurality)). But saying that a rule governs the manner and means of enforcing rights is just to say that it regulates "practice and procedure." 28 U.S.C. § 2072(a). If that is all the Enabling Act required, subsection (b) would be superfluous.

In order to give effect to every part of the statute, "an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy" must be held to "violate[]" the Act. *Shady Grove*, 559 U.S. at 422 (Stevens, J., concurring). That conclusion follows naturally from the text: if the application of a Rule abridges, enlarges, or modifies a substantive right, then the Rule breaches, in that application, Congress's instruction that the Rules "shall not" do so. 28 U.S.C. § 2072(b). Considering the validity of a law or rule in this manner—as applied to a particular circumstance—is the judicial norm; all-or-nothing facial challenges are the exception. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024); *id.* at 747-48 (Barrett, J., concurring); *id.* at 753 (Thomas, J., concurring in the judgment).

Petitioner's insistence on considering only "the rule itself," and not its particular application, Pet'r Br. 28, also conflicts with this Court's enforcement of the Enabling Act in evidentiary contexts. In *Tyson Foods, Inc. v. Bouaphakeo*, the Court held that "representative evidence" could be used to both certify a class under the Fair Labor Standards Act and prove class members' individual claims where the employer failed to keep adequate records of individual hours worked. 577 U.S. 442, 455 (2016). In reaching that conclusion, the Court relied on "the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge ... any substantive right,'" *id.* (alteration in original) (citation omitted), to explain that prohibiting the use of representative evidence in circumstances where an individual plaintiff could use it would abridge substantive rights.

The Court invoked the Enabling Act in a similar manner in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As the Court later recounted in *Tyson Foods*, use of the *Wal-Mart* plaintiffs' "proposed methodology" for taking a percentage of "valid" discrimination claims and "applying it to the rest of the class" "was contrary to the Rules Enabling Act" because it deprived defendants of their right to litigate defenses to individual claims and enlarged plaintiffs' substantive rights. 577 U.S. at 458. Put differently, the Court in these cases did not make an up-or-down ruling on the facial validity of Rule 23. It relied on the Enabling Act to prevent Rule 23 from being *applied* to "abridge, enlarge or modify" substantive rights on particular facts. 28 U.S.C. § 2072(b).

Nothing in *Sibbach v. Wilson & Co.* requires this Court to take a different approach here and close its eyes to the way the Rules interact with Delaware law. 312 U.S. 1 (1941). *Sibbach* involved a purely facial attack on Rules 35 and 37 by a plaintiff who did not wish to be subjected to a

physical examination under those rules. *Id.* at 9. As this Court pointedly noted, no relevant State had "any statute governing the matter." *Id.* at 7. And since "the petitioner in *Sibbach* argued only that federal rules could not validly address subjects involving 'important questions of policy,'" the Court "had no occasion to consider whether the particular application of the Federal Rules in question would offend the Enabling Act." *Shady Grove*, 559 U.S. at 427 & n.11.

2. Applying a rule to displace an evidentiary requirement like Section 6853 would impermissibly "abridge, enlarge or modify ... substantive right[s]." 28 U.S.C. § 2072(b).

Answering the Enabling Act's second question requires courts to identify "the nature of the state law" that would be displaced—specifically, whether it "actually is part of a State's framework of substantive rights or remedies." *Shady Grove*, 559 U.S. at 419 (Stevens, J., concurring). "[I]n some instances," seemingly procedural rules are "so bound up" with substantive rights that they cannot be separated—for example, when seemingly procedural devices define the right's scope. *Id.* at 419-20. "[W]ere federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies." *Id.* at 420.

Here, Delaware enacted Section 6853 as a part of the Delaware Medical Malpractice Act, a law that "address[es] concerns about … the rising costs of malpractice liability insurance." *Dambro v. Meyers*, 974 A.2d 121, 130 (Del. 2009). The Act defines "medical negligence," creates a damages framework, and sets a limitations period for claims. *See generally* Del. Code Ann. tit. 18, §§ 6801 *et seq*. The affidavit-of-merit requirement works hand-in-glove

with these provisions: together, they allow redress for victims of medical negligence, conditioned on a "*prima facie* showing of medical negligence" through an expert affidavit. *Dishmon*, 32 A.3d at 345. The General Assembly closely tied that *prima facie* evidentiary requirement to a plaintiff's ultimate substantive burden, requiring an affidavit only where expert testimony will be required at trial to prove negligence. *See* Del. Code Ann. tit. 18, § 6853(b), (e). And Delaware views this requirement as "play[ing] an important role in preventing frivolous claims," and thus its policy of lowering insurance costs. *Dishmon*, 32 A.3d at 342; *see also Beckett*, 897 A.2d at 757 ("The intent of the General Assembly in enacting this provision was to reduce the filing of meritless medical negligence claims.").

Section 6853 is thus a textbook provision that is "intimately bound up in the scope of a substantive right or remedy." *Shady Grove*, 559 U.S. at 433 (Stevens, J., concurring). It "reflects a policy judgment about which lawsuits should proceed ... and which should not." *Id.* To allow a plaintiff to proceed and ultimately recover under the Delaware Medical Malpractice Act, but *without* making the *prima facie* evidentiary showing that Act demands, would upend the statutory scheme, "enlarge" the substantive rights of plaintiffs, and "abridge" those of defendants. 28 U.S.C. § 2072(b).

3. At minimum, the Enabling Act question here is a serious one. This Court has traditionally avoided interpretations of the Rules that "would arguably violate" the Act's substantive-rights restriction. *Semtek,* 531 U.S. at 503; *see also Shady Grove*, 559 U.S. at 405-06 (majority op.) (if a Rule is "susceptible of two meanings," "one that would violate § 2072(b) and another that would not," the Court should interpret the Rule to "avoid[] overstepping its authorizing statute"). Since the Rules can readily be

interpreted to avoid a potential clash with the Enabling Act, that is how the Court should interpret them.

III. The Evidentiary Showing Demanded by Delaware Law Is Substantive Under *Erie*.

Where, as here, there is no conflict between state law and a Federal Rule (or where the conflicting Rule cannot be validly applied), the final question is whether the state law is substantive or procedural under *Erie*. *See Shady Grove*, 559 U.S. at 398 (majority op.). Section 6853 of the Delaware Code is substantive, Petitioner's halfhearted argument notwithstanding.

State laws are substantive for purposes of the Rules of Decision Act when they are "outcome-determinative" by reference to "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468. Section 6853 is undoubtedly outcome-determinative—a plaintiff who cannot make the required "*prima facie* showing" cannot proceed. *Dishmon*, 32 A.3d at 342. Failing to apply this outcome-determinative rule would "encourage forum shopping," because "a plaintiff 'who [has] been unable to secure expert support for their claims and face[s] dismissal under the statute in state court may, by filing in federal court, be able to" proceed. *Liggon-Redding*, 659 F.3d at 264 (quoting *Chamberlain*, 210 F.3d at 161). Indeed, States that have enacted affidavit-of-merit requirements have sharply reduced the filing of medical malpractice claims, *see supra* p. 4, and anyone deterred by an evidentiary burden that only applies in state court would surely run to federal court if they could.

Failing to apply the requirement would likewise result in "inequitable administration of the law," because "in a

federal court that refused to apply the affidavit requirement," the defendant "would be unfairly exposed to additional litigation time and expense before the dismissal of a non-meritorious lawsuit could be secured, merely because the plaintiff is a citizen of a different state." *Chamberlain*, 210 F.3d at 161; *see also Trierweiler*, 90 F.3d at 1541 (if "certificate of review requirement applies in state but not federal court, the inequitable result would be a penalty conferred on state plaintiffs").[14]

It would be surprising if an "evidentiary requirement[]," *Dishmon*, 32 A.3d at 344, could be deemed procedural under *Erie*. *See also* Brief in Opposition at 9, *Young v. United States*, No. 19-8587 (U.S. Aug. 24, 2020) (Illinois affidavit-of-merit requirement is a "substantive condition of liability"). Courts have long recognized that evidentiary rules inform the scope of a claim and thus are substantive. *See, e.g.*, *Milam v. State Farm Mut. Auto. Ins. Co.*, 972 F.2d 166, 170 (7th Cir. 1992) ("[W]here a state in furtherance of its substantive policy makes it more difficult to prove a particular type of state-law claim, the rule by which it does this, even if denominated a rule of evidence … , will be given effect in a diversity suit as an expression of state substantive policy."); *see also Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1107-09 (D.C. Cir. 2012) (affirming entry of summary judgment for failure to satisfy D.C. expert testimony requirement to establish standard of care in negligence case). So too with laws, whether evidentiary in nature or otherwise, that impose conditions

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[14] There are no strong countervailing federal interests that would prevent the Delaware affidavit-of-merit statute from being applied in federal court—and Petitioner identifies none. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-38 (1958). The general federal interest in maintaining uniform practices in federal courts is of course insufficient to prevent application of a state substantive law, lest *Byrd*'s narrow exception swallow the *Erie* analysis whole.

on proceeding with a suit. *See Cohen*, 337 U.S. at 555-56; *supra* p. 27.

Petitioner acknowledges that the *Erie* analysis "must be guided" by the "twin aims" of "discouragement of forum shopping and avoidance of inequitable administration of the laws." Pet'r Br. 12-13 (quoting *Gasperini*, 518 U.S. at 428). But when he purports to apply *Erie*, Petitioner mentions neither. *See id.* at 33-34. Instead, Petitioner baldly asserts that Section 6853 is "plainly a rule of procedure." *Id.* at 33. His only explanation is that "[t]he law is directed to *Delaware*'s courts" based on its instructions for how an envelope containing the affidavit should be addressed. *Id.* This Court has long rejected such arguments. *See Gasperini*, 518 U.S. at 426 (rejecting argument that state law was wholly procedural because it "trains on the New York Appellate Division"); *Woods*, 337 U.S. at 536 n.1 (applying in federal court statute conditioning ability of out-of-state corporation to bring "suit in any of the courts of this state"). Unsurprisingly, Petitioner identifies no court that has held a state affidavit-of-merit statute procedural under *Erie*.

Section 6853 of the Delaware Code, on its face and as authoritatively construed by the Delaware Supreme Court, imposes an evidentiary requirement. The General Assembly responded to a serious policy concern threatening healthcare providers like Beebe, and it did so by amending the substance of Delaware medical negligence law. The district court correctly applied Delaware's affidavit-of-merit requirement, and the Third Circuit correctly affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

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