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 FOR THE STATE OF TENNESSEE AND TWENTY-SIX OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Petitioner states the question presented as:

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.

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INTEREST OF *AMICI CURIAE*

The *amici* States have a long-recognized interest in protecting the proper allocation of governmental power between the federal government and the States. That interest includes ensuring that the "legal rules determin[ing] the outcome" of a state-law claim brought in federal court by virtue of diversity jurisdiction are "substantially the same" as they "would be if tried in a State court." *See Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). Indeed, respect for substantive state interests by federal courts sitting in diversity is "one of the modern cornerstones of our federalism." *See Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). But the "federalism grounding" of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny has become "ero[ded]" in the context of alleged conflicts between Federal Rules and state laws. *See Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 458 (2010) (Ginsburg, J., dissenting)

Now's the time to correct course. The *amici* States urge the Court to affirm that "important state interests and regulatory policies," *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 427 n.7 (1996), must guide courts in navigating alleged conflicts between Federal Rules and state laws. Rather than reading Federal Rules broadly to invite clashes with state laws, courts should return to *Erie*'s roots and employ federalism-based canons to favor interpretations that fairly avoid such conflicts. On top of furthering federalism, this approach also comports with Congress's command that this Court's rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

SUMMARY OF THE ARGUMENT

According to Petitioner, state affidavit-of-merit laws do not apply in federal diversity actions because they conflict with the Federal Rules. But before overriding these state laws that are carefully crafted to advance important state interests and regulatory policies, the Court should employ familiar federalism-based canons to ask, "[i]s this conflict really necessary?" *Shady Grove*, 559 U.S. at 458 (Ginsburg, J., dissenting). So considered, the answer is often, as here, "no."

I. Affidavit-of-merit laws are important, substantive features of many States' medical malpractice schemes. They impose a nominal barrier to recovery for those injured by negligent medical care, while providing critical protection for providers, insurers, and the public against the ills that accompany frivolous claims. These laws therefore serve as a means of defining the scope of substantive rights and remedies.

II. This Court regularly considers federalism when determining the scope of federal statutes. Recognizing that Congress legislates against the backdrop of our federal system, the Court typically allows only the clearest textual commands to alter the balance of state and federal power. This federalism-based interpretive principle is deeply rooted in the Court's jurisprudence and is often invoked to preserve the States' broad authority.

Similar interpretative canons are warranted for determining the scope of Federal Rules. Such an approach is in line with the federalism underpinnings of

Erie and its progeny. It also comports with past decisions of this Court that have interpreted Federal Rules with "sensitivity to important state interests and regulatory policies." *Gasperini,* 518 U.S. at 427 n.7.

Applying federalism-based canons when interpreting Federal Rules also respects the explicit limits that Congress has placed on this Court's rulemaking authority in the Rules Enabling Act. This Court regularly evaluates regulatory actions by federal agencies through a federalism lens, requiring a clear statement of congressional intent before allowing overrides of core state interests. Evaluating the validity of this Court's exercise of its delegated rulemaking authority should proceed similarly.

ARGUMENT

I. Affidavit-of-merit laws are critical features of state medical malpractice schemes.

1. Policing medical malpractice is a core state function. The States have "historic primacy" over the regulation of health and safety. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This includes the power to "regulat[e] the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). Indeed, "[t]here is perhaps no profession more properly open" to regulation under the States' "police power." *Watson v. Maryland*, 218 U.S. 173, 176 (1910); *see also Hillsborough Cnty. v. Automated Med. Lab'ys Inc.*, 471 U.S. 707, 719 (1985). The regulation of insurance also "has traditionally been under the

control of the States." *SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 69 (1959). And the States are traditionally the font of substantive tort law. *See Erie*, 304 U.S. at 77-78.

Medical malpractice sits at the intersection of these spheres of traditional state authority. And regulating such claims has long been the prerogative of the States given the highly localized nature of medical, legal, and insurance practices. *See, e.g.*, Robert L. Rabin, *Federalism and the Tort System*, 50 Rutgers L. Rev. 1, 29 (1997); Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 Ariz. L. Rev. 917, 922-24 (1996). State medical malpractice schemes have "two ostensible goals: to compensate the negligently injured, and to deter negligent behavior." Daniel Miller, *Liability for Medical Malpractice: Issues and Evidence*, U.S. Cong. Joint Econ. Comm. 2 (2003), https://perma.cc/9KN2-Q85H ("Congressional Report").

2. States working to achieve these dual aims must consider competing interests to strike an appropriate balance between the rights of the injured, the obligations of medical professionals, public health outcomes, and burdens to the judicial system.

a. States, of course, seek to establish medical malpractice schemes that compensate victims of negligent care. *See, e.g.*, *Stuka v. Fleming*, 561 So.2d 1371, 1373 (La. 1990). But allowing free-for-all litigation has "rarely compensate[d] individuals who suffer injuries through medical negligence"; instead, such systems

"often compensate[] those who suffer injuries unrelated to medical negligence." Fred J. Hellinger, PhD, and William E. Encinosa, PhD, *The Impact of State Laws Limiting Malpractice Damage Awards on Health Care Expenditures*, 96 Am. J. of Pub. Health 1375, 1375 (Aug. 2006) (citing study finding that only 2% of negligent injuries resulted in a claim and only 17% of claims involved negligent injuries). In other words, medical malpractice schemes often "provid[e] compensation to the wrong people." *See* Congressional Report, *supra*, at 9.

Thus, a recognized "drawback of the medical liability system is the incentives for unwarranted, or nuisance lawsuits." *Id.* And as medical malpractice awards swell, *see* Robert White, *Medical malpractice payouts are ballooning—and insurers are warning it will cost patients*, Fortune (July 2, 2024, at 7:21 a.m. ET), https://perma.cc/NA9B-SZ4H, frictionless systems incentivize "significant fraud and abuse of the tort system," Congressional Report, *supra*, at 9. "The economic motivation of insurers to settle claims quickly, combined with the contingent fee system, provides incentives for plaintiffs and their attorneys to pursue frivolous claims or to embellish valid ones." Anthony Dippolito, et al., *Republication: History of Physicians Fighting Frivolous Lawsuits: An Overview*, 2 Inter. J. Academic Med. (Supplement 1) S34, S38 (2016), *available at* https://perma.cc/Z7K7-MNT8. Indeed, "fear of overly sympathetic jury verdicts" has cultivated a "'culture' of early settlement of cases for their nuisance value and continued litigation costs." *Id.*

b. States also must account for the impact medical malpractice suits have on the behavior of medical providers and, relatedly, public health. Nearly a third of physicians will face a malpractice claim at some point in their career. *See* José R. Guardado, *Policy Research Perspectives: Medical Liability Claim Frequency Among U.S. Physicians*, Am. Med. Ass'n, 2 (2023), https://perma.cc/8N8T-RFEZ. Of course, "getting sued is not necessarily indicative of medical error," as most medical malpractice claims are "dropped, dismissed or withdrawn." *Id.* And of the few claims "decided by a trial verdict, 89 percent [are] won by the defendant." *Id.*

Still, such "excessive tort" litigation "impose[s] a significant cost on defending individuals." Deanna Arpi Youssoufian, Note, *The Rules of the Malpractice Game: Affidavit of Merit Statutes,* Erie*, and the Cautionary Tale of an Overbroad Application of Rule 11*, 87 Brook. L. Rev. 1459, 1462-63 (2022). It costs tens of thousands of dollars to defend a malpractice claim. *See* Congressional Report, *supra*, at 8. Even claims that are ultimately dropped or dismissed are costly to defend. *Id.* Malpractice suits also "produce costs of time away from patient care … , with resulting lost productivity and income." Michelle Mello, et al., *National Costs of the Medical Liability System*, 29(9) Health Aff. (Millwood) 1569, 1574 (2010).

Moreover, the costs of malpractice litigation "extend beyond" the provider defendant to "taxpayers, state economies, and the judicial system." *See* Youssoufian, *supra*, at 1462; *see also* Mello, *supra*, at 1575 (estimating that in 2008 the "medical liability system

costs the nation more than $55 billion annually"). For starters, excessive claims threatening big payouts warp the malpractice insurance market, driving up premiums and making it "extremely difficult" for physicians to obtain coverage. Congressional Report 6; *see also* Allen Hardiman, *Policy Research Perspectives: Upward Trajectory of Medical Liability Premiums Persists for Sixth Year in a Row*, Am. Med. Ass'n (2025), https://perma.cc/2ZZA-7RRL. These higher "costs are passed on to consumers[,] adversely impact[ing] the affordability of health insurance." Congressional Report, *supra*, at 6.

Defensive medicine is an even more damaging attribute of medical malpractice systems that permit excessive or frivolous claims. *See* Hellinger, *supra*, at 1375-76. Defensive medicine generally manifests in actions taken by physicians that lack medical necessity and offer no benefits to the patient. *See* Congressional Report, *supra*, at 11-13. Sometimes these "additional tests and treatments … themselves expose patients to additional risk of injury." *Id.* at 11. The threat of malpractice liability also may dissuade doctors from "recommending treatments that might be considered riskier, but that are also more medically appropriate." *Id.* It also "deters health care providers from recognizing and reporting errors and working to prevent future mistakes." *Id.* at 12. Thus, defensive medicine reduces the quality and efficiency of medical care at every turn.

Defensive medicine also increases costs for the healthcare system. It accounts for between 2.9% and 13% of patients' medical costs. *See* Michael Rothberg,

The Cost of Defensive Medicine on 3 Hospital Medicine Services, 174 JAMA Internal Med. 1867, 1867-68 (Nov. 2014). In 2008, around the time many States were reforming their malpractice schemes, defensive medicine was estimated to have generated nearly $46 billion in costs, a huge proportion of the total cost of the nation's medical liability system. *See* Mello, *supra*, at 1574. And because studies have shown that greater spending by physicians reduces the risk of incurring a malpractice claim, *see* Anupam Jena, et al., *Physician Spending and Subsequent Risk of Malpractice Claims: Observational Study*, British Med. J. 1 (Nov. 2015), https://perma.cc/6HE7-M8LN, poorly structured malpractice schemes encourage these higher costs.

c. Finally, States crafting medical malpractice policies must account for the burdens excessive lawsuits place on their judicial systems. "[F]rivolous lawsuits consume already scarce judicial resources and prevent individuals with meritorious claims from receiving judicial relief." Youssoufian, *supra*, at 1463. Thus, "the entire public inevitably suffers" when plaintiffs are allowed to "prosecut[e] frivolous lawsuits" that "squander[] limited judicial resources." *Am. Fam. Life Assur. Co. of Columbus v. Teasdale*, 733 F.2d 559, 570 (8th Cir. 1984).

3. Weighing all these factors, States have deployed a suite of tools to craft medical malpractice schemes that preserve significant rights for the injured without imposing an undue burden on providers, healthcare systems, or the courts. Affidavit-of-merit laws—adopted now by more than half of the States—

are key among those reforms. These laws require a medical malpractice plaintiff "to file a certificate (either before, in conjunction with, or shortly after the filing of the complaint) that certifies, typically by way of an attached expert report, that the claim is meritorious." *See* Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 Penn St. L. Rev. 1077, 1111 (2004).

Affidavit-of-merit laws "appear[] to succeed where other methods of reform have failed." *Id.* For example, the year after Maryland implemented its affidavit-of-merit law, "medical malpractice filing rates dropped by 36%," signaling a deterrence against damaging frivolous claims. *Id.* Pennsylvania has also "seen very positive results from the certificate of merit requirement, experiencing a 46.5% dip in the amount of case filings in the state since" implementing the requirement. Eric Lindenfeld, *Moving Beyond the Quick Fix: Medical Malpractice Non-Economic Damage Caps A Poor Solution to the Growing Healthcare Crisis*, 41 T. Marshall L. Rev. 109, 124 (2015).

And affidavit-of-merit laws "achieve the goal" of medical malpractice "reform without offending the twin objectives of tort law." Kyle Miller, Note, *Putting the Caps on Caps: Reconciling the Goal of Medical Malpractice Reform with the Twin Objectives of Tort Law*, 59 Vand. L. Rev. 1457, 1491 (2006). By limiting frivolous suits, affidavit-of-merit laws "impact the area of greatest economic waste, namely expenses incurred in defending meritless medical malpractice

cases." Nathanson, *supra*, at 1119. At the same time, these laws maintain the rights of the victims of medical negligence, because the plaintiffs most affected by affidavit-of-merit laws are "those with illegitimate claims." Miller, *supra*, at 1491. The "legitimate plaintiff is ultimately unaffected" by these laws, thereby "reducing the … costs associated with litigating meritless claims without affecting the amount paid to legitimately injured plaintiffs in indemnity payouts." Nathanson, *supra*, at 1120. Thus, affidavit-of-merit laws help relieve stress on providers, the healthcare system, and the courts, while maintaining the rights of victims of medical negligence. As such, they are critical features of state medical malpractice schemes.

II. Federalism must guide this Court's inquiry.

The "difficulties of adjusting the spheres of authority of two independent, co-ordinate, and largely competitive sovereignties operating in the same territory" are inherent to "our federal system." Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 Yale L. J. 267, 269 (1946). To protect the constitutional balance of power between the States and the federal government, this Court regularly applies federalism-based interpretative canons to federal statutes and regulatory actions to prevent unintended interference with core state interests, *see Sackett v. EPA*, 598 U.S. 651, 679 (2023), or preemption of state laws, *see Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). These canons require clear congressional intent to displace state prerogatives.

A similar approach is warranted when assessing whether a Federal Rule preempts a state law. Indeed, five Justices in *Shady Grove* explicitly recognized the general need "to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies." *Shady Grove*, 559 U.S. at 437, 442 n.2 (Ginsburg, J., dissenting); *see id.* at 418, 430 (Stevens, J., concurring in part and concurring in the judgment). And the other four Justices accepted that conflict-avoiding approach, at least for "ambiguous Federal Rule[s]," to avoid "substantial variations [in outcomes] between state and federal litigation." *See id.* at 405 n.7 (quotation omitted). Using well-worn federalism-based canons to "fairly construe[]" Federal Rules to avoid conflicts with state affidavit-of-merit laws would reverse an "unwise[] and unnecessar[y] retreat[] from the federalism principles undergirding *Erie*." *See id.* at 439, 451 (Ginsburg, J., dissenting). It would also restore the "balance that Congress struck" in 28 U.S.C. § 2072 between uniform rules of federal procedure and substantive state-created rights. *See id.* at 424-25 (Stevens, J., concurring in part and concurring in the judgment)

A. Federalism-based canons regularly prevent federal intrusion on state interests.

"[O]ur Constitution establishes a system of dual sovereignty" that divides power "between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, the federal government wields only the "enumerated powers" that the States surrendered in the Constitution. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). The States, by contrast, retain "numerous and

indefinite" powers that "extend to all the objects … concern[ing] the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State[s]." *Gregory*, 501 U.S. at 458 (quoting *The Federalist* No. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961)).

This system of joint sovereignty "preserves the integrity, dignity, and residual sovereignty of the States," and thereby "secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States* (*Bond I*), 564 U.S. 211, 221 (2011) (quotations omitted). Such diffusion of power in turn "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society," "makes government more responsive by putting the States in competition for a mobile citizenry," and "allows for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458. In short, reserving States' significant lawmaking powers reflects that citizens are often best served by "governments more local and more accountable than a distant federal authority." *West Virginia v. EPA*, 597 U.S. 697, 739 (2022) (Gorsuch, J., concurring) (cleaned up).

Recognizing the importance of state sovereignty, this Court has long presumed that Congress legislates with an eye toward preserving "the constitutional balance between the National Government and the States." *See Bond v. United States* (*Bond II*), 572 U.S. 844, 862 (2014) (quotation omitted). So any inquiry into whether a federal law preempts a state law "start[s] with the assumption that the historic police

powers of the State [are] not to be superseded by … Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). It is thus not enough for preemption that a state law merely frustrates a federal purpose. Rather, "rebutting the presumption" against preemption "requires a showing that preemption is implicitly *required* by the statutory structure or purpose." Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. Legis. & Pub. Pol'y 187, 225-26 (2013) (emphasis added).

Otherwise, to displace traditional spheres of state authority, Congress must "make its intention to do so 'unmistakably clear in the language of [a] statute.'" *Gregory,* 501 U.S. at 460 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). The text itself must contain "exceedingly clear language … to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 622 (2020).

This federalism-based interpretive principle is deeply rooted in the Court's jurisprudence and is often invoked when construing acts of Congress. The Court has respected federalism when interpreting laws that implicate civil rights, property rights, natural resources, and criminal punishment. *See id.* at 621-22; *Bond II*, 572 U.S. at 857-60; *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Jones v. United States*, 529 U.S. 848, 858 (2000); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544

(1994); *Will*, 491 U.S. at 65; *United States v. Bass,* 404 U.S. 336, 349-50 (1971). It has respected federalism when considering laws setting qualifications for state office, *Gregory*, 501 U.S. at 457-64, and laws regulating interactions between state officials and their constituents, *McDonnell v. United States*, 579 U.S. 550, 576-77 (2016). It has repeatedly shown respect for federalism when construing congressional delegations of legislative power. *See Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (per curiam); *United States v. Five Gambling Devices Labeled in Part "Mills," & Bearing Serial Nos. 593-221*, 346 U.S. 441, 449-51 (1953); *FTC v. Bunte Bros.*, 312 U.S. 349, 351 (1941). And "[o]ut of respect for state courts, this Court has time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 389 (2016).

In sum: Before upsetting "the usual constitutional balance of federal and state powers," it is "incumbent upon the … courts to be certain of Congress'[s] intent." *Bond II*, 572 U.S. at 858 (quoting *Gregory*, 501 U.S. at 460) (cleaned up).

B. Federal Rules should be construed to avoid conflicts with state laws.

The "principal arena in which controversies persist under the *Erie* doctrine" is "conflicts with the Federal Rules and state law." Earl C. Dudley, Jr., and George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with Recent* Erie *Decisions*, 92 Va. L. Rev. 707, 737 (2006). But are these "conflict[s] really necessary?" *Shady Grove*, 559 U.S. at 437

(Ginsburg, J., dissenting). In answering that question, "[t]he scope of a federal rule is often the central disputed issue," but the Court "has tied itself in knots trying to explain how to determine that scope." Allan Erbsen, Erie*'s Starting Points: The Potential Role of Default Rules in Structuring Choice of Law Analysis*, 10 J. L. Econ. & Pol'y 125, 146-47 (2013).

This Court's familiar federalism-based canons provide the solution. "The Federal Rules should," of course, "be given their plain meaning," *Walker v. Armco Steel Co.*, 446 U.S. 740, 750 n.9 (1980), just like with statutes, *see EPA v. Calumet Shreveport Ref., LLC*, 145 S. Ct. 1735, 1750 (2025). And consonant with the Court's approach to interpreting federal statutes that run up against core state authorities, *see supra* 12-14, "fairly" construing "the federal rules to avoid conflict with important state regulatory policies" properly stalls federal preemption of core state prerogatives. *See Shady Grove*, 559 U.S. at 439, 441 (Ginsburg, J., dissenting) (quotation omitted); *id.* at 421, 430 (Stevens, J., concurring in part and concurring in the judgment). This "pay[s] greater respect to important state interests by more often giving them effect in federal court," thereby reinforcing *Erie*'s federalism underpinnings and "protect[ing] the separation of powers by limiting judicial power to displace state law." Joshua P. Zoffer, Note, *An Avoidance Canon for* Erie: *Using Federalism to Resolve* Shady Grove's *Conflicts Analysis Problem*, 128 Yale L. J. 482, 489 (2018).

1. *Erie* and its progeny are "deeply rooted in notions of federalism." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 517 (1988) (Brennan, J., dissenting). Indeed,

Erie has been described as "one of the modern cornerstones of our federalism." *Hanna*, 380 U.S. at 474 (Harlan, J., concurring). The "constitutional core" of *Erie* is that "federal judicial lawmaking cannot override substantive rights where such lawmaking has only an adjudicative rationale." Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 Notre Dame L. Rev. 245, 316 (2008); *see also* Zoffer, *supra*, at 508 (describing the appropriate federal-state balance of power as "a value of constitutional magnitude"). This "helped to restore eroded state power and prepare for a realignment of state and federal areas of concern." Glenn S. Koppel, *The Fruits of* Shady Grove*: Seeing the Forest for the Trees*, 44 Akron L. Rev. 999, 1013 (2011) (citation omitted).

Employing "relentless[]" or "wooden[]" interpretations of the Federal Rules "unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*." *See Shady Grove*, 559 U.S. at 437, 451 (Ginsburg, J., dissenting); *see also* Joseph P. Bauer, *Shedding Light on* Shady Grove*: Some Further Reflections on the* Erie *Doctrine from a Conflicts Perspective,* 86 Notre Dame L. Rev. 939, 985 (2011) (criticizing *Shady Grove* for failing to "take seriously ... the agreed benefits of identifying, and then deferring to, state interests"). Indeed, such an "approach … will necessarily undermine state policies and regulatory goals." *See* Zoffer, *supra*, at 519. This in turn "cuts against" important aspects of our federal system, like the "diffusion of sovereign power and the role of states as innovators, as competitors in a policy market, and as guarantors of legal rights." *See id.* at 508 & n.128.

2. Five Justices therefore "agree[d]" in *Shady Grove* 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., dissenting); *see also id.* at 418, 430-31 (Stevens, J., concurring in part and concurring in the judgment). Even the four other Justices recognized that when more than "one reading" of a rule is possible, the rule should be read to "avoid 'substantive variations [in outcomes] between state and federal litigation.'" *See id.* at 405 n.7 (citation omitted). So, where a Federal Rule can be "fairly construed" using familiar federalism-based canons to "leav[e] … room for the operation" of the state law, the latter should apply. *See Burlington N. R. Co. v. Woods,* 480 U.S. 1, 4-5 (1987); *Shady Grove*, 559 U.S. at 452-58 (Ginsburg, J., dissenting). This approach is consistent with a long line of this Court's cases that have "interpreted the Federal Rules … with sensitivity to important state interests and regulatory policies." *Gasperini*, 518 U.S. at 427 n.7; *see Shady Grove*, 559 U.S. at 439 (Ginsburg, J., dissenting).

Consider some pre-*Hanna* decisions. In *Palmer v. Hoffman*, this Court read Federal Rule 8(c), which lists affirmative defenses, to control only the *manner* of pleading the listed defenses in diversity cases, while state law controls the *burden of proof* in those cases. 318 U.S. 109, 117 (1943). In *Ragan v. Merchants Transfer & Warehouse Co.*, this Court held that Rule 3's specification that "[a] civil action is commenced by filing a complaint with the court" could coexist with a state law that keyed commencement to service of the summons. 337 U.S. 530, 531-33 & n.1 (1949). In *Cohen v. Beneficial Industrial Loan Corp.*,

the Court held that even though the Federal Rule specifying prerequisites for stockholders to maintain a derivative suit did not require a bond as security for cost, a state statute requiring such a bond should nonetheless be enforced. *See* 337 U.S. 541, 556 (1949).

And while *Hanna* found the conflict there "unavoidable," 380 U.S. at 470, the Court after *Hanna* "continued to "interpre[t] the federal rules to avoid conflict with important state regulatory policies," *Shady Grove*, 559 U.S. at 441 (Ginsburg, J., dissenting) (citation omitted). *Walker*, for example, again avoided reading Federal Rule 3 to override state rules around the commencement of an action in light of significant state policy interests. 446 U.S. at 749-52. And in *Semtek International Inc. v. Lockheed Martin Corp.,* this Court held that Rule 41(b) did not bar an action that state law otherwise allowed because a different holding "'would arguably violate the jurisdictional limitation of the Rules Enabling Act' and 'would in many cases violate [*Erie*'s] federalism principle.'" *See Shady Grove*, 559 U.S. at 442 (Ginsburg, J., dissenting) (quoting 531 U.S. 497, 503, 504 (2001)). Thus, "before and after *Hanna*," this Court has "cautioned" courts to "'interpre[t] the Federal Rules ... with sensitivity to important state interests,'" and "'to avoid conflict with important state regulatory policies.'" *Id.* (quoting *Gasperini*, 518 U.S. at 427 n.7, 438 n.22).

3. Avoiding conflicts also means "more frequent application of state law in federal courts," which will "better serve *Erie*'s twin aims." Zoffer, *supra*, at 523. "Whenever a Federal Rule displaces state law in federal court, it results in different legal standards in

state and federal courts," inviting forum shopping. *Id.* at 523-24. Indeed, the *Shady Grove* plurality recognized that the conflict created by its reading of Rule 23 would drive litigation barred in state court to federal courts. *Shady Grove*, 559 U.S. at 415 (Scalia, J., plurality opinion). But the shoulder-shrug reaction to that concern "undervalues a principle of federalism that arises when, in a diversity case, the conflicting law is both state-created and substantive." *See* 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, 1063 (2011). For example, allowing federal courts to become havens for frivolous claims threatens to disrupt the balance of interests that States have carefully weighed in formulating their medical malpractice schemes to avoid the ills of excessive litigation while protecting the rights of those injured by medical negligence. *See supra* 8-10.

4. Petitioner counters that Rule 11 is the means of preventing frivolous suits in federal courts. Pet. Br. 24-25. But Rule 11 is a case study for how a federalism-based approach avoids unnecessary disruption of state interests. The "fact that both" Rule 11 and affidavit-or-merit laws "address frivolous litigation hardly creates a conflict." *Pledger v. Lynch*, 5 F.4th 511, 531 (4th Cir. 2021) (Quattlebaum, J., concurring in part and dissenting part). Rather, these mechanisms can be read to "co-exist." *See Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 263 (3d Cir. 2011); *see also Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1539-41 (10th Cir. 1996).

Setting aside the distinctions that courts have drawn between the applicability of Rule 11 and affidavit-of-merit laws, *see, e.g.*, *Liggon-Redding*, 659 F.3d at 263, Petitioner argues that Rule 11 states that "'a pleading need *not* be verified or accompanied by an affidavit—precisely what Delaware demands." Pet. Br. 24 (emphasis in original) (quoting Fed. R. Civ. P. 11(a)). But Rule 11(a) does not require verification or an affidavit "*[u]nless* a rule or statute specifically states otherwise." Fed. R. Civ. P. 11(a) (emphasis added). The rule "does not specify whether the 'rule or statute' exception applies only to federal enactments or whether state statutes can also override the exception." Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The* Erie *Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 251 (2010). Under a federalism-based approach, state affidavit-of-merit laws would fit comfortably within Rule 11's rule-or-statute exception allowing verification. *See* Youssoufian, *supra*, at 1475-76. Such a reading not only comports with the text of the rule, but it also "promotes the principles of federalism and separation of powers underlying the *Erie* doctrine and our governance system." *Id.*; *see id.* at 1476-83 (explaining benefits of such an interpretation). Indeed, many cases that have "considered this question in the context of certificate of merit statutes has found that the exception does include state statutes." Grossberg, *supra*, at 251 (collecting cases).

C. A federalism approach abides by Congressionally imposed limits on the Federal Rules.

Importing federalism-based canons to construe Federal Rules also flows from Congress's "incomplete" rulemaking delegation under the Rules Enabling Act. *See* Thomas, *supra*, at 241-43. As with regulations promulgated by federal executive agencies, *see, e.g.*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), the Federal Rules derive from a congressional delegation of rulemaking authority, 28 U.S.C. § 2072. So just as Congress must use "clear" statutory language to authorize an agency to "significantly alter the balance between federal and state power," *see Sackett*, 598 U.S. at 679-80, the Court "should generally presume" that Congress has not exercised its "constitutional power 'to supplant state law' with rules that are 'rationally capable of classification as procedure,'" *see Shady Grove*, 559 U.S. at 422 (Stevens, J., concurring in part and concurring in the judgment) (quoting *id.* at 406, (Scalia, J., plurality opinion)); *see also* Thomas, *supra*, at 241-42. In other words, adopting Federal Rules that intrude on traditional areas of state autonomy should require a "manifestation of intent by Congress to displace state law," particularly "in areas where states are exercising their historic police powers." *See* Thomas, *supra*, at 193.

And Congress's "mandate that federal rules 'shall not abridge, enlarge or modify any substantive right' evinces" an intent to preserve state laws promoting substantive state rights and policies, "as does Congress'[s] decision to delegate the creation of rules to this Court rather than to a political branch." *Shady*

Grove, 559 U.S. at 422 (Stevens, J., concurring in part and concurring in the judgment). The limits imposed by the Rules Enabling Act were meant to strike a balance "between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies." *Id.* at 424-25. They thereby enforce "the separation-of-powers presumption and federalism presumption that counsel against judicially created rules displacing state substantive law" that animated *Erie*. *See id.* at 425 (citation omitted).

Thus, the inquiries into whether a Federal Rule unavoidably conflicts with state law and whether its application is valid under the Rules Enabling Act "bleed" together. *See id.* 559 U.S. at 422; *see also Semtek Int'l Inc.*, 531 U.S. at 503-04 (interpreting Rule 41(b) to avoid a conflict because "the federal court's extinguishment of" a state-created right "would seem to violate" 28 U.S.C. § 2072(b)). "When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts" then "must consider whether the rule can reasonably be interpreted to avoid that impermissible result." *Shady Grove*, 559 U.S. at 422-23 (Stevens, J., concurring in part and concurring in the judgment). "This application" of the Rules Enabling Act "shows 'sensitivity to important state interests' and 'regulatory policies,' but it does so as Congress authorized." *Id.* at 423 (quoting *id.* at 437, 442 (Ginsburg, J., dissenting)).

This does not mean that Federal Rules can never "displace state policy judgments; it means only that federal rules cannot displace a State's definition of its

own rights or remedies." *Id.* at 418 (Stevens, J., concurring in part and concurring in the judgment). But whether a state law "defines the scope of [a] state-created right" does not necessarily turn on whether the state law is labeled substantive or procedural. *See id.* at 423. A "state procedural rule, though undeniably 'procedural' in the ordinary sense of the term, may exist 'to influence substantive outcomes[.]'" *Id.* at 420-21 (citation omitted).

Consider, for example, state affidavit-of-merit laws. As described, those laws balance the rights and obligations of those injured by negligent care and medical providers at risk of ruinous frivolous suits. *Supra* 8-10. Thus, to whatever extent those laws are considered "procedural," they are nevertheless "so bound up with the state created right or remedy" that they help "define[] the scope of [the] substantive right or remedy." *Shady Grove*, 559 U.S. at 420-21 (Stevens, J., concurring in part and concurring in the judgment). For example, Delaware's affidavit-of-merit law resides within the substantive provisions of its medical malpractice scheme, *see* 18 Del. C. § 6853, unlike New York's prohibition against statutory-damages class actions, which was a creature of the State's procedural code. *See id.* at 416, 436 (concluding that the state law's placement "in New York's procedural code" signaled a lack of substantive import). And Justice Stevens recognized that other "seemingly procedural rules" that make it "more difficult to bring or prove a claim," are of the kind that Congress meant to guard, as they "serv[e] to limit the scope of that claim." *Id.* at 420 (citing *Cohen*, 337 U.S. at 555; *Guar. Tr. Co.*, 326

U.S. at 99). "When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice." *Id.*

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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