No.

In the Supreme Court of the United States

HAROLD R. BERK, PETITIONER,

v.

WILSON C. CHOY, MD; BEEBE MEDICAL CENTER, INC.; ENCOMPASS HEALTH REHABILITATION HOSPITAL OF MIDDLETOWN, LLC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a clear, recognized, entrenched conflict over an important question about the application of state procedural rules in federal court.

Delaware, like numerous states, requires that in certain actions the plaintiff must also file an affidavit of merit ("AOM") with the complaint. *See* 18 Del. C. § 6853. An AOM is an affidavit signed by an expert stating that there are reasonable grounds to believe that each defendant has committed the alleged misconduct. *See id.* § 6853(a)(1).

The Second, Fourth, Fifth, Sixth, Seventh, and Ninth circuits hold that AOM provisions and comparable statutes do not govern actions in federal court because they answer the same question as—and therefore conflict with—several different Federal Rules of Civil Procedure. The Third and Tenth circuits, in contrast, hold that they present "no conflict" with any Federal Rules.

In the decision below, the Third Circuit, in an unpublished opinion, for at least the fifth time, refused to hold that an AOM statute conflicts with any Federal Rules. Judge Phipps "concur[red] in only the judgment." Third Circuit precedent required him to vote to affirm, he explained, but "writing on a clean slate . . . he may not [have] arrive[d] at that same conclusion."

The question presented is:

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.

RELATED PROCEEDINGS

U.S. District Court for the District of Delaware:

Harold R. Berk v. Wilson C. Choy, M.D., et al., No. 1:22-cv-1506-RGA (Apr. 4, 2023) (dismissing petitioner's complaint)

U.S. Court of Appeals for the Third Circuit:

Harold R. Berk v. Wilson C. Choy, MD, et al., No. 23-01620 (July 25, 2024) (affirming district court)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-11a) is unpublished but available at 2024 WL 3534482. The decision of the United States District Court for the District of Delaware (Pet. App. 12a-15a) is unpublished but available at 2023 WL 2770573.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision is reproduced in the petition appendix at Pet. App. 16a-19a.

STATEMENT OF THE CASE

This case presents a square conflict over an important question of federal procedure: 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.

In the decision below, the Third Circuit held that Delaware's affidavit of merit ("AOM") requirement for medical negligence claims applies in federal court. Pet. App. 1a-11a. In doing so, the court acknowledged it was splitting with five courts of appeals that have ruled similar AOM statutes do not apply in federal court. Pet. App. 8a n.10. This marks at least the fifth time the Third Circuit has insisted that state AOM laws must be enforced in federal court because they purportedly present "no conflict" with the Federal Rules of Civil Procedure. Pet. App. 8a; *see* Pet. App. 5a, 11a n.12 (citing previous cases). Only the Tenth Circuit shares this position. *See*

Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1537-38 (10th Cir. 1996).

This case unquestionably warrants the Court's review. The conflict is clear, acknowledged, and deeply entrenched. Numerous courts and commentators have recognized it.[1] Six courts of appeals have ruled that AOM statutes similar to Delaware's do not apply in federal

[1] *E.g.*, 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4511 & nn.95-108.50 (3d ed. 2024) (discussing split); 17A James Wm. Moore *et al.*, *Moore's Federal Practice* § 124.07[2][b][i] (Matthew Bender 3d ed. 2024) (discussing split); 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, 1461 (2022); *see also id.* at 1470-73 (discussing the circuit split); *id.* at 1469 n.77 (noting conflict among circuits regarding application of AOM statues and Rules 8, 9, 12, 26 and 56); D. Chanslor Gallenstein, *Whose Law Is It Anyway? The* Erie *Doctrine, State Law Affidavits of Merit, and the Federal Tort Claims Act*, 60 U. Louisville L. Rev. 19, 34 (2021) ("[F]ederal courts of appeals have reached . . . inconsistent results vis-a-vis AOM statutes. Some courts have held outright that the AOM statutes apply, others have held that the Federal Rules displace state law, others still have split the baby, and have created intra-circuit splits on the issue.") (footnote omitted); Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The* Erie *Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 242-64 (2010) (discussing division among courts addressing whether certificate-of-merit statutes conflict with Rules 8, 9, 11, 12, 26, and 37); Meryl J. Thomas, Note, *The Merits of Procedure vs. Substance:* Erie*,* Iqbal*, and Affidavits of Merit as MedMal Reform*, 52 Ariz. L. Rev. 1135, 1140-43 (2010) (discussing split); Bates McFadden Holman, Note, *Allowing Anti-SLAPP Statutes in Federal Court Perpetuates the Rules Enabling Act's* Erie*,* Shady *Adumbration*, 18 Charleston L. Rev. 429, 473 n.287 (2023) (discussing "the current Circuit split on whether state certificate of merit requirements apply in federal court").

court, while two have held the opposite.[2] The Third Circuit has doubled down on its position at least five times.[3] Further percolation is pointless: the arguments have been fully aired, and there is no realistic chance this split will resolve on its own.

The question presented is of paramount legal and practical significance, and its proper resolution is essential for maintaining consistency in the federal courts. Parties gain little from mastering federal procedural rules if fifty states can impose a fragmented array of procedural requirements for every state-law cause of action litigated in federal court. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (citation omitted). That purpose is undermined when federal courts allow a patchwork of state procedural rules to govern, creating a chaotic landscape where litigants face drastically different procedural standards based solely on where they file. Because this case presents an ideal vehicle for addressing this crucial issue of federal law, the petition should be granted.

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[2] *See* Pet. App. 8a n.10 (citing *Corley v. United States*, 11 F.4th 79, 83 (2d Cir. 2021); *Pledger v. Lynch*, 5 F.4th 511, 515 (4th Cir. 2021); *Young v. United States*, 942 F.3d 349, 350 (7th Cir. 2019); *Gallivan v. United States*, 943 F.3d 291, 293-34 (6th Cir. 2019)); *see also Passmore v. Baylor Health Care Sys.*, 823 F.3d 292, 293 (5th Cir. 2016); *Martin v. Pierce Cnty.*, 34 F.4th 1125, 1129-30 (9th Cir. 2022).

[3] *See Chamberlain v. Giampapa*, 210 F.3d 154, 159-61 (3d Cir. 2000); *Liggon-Redding v. Est. of Sugarman*, 659 F.3d 258, 262-64 (3d Cir. 2011); *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 303-04 (3d Cir. 2012); *Schmigel v. Uchal*, 800 F.3d 113, 119-20 (3d Cir. 2015); Pet. App. 1a-11a.

A. Factual Background

Petitioner Harold R. Berk is a resident and citizen of Florida who also owns a home in Delaware. Pet. App. 33a. In August 2020, petitioner sustained injuries to his left ankle and foot after falling out of bed in his Delaware home. Pet. App. 34a-35a. He was taken by ambulance to the emergency room at Beebe Healthcare, a facility owned by Respondent Beebe Medical Center, Inc. ("Beebe"). *Id.* An X-ray revealed fractures to the tibia and fibula. Respondent Dr. Wilson C. Choy recommended petitioner's ankle be placed in a splint. Pet. App. 35a. Because petitioner had chronic injuries in his lower extremities, however, Dr. Choy agreed that a controlled ankle monitor ("CAM") boot should be used instead. Pet. App. 35-36a.

Beebe Healthcare staff attempted with difficulty to fit petitioner with the CAM boot. Pet. App. 36a-37a. The staff repeatedly and forcibly twisted and turned petitioner's fractured leg and manipulated his ankle in an attempt to force the boot onto his foot, ultimately failing to do so. *Id.* These efforts aggravated and worsened petitioner's existing fractures and led him to suffer extreme pain. *Id.* Nevertheless, no additional X-ray imaging of petitioner's ankle was performed. Pet. App. 38a.

Petitioner remained hospitalized following the botched CAM boot placement. Pet. App. 37a-38a. Dr. Choy visited petitioner that evening and advised him surgery would not be required for either fracture. Pet. App. 37a. Dr. Choy also advised petitioner not to put weight on his left leg for eight weeks. Pet. App. 39a. He gave no indication that he had consulted with the staff about their failed, painful efforts to apply the CAM boot to petitioner's leg; nor did Dr. Choy order additional X-rays. Pet. App. 37a-38a.

After three days at Beebe Healthcare, petitioner was transferred to Encompass Health Rehabilitation Hospital of Middletown, owned by Respondent Encompass Health Rehabilitation Hospital of Middletown, LLC ("Encompass"). Pet App. 38a. While at the Encompass facility, petitioner noticed his left leg appeared deformed and was oriented at an unusual leftward angle. *Id.* Encompass staff were informed of the issue and, in fact, noted the left foot was "somewhat rotated externally." Pet. App. 39a. But no X-rays were performed or treatment otherwise provided—to the contrary, petitioner was made to participate in physical and occupational therapy requiring him to place weight on his injured left leg, despite Dr. Choy's orders to the contrary. Pet. App. 38a-39a.

A week after his discharge from Encompass, petitioner went to an appointment at Dr. Choy's office (though Dr. Choy himself was not present). Pet. App. 40a. Dr. Choy's physician assistant ordered an X-ray of petitioner's left ankle. *Id.* That imaging showed petitioner's leg was severely deformed, with his fractured bones pointing in three different directions, a serious injury known as a trimalleolar ankle fracture. Pet. App. 40a-41a. After consulting with Dr. Choy by phone, the physician assistant informed petitioner he required immediate surgery to correct these deformities. *Id.* Petitioner then contacted Dr. Steven Raikin, then-head of the ankle and foot practice at the Rothman Orthopaedic Institute. Pet. App. 41a. Dr. Raikin reviewed the imaging and confirmed it showed major deformities in petitioner's left ankle; urgent surgery was necessary. Pet. App. 41a-42a. Petitioner was taken that same day to Thomas Jefferson University Hospital. Pet. App. 42a. After a diuresis procedure to reduce fluid from petitioner's lungs, Dr. Raikin performed the needed surgery. Pet. App. 43a. At the conclusion of the operation, an external fixator

device was installed into petitioner's bones to hold the ankle in alignment as it healed. *Id.*

After four months of constant pain and repeated treatments for leg ulcers, Dr. Raikin performed a second successful surgery to remove the external fixator. Pet. App. 43a-44a. Months of extensive physical and occupational therapy followed. Pet. App. 44a. Over a year after the original incident, petitioner was finally able to walk short distances with a cane in October 2021. *Id.*

B. Legal Background

1. Federal courts sitting in diversity must "apply state substantive law and federal procedural law." *Hanna*, 380 U.S. at 465. When both a federal rule and a state law purport to answer the same question of procedure, the federal rule will govern, assuming the federal rule is constitutional and within the scope of the Rules Enabling Act—notwithstanding the contrary state provision. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (majority op.). The first question, then, is whether any Federal Rule of Civil Procedure "answer[s] the same question" as the state law or rule. *Id.* at 401. If so, a court must then ask whether the Federal Rule is valid under the Rules Enabling Act and the federal Constitution. *Id.* at 398. If so, the inquiry ends—the court must apply the Federal Rule over the state law or rule.

2. Numerous states have enacted "affidavit of merit" laws that require "medical-malpractice plaintiffs to file an affidavit (either before, contemporaneously with, or shortly after filing a complaint) signed by an expert or the plaintiff's attorney attesting to the expert's belief that the case is meritorious." Jason C. Sheffield, *Congress Prescribes Preemption of State Tort-Reform Laws to Remedy Healthcare "Crisis": An Improper Prognosis?*, 32 J. L. & Health 27, 29 (2019); *see also* 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*

§ 4511 (3d ed.) (describing statutes). These statutes are also sometimes referred to as "certificate of review," "certificate of merit," "good-faith certificate," and "expert report" statutes. As of 2019, "twenty-seven states require[d] a certificate of merit in medical-malpractice cases." Sheffield, *supra* at 29; *see also id.* at 37-47 (surveying statutes).

The Delaware General Assembly passed an affidavit of merit statute in 2003 amendments to the State's Medical Negligence Act. The Delaware AOM statute requires "that all complaints alleging medical negligence be accompanied by an affidavit of merit, signed by a qualified expert witness and stating that there are reasonable grounds to believe that each defendant has committed medical negligence." *Dambro v. Meyer*, 974 A.2d 121, 132-33 (Del. 2009) (citing 18 Del. C. § 6853). "If the required affidavit does not accompany the complaint . . . then the Prothonotary or clerk of the court *shall refuse to file the complaint and it shall not be docketed* with the court." 18 Del. C. § 6853(a)(1) (emphasis added). This affidavit is a "filing requirement[]," *Dishmon v. Fucci*, 32 A.3d 338, 342 (Del. 2011), without which a case cannot "get through the courthouse doors," *Mammarella v. Evantash*, 93 A.3d 629, 637 (Del. 2014); *see also Dishmon*, 32 A.3d at 344-45 (without AOM, "the Court will not entertain the case"); *Duross v. Connections CSP, Inc.*, No. N19C-05-048, 2019 WL 4391231, at *3 (Del. Super. Ct. Sept. 13, 2019) (without AOM, "[c]omplaint is statutorily deficient").

C. Procedural Background

1. In November 2022, petitioner initiated this case *pro se* in federal district court for the District of Delaware, alleging claims of medical negligence against Beebe, Dr. Choy, and Encompass. Attempting to comply with Delaware's AOM statute, petitioner filed with the complaint a motion under 18 Del. C. § 6853(a)(2) for an

extension of time to file an affidavit, which was granted. Pet. App. 14a, 16a. In the meantime, each defendant answered and filed cross-claims against its co-defendants. Petitioner then sought an affidavit of merit from Dr. Raikin, who advised that though Petitioner had what Dr. Raikin viewed as a good malpractice case, he could not provide an affidavit. C.A. App'x 202-203. In an attempt to nonetheless comply with the AOM statute, Petitioner filed medical records and documents from Beebe, Thomas Jefferson University Hospital, and the Rothman Orthopedic Institute with the court under seal. Pet. App. 12a, 14a.

After Beebe, Encompass, and Dr. Choy filed motions seeking *in camera* review of the filings to assess whether they satisfied the AOM statute, petitioner filed an opposition to the motions, arguing, *inter alia*, that the State's AOM statute does not apply in diversity actions in federal court. Pet. App. 14a. But the District Court dismissed petitioner's claims for failure to comply with the AOM law. Pet. App. 14a-15a. In its ruling, the District Court concluded Third Circuit law required it to apply the Delaware AOM statute in diversity cases. Pet. App. 14a.

2. The Third Circuit affirmed without argument and in an unpublished opinion. The court held that Delaware's AOM statute did not conflict with the Federal Rules of Civil Procedure, including Rules 8, 9, 11, and 12, and that the AOM statute is "substantive state law" that applies in federal court. Pet. App. 3a-10a.

The Third Circuit recognized that this was not a new or isolated issue in its circuit. In fact, it has addressed this question multiple times and repeatedly upheld the application of state AOM statutes in federal diversity cases. The Third Circuit emphasized that it had consistently held that these state statutes do not conflict with the Federal Rules and must be applied in federal court. The court specifically noted that its previous

decisions regarding the Pennsylvania and New Jersey AOM statutes—including *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258 (3d Cir. 2011), and *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000)—compelled its ruling here. Pet. App. 5a.

The Third Circuit first addressed whether the AOM statute conflicts with Rules 8 or 9. Rule 8 requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief"; Rule 9 governs the pleading of special matters and imposes certain heightened pleading requirements in a small category of cases. The Third Circuit found no conflict with either of those rules, explaining that, under its precedent, an AOM statute does not conflict with Rules 8 or 9 if it "does not require a plaintiff to set forth any factual averments upon which a claim is based," "does not have any effect on what is included in the pleadings of a case or the specificity thereof," and "is not a pleading and need not be filed until well after the complaint." Pet. App. 6a (cleaned up). The Third Circuit held that Delaware's AOM statute meets these requirements. Pet. App. 6a. The court emphasized that "[b]ecause the AOM is not a pleading and serves a different purpose than pleadings do, there is no conflict between the Delaware statute and Rules 8 or 9." Pet. App. 7a.

The Third Circuit turned to Rule 11, which requires attorneys to sign pleadings and certify that they are being filed for a proper purpose and that the claims included have merit. The court explained that the AOM statute does not conflict with Rule 11 because "Rule 11 governs attorney conduct, whereas the Delaware statute governs what an expert must do in a particular type of case." Pet. App. 7a. The court concluded that "[t]hese two rules therefore have different spheres of coverage and do not conflict." Pet. App. 7a (cleaned up).

Finally, the Third Circuit rejected any conflict between the AOM statute and Rule 12, which governs motions to dismiss for failure to state a claim. The court explained that while Rule 12 provides "a mechanism to test the sufficiency of the complaint's factual allegations," the AOM statute "serves an entirely different purpose." Pet. App. 8a. "Whether a complaint is sufficient . . . has no bearing on a court's decision to dismiss an action for failure to comply with an AOM statute." Pet. App. 8a. Delaware's AOM statute instead "contemplates a process for addressing noncompliance that differs from a motion to dismiss based on a pleading defect." Pet. App. 8a. "Therefore, the Delaware AOM statute does not collide with Rule 12." Pet. App. 8a.

In a footnote, the Third Circuit acknowledged the existence of a circuit split regarding whether state AOM statutes apply in federal court. Pet. App. 8a n.10. The court recognized that five circuits—the Second, Fourth, Sixth, Seventh, and Ninth circuits—have held that similar AOM statutes do not apply in federal court. Pet. App. 8a n.10. The Third Circuit stated that "[m]any" of the cases were "federal question cases" rather than diversity cases and appeared to suggest (without explicitly stating) that state AOM statutes may not apply in federal question cases. *See* Pet. App. 8a n.10. The court stated that the Sixth and Ninth circuits' positions were "further distinguishable because they treat AOMs as pleadings . . . which is contrary to our conclusion that AOMs are not pleadings where, as here, the state AOM statute permits temporal separation of the filing of the complaint and the AOM." Pet. App. 8a n.10 (cleaned up).[4]

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[4] The Third Circuit incorrectly described the Ninth Circuit decision in *Martin v. Pierce County*, 34 F.4th 1125 (9th Cir. 2022), as addressing an AOM statute. Pet. App. 8a n.10. In fact, *Martin* concerned a Washington provision requiring medical-malpractice

After concluding that there was no conflict between Delaware's AOM statute and the Federal Rules, the court analyzed whether the AOM statute is substantive under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and therefore applicable in federal diversity cases. Pet. App. 8a-11a. The court applied the two-part *Erie* inquiry, evaluating: (1) whether the state law is outcome determinative, and (2) whether failure to apply the state law would frustrate the twin aims of *Erie*—discouraging forum shopping and avoiding inequitable administration of the law. Pet. App. 8a-9a.

The court found that Delaware's AOM statute is outcome determinative because failure to comply "can result in the dismissal of [a] case." Pet. App. 9a. The court then concluded that failure to apply Delaware's AOM statute would frustrate the twin aims of *Erie*. Pet. App. 9a-10a. The Third Circuit reasoned that forum shopping would be a concern because plaintiffs unable to secure an AOM would have an incentive to file in federal court. Pet. App. 9a. And permitting diverse plaintiffs to file federal cases without complying with the AOM statute would "force[]" defendants "to engage in additional litigation and expense in a non-meritorious malpractice suit simply because the plaintiff was from a different state." Pet. App. 9a-10a. "Accordingly" the Third Circuit found "both aims of *Erie* are satisfied by enforcing the Delaware AOM statute in federal court." Pet. App. 10a.

In a footnote, the court noted that Judge Phipps "concur[red] in only the judgment." Pet. App. 11a n.12.

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plaintiffs to file with their complaint a declaration declining to submit the case to arbitration. *See Martin*, 34 F.4th at 1126-27 (citing Wash. Rev. Code § 7.70A.020). *Martin* nevertheless drew heavily on AOM case law from the Second, Fourth, Sixth, and Seventh circuits and applied the same approach to conclude that the Washington statute is "displaced … in federal court" by the Federal Rules. *Id.* at 1132.

"Judge Phipps agree[d] with the disposition of [the] appeal because he [saw] no persuasive grounds for preventing the legal reasoning in this Court's prior precedents." Pet. App. 11a (collecting Third Circuit precedents holding that materially similar AOM statutes from Pennsylvania and New Jersey apply in federal court). But, Judge Phipps explained that if he were "writing on a clean slate . . . he may not arrive at that same conclusion." Pet. App. 11a n.12.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT OVER A SIGNIFICANT QUESTION

The decision below deepens an entrenched and undeniable conflict over a question that one circuit recognized is "of significance not only in [this circuit], but also in other circuits which are divided about whether analogous 'state law certification requirements should be given effect in a federal court.'" *Corley v. United States*, 11 F.4th 79, 87 (2d Cir. 2021) (Lynch, J.) (citation omitted). The conflict is stark: multiple circuits, including the Third Circuit below, have openly acknowledged the split and repeatedly rejected the positions of their sister circuits. The uncertainty is pervasive, with even some courts on the majority side of the divide disagreeing on the exact reasoning for finding AOM statutes inapplicable in federal court. This disarray only underscores the urgent need for this Court's intervention:

- Six circuits—the Second, Fourth, Fifth, Sixth, Seventh, and Ninth—hold that affidavit of merit provisions and comparable statutes must not apply in federal court because they conflict with one or more Federal Rules.
- Two circuits—the Tenth and Third—hold that affidavit of merit statutes must apply in federal

court because they are substantive and do not conflict with any Federal Rules.

The stark division over this fundamental question is untenable. It breeds uncertainty and confusion about which procedural rules govern actions in federal courts, undermining the consistency the Federal Rules are meant to provide. Worse still, it highlights a broader, unresolved uncertainty in the lower courts about how to conduct conflicts analysis—an uncertainty that has persisted since this Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). This confusion demands immediate resolution.

The conflict here is unmistakable and entrenched, openly acknowledged by courts and commentators alike, with no realistic prospect of resolving itself. *See, e.g.*, *supra* note 1. Litigants face dramatically different procedural rules depending solely on where their case is heard, creating enormous disparities in the application of state AOM statutes in federal courts. This split has persisted for decades, now standing at 6-2, with each side firmly committed to its position. Any hope that this division will resolve itself is long gone. The conflict is ripe for resolution, and this Court's intervention is urgently needed to provide definitive guidance on how to address Federal Rules conflicts in cases involving AOM statutes. The circuit split is undeniable, deeply rooted, and should be settled by this Court in this case.

A.1. The decision below directly conflicts with settled law in the Sixth Circuit. In *Gallivan v. United States*, the Sixth Circuit unequivocally held that state-law affidavit-of-merit requirements materially similar to Delaware's do not apply in federal court. 943 F.3d 291, 293-94 (6th Cir. 2019) (Thapar, J.).[5] The court provided a clear and

[5] Just like in Delaware, the Ohio rule at issue in *Gallivan* "require[d] a person alleging medical negligence to include a

detailed analysis of why such requirements conflict with the Federal Rules of Civil Procedure. *Id.* Applying the framework from *Shady Grove*, 559 U.S. at 398-406, the Sixth Circuit concluded that Rules 8 and 12 establish the exclusive requirements to state a claim for relief in federal court. 943 F.3d at 293-94. State laws that purport to impose additional requirements are therefore inapplicable. *Id.*.

The *Gallivan* court's reasoning was straightforward. Rule 8(a) sets forth the requirements for a complaint, and "implicitly 'excludes other requirements that must be satisfied for a complaint to state a claim for relief.'" *Id.* at 293 (citation omitted). Rule 12, in turn, allows a complaint to survive a motion to dismiss by simply alleging facts "sufficient to state a claim to relief that is plausible on its face," without requiring any "evidentiary support." *Id.* Additionally, "Rule 9 confirms the point by specifying the few situations when heightened pleading *is* required—for instance, when a party alleges fraud or mistake." *Id.* at 293-94.

Critically, the Sixth Circuit explicitly rejected arguments that state affidavit-of-merit requirements should apply in at least some contexts in federal court. The court rebuffed the United States' contention that the Federal Rules of Civil Procedure should be more readily displaced in Federal Tort Claims Act (FTCA) cases like *Gallivan* than in diversity cases. *Id.* at 294. The court emphasized that "Rule 1 states that the Federal Rules apply in basically all civil actions in federal court" and that an "FTCA action is a civil action in federal court." *Id.* As such, the Federal Rules apply absent clear instructions to the contrary. *Id.*

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medical professional's affidavit stating that the claim has merit" with his complaint. 943 F.3d at 293 (citing Ohio Civ. R. 10(D)(2)).

The Sixth Circuit also thoroughly engaged with and rejected the argument that there was no conflict between the AOM statute at issue and the federal rules. *Id.* at 296-97. At bottom, the Sixth Circuit concluded that the affidavit of merit statute functioned as "a pleading requirement that does *not* go to the merits of a medical-negligence claim." *Id.* at 296. As a consequence, there was a "clear conflict between the federal pleading rules and the state affidavit-of-merit requirement" under this Court's guidance in *Shady Grove*. *Id.* at 296-97.

Gallivan squarely addresses the issue presented here and provides a thorough, well-reasoned analysis for why state affidavit-of-merit requirements do not apply in federal court. Its holding and reasoning are directly at odds with the decision below.

2. The decision below also directly conflicts with settled law in the Seventh Circuit. In *Young v. United States*, the Seventh Circuit also held that state-law affidavit-of-merit requirements just like Delaware's do not apply in federal court. 942 F.3d 349, 351 (7th Cir. 2019) (Easterbrook, J.).[6] The court provided a clear and detailed analysis of why such requirements conflict with the Federal Rules of Civil Procedure, which provide the exclusive pleading standards in federal court. *Id.* at 350-51.

The *Young* court's reasoning was straightforward. The court explained that "Rule 8 of the Federal Rules of Civil Procedure specifies what a complaint must contain" and "does not require attachments." *Id.* at 351. The court emphasized that in federal court, one can "initiate a

[6] As in Delaware, the Illinois statute at issue in *Young* requires an affidavit stating that "there is a reasonable and meritorious cause" for litigation (along with a physician's report supporting the affidavit) to be attached to the complaint unless an exception applies. 942 F.3d at 350-51 (citing 735 Ill. Comp. Stat. § 5/2-622).

contract case without attaching the contract, an insurance case without attaching the policy, a securities case without attaching the registration statement, and a tort case without attaching an expert's report." *Id.* "Many cases hold that federal, not state, rules apply to procedural matters—such as what ought to be attached to pleadings—in all federal suits, whether they arise under federal or state law." *Id.* Thus, the affidavit of merit statute conflicted with Rule 8. *Id.*

Young squarely addresses the issue presented here and its holding and reasoning are directly at odds with the decision below. The Seventh Circuit's decision in *Young* is particularly noteworthy because the Illinois statute at issue operated in a manner almost precisely identical to the Delaware statute in this case. The Seventh Circuit's unequivocal holding that 735 Ill. Comp. Stat. § 5/2-622 does not apply in federal court, to the extent it functions as a procedural rule, is in direct conflict with the Third Circuit's decision below.

3. The decision below also directly conflicts with settled law in the Second Circuit. In *Corley v. United States*, the Second Circuit held that state-law affidavit-of-merit requirements like Delaware's do not apply in federal court. 11 F.4th at 88-89.[7] In reaching the conclusion that such AOM statutes conflict with Rules 8, 9, and 12, the Second Circuit looked to and followed the

[7] As in Delaware, the Connecticut law at issue in *Corley* required a party filing a medical malpractice action to affix to the complaint a certificate stating that "reasonable inquiry gave rise to a good faith belief that grounds exist for an action." 11 F.4th at 85 (quoting Conn. Gen. Stat. § 52-190a(a)). And to show the existence of such good faith, the certificate was required to attach "a written and signed opinion of a similar health care provider [to the treating physician] … that there appears to be evidence of medical negligence" along with a "detailed basis for the formation of such opinion." *Id.*

Sixth Circuit's analysis in *Gallivan*. *Id.*[8] The Second Circuit found the reasoning of *Gallivan* "instructive." *Id.* at 89. "All that Federal Rule of Civil Procedure 8 requires," the Second Circuit explained, is a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). "The Rule embodies a policy of 'notice pleading' that eschews the need to plead specific types of documentary evidence to establish a plausible claim." *Id.* "This is in direct contrast to the heightened pleading requirement" imposed by AOM statutes. *Id.* Thus, the Second Circuit held that such AOM statutes conflict with the Federal Rules. *Id.*

Corley squarely addressed the question presented and reached a holding utterly irreconcilable with the answer given by the Third Circuit below. The Second Circuit's unequivocal holding that AOM requirements do not apply in federal court is in direct conflict with the Third Circuit's decision below.

4. The decision below further directly conflicts with settled law in the Fourth Circuit. In *Pledger v. Lynch*, the Fourth Circuit also unequivocally held that state AOM laws conflict with the Federal Rules of Civil Procedure.[9] 5

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[8] The Second Circuit in *Corley*, like the Sixth Circuit in *Gallivan*, also rejected the United States' argument that that the Federal Rules of Civil Procedure should be more readily displaced in FTCA cases than in diversity cases. 11 F.4th at 88-89.

[9] Similar to Delaware, the West Virginia law at issue in *Pledger* imposed a pre-suit notice and certification requirement for medical negligence cases. 5 F.4th at 517-18 (citing W. Va. Code § 55-7B-6). Under that law, would-be medical malpractice plaintiffs must serve on each putative defendant, at least thirty days prior to filing suit, a notice of claim that includes a "screening certificate of merit" from a health care provider who qualifies as an expert under state law. *See id.* And in that certificate, the expert must set out and explain her judgment that the "applicable standard of care was breached" in a way that "resulted in injury or death." *Id.*

F.4th 511, 518-20 (4th Cir. 2021) (Harris, J.). Explaining that it was joining a "growing consensus" of courts, the Fourth Circuit looked to the Sixth Circuit's analysis in *Gallivan* and the Seventh Circuit's analysis in *Young* in similarly concluding that AOM statutes conflict with Federal Rules of Civil Procedure 8, 9, and 12. *Id.* at 518-20. "Following their guidance," the Fourth Circuit held, "we conclude that the Federal Rules governing the sufficiency of pleadings likewise answer the 'question in dispute' here, and thus supplant" state AOM requirements. *Id.* at 519. Rule 8 only requires a short plain statement to state a claim—no further documents are required. *Id.* at 520. Rule 9 provides the narrow set of circumstances in which the pleading requirements may be heightened. *Id.* And Rule 12 provides the exclusive list of bases for dismissing an action, none of which include the failure to provide a document. *Id.*[10] The Fourth Circuit also held that AOM statutes additionally transgress Rule 11 because it is the federal rule designed to deter frivolous lawsuits, and thus to the extent AOM statutes seek to accomplish the same purpose through a different mechanism, they are in conflict. *Id.*

Judge Quattlebaum dissented from the majority's holding that AOM statutes conflict with any of the Federal Rules of Civil Procedure. *Pledger*, 5 F.4th at 527-35 (Quattlebaum, J., concurring in part and dissenting in part). He argued that the Federal Rules do not actually answer the question of whether a certificate of merit is required, finding no direct conflict under the *Shady Grove* analysis. *Id.* at 527-32. Ultimately, Judge Quattlebaum—in line with the reasoning of the Third Circuit—concluded

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[10] The Fourth Circuit in *Pledger*, like the Sixth Circuit in *Gallivan* and Second Circuit in *Corley*, also rejected the United States' argument that that the Federal Rules of Civil Procedure should be more readily displaced in FTCA cases than in diversity cases. *Pledger*, 5 F.4th at 522.

that because the relevant certificate of merit requirement is substantive state law and does not conflict with the Federal Rules, it should apply in federal court. *See id.*

5. The decision below also conflicts with settled law in the Fifth Circuit. In *Passmore v. Baylor Health Care System*, the Fifth Circuit held that even AOM statutes with a twist—requiring an expert report within 120 days of a defendant's answer, rather than alongside the complaint—*also* cannot apply in federal court. 823 F.3d 292, 293 (5th Cir. 2016). The Fifth Circuit concluded that by requiring an expert report on a mandatory timeline, and instructing that complaints must be dismissed if the deadline is missed, the Texas AOM statute at issue conflicted with Rules 26 and 37 of the Rules of Civil Procedure. *See id.* at 296-97; *see also id.* at 294 (describing statute's requirements). Rule 26(a), the Fifth Circuit held, governs pretrial disclosures and discovery, including the disclosure of expert reports, and Rule 37(c) provides the consequences for a party's failure to comply with Rule 26(a) requirements. *Id.* at 296. Those rules conflict with, and thereby displace, a state AOM requirement that purports to require the filing of an expert report on a mandatory timeline and purports to set the consequences (dismissal) for failure to comply. *See id.* at 296-98.

Four judges—Jones, Smith, Clement, and Owen—dissented from the denial of rehearing en banc. *Passmore v. Baylor Health Care Sys.*, 841 F.3d 284 (5th Cir. 2016). In their view, the panel "does not apply *Erie*-related concepts accurately." *Id.* at 285. The dissenters also stated that the decision of the panel was irreconcilable with the decisions of the Third Circuit and Tenth Circuit that had held that AOM statutes can lawfully apply in federal court. *See id.* at 285-86 (citing and discussing *Liggon-Redding v. Est. of Sugarman*, 659 F.3d 258 (3d Cir. 2011) and *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996)).

6. The decision below further conflicts with settled law of the Ninth Circuit. In *Martin v. Pierce County*, the Ninth Circuit applied AOM case law from the Second, Fourth, Sixth, and Seventh circuits to hold that federal courts may not apply a Washington statute that requires a medical-malpractice plaintiff to file with their complaint a declaration electing or declining arbitration. 34 F.4th 1125, 1129-32 (9th Cir. 2022). Although the Ninth Circuit noted that no court had yet addressed "a declaration requirement exactly like Washington's," AOM cases "provide[d] a useful analogy" because "they generally require plaintiffs to file a declaration with the pleadings containing some reassurance, usually by an expert, that the claim has merit." *Id.* at 1129.

Recognizing the "'growing consensus' among federal circuit courts that such certificate requirements do not govern actions in federal court, because they conflict with and are thus supplanted by the Federal Rules of Civil Procedure," the Ninth Circuit concluded that the Washington statute creates materially identical conflicts and is accordingly displaced. *Id.* at 1130-32 (quoting *Pledger*, 5 F.4th at 518). Embracing and applying the reasoning of the Fourth Circuit in *Pledger*, the Sixth Circuit in *Gallivan*, and the Seventh Circuit in *Young*, the Ninth Circuit held that "Rule 8's requirement of a 'short and plain statement' of the plaintiff's claim, jurisdictional statement, and explanation of the relief sought is 'a list of elements that implicitly excludes other requirements.'" *Id.* at 1130 (quoting *Pledger*, 5 F.4th at 519). Because the Washington statute attempted to add additional requirements to that exclusive list, the Ninth Circuit held that it was displaced by Rule 8. *Id.*

The Ninth Circuit also held that the Washington statute was displaced by Federal Rule 3. *Id.* at 1131-32. Adopting the "instructive" reasoning of a Sixth Circuit decision that followed *Gallivan*, the Ninth Circuit held

that Rule 3 "requires only the filing of a complaint to commence an action—nothing more." *Martin*, 34 F.4th at 1131 (quoting *Albright v. Christensen*, 24 F.4th 1039, 1046 (6th Cir. 2022)). The Washington statute conflicted with that rule "by adding additional, procedural steps for commencing a suit beyond those that Rule 3 contemplates." *Id.* Because Rule 3 "governs *how* a lawsuit is commenced," and Washington's law requires filing a declaration "*when commencing* a medical malpractice claim," the Ninth Circuit held that the state provision was displaced by Rule 3. *Id.*

B. In sharp contrast with the six circuits discussed above, the Third and Tenth circuits have held that affidavit of merit statutes do not conflict with any valid federal rules.

1. In a series of cases culminating in the decision below, the Third Circuit has repeatedly and consistently held for decades that AOM statutes do not conflict with any Federal Rules of Civil Procedure. *See* Pet. App. 1a-12a; *Schmigel v. Uchal*, 800 F.3d 113, 119 (3d Cir. 2015); *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 303-04 (3d Cir. 2012); *Liggon-Redding v. Est. of Sugarman*, 659 F.3d 258, 262-64 (3d Cir. 2011); *Chamberlain v. Giampapa*, 210 F.3d 154, 159-61 (3d Cir. 2000). The Third Circuit has reasoned that AOM statutes do not affect pleading requirements and therefore do not conflict with Rules 8 or 9, and that failure to include an affidavit of merit is simply another grounds for dismissal, and therefore does not conflict with the enumerated bases for dismissal set forth in Rule 12. *See* Pet. App. 6a-8a.[11]

[11] In the decision below, the Third Circuit purported to distinguish this case from the contrary holdings of other circuits on the basis that this is a diversity case. Pet. App. 8a n.10. But as the Sixth Circuit persuasively explained in *Gallivan*, there is absolutely no

2. The Tenth Circuit has taken the same position as the Third Circuit. In *Trierweiler v. Croxton & Trench Holding Corp.*, the Tenth Circuit held that AOM statutes do not "collide[] with any federal procedural rule[s]." 90 F.3d 1523, 1539-40 (10th Cir. 1996).[12] After examining the statute and the Federal Rules, the Tenth Circuit concluded that no Federal Rule was "directly on point." *Id.* at 1540. The only rule that it could even be "argued" would result in a direct collision, according to the Tenth Circuit, was Rule 11. *Id.* at 1540. Both the AOM statute and Rule 11 "demonstrate an intent to weed unjustifiable claims out of the system." *Id.* But "[d]espite the superficial similarity of the two rules," the Tenth Circuit "conclude[d] that they do not collide." *Id.* Each could "exist side by side," "controlling its own intended sphere of coverage without conflict." *Id.* (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)). Thus, "[a]lthough the state and federal rules [were] similar," there was "no 'direct collision' between the two." *Id.*

The Tenth Circuit's conflicts analysis—which looks identical to the Third Circuit's analysis in this case, including reliance on *Walker v. Armco Steel Corp.* for its conflicts analysis—is irreconcilable with the conflicts analysis used to hold that AOM statutes and similar

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difference in *Erie* analysis between an FTCA case and a diversity case. *See Gallivan*, 943 F.3d at 295. The basis for jurisdiction does not change the nature of the action or the application of the Federal Rules of Civil Procedure, which apply to "all civil actions." Fed. R. Civ. P. 1.

[12] Similar to Delaware, the Colorado statute in *Trierweiler* required the plaintiff's attorneys in professional negligence cases to certify, within sixty days of filing the complaint, that an expert had examined the clients' claims and found them to have "substantial justification," with failure to comply with this requirement resulting in dismissal. 90 F.3d at 1537-38 (citing Colo. Rev. Stat. § 13-20-602).

provisions are inapplicable in federal court in the Second, Fourth, Fifth, Sixth, Seventh, and Ninth circuits.

C. Countless courts and commentators have recognized this split. District courts nationwide have discussed the sharp circuit conflict. *See, e.g.*, *Shields v. United States*, 436 F. Supp. 3d 540, 543, 550 (D. Conn. 2020) (discussing split); *Petrus v. United States*, No. 16-53, 2022 WL 910263, at *2-3 (D.V.I. Mar. 29, 2022) (same); *Deblois v. Corizon Health, Inc.*, No. ELH-20-1816, 2021 WL 3142003, at *9 (D. Md. July 23, 2021) (same); *Fiorito v. United States*, No. 22-CV-2597, 2023 WL 4407486, at *2 (D. Minn. July 7, 2023) (same); *Straughter v. United States*, No. 4:20-cv-127-DPM, 2022 WL 883546, at *2 (E.D. Ark. Mar. 24, 2022) (recognizing the "law continues to percolate on th[is] complicated issue").

Numerous commentators have also recognized the split. *See, e.g.*, *supra* note 1. As the leading treatises on federal civil procedure have explained, collecting dozens of cases on all sides of the split, "the proposition that federal diversity courts must give effect to state rules requiring plaintiffs to certify that their claims have merit now has considerable support," but that "support is far from unanimous." 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4511 (3d ed.) (collecting cases). As another commentator explained, "federal courts of appeals have reached . . . inconsistent results vis-a-vis AOM statutes." D. Chanslor Gallenstein, *Whose Law Is It Anyway? The* Erie *Doctrine, State Law Affidavits of Merit, and the Federal Tort Claims Act*, 60 U. Louisville L. Rev. 19, 34 (2021). "Some courts have held outright that the AOM statutes apply, others have held that the Federal Rules displace state law, while others still have split the baby, and have created intra-circuit splits on the issue." *Id.* It is difficult to picture many rifts in circuit authority more glaring and far-reaching than this.

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The conflict over the application of state AOM statutes in federal court is entrenched and intractable, creating a 6-2 circuit split. This deep division has persisted for decades, with every circuit that has addressed the issue firmly choosing a side. Neither bloc is likely to reverse course, and any further developments will only deepen the confusion and exacerbate the conflict between and within the circuits. Until this Court intervenes, parties will continue to face drastically different procedural rules depending on the circuit in which they file, undermining the uniformity the Federal Rules are meant to provide. Review is urgently warranted.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

A. The question presented in this case is important, with sweeping implications for plaintiffs subject to AOM requirements, and for clarifying the analysis federal courts should use to determine whether state procedural rules conflict with the Federal Rules of Civil Procedure. The decision below reached the extraordinary conclusion that a state pleading requirement supersedes federal law in federal court. That conclusion defies this Court's *Erie* doctrine precedent, as clarified by *Shady Grove*. It undermines the exclusive authority of the Federal Rules in dictating the necessary and sufficient content of pleadings in federal court. It diverges from the majority of other circuits that have considered—and rejected—the application of state AOM and analogous pleading requirements in these circumstances. And it strikes a blow at a claimant's ability to secure relief in a federal courthouse otherwise open to him.

No further percolation is necessary or likely to benefit the Court in its review of the question presented. Further delay in resolving this question is likely only to

create greater confusion and further entrench the split. Eight circuits now resolutely disagree over how to understand whether state AOM statutes and other requirements conflict with the Federal Rules of Civil Procedure. That conflict is rooted in a more fundamental conflict between the courts of appeals over how to determine whether state procedural rules and Federal Rules of Civil Procedure conflict, with consequences across numerous categories of state-created procedural rules that might have application in federal courts. *See, e.g.*, *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333-34 (D.C. Cir. 2015) (Kavanaugh, J.) (rule requiring plaintiffs in certain actions to establish a likelihood of success on the merits in response to special motion or face dismissal); *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1355, 1358-60 (11th Cir. 2014) (rule requiring plaintiffs in certain cases to file a written verification that the claim is "well grounded in fact, . . . warranted under existing law, and . . . not made for an improper purpose").

Clarity about this important question is critical. Stakeholders should know the steps they must take to successfully litigate their cases, which requires understanding, at a basic level, which procedural rules govern in federal courts. As this Court has noted, the entire purpose of the Rules is to provide litigants with uniform, nationwide rules of procedure in federal court. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). "Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules." *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring).

Yet as it now stands, parties have different rights to bring medical malpractice suits based on nothing more than the fortuity of where their case happens to arise. And the *tests* used to determine whether other state

procedural rules might apply in diversity and federal question suits involving state-law claims are just as variable and uncertain. Nor is there any hope of this issue resolving itself. Each side of the split has staked out its position, and the competing arguments have been thoroughly examined. The question is ripe for review.

The number of cases in which federal and state procedural rule conflicts potentially arise confirms the issue's importance. This Court's decision in *Shady Grove*, 559 U.S. 393, the last time the Court weighed in on this issue, has been cited more than 1,500 times by the lower courts, including in nearly 200 court of appeals cases. Just with respect to medical malpractice alone, the issue of the applicability of AOM statutes in federal court has arisen at least *five times* in the Third Circuit. There is a reason this issue has gotten the attention it has, including in the leading treatises on civil procedure and federal practice. *See supra* note 1.

B. This case is the ideal vehicle to resolve the conflict among the circuits. This case ended on dismissal of the complaint for failure to include an affidavit of merit. Whether an affidavit of merit is a necessary prerequisite to the maintenance of this suit in federal court is the sole issue this case presents, and it was litigated and outcome determinative at every stage of this case.

The court of appeals ruled against petitioner solely because his complaint was not accompanied by an affidavit of merit. Petitioner's case would have proceeded to discovery had he filed it in the Second, Fourth, Fifth, Sixth, Seventh, or Ninth circuits, but instead it was dismissed because this case arose in the Third. This clean presentation is the perfect backdrop for a definitive resolution of this issue by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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