

**In the
Supreme Court of the United States**

ALAN GRAYSON,

Petitioner,

v.

NO LABELS, INC. ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit**

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The decision below is a dramatic break with nearly a century of controlling Supreme Court direction to apply the Federal Rules to procedural issues in federal courts. Unless it is reviewed and reversed, this Court of Appeals decision will nullify the holdings of *Erie v. Tompkins* (1938), *Hanna v. Plumer* (1965) and *Shady Grove v. Allstate* (2010). It will balkanize the federal courts, leading to 50 different versions of “federal procedure.” Furthermore, the lower court decision blasts the bedrock in “the bedrock principle known as the ‘American Rule,’ [under which] each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.” *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 382 (2013). The Respondents’ non-responsive response to this Petition only underscores the “clear and present danger” that the lower court’s decision poses both to federalism and the American Rule on attorney’s fees.

As the Petition explains, the lower court erred by awarding attorney’s fees as a penalty¹ under the Florida procedural rule on offers of judgment, even though Federal Rule 68 prohibits the award of attorney’s fees under an offer of judgment. (Federal Rule 11 is the rule on awarding attorney’s fees as a penalty. The lower court *denied* attorney’s fees under Federal Rule

¹ The Florida offer-of-judgment statute expressly confers attorney’s fees as a “penalty” (*i.e.*, “penalties of this section”). “In line with this text, Florida courts have uniformly characterized section 768.79 as a *penalty* statute.” *Coates v. RJ Reynolds Tobacco Co.*, 365 So.3d 353, 355 (Fla. 2023).

11, but it nevertheless *granted* them under a *Florida* Rule of Civil Procedure.) After elevating a Florida rule of procedure above Federal Rules 68 and 11, the lower court then compounded this fundamental error by refusing to refer the resulting dispositive questions of Florida law to the Florida Supreme Court for an “*Erie* query,” per the Florida Constitution.

The Respondents’ response, having nothing of substance to argue, is merely a prolonged effort to change the subject.² They misstate that these issues were not raised before the district court (or, vaguely, that that they were “not adequately addressed.” Respondent’s Brief in Opposition (“BIO.”) at 4. That argument is refuted by the district court’s decision:

The Plaintiff’s objection is misplaced. As discussed in *Schafler v. Fairway Park Condominium Ass’n*, 324 F.Supp.2d 1302, 1311 (S.D.Fla. 2004), the Florida rule as to the necessity of expert testimony in support of a motion for an award of attorneys’ fees is merely procedural for *Erie* purposes.... The Schafler Court concluded it appears that the Florida Supreme Court agrees with the federal law as opposed to the appellate courts on this issue. *Id.* Thus, to the extent that Florida appellate courts have imposed a rule requiring expert testimony in support of an application for attorney’s fees, the rule is procedural and is not binding on federal courts sitting in diversity.

² Respondent’s entire 23-page response contains only two sentences responding to the Questions Presented in the Petition. BIO.8.

M.D.Fla.Dkt.No. 211 at 7.³ The Respondents also are mistaken about when these issues were raised before the Circuit Court; they were raised in the Petitioner's summary reversal briefs, even before the full briefing.

The Respondents also continue to cast aspersion on the Petitioner and his case, apparently without realizing the irony of that in a defamation case.⁴ In any case, that is not the issue in this Petition at all.

I. The Federal Rules of Civil Procedure, Not the Florida Rules of Civil Procedure, Govern the Procedural Question of Whether an Offer of Judgment Can Result in the Award of Attorney's Fees

The primary issue in this Petition is whether, in a federal diversity action, a party can escape the clearcut rule of no attorney's fees under Federal Rule 68 (Offer of Judgment) by couching its offer of judgment within Florida Rule 1.442 (and Florida Statute § 768.79, which essentially reiterates Florida Rule 1.442). As noted earlier, the Florida Supreme Court specifically identified Florida's Florida Rule 1.442 as a *procedural* rule when it promulgated it. Indeed, the Florida Constitution limits the Florida Supreme Court's rulemaking authority to matters of *procedure* only.

³ Puzzlingly, the district court thus applied Federal Rule 54(d)(2) to the Respondents' motion for attorney's fees, but not Federal Rule 68, which mandates that the motion be denied.

⁴ The Respondents eluded responsibility for their vulgar smears against the Petitioner solely because Grayson was unable to marshal sufficient evidence that the Respondents knew that they were lying about the Petitioner. BIO.2-3; M.D.Fla.Dkt.No. 159.

Fla. Const. Art. V, § 2(a). Therefore, offers of judgment are procedural.

At the risk of stating the obvious, “federal procedural rules govern a case that has been removed to federal court. *See Shady Grove*[, *infra*].” *Smith v. Bayer*, 564 U.S. 299, 304 n.2 (2011). Quite simply, “federal procedural rules trump overlapping state rules, *see Shady Grove*, 559 U.S. at 409.” *Bobulinski v. Tarlov*, 758 F.Supp.3d 166, 187 (S.D.N.Y. 2024). It is “settled” that a valid, on-point Federal Rule “applies regardless of contrary state law”). *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n.7 (1996). “We must first determine whether [the Federal Rule] answers the question in dispute.... if it does, it governs — [state] law notwithstanding.” *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

In this case, Rule 68(d) “answers the same question” as Florida R.Civ.P. 1.442 (and Florida Statute § 768.79), *i.e.*, “what are the consequences of declining an offer of judgment?” The answer is:

- under Federal Rule 68(d), costs only;
- under Florida Rule 1.442, potentially costs and attorney’s fees.

Therefore, the Federal Rule governs. *Id.*; *see also Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 774 (2019) (per Gorsuch, J.) (*Shady Grove* is a Supremacy Clause field preemption case).⁵

⁵ And the Respondents do not argue that Federal Rule 68 transgresses the limits of the Rules Enabling Act or the Constitution (nor could they). *See Shady Grove, supra*.

[The] “courts treat an award of attorney’s fees for bad-faith litigating conduct as ‘procedural’ and so governed by federal standards.” And, digging deeper, “a state law denying the right to attorney’s fees or giving a right thereto, which reflects a substantial policy of the state, should be followed” only where the “*state law does not run counter to a valid federal statute or rule of court*[.]”

Schnatter v. 247 Group, LLC, slip op., No. 3:20-CV-00003 (W.D.Ky. Aug. 23, 2024) (citations omitted; emphasis in original).

In the *Shady Grove* case, the rejected State law threatened to transmogrify federal procedure in the name of relieving “pressure on the defendant to settle even unmeritorious claims[.]” *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 524 (2018). Here, the State law threatens to transmogrify federal procedure — and wipe out the American Rule on attorney’s fees — by putting pressure on plaintiffs to settle (or, rather, drop) even meritorious claims.⁶

Until now, the federal courts have confirmed on many occasions that Rule 68 preempts state laws authorizing an award of attorney’s fees or other enhanced remedies to a prevailing defendant who

⁶ As this case illustrates. The Petitioner’s expert report said that his damages were \$17 million. The Respondent’s offer of judgment offered him only \$500 because, as one of the Respondents explicitly told the Petitioner (at a settlement conference, no less) that the Respondents planned to assert this claim for attorney’s fees against the Petitioner to destroy him financially. In line with that plan, this month the Respondents attempted to seize the Petitioner’s home. The Respondents are trying to exploit Florida Rule 1.442 not to settle a case, but to terrorize the Petitioner.

serves a rejected offer of judgment. *See, e.g., Cribari v. Allstate Fire & Cas. Ins. Co.*, Nos. 19-1270, 19-1343, 19-1425, slip op. (10th Cir. June 3, 2021) (Rule 68 governs over and displaces Colorado’s C.R.S. § 13-17-202 in federal court because “[t]he state and federal rules are... in conflict”); *Goldberg v. Pac. Indem. Co.*, 627 F.3d 752, 757-58 (9th Cir. 2010); *Rebollo v. Miami Heat Assoc.*, 137 F.3d 56, 66 (1st Cir. 1998); *D.S. v. East Porter Cnty. School Corp.*, 981 F.Supp.2d 805, 814-20 (N.D. Ind. 2013); *accord S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 311 (7th Cir. 1995) (defendant offers of judgment under state law and Rule 68 are identical). The lower court’s decision hence has created a troubling division between the Eleventh Circuit and the First, Seventh, Ninth and Tenth Circuits, on a central question of federal procedure.

Furthermore, the decision here below contravenes Florida district court decisions correctly applying *Shady Grove*, which conclude that Florida Rule 1.442(b) and Fla.Stat. § 768.79 are preempted by Federal Rules 68, 54(d) and 41. *Olivia v. NBTY, Inc.*, No. 11-80850-CIV, 2013 WL 12092119, at *5 (S.D.Fla. May 22, 2013); *accord DeVarona v. Discount Auto Parts, LLC*, 935 F.Supp.2d 1335 (S.D.Fla. 2013); *cf. Collazo v. Progressive Select Ins. Co.*, No. 20-CV-25302, slip op. (S.D.Fla. Dec. 19, 2022) (Federal Rule preempts Florida statute on shifting costs). “The conflicting (and clearly procedural) federal rule... ha[s] to govern.” 935 F.Supp.2d at 1347, citing *Shady Grove*.

Respondents’ only response is to argue that this same error has been committed twice before. BIO.8.

“We did it before, and we can do it again” is hardly a valid legal argument, however.⁷

Florida is not the only State to have State-specific rules and procedures for their state courts regarding the shifting of attorney’s fees and costs. In 1853, however, Congress decided to reject their application in federal courts, and to establish a uniform national system for the shifting of costs.

That in lieu of the compensation now allowed by law to attorneys, solicitors,... and... witnesses... in the several States, the following and no other compensation shall be taxed and allowed.

Act of Feb. 26, 1853, 10 Stat. 161. Rule 68 on offers of judgment is best understood in that historical context, as mandating uniform rules of civil procedure in all federal courts. *See Crawford Fitting Co. v. JT Gibbons, Inc.*, 482 U.S. 437 (1987) (per Rehnquist, C.J.).

Note that this is not a case of fee-shifting for prevailing on a particular type of claim, such as claims under the Civil Rights Act of 1964. Under both federal and state law, and in both federal and state courts, such fee-shifting statutes are substantive laws creating substantive rights, as opposed to, here, “sanctions... imposed for conduct during the litigation” (e.g., for declining a \$500 offer of judgment) to which federal law, not state law, applies. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52-54 (1991); *accord Shady Grove*, 559 U.S. at 407 (*procedural* rules regulate “the judicial

⁷ Dick Robertson, “We Did It Before (And We Can Do It Again)” (1941 song). Put another way, “three wrongs don’t make a right.” *State v. Davis*, 85 P.3d 1164 (Kansas 2004).

process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them”); *Los Lobos Renewable Power v. Americulture, Inc.*, 885 F.3d 659, 668 (10th Cir. 2018) (award of attorney’s fees as a sanction is procedural and governed by federal law, not substantive and governed by state law, “assuming one is able to read”).

The Respondents accuse the Petitioner of facing attorney’s fees for “over-litigating” this case. BIO.1.⁸ This hoists the Respondents on their own petards. Questions of penalties or sanctions for “over-litigation” are questions of procedure (notably, under Fed.R.Civ.P. 11), not questions of substantive rights. In analogous circumstances, the court ruled: “By its own statements, Wasserman slides the scale almost entirely towards a finding that [Kentucky’s] KRS 454.478 is preempted” by Federal Rule 11. *Schnatter v. 247 Group, LLC*, slip op., No. 3:20-CV-00003, (W.D.Ky. Aug. 23, 2024).

In sum, the Respondents’ response only confirms that the lower court’s decision establishes a deep split among the Circuits on the fundamentals of federal civil procedure, and it disregards and undermines the very purpose of controlling U.S. Supreme Court legal authority, *i.e.*, to create uniform procedure in federal courts regarding fee-shifting of attorney’s fees and costs that comports with the American Rule.

⁸ The Respondents’ “over-litigation” allegation is based primarily on the fact that the Petitioner has presented this case to The Highest Court in the Land.

II. If the Assessment of Penalties Under Offers of Judgment Were Substantive Rather Than Procedural, Then the Lower Court Erred by Guessing (and Guessing Wrong) as to Florida Law, Rather Than Certifying Dispositive Questions to the Florida Supreme Court as the Florida Constitution Mandates

As explained previously, Florida was the first State to establish a regular procedure for federal courts of appeals to certify questions to the Florida Supreme Court, and Florida amended the Florida Constitution to guarantee this. Fla. Const. Art. V, § 3(b)(6); *see also* Fla.R.App.P. 9.150. Until now, the Eleventh Circuit scrupulously adhered to the certification of “*Erie* queries” to the Florida Supreme Court, on countless occasions. Indeed, the Circuit Court previously certified questions regarding this rather obscure Florida offer-of-judgment rule and statute *twice*. *Horowitch v. Diamond Aircraft Industries, Inc.*, 645 F.3d 1254 (11th Cir. 2011); *Auto-Owners Ins. v. Southeast Floating Docks*, 632 F.3d 1195 (11th Cir. 2011).⁹

Erie established that on substantive questions of law in diversity cases, federal courts must look to state law “as declared by its highest court.” *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-82 (1938). Therefore, in Florida diversity cases, the requirement is for the Circuit Court: (i) to apply controlling precedent of the Florida Supreme Court whenever it exists already, and (ii) to certify questions to the Florida Supreme

⁹ And in a third case, the Circuit Court relied on answers already received from another prior certification to the Florida Supreme Court. *McNamara v. Government Employees Ins. Co.*, 30 F.4th 1055 (11th Cir. 2022).

Court whenever “the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.” Fla.R.App.P. 9.150. Here, however, the lower court blew a hole in federalism by doing neither.

This case presents seven distinct dispositive questions regarding the construction of Fla.R.Civ.P. 1.442 and Fla. Stat. § 768.79 (if they are not preempted by Federal Rule 68, and they apply at all). Petition at 19-33. As to one of them, the Florida Supreme Court already held (in response to a question certified by the Circuit Court) that Fla.R.Civ.P. 1.442 and Fla.Stat. § 768.79, on their face, do not apply whenever a plaintiff’s Complaint pleads injunctive relief, “*even where those claims lack merit.*” BIO.10 (emphasis added), citing *Horowitch, supra*. Here, the Petitioner’s Complaint pled injunctive relief, and that prayer certainly was *not* frivolous. Yet the Circuit Court simply disregarded this “controlling precedent of the Supreme Court of Florida.”¹⁰

Regarding the other distinct dispositive questions on the construction of Fla.R.Civ.P. 1.442 and Fla. Stat. § 768.79, the Petitioner filed a formal motion for certification, in accordance with Florida Rules. The Circuit Court inexplicably denied this motion “as moot.”

This is an ill-advised initiative by the Circuit Court to substitute its own views, feelings and “unnecessary speculation,” *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 827 F.3d 1016, 1025 (11th Cir. 2016), in place of

¹⁰ The Respondents clearly would like to relitigate *Horowitch*. BIO.9-13. The point, however, which the Respondents never address at all, is that both they and the Eleventh Circuit are bound by it.

the holdings of the Florida Supreme Court, either existing (as in *Horowitch*) or as certified to that Court. The Circuit Court decision here is completely at odds with *Erie v. Tompkins*, *Hanna v. Plumer*, the Florida Constitution, and even the prior precedent of the Circuit Court.

[When] the course that the Supreme Court of Florida would take is sufficiently unclear that, rather than risk pronouncing a result which that court might ultimately elect not to follow, we follow the course — often pursued by this and our predecessor court, with enthusiastic support of the U.S. Supreme Court [citing *Lehman v. Schein*, 416 U.S. 386 n.6 (1974)] — of certifying the significant issues to the Supreme Court of Florida for an authoritative answer.... The Fifth Circuit's [now Eleventh Circuit's] willingness to certify is in part a product of frequent state court repudiation of its interpretations of state law.... Indeed, to its credit, [Appellant] urges we take this course.

Ageloff v. Delta Airlines, Inc., 860 F.2d 379, 389-90 (11th Cir. 1988) (footnotes omitted).

Principles of federalism and comity counsel us not to attempt to divine the answers to these challenging and important questions of Florida statutory and common law. *See In re Cassell*, 688 F.3d 1291, 1300 (11th Cir. 2012) (“When there is substantial doubt about the correct answer to a dispositive question of state law, a better option is to certify the question to the state supreme court.”).

Pincus v. American Traffic Solutions, Inc., 986 F.3d 1305 (11th Cir. 2021). Now, however, the Circuit Court has crossed a double line and made a U-turn away from allowing the Florida Supreme Court to decide Florida law. Granting *certiorari* is the only means to have it stay in its lane.

The Respondents' sole response to this issue is to concede, *sub silentio*, that the Circuit Court *never* certified *any* of these dispositive issues to the Florida Supreme Court, notwithstanding *Erie*, the Florida Constitution and its own precedent, nor did the Circuit Court show any deference at all to State law "as declared by its highest court." *Erie*, 304 U.S. at 80. Rather, the Respondents argue that "those issues were already addressed and debunked by the lower [federal] courts" in this case *sans* certification, BIO.9, which is prohibited. Indeed, it is a regression to the law *before Erie*, i.e., *Swift v. Tyson*, 16 Pet. 1 (1842), which *Erie* expressly overruled.



CONCLUSION

The decision below threatens to spread turmoil throughout the federal courts, and it impairs the basic rules of federalism in the judiciary. On these two central questions of federal civil procedure, which arise virtually every day, the Eleventh Circuit has gone astray, so to speak, and the only way to correct it is to grant this Petition.

Respectfully submitted,

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