No. 24-440

IN THE

Supreme Court of the United States

HAROLD R. BERK,

Petitioner,

v.

WILSON C. CHOY, ET AL.,

Respondents.

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

BRIEF OF PROFESSOR MICHAEL T. MORLEY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Federal Rules of Civil Procedure do not displace the Delaware affidavit requirement. Under 28 U.S.C. § 2072(a) the Court has the authority to promulgate procedural rules. At the same time, § 2072(b) limits that authority by prohibiting rules that "abridge, enlarge or modify any substantive rights." Section 2072 thus establishes two distinct requirements. Even if a rule is procedural, or rationally capable of being classified as such, § 2072(b) mandates that it may not change a substantive right.

Whether a procedural rule changes another substantive right is necessarily case specific and depends on the nature of the other substantive right that may be affected. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 412 (2010) (plurality opinion) ("[I]t is hard to understand how it can be determined whether a Federal Rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist"). A procedural rule that validly applies in one case because it does not change a substantive right cannot be applied in other cases where its application would affect substantive rights.

There are various potential tests to resolve that question. One possibility is to incorporate the standard for substantive rights under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938), deeming a law substantive if its application "significantly affects" the outcome of the litigation. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 416 (1996). Another is to evaluate the law under Federal Rule of

Civil Procedure 1, treating a right as procedural if it is aimed at securing "the just, speedy, and inexpensive determination" of federal cases, Fed. R. Civ. P. 1, and substantive if it furthers other, unrelated goals.

A third approach is to deem a rule substantive if it "substantially affect[s] . . . primary decisions" made outside the litigation context. *Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (Harlan, J., concurring). A fourth option is to ask whether the rule at issue is generally applicable to civil actions, in which case it is procedural, or instead "specially" affects "a group of litigants or prospective litigants," in which case it is substantive. Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281, 308 (1989).

Under any of these tests, Delaware's affidavit of merit requirement creates substantive rights. The requirement—which obliges a plaintiff to submit with a complaint alleging a medical malpractice claim an expert affidavit attesting to the merit of the claim, Del. Code Ann. tit. 18, § 6853(a)—determines whether a person is entitled to sue at all, not merely *how* a person must initiate a lawsuit. The rule substantially affects the outcome of litigation, since failure to comply with it results in dismissal. The rule is not generally applicable to civil actions; it applies only to medical malpractice claims. The requirement is not aimed solely at resolving cases justly and inexpensively; its function is to protect medical providers by precluding some medical malpractice claims. Those additional protections affect conduct outside the courtroom by allowing medical providers to act with less fear of litigation.

Accordingly, the Federal Rules should not be read to displace the Delaware affidavit requirement.

ARGUMENT

The Rules Enabling Act authorizes this Court to promulgate rules regulating "practice and procedure" in federal court, 28 U.S.C. § 2072(a), but those rules cannot "abridge, enlarge or modify any substantive right." *id*. § 2072(b). Applying the Federal Rules of Civil Procedure to displace the Delaware affidavit requirement would violate that limitation. Accordingly, the Court should affirm.

I. The Rules Enabling Act authorizes procedural rules that do not abridge, enlarge, or modify substantive rights.

The Rules Enabling Act (the "Act") confers on this Court the power to prescribe rules of practice and procedure for the federal courts. 73 Cong. ch. 651, 48 Stat. 1064 (1934). The Act, now codified at 28 U.S.C. § 2072, has been amended several times since its enactment in 1934, but its substance has not changed. It authorizes the promulgation of procedural rules, but those procedural rules may not abridge, enlarge, or modify substantive rights.

The Court's approach to § 2072 has not been entirely consistent. This case presents an ideal opportunity to clarify that the Rules Enabling Act's text, structure, and purpose, as well as this Court's precedents, require courts to engage in a two-step process to determine whether a Federal Rule of Civil Procedure may be applied in a particular case. First, the court must confirm that the Rule at issue is

authorized by § 2072(a) because it is "rationally capable" of being classified as procedural. *Hanna*, 380 U.S. at 472. Second, the court must determine whether applying the Rule in the particular context abridges, enlarges, or modifies substantive rights in violation of § 2072(b).

This Part begins by demonstrating that § 2072(b) establishes an independent, enforceable constraint on this Court's authority to promulgate procedural rules. It then identifies potential standards the Court may apply in doing so.

A. The Rules Enabling Act establishes a two-step process for determining a Rule's validity.

1. The Constitution grants Congress authority to adopt rules of practice and procedure in federal courts. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941). Pursuant to this power, Congress may adopt rules to "regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna*, 380 U.S. at 472.

Congress has chosen to delegate part of this power to the judiciary. The Rules Enabling Act begins by empowering the Court "to prescribe general rules of practice and procedure . . . for cases in" the federal courts. 28 U.S.C. § 2072(a). This grant of authority reflects the full scope of Congress's constitutional power. Rules promulgated under this provision must regulate "the manner [or] the means by which a right to recover . . . is enforced." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

Congress, however, has not delegated to the judiciary its full authority to regulate federal judicial procedure. John H. Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 707 n.77 (1974). Section 2072(b) limits the scope of the procedural rules the Court may promulgate under § 2072(a) by imposing the "additional requirement" that such rules "must not 'abridge, enlarge or modify any substantive right.'" *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987) (quoting 28 U.S.C. § 2072(b)); *see also Sibbach*, 312 U.S. at 10 (characterizing § 2072(b) as a "proviso[] or caveat[]" on § 2072(a)).

Section 2072(b)'s "text . . . in plain and understandable terms[] imposes a substantive-rights limit" on the scope of Congress's delegation of rulemaking authority to the Court. Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 Notre Dame L. Rev. 1041, 1061 (2011). Under § 2072(b), a procedural rule that has a greater than "incidental" effect on "litigants' substantive rights" violates § 2072(b). *Burlington N. R.R. Co.*, 480 U.S. at 5; *accord Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 554 (1991); *cf. Shady Grove Orthopedic Assocs.*, 559 U.S. at 407-08 (plurality opinion) (holding a rule is valid if it "regulate[s] *only* the process for enforcing . . . rights," without "alter[ing] the rights themselves, the available remedies, or the rules of decision" (emphasis added)).

The text of § 2072(b) makes clear that this limitation restricts the scope of the procedural rules that otherwise would be permitted under § 2072(a).

Section 2072(b) provides that "*[s]uch* rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (emphasis added). Used in this way, the word "such" is defined to be "of the character [or] quality . . . previously indicated." Merriam Webster's Collegiate Dictionary 1172 (10th ed. 1997). Accordingly, the phrase "such rules" in § 2072(b) indicates that its restrictions apply to the procedural rules permitted by § 2072(a). *See King v. Burwell*, 576 U.S. 473, 487 (2015) ("By using the phrase 'such Exchange,' Section 18041 instructs the Secretary to establish and operate the same Exchange that the State was directed to establish under Section 18031."); *see also Slack Techs., LLC v. Pirani*, 598 U.S. 759, 767 (2023) ("[T]he statute repeatedly uses the word 'such' to narrow the law's focus").

The rule against surplusage confirms this understanding of § 2072(b). *See Dunn v. CFTC*, 519 U.S. 465, 472 (1997) (reading a statute "consonant with the doctrine that legislative enactments should not be construed to render their provisions mere surplusage"); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995). Reading § 2072(b) to be satisfied whenever a rule is arguably procedural as required by § 2072(a) would impermissibly render § 2072(b) redundant.

Decisions of this Court also recognize the restriction § 2072(b) imposes on procedural rules. For example, in *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–04 (2001), the Court held that Fed. R. Civ. P. 41(b) does not determine the preclusive effect of federal court judgments in diversity cases. Even though Rule 41(b) "govern[ed]

the internal procedures of the rendering court," this Court recognized that interpreting it as controlling claim preclusion would "arguably violate" § 2072(b) by changing substantive rights established by state law. *Id*. This Court applied a similar analysis in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). There, the Court interpreted Rule 23 "in keeping . . . with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Id.* at 612-13 (citing 28 U.S.C. § 2072(b)); *see also, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (noting the "need for caution" in interpreting the federal rules to avoid violating § 2072(b)).

Thus, § 2072 establishes a two-part inquiry. First, § 2072(a) authorizes the Court to promulgate only procedural rules. Second, even if a rule is procedural, or rationally capable of being classified as such, *see Hanna*, 380 U.S. at 472, § 2072(b) mandates that it may not change a substantive right. *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. Rev. 654, 683 (2019) ("Supreme Court precedent . . . makes clear that the Court has embraced an understanding of the [Rules Enabling Act] that gives its 'abridge, enlarge or modify' language independent weight apart from the directive to confine rules to the procedural realm").

2. The two-step inquiry mandated by the Rules Enabling Act is necessarily case-specific. Whether a federal rule is procedural within the meaning of § 2072(a) can be assessed by analyzing the rule itself. But the § 2072(b) inquiry as to whether a federal procedural rule changes *another* substantive right

cannot be determined in a vacuum. Rather, that analysis necessarily depends on the nature of the other substantive right that may be affected. *See Shady Grove*, 559 U.S. at 412 (plurality opinion) ("[I]t is hard to understand how it can be determined whether a Federal Rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist").

A procedural rule that validly applies in cases where its application does not curtail a substantive right may not properly be applied in another case where its application would have such an effect. By the same token, a determination that applying a procedural rule in a particular case would affect a substantive right does not render the rule facially invalid or categorically unenforceable; rather, it means only that the rule cannot be applied in circumstances where it changes the substantive right. *See id*. at 423 (Stevens, J., concurring in part and concurring in the judgment) ("A federal rule, therefore, cannot govern a *particular case* in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." (emphasis added)).

For example, although a federal rule imposing a two-year statute of limitations in all actions brought in federal court could rationally be classified as a procedural rule permitted by § 2072(a), *see Guaranty Trust*, 326 U.S. at 109, that rule could not be applied to shorten the limitations period when state law

establishes a longer timeframe because to do so would abridge substantive rights. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.10 (1980) (noting concerns about "whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations"); *see also* Amendments to Rules of Civil Procedure for the United States District Courts, 31 F.R.D. 587, 620 (1963) (Black & Douglas, JJ., dissenting) (explaining that transferring responsibility for certain aspects of the federal rulemaking process from the Court to the Judicial Conference of the United States "would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and *which as applied in given situations* might have to be declared invalid" (emphasis added)).[2]

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[2] Scholars of all stripes have likewise concluded that § 2072(b) must be assessed on as-applied basis. *See* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 Notre Dame L. Rev. 1181, 1184 (2011) ("[S]tate-specific as-applied invalidation of a federal rule should be permissible . . . ."); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 Notre Dame L. Rev. 963, 983 (1998) ("[I]nvalidity of a Federal Rule for violating the substantive-rights proviso might be no more than as applied where a substantive, state provision collided directly with the Federal Rule; the Rule would remain fully valid in other states lacking similar provisions."); Ely, *supra* at 722 (explaining § 2072(b) establishes a "significant, enclave-type proviso" that may prohibit a procedural rule from being applied in certain cases depending on the "character of the state provision that enforcement of the Federal Rule in question will supplant");

Restricting the application of a federal rule on an as-applied basis may sometimes result in the rule being treated differently among district courts because of differences in state law. In a state where no substantive law is affected by the application of a particular Federal Rule of Civil Procedure, a district court may apply the Rule in all cases. In contrast, the substantive law of another state may prevent a district court there from applying that Rule in certain circumstances. *See Shady Grove*, 559 U.S. at 416.

This kind of substantial variation of rules already exists in district courts sitting in different states. *See* Struve, *supra* note 2, at 1221 n.156-57. Several rules, for example, already incorporate state law. *See, e.g.*, Fed R. Civ. P. 4(e)(1) (authorizing service of process by "following state law"); Fed R. Civ. P. 64(a) (authorizing remedies for collecting a judgment that are "available . . . under the law of the state where the court is located"); Fed. R. Civ. P. 69(a)(1) (providing

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Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. & Contemp. Probs. 229, 246 (1998) (explaining this Court must "decid[e] whether a Rule, on its face *or as applied*, violates the Rules Enabling Act, with its prohibition against Rules that 'abridge, enlarge or modify any substantive right.'" (emphasis added) (quoting 28 U.S.C. § 2072)); Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 Notre Dame L. Rev. 47, 93 (1998) ("There are matters falling within state competence that are rationally capable of classification as procedural, but are so 'substantive' as to be beyond the scope of authority delegated to the Court under the [Rules Enabling Act]."); Ides, *supra* at 1062 ("[I]t is difficult . . . to read the phrase 'really regulates procedure'" in *Sibbach* "as proclaiming the irrelevance of state law and eliminating all as-applied challenges to the Federal Rules.").

that the "procedure on execution" of money judgments "must accord with the procedure of the state where the court is located"). The disuniformity resulting from application of § 2072(b)—inconsistency from state to state because of differences substantive state law—is a core feature of federalism. It is precisely the kind of inconsistency envisioned by *Erie Railroad Co.*, 304 U.S. at 78-79. [3]

3. None of this Court's precedents precludes interpreting § 2072(b) as imposing an independent restriction on the Court's rulemaking power. In *Sibbach*, 312 U.S. at 10, the Court held that "[t]he test" for determining whether a rule is valid under the Rules Enabling Act "must be whether [the rule] really regulates procedure." *Id.* at 14. A plurality of the Court in *Shady Grove* read this statement as

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[3] Several lower courts have enforced § 2072(b) as an independent, enforceable limit on the judiciary's rulemaking authority under § 2072(a). *See, e.g.*, *Douglas v. NCNB Tex. Nat'l Bank*, 979 F.2d 1128, 1130 (5th Cir. 1992) (applying state law because enforcing Fed. R. Civ. P. 13(a) "in the instant case would abridge the lender's substantive rights and enlarge the debtor's substantive rights"); *Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977 (10th Cir. 2010) (applying state law requirements for filing a complaint against government defendants because "[p]ermitting the federal rules to trump substantive [state] law would 'abridge, enlarge, or modify' the litigants' rights in violation of the Rules Enabling Act"); *McCollum Aviation, Inc. v. CIM Assocs.*, 438 F. Supp. 245, 248 (S.D. Fla. 1977) (holding a state's registration requirement for foreign corporations "is clearly substantive and as such, it must be given precedence over Rule 17(b) because under the Rules Enabling Act, as developed by *Hanna*, a Federal Rule cannot abridge an existing substantive right"); *accord ReHabCare Grp. E., Inc. v. Camelot Terrace, Inc.*, No. 10 CV 02350, 2010 WL 5174369, at *5 (N.D. Ill. Dec. 15, 2010).

establishing a "single criterion" for determining a Federal Rule's validity under the Rules Enabling Act: whether the Rule "really regulates procedure." *Shady Grove*, 559 U.S. at 411.

That understanding of *Sibbach* is unwarranted. The petitioner in *Sibbach* "conceded that both the Federal Rule and the state law with which it conflicted were procedural," and "made no admissible argument that the rule—either on its face or as applied—abridged, enlarged, or modified a state-created 'substantive right.'" Ides, *supra* at 1054, 1063. Instead, the petitioner argued that § 2072(b) prohibits courts from applying Federal Rules to "otherwise non-substantive rights that are deemed 'important' or 'substantial.'" *Id.* at 1061-62; *see also id.* at 1054 (explaining *Sibbach*'s holding that § 2072(b)'s reference to "substantive right[s] does not embrace concededly procedural rights merely because they might be deemed to be 'important' or 'substantial'").[4]

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[4] To the extent *Sibbach* holds that § 2072 authorizes the application of Federal Rules even when they would alter or nullify substantive rights, it should be reconsidered. *See* Ely, *supra*, at 719-20 (criticizing *Sibbach* for ignoring § 2072(b)); *see also Shady Grove*, 559 U.S. at 413 (plurality opinion) ("*Sibbach*'s exclusive focus on the challenged Federal Rule . . . is hard to square with § 2072(b)'s terms."). Although *stare decisis* generally precludes this Court from reinterpreting statutes, that has not been the case with the Rules Enabling Act due to the important constitutional issues it implicates. *See Erie*, 304 U.S. at 77-78 (reinterpreting the Rules Enabling Act because the Court's previous interpretation raised constitutional concerns). Moreover, Congress's "failure legislatively to overrule the Court's decisions construing the Act should not be regarded as ratifications of the Court's interpretations of the scope of its

In rejecting that argument, the Court "did not in fact rule out the possibility of as-applied Enabling Act challenges" under § 2072(b). Struve, *supra* note 2, at 1191.

Nor does *Hanna*, 380 U.S. 460, suggest that procedural rules automatically satisfy § 2072(b). The "right invoked in *Hanna* was a classically procedural right—specifically, the right to a particular method of service." Ides, *supra* at 1062. As a result the Court "had no occasion to consider whether [a Rule] . . . abridged, enlarged, or modified a substantive right." *Id.*

Hanna further noted that for a court to conclude that a Rule violates the Rules Enabling Act, it must determine that the Advisory Committee, the Court, and Congress "erred in their prima facie judgment" on the issue. 380 U.S. at 471. But "[t]he fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." *Miss. Publ'g Corp. v. Murphee*, 326 U.S. 438, 444 (1946). Furthermore, as the Wright & Miller treatise explains, the "intended scope of a rule [may be] uncertain," or a Rule may "be applied in unusual situations that might not have been anticipated by the Advisory Committee, the Judicial Conference, or the Supreme Court during the Rule's formulation." 19 Charles Alan Wright & Arthur R. Miller, Federal

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rulemaking power . . . ." Stephen B. Burbank, The *Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1102 (1982).

Practice & Procedure § 4509 (3d ed. 2025); *see also* Struve, *supra* note 2, at 1209-10 (discussing various reasons why a rule's effects on substantive rights might become apparent only after the rulemaking process concludes).

4. The Rules Enabling Act's legislative history bolsters this plain-meaning interpretation of § 2072(b) limiting the scope of rules allowable under § 2072(a). As Professor Stephen B. Burbank's comprehensive analysis of that history demonstrates, Congress's primary consideration was the "allocat[ion] [of] power between the Supreme Court as rulemaker and Congress." Burbank, *supra* note 4, at 1025. "Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy in the first two sentences was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress." *Id*. at 1106; *see also id*. at 1101-02 (explaining that the Act's "statutory limitations . . . were intended to confine the power of the Court itself, a fact that requires the Court ever be open to the reconsideration of past interpretations"). The "protection of state law" was a "probable effect" of this limitation. *Id*. at 1106.

Chief Justice Taft, one of the Rules Enabling Act's longstanding supporters, had recommended that Congress grant the Court "the same power to make rules at law as it had in equity." *Id*. at 1070. A bill was developed by Senator Cummins to implement this proposal, providing that "the rules for actions at law be prepared by a commission such as Taft had recommended." *Id*. at 1072. He sent a copy to Chief

Justice Taft and Justice Sutherland, explaining that its prohibition on abridging, enlarging, or modifying litigants' "substantive rights" was "designed to emphasize the fact that 'Congress could not if it wanted to, confer upon the Supreme Court, legislative power.'" *Id.* at 1073 (quoting Letter from the Hon. Albert B. Cummins to the Hon. George Sutherland (Dec. 17, 1923) (on file with Iowa State Historical Department)). The Rules Enabling Act as enacted was "essentially unchanged" from the version drafted in 1924. *Id.* at 1099.

The 1926 Senate Judiciary Committee report explained that the language that would become § 2072(b) prevents the Court from using the power the bill granted to develop procedural rules to "affect substantive rights or remedies." *Id.* at 1086 (quoting S. Rpt. No. 69-1174, at 9 (1926)). The report emphasized that the bill did not allow courts to change "substantive legal and remedial rights affected by the considerations of public policy." *Id.* It cautioned "that an expansive interpretation of the first sentence [now § 2072(a)] would ignore the second [now § 2072(b)]." *Id.* at 1108 (quoting S. Rpt. No. 69-1174, at 9, 11 (1926)).[5]

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[5] Admittedly, Professor Burbank contends § 2072(b) lacks any "independent meaning" and does not impose any separate "limitations" on § 2072(a). Burbank, *supra* note 4, at 1107. But that conclusion is premised on a narrow interpretation of § 2072(a). That is, Burbank argues that § 2072(a) does not delegate to the judiciary all of Congress' authority to regulate federal judicial procedure. Rather, the term contains "inherent" restrictions that already prevent violations of substantive rights.

Accordingly, reading § 2072(a) to authorize any procedural rule while failing to accept any limitations on that power pursuant to § 2072(b) is inconsistent with congressional intent and runs contrary to the separation of powers considerations motivating the Rules Enabling Act. "As might be expected in a statute designed to allocate lawmaking power," decisions that "affect 'rights' already recognized by the 'substantive law'" are "for Congress, or in the absence of congressional action, for the states." *Id*. at 1124-25 (footnote omitted).

5. As the Rules Enabling Act's legislative history demonstrates, compelling separation-of-powers and policy considerations require independently enforcing

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Id. at 1108 ("[T]he first sentence itself [now § 2072(a)] was thought to impose significant restrictions on court rulemaking.").

Rather than reinterpreting § 2072(a) to define the term "procedure" more narrowly, this Court may instead rectify the problem Professor Burbank identifies by instead recognizing—as several of its precedents already appear to do, *see supra* p. 8—that § 2072(b) prevents application of procedural rules where they would materially impact a litigant's substantive rights. Either way, the Rules Enabling Act's legislative history does not support the notion that this Court may both claim the full extent of Congress's rulemaking authority while simultaneously recognizing no safeguards to prevent material infringements of substantive rights. Burbank, *supra* note 4, at 1108 (demonstrating that construing the Rules Enabling Act as delegating the full scope of Congress's rulemaking authority to the judiciary "neglect[s] restrictions sought to be imposed by Congress").

§ 2072(b) to ensure the Federal Rules do not materially impact litigants' substantive rights.

Declining to enforce independent protection for substantive rights under § 2072(b) in diversity cases also undermines federalism by allowing procedural rules effectively to nullify state policies that may have been crafted to promote important substantive policy objectives. Kelleher, *supra* note 2, at 69, 92 ("A legal rule can have both procedural and substantive purposes, and even if the animating policies of a rule ostensibly are procedural, it may have significant substantive implications, whether intended or not."). The *Erie* Doctrine teaches that federal courts are presumptively required to apply state substantive law in diversity cases and other matters arising under state law. *Erie*, 304 U.S. at 78 (holding that, except where the Constitution or federal law otherwise require, "the law to be applied in any case is the law of the [S]tate").

More broadly, the *Erie* Doctrine is about fairness: a person's material rights in a case should not differ depending on whether the case is filed in state court or the federal court across the street. *Id.* at 76-77 (condemning the "injustice and confusion" that arises when a case's outcome depends on whether it is filed in federal or state court); *see also Hanna*, 380 U.S. at 467 ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or [*sic*] result of a litigation materially to differ because the suit had been brought in a federal court."); Ely, *supra* at 714 n.123. Automatically enforcing any arguably procedural rule without regard to the impact it has on

a litigant's entitlement to sue or ability to prevail fosters such unjust arbitrary disparities.

* * *

In sum, the Rules Enabling Act authorizes this Court to make "general rules of practice and procedure and rules of evidence" for the federal courts. 28 U.S.C. § 2072(a) But those rules, even if procedural, may not be applied when doing so would "abridge, enlarge or modify any substantive right." *Id*. § 2072(b). This Court should faithfully and vigorously enforce both parts of the statute.

B. This Court should clarify what constitutes a "substantive right" for purposes of § 2072(b).

Determining what constitutes a "substantive right" under § 2072(b) can be a "challenging endeavor." *Gasperini*, 518 U.S. at 427. There are several approaches the Court may choose to adopt for that purpose. An important theme underlying all of these alternatives is that "[t]he determination of whether a rule abridges, enlarges, or modifies substantive rights cannot be made without taking state—and federal—substantive rights into account." Spencer, *supra* at 680 (footnote omitted).

One possibility would be to incorporate the standard for substantive rights already built into the *Erie* Doctrine by *Hanna v. Plumer*. Under this approach, a state measure should be treated as substantive when declining to apply it in federal court would "significantly affect" the outcome of the litigation. *Gasperini*, 518 U.S. at 416; *see also*

Burlington N. R.R. Co., 480 U.S. at 5 (holding that a Rule violates § 2072(b) is if it more than "incidentally affect[s] litigants' substantive rights"). The Court has cautioned, however, that this test cannot be "applied mechanically" but instead must be guided by the two considerations laid out in *Erie*—discouraging forum shopping and avoiding inequitable administration of the law. *Gasperini*, 518 U.S. at 416.

Dean Ely suggested an alternate approach. He proposes that a substantive right under § 2072(b) is one tailored toward achieving some policy objective "not having to do with the fairness or efficiency of the litigation process." Ely, *supra* at 725. This understanding is consistent with Rule 1, which specifies that procedural rules are adopted to "secure the just, speedy, and inexpensive determination" of federal cases. Fed. R. Civ. P. 1. Laws and other measures concerning other, unrelated policy objectives are substantive. While Congress may have constitutional authority to override them through its legislative powers, the Rules Enabling Act should not be read to delegate such blanket authority to the federal judiciary. Burbank, *supra* note 4, at 1102. Dean Ely's standard also appears to underlie this Court's implication in *Burlington Northern Railroad Co.*, 480 U.S. at 5, that the Rules Enabling Act does not allow courts to enforce procedural rules that have a greater-than-incidental effect on substantive rights.

A third potential interpretation is that a rule involves substantive rights if it would lead a rational party to order its conduct "outside of the courthouse and before commencement of litigation" in accordance with it. Donald L. Doernberg, *"The Tempest":* Shady

Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*: The Rules Enabling Act Decision that Added to the Confusion, But Should Not Have*, 44 Akron L. Rev. 1147, 1186, 1206 (2011); *see also* Spencer, *supra* at 659 ("[S]ubstantive rights pertain to our primary interactions with one another and with governments"); Max Minzner, *The Criminal Rules Enabling Act*, 46 U. Rich. L. Rev. 1047, 1060 (2012). Rules impacting a party's "decision to commence litigation" qualify as substantive under this standard. Doernberg, *supra* at 1186-87, 1191-92. Justice Harlan's *Hanna* concurrence embraced this position. A rule impacts substantive rights when it would "substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." *Hanna*, 380 U.S. at 475 (Harlan, J., concurring).

A fourth option focuses on whether a particular provision is trans-substantive. A rule is procedural if it governs federal courts' resolution of cases and is "generally applicable to all civil actions." Carrington, *supra* at 308. Such procedural requirements have no connection to any substantive policy beyond the operation of the courts. *Id*. In contrast, a rule affects substantive rights if it "specially" affects "a group of litigants or prospective litigants" (beyond just plaintiffs or defendants as a class). *Id*. Requirements in statutes that create particular rights or relate to specific claims "can be more readily characterized as substantive" because they are "dimension[s]" or "condition[s]" of that right or claim. *Id*. at 290-91; *cf*. Kelleher, *supra* note 2, at 108-21 (proposing a multi-factor test to identify substantive rights).

Any of these interpretations would faithfully enforce the text, structure, and legislative intent underlying the Rules Enabling Act, and more effectively flesh out this Court's holdings in cases such as *Semtek International*, 531 U.S. at 503–04, and *Burlington Northern Railroad Co.*, 480 U.S. at 5.

II. Applying the Federal Rules of Civil Procedure to displace Delaware's affidavit requirement would abridge or modify litigants' substantive rights under state law.

Under any of the standards set forth above, Delaware's affidavit of merit requirement creates substantive rights. Accordingly, a court may not interpret or apply a Federal Rule of Civil Procedure in a manner that suspends or circumvents this requirement.

Delaware's affidavit requirement obliges a plaintiff suing for medical negligence to submit an expert affidavit attesting to the merit of the claim with the complaint. Del. Code Ann. tit. 18, § 6853(a). This requirement furthers several important substantive state policy objectives apart from the fair and efficient operation of the court system. These goals include discouraging strike suits, minimizing the overall costs to the insurance system, and controlling health care costs. *See* Jeffrey A. Parness, Amy M. Leonetti & Austin W. Bartlett, *The Substantive Elements in the New Special Pleading Laws*, 78 Neb. L. Rev. 412, 416–20 (1999); Jean Macchiaroli Eggen, *Medical Malpractice Screening Panels: Proposed Model Legislation To Cure Judicial Ills*, 58 Geo. Wash. L. Rev. 181, 181–85 (1990).

The affidavit requirement is substantive because it determines whether a person is entitled to sue at all, not merely *how* a person must initiate a lawsuit. A person must have actual evidence of medical malpractice to open the courthouse doors and subject a defendant to the burdens, costs, inconvenience, and risks of litigation. This Court has already held that requiring a particular party to adduce evidence of particular facts in order to win a case is a substantive requirement controlled by state law. *See Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959) ("[B]urden[s] of proof are 'substantive.'"); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) ("The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply." (citation omitted)). For the same reasons, a statute requiring a particular party to provide evidence in order to commence a case should be deemed substantive, as well.

A state should have the ability to limit the circumstances under which potential defendants are haled into court under its laws; those limits are undermined if they can be circumvented in federal court. Indeed, dispensing with the affidavit requirement is likely to affect a plaintiff's decision whether to file suit in state or federal court, particularly when the plaintiff has a weak claim and lacks expert evidentiary support.

To be sure, Delaware law also prescribes the procedure a plaintiff must follow to satisfy this substantive requirement: the plaintiff must file its affidavit with the court. But the inclusion of a

"procedural instruction" does not convert a substantive provision into a procedural one when "the State's objective is manifestly substantive." *Gasperini*, 518 U.S. at 429. This Court has recognized that state substantive rights may be embedded in procedural rules, such as a pre-filing bond requirement, *see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 555 (1949), or a statute of limitation, *see Guaranty Trust*, 326 U.S. at 110.

Of course, even if this Court held that Delaware's affidavit of merit requirement was inapplicable in federal court, a plaintiff in a medical malpractice case would *eventually* be required to obtain an expert opinion to support his case. *See* Del. Code Ann. tit. 18, § 6853(e) ("No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care . . . ."). But that obligation would not arise until after considerable litigation had taken place. *Froio v. Du Pont Hosp. for Children*, 816 A.2d 784, 786 (Del. 2003) (explaining that "expert medical testimony" is an "essential element" of a Delaware medical malpractice claim and must be presented once there has been an "adequate time for discovery").

Refusing to apply Delaware's affidavit requirement in federal court would allow a plaintiff to sue there without incurring thousands of dollars in up-front expert fees. By subjecting the defendant to the cost and burdens of litigation, including discovery, the plaintiff could pressure the defendant to settle, notwithstanding that he or she would have been unable to sue in state court at all. Indeed, the

incentive to file in federal court would be particularly high among plaintiffs with weak or meritless claims who hope to make easy money by forcing defendants into settlements solely to avoid the cost and disruption of prolonged litigation.

As this analysis demonstrates, dispensing with the affidavit requirement would also cause "substantial variations" in the outcomes of similar suits filed in federal and state courts. *Gasperini*, 518 U.S. at 430 (internal quotation marks omitted) (quoting *Hanna*, 380 U.S. at 467–68). Weak, unsupported, and meritless claims would continue to be weeded out in state court, while federal dockets would remain clogged with them.

In short, the Delaware affidavit requirement is substantive because it is intended to provide, and in fact provides, real protection for medical providers by preventing plaintiffs from pursuing malpractice claims without making a threshold showing that their claims have merit. That protection extends to insurers providing malpractice coverage and ultimately to the public at large by holding down the overall cost of medical care.

Because Delaware's affidavit requirement is substantive, § 2072(b) prohibits applying the Federal Rules of Civil Procedure in a way that abridges, enlarges, or modifies that requirement. *See supra* Part I. Accordingly, to the extent that any Federal Rule of Civil Procedure conflicts with the Delaware affidavit requirement,[6] federal courts should apply

[6] Of course, this Court could opt not to construe Rule 8 as conflicting with Delaware law in the first place. This Court has

the Delaware affidavit requirement instead of following the Federal Rule.

CONCLUSION

The Court should affirm the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully Submitted.

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never held that the Federal Rules preclude enforcement of state-law requirements for initiating a lawsuit that promote substantive state policy objectives. *See Cohen*, 337 U.S.at 543, 556 (enforcing, in a diversity case, a state law requiring a plaintiff to post security in order to commence a derivative suit, even though the plaintiff had filed a complaint which compiled with the Federal Rules); *Woods v. Interstate Realty*, 337 U.S. 535, 536 & n.1, 538 (1949) (enforcing, in a diversity case, a state law requiring a foreign corporation to file a "written power of attorney" to be eligible to sue, even though the plaintiff corporation had filed a complaint which compiled with the Federal Rules).