No. 24-440

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.,

Respondents.

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

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BRIEF AMICUS CURIAE OF CIVIL PROCEDURE PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici are law professors who teach civil procedure including the issues presented in this petition. Professors Helen Hershkoff, Arthur Miller, and John Sexton teach at New York University School of Law and are three of the co-authors of a leading civil procedure casebook, Friedenthal, Miller, Sexton, Hershkoff, Steinman, & McKenzie, Civil Procedure: Cases and Materials (13th ed. 2022). Professor Alan Morrison is an associate dean and teaches at the George Washington University Law School.

Amici agree that the Third Circuit incorrectly applied the law of Delaware instead of Federal Rule of Civil Procedure 8. They offer their analysis of the legal issue to provide additional support for the petition and to underscore the importance of this question to the maintenance of the overall coherence of the Federal Rules as a unified system of civil procedure in the federal courts.

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[1] Pursuant to Rule 37.6, amici state that no party, counsel for any party, or any person other than amici and their counsel authored this brief or made any monetary contribution for its preparation or submission. As required by Rule 37.2, counsel of record for the amici advised counsel for respondents on October 21, 2024, of their intention to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the petition demonstrates, the question presented plainly meets all of this Court's criteria for granting review under Rule 10. There is a significant conflict among the circuits, and in this case the Third Circuit declined to re-examine its prior rulings even when petitioner called the conflicts with other circuits to its attention. The decisions of the Third Circuit are also inconsistent with this Court's decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 U.S. 393 (2010), which provided directions on how to resolve the kind of conflict between the Delaware statute at issue in this case and the Federal Rules of Civil Procedure. Moreover, the question presented is an important and recurring one, namely whether state laws that impose additional requirements for complaints beyond those set forth in Rule 8 must be followed where the effect of that state law is close the door of the district courts in diversity actions before plaintiffs have an opportunity to establish the legal and factual merits of their claims.

The Delaware law at issue, 18 Del. Code § 6853, which is set forth in full in the Appendix to this brief ("App."), requires that a complaint in a "health-care negligence" lawsuit must be accompanied by an affidavit of a qualified medical expert attesting to the validity of the claims against each defendant— three separate providers in this case, each involving different acts of negligent medical treatment over a two-year

period. The time to file may be extended for good cause for 60 days.

The Delaware legislature has also imposed a detailed set of rules to implement the affidavit requirement, which, if the Third Circuit is correct, would have to be followed by the federal courts. First, paragraph (a)(1) directs that if the required affidavit or motion for an extension "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." Second, subsection (c) sets forth the qualifications for the expert affidavit even though the law on the qualifications of experts in the federal courts is contained in Federal Rule of Evidence 702 and the cases interpreting it.

Third, in contrast to Federal Rule 26(c), which sets forth the standards for protective orders, the final sentence in paragraph (a)(1) directs that the required affidavit "shall be and remain sealed and confidential" except as provided in subsection (d), which deals with access by the defendant to the affidavit. Fourth, under subsection (b), an affidavit of merit does not have to be submitted "if the complaint alleges a rebuttable inference of medical negligence, the grounds of which are set forth below in subsection (e) of this section." Subsection (e) in turn contains very complicated rules that cover when "liability …based upon asserted negligence" is established, which district judges would have to follow if section 6853 applied in this case. App at 3a-4a. Fifth, in contrast to the mandates of Federal Rule 12, under paragraph (a)(4), no defendant is "required to take

any action with respect to the complaint in such cases until 20 days after plaintiff has filed the affidavit or affidavits of merit."

Sixth, subsection (d) further intrudes on the procedures otherwise applicable in diversity suits in federal court. When a defendant asks the court to determine the sufficiency of a medical affidavit, it must do so *in camera*. This provision also makes the affidavit not subject to discovery, as well as imposing other restrictions regarding its use and the immunity given the expert who swore to it, despite Federal Rule 26 that bears directly on these issues. Finally, that provision further mandates that the "affidavit of merit and [the expert's] curriculum vitae shall be filed with the court in a sealed envelope" that states that its contents "may only be viewed by a judge of the Superior Court."

In addition to the specific conflicts with Rule 8 on pleadings and other Rules that the Third Circuit permitted, the essential flaw in the decision below and in the opinions of other judges who have permitted similar state law intrusions in diversity cases is that they fail to recognize that the Federal Rules of Civil Procedure constitute an interlocking system under which the district courts are directed in Rule 1 to bring about the "just, speedy, and inexpensive" resolution of all civil actions. To achieve those goals, the Rules create a unified approach to resolving civil cases that would be undermined here by the addition of the numerous provisions of Delaware law that district judges will have to follow to implement section 6853. It is the balances struck among the many tradeoffs in the Rules that are upset when, as here, Delaware

attempts to impose its view as to what plaintiffs in medical negligence cases need to establish before they can even start their cases and how the district courts must determine whether the requirements of section 6853 have been satisfied. Accordingly, the Court should grant the petition and reverse.

ARGUMENT

In enacting the Rules Enabling Act of 1934, now codified at 28 U.S.C. §§ 2071 et seq., Congress directed that this Court, acting through a special drafting committee, create a uniform system of rules to be used for adjudicating civil cases in the district courts. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules." *Hanna v. Plumer,* 380 U.S. 460, 472-73 (1965).

Prior to 1938, when the Federal Rules became effective, the district courts applied the procedural rules of the state court in which they were located. The promulgation of the Rules substantially reduced the prior lack of uniformity so that, subject to any local district court rules, lawyers would have one set of procedural rules to use in federal courts across the country.

The drafters set as their overall goal that all cases should be decided on the merits, based on the facts adduced and the relevant law, which included the Rules of Decision Act, 28 U.S.C. § 1652. To

achieve that goal, the drafters sought to eliminate many of the procedural barriers that prevented courts from reaching the merits. Furthermore, in order to lessen the likelihood of a case being decided by surprise, the new rules on discovery provided ready access to information held by the other side and third parties. On the defense side the Rules provided for motions to dismiss for legal insufficiencies at an early stage and summary judgment once discovery was completed. The central proposition is that the drafters and eventually this Court developed an overall system which sought to balance the interests of plaintiffs, defendants, the court, and third parties.

Section 6853 Directly Conflicts with Rule 8.

The issue in this case is whether federal district court are required to follow Delaware's requirement that an affidavit of merit must be filed with the complaint in this diversity action. To understand the problems that the decision below creates, it is necessary to examine its direct impacts on Rule 8 and the other Rules that are affected by it.

Rule 8 provides that a complaint must contain a "short and plain statement of the claim," include the basis of subject matter jurisdiction, and describe the nature of the relief sought, *i.e.,* money damages or an injunction. When the Rules were first promulgated, there were model forms that illustrated just how bare bones valid complaints

could be. Rule 8 was a marked change from the prior practice and came to be known as notice pleading. A plaintiff only had to tell the defendant the basics of the suit - who, where, when, and what claim – so that the defendant could begin to prepare its defense. The minimal nature of the requirements for most complaints is made clear by the exception in Rule 9(b) for claims based on fraud or mistake for which plaintiffs must include "with particularity" the circumstances giving rise to those claims. And under Rule 11(a), complaints need not be made under oath, but that is one of the affidavit requirements of section 6853.

Rule 20 permits the joinder of multiple defendants where the claims involve the same transaction or, as in this case, the continued course of petitioner's treatment over many months by three different providers. At the initial filing stage, Rule 20 allowed petitioner to sue all three providers without differentiating among them as to which one is responsible for which of his injuries or to allocate his claims for damages among them. Indeed, it is quite likely that, given the lack of pre-trial discovery, even if petitioner could identify qualified experts who would be willing to consider his case, it would be very difficult to obtain an opinion that meets the requirements of Delaware law for each of the three defendants, even within the 60 days allowed post-filing.

This Court has made it clear in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163 (1993), that there are no special pleading rules for specific types of claims, in that case claims arising under 42 U.S.C.

§ 1983. In recent years, the Court has construed Rule 8 to require that the factual allegations in a complaint must be plausible and that conclusory allegations cannot substitute for them, it did so by interpreting Rule 8 to include those requirements. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). But, as the Court observed in *Shady Grove* (for Rule 23), once the requirements of Rule 8 have been met, the Rule "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim." 559 U.S. at 398.

Moreover, when special rules have been created for certain claims, Congress enacted statutes, such as the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 ("PSLRA"). If a PSLRA complaint alleges certain types of securities fraud, subsection (b)(1) adds to Rule 8 and requires that

> the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

In addition, subsection (a)(2) requires the named plaintiff to submit a six-part "sworn certification" affirming the allegations of the complaint. Like section 6853, the separate statement requires a person other than counsel for the plaintiff to submit a supplement to the complaint and requires

that it be under oath, but unlike section 6853, Congress, not the Delaware legislature, imposed these mandates.

The 2022 amendment to Rule 7.1 demonstrates the care with which this Court amends the Rules. Under *Americold Realty Trust v. Conagra Foods Inc.*, 577 U.S. 378 (2016), for a legal entity that does not meet the definition of a corporation in 28 U.S.C. § 1332 (c)(1), its citizenship for diversity purposes is determined by the citizenship of its owners, partners, or members. In order to prevent cases from being dismissed for lack of complete diversity after many years of litigation (as happened in *Americold*), Rule 7.1—not Rule 8—was amended to require that parties file separate statements stating the citizenship of each person whose citizenship might affect complete diversity. This change went through the full rulemaking process under 28 U.S.C. § 2072 so that its impact on all the Rules was considered by the various rules committees, the public, and ultimately by this Court. By contrast, only the Delaware legislature considered the impact of section 6853, and it almost surely did not evaluate how it would affect cases in federal court.

Adding to the ease with which a plaintiff can start a case is Rule 15, which allows a plaintiff to amend the complaint as of right within 21 days after serving it. Further amendments can be made when "the interest of justice requires." The effect of Rule 15 is to prevent plaintiffs from being locked in by their original complaint, further underscoring the commitment of the Rules to assure that discovery and other tools will enable plaintiffs to

have their cases decided on the merits and not based solely on what they can establish when they file their complaint.

Under the Federal Rules, this decided front-end advantage for plaintiffs then shifts by Rule 12 that enables defendants to seek to end the case for both procedural and substantive reasons by moving to dismiss before the plaintiff can take discovery. Those motions include lack of subject matter jurisdiction, personal jurisdiction, and venue, as well the failure of plaintiff to state a valid legal claim. The tradeoff for the latter motion, which would be made under Rule 12(b)(6), is that all of the well-pleaded facts in the complaint must be taken as true, so that only the legal merits of the claims are at issue. In this case, there can be no debate that petitioner's allegations of negligent medical care state a valid legal claim, and so Rule 12(b)(6) would not be a proper basis for dismissal. But the limits on that Rule underscore the determination of the Rules that the requirement of establishing the facts necessary to state a valid claim must await discovery and must not be cut short by a state law that requires that showing at the time that the complaint is filed.

Although the Delaware law does not prohibit the discovery that the Federal Rules provide, it requires plaintiffs to satisfy section 6853 without the benefit of discovery. Although not entirely clear, the professional who submits the required affidavit in Delaware must say more than "I think that the plaintiff has a good (reasonable) claim," but to say more, the affiant must know more about the facts and the plaintiff may not be able provide

them. Moreover, the Delaware affidavit requirement creates incentives for providers not to be forthcoming by giving the patient their medical records or providing additional information about their treatment and what might have gone wrong. The federal discovery rules neutralize the information disadvantage by assuring that there is a full exchange of information in both directions later in the process. But that assurance is seriously undermined by the Delaware law that effectively requires plaintiffs to obtain the needed information before filing their complaint.

To be sure, the Delaware law does not eliminate medical malpractice claims or make them impossible to litigate, but it does erect a significant initial barrier to pursuing them, contrary to the policy of Rule 8. Surely, if Delaware had a $5000 filing fee for all medical malpractice cases, the district court would not have to abide by it, and this statute is only different in degree from a filing fee law. It is plain that Delaware wishes to discourage medical malpractice claims generally, but, except for subsection (e) discussed *infra* at 3-4, it has chosen not to amend its substantive laws. Instead, it has imposed a procedural barrier on filing such cases that creates a direct conflict with the Federal Rules generally and Rule 8 in particular.

Section 6853 Massively Intrudes on the Federal Courts.

The law at issue in *Shady Grove* was a single sentence that created an exception barring class actions for claims based on penalties or minimum statutory damages. If it were followed in diversity cases, it would impose no new burdens on district judges or make other changes to how civil cases were handled in federal court: it would simply have excluded some claims from using Rule 23. By contrast, if the Third Circuit is correct, and section 6953 applies in federal courts, the parties, district judges, and even the clerks of court must abide by Delaware's preferences and undertake procedures not used in any other cases.

Starting with the clerks, they would be forbidden from filing or even docketing any "health care negligence lawsuit" that was not accompanied by an affidavit of merit. Paragraph (a)(2). However, under subsection (b), the affidavit of merit need not be filed if one of the exceptions in subsection (e) applies: would the clerk have to pass on them if they were alleged in the complaint? Under subsection (c), there are detailed requirements for the contents of the affidavit of merit and of the qualifications for those who may submit them: is the clerk supposed to consider them in deciding whether to file the case, or will those questions be decided by the district judge before the complaint can even be filed? Relatedly, under paragraph (a)(2), the filing requirement may be temporarily excused if plaintiff submits a motion with the complaint and the "court"

determines that there is "good cause" for allowing the plaintiff up to 60 days to obtain one. It is unclear whether the filing of the good cause motion permits the plaintiff to serve the complaint, which starts the time within which the defendant must respond, even though paragraph (a)(4), in contrast to Federal Rule 12, relieves the defendant of the obligation "to take any action with respect to the complaint" until plaintiff has a filed a satisfactory affidavit of merit.

Section 6853 is broad but not all inclusive. It applied only to "health care" lawsuits, and that term is defined in 18 Del. Code § 6001(4) (App. at 4a) to include only suits against a "health care provider." Under subparagraph (5), that includes "a person, corporation, facility or institution licensed by this State pursuant to Title 24, excluding Chapter 11 thereof, or Title 16 to provide health-care or professional services." That definition does not extend to manufacturers of medical devices and drugs, which raises the question of whether a court clerk—state or federal— would be charged with deciding whether to file a mixed case in which there was no affidavit of merit.

Section 6853 also includes many other provisions not found in the Federal Rules. Under paragraph (a)(1), the affidavit of merit and related documents must be filed in a sealed envelope with a prescribed statement of permanent confidentiality, which, if the Third Circuit is correct, would supersede the law in the federal courts on sealing records. Subsection (d) establishes a procedure for the defendant to

challenge the sufficiency of an affidavit of merit under subsection (c). In addition, despite any Federal Rules to the contrary, that provision purports to make the affidavit "and the fact that an expert has signed the affidavit of merit" inadmissible in this or any other case, "nor may the expert be questioned in any respect about the existence of said affidavit" in this or any other case. If section 6853 applies, district judges would have to follow these mandates as well.

Thus, in addition to the direct conflict with Rule 8, section 6853 would impose very substantial burdens on the federal courts, many of which are inconsistent with specific Rules and practices.

Section 6853, like Rule 8, Is Primarily a Rule of Procedure That Does Not Have to be Followed in Federal Court.

The Rules of Decision Act, 28 U.S.C. § 1652, passed by the First Congress, as construed in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), and *Hanna v. Plumer*, *supra*, directs federal courts to apply state law in diversity cases except where there is applicable federal law, which includes the Federal Rules of Civil Procedure. However, under the Rules Enabling Act, 28 U.S.C. § 2072(b), Federal Rules may "not abridge, enlarge or modify any substantive right." Thus, if there is a conflict between a state procedural law and a Federal Rule, the Federal Rule must be followed. There is no doubt that the Delaware statute is inconsistent with the minimal requirements of Rule 8 and that

Rule 8 is not substantive, but is a proper procedural rule. Indeed, there is no rule that is more procedural than the pleading standard in Rule 8, and that should end the inquiry.

In the *Erie* line of cases, including some discussed below, there are some instances in which this Court has asked the substantive law question from the opposite direction: is the state law substantive? If it is, and if Rule 8 is inconsistent with the state law, then under that approach, Rule 8 must be substantive and hence invalid, at least as applied to the state law at issue in that case.

Most of section 6853 is plainly procedural because it mandates how court clerks and judges process a health care negligence case. There is one exception to the procedural nature of section 6853: subsection (e) provides the legal standard by which "liability" is determined, including when expert medical testimony is required or may be excused. There is nothing in any Federal Rule that covers those subjects, and if this case came to trial, the plaintiff would have to meet those very substantive standards. However, the contrast between subsection (e) and the remainder of section 6853 underscores how procedural the affidavit of merit and its implementing requirements are.

Even if the Court were to focus on the other questions asked by the courts in these cases to determine whether a federal rule is substantive, the conclusion would be the same: neither the bulk of section 6853 nor Rule 8 is a substantive provision, and hence Rule 8 alone may be applied in this case and is not barred by section 2072(b). In this alternative analysis, courts have asked, does

the state law, such as a statute of limitations, intend to affect the outcome of cases that it covers, so that if it is not followed in federal court, the outcome will be different than if the case is litigated in state court.

In one sense, section 6853 is intended to help defendants by preventing a case from being filed in a Delaware court unless plaintiff can obtain an affidavit of merit. However, there is no evidence that Delaware sought to export section 6853 to the district court, largely because its mandates are directed to the operation of the Delaware court system and do not fit well in the federal courts. Further evidence that section 6853 is a procedural rule limited to Delaware courts is that section 6853(a), which specifies that "[n]o health-care negligence lawsuit shall be filed in this State," is not limited to claims under Delaware law. This could occur if a resident of Delaware is injured in another state at a hospital that is incorporated in Delaware and suit was filed in Delaware. Conversely, if the plaintiff was injured in Delaware, but sued the defendant in another state (where it had its principal place of business), the law would not apply because the "lawsuit [was not] filed in this State." But if section 6853 were a substantive law aimed at protecting all medical defendants in claims arising under Delaware law, it would apply, like a statute of limitations, only if Delaware substantive law applied.

Moreover, like the New York class action rule in *Shady Grove,* the fact that the state law "had some practical effect on the parties' rights," did not require that the state law be followed

because the New York law there "undeniably regulated only the process for enforcing those rights [and none of the laws in prior cases upholding the federal rule] altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." 559 U.S. at 407-08. Finally, unlike overriding a statute of limitations that would have foreclosed a claim entirely, applying Rule 8 and not section 6853 will only enable petitioner to litigate his case on the merits, which is the goal of the Federal Rules.[2]

The line of cases beginning with *Erie* also ask a two-part question when the federal law is a Rule of Civil Procedure: Will application of the federal rule cause plaintiffs to file in federal not state court, and if so, is that nonetheless a permissible kind of forum shopping that is not inconsistent with the Rules of Decision Act and the grant of diversity jurisdiction in Article III of the Constitution and 28 U.S.C. § 1332? In these cases, because plaintiffs' lawyers are almost certain to be aware of the affidavit requirement, they will file in

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[2] Even if section 6853 were considered to be a substantive law, "Rules which incidentally affect litigants' substantive rights do not violate [section 1652] if reasonably necessary to maintain the integrity of that system of rules." *Burlington Northern R. Co. v. Woods,* 480 U.S. 1, 5 (1987). *See also Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,* 498 U.S. 533, 552 (1991) ("There is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental.").

federal court if they can. The issue becomes, is that an improper type of forum shopping?

Although often derided, forum shopping is invited by Article III itself and by section 1332. There is no reason for the grant of diversity of citizen jurisdiction in the federal courts *except* to allow a party to choose to litigate a case in a federal instead of a state court. This principle applies to both plaintiffs, who choose to file in federal court, as well as defendants who seek to remove state-filed cases to federal court if there is diversity. 28 U.S.C. § 1441. The reason that parties exercise the federal court option is because they believe that they are more likely to prevail in that forum. That is why

> a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge.

Hanna v. Plumer, 380 U.S. at 475 (Harlan, J., concurring). Other reasons for preferring federal court include a more favorable federal jury pool, or the federal courthouse is in a more convenient location or it is easier to obtaining local counsel there. No one would suggest that any of these rationales is a form of improper forum shopping, and indeed a lawyer who did not consider those factors when deciding where to litigate a case would not be properly representing their client.

The plurality opinion in *Shady Grove* provides the answer to the argument that disregarding section 6853 would invite improper forum shopping:

> We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. That is unacceptable when it comes as the consequence of judge-made rules created to fill supposed "gaps" in positive federal law…. But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to "disembowel either the Constitution's grant of power over federal procedure" or Congress's exercise of it.

559 U.S. at 415-16 (citations omitted).

The kind of forum shopping that the *Erie* line of cases bars is "law shopping" in which the goal is to change the substantive law governing the case. That is why, under *Erie,* subsection 6853(e), establishing the standard of "liability," would apply to the merits of petitioner's claims. Even though this Court has held that statutes of limitations fall on the substantive side of the line, the Court in

Hanna, supra, upheld a federal rule on service of process used to satisfy the state statute of limitations against a state law that required a different method of service in that case. *Hanna* thus enunciated a general standard that the Federal Rules should ordinarily apply where the Rules are clearly applicable even in the face of a contrary state statute even where the outcome would be different if state law applied. This Court reaffirmed that approach in *Shady Grove*, where the state law there would have restricted the class action remedies available under Rule 23:

> A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).

559 U.S. at 409.[3]

One rationale for applying a federal rule in these cases is to retain a uniform set of federal civil procedures. That rationale, which was front and

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[3] In *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 555 (1949), this Court upheld an additional procedure (requiring the posting of a bond for security in certain actions) because it was necessary to enforce the substantive right that protected the defendants in such actions should the plaintiff's claims prove to be without merit. By contrast here, under subsection (d), once the affidavit is submitted and the case is allowed to proceed, its further use in the case is forbidden.

center in *Hanna*, applies so that counsel can be confident that the basic procedures are the same throughout the federal system and so that federal judges will not have to consult state procedural laws when deciding diversity cases. Uniformity does not override all considerations, but it is surely important in answering questions such as the one presented here.

Accordingly, whether examined from the perspective of whether Rule 8 is properly classified as procedural, or whether Rule 8 interferes with substantive rights created by section 6853, the answer is the same: there is no violation of section 2072(b).

Section 6853 Substantially Upsets the Balance Struck by the Federal Rules.

There is another respect in which section 6853 is incompatible with the Federal Rules generally. As discussed above, Congress created the mechanism to establish a uniform set of rules for civil cases in federal court, including the means by which cases would be decided on the merits under a system that balanced the interests of plaintiffs and defendants, recognizing that tradeoffs were inevitable in a well-functioning civil procedure system.[4]

[4] Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 Oregon L. Rev. 993 (2012).

In this respect, section 6853 has made a different choice from that in the Federal Rules regarding what a plaintiff must show to enter the Delaware courthouse in health care negligence lawsuits. If Delaware's law applies here, other states could decide that plaintiffs in other types of cases must meet higher pleading standards for them. Or another state could conclude that defendants are abusing summary judgment in certain categories of cases, or a different state could decide that there is too much expert discovery or that the work product privilege should be abolished for some or all cases. There is no reason to believe that, when Congress enacted the Rules Enabling Act it intended to allow states to undermine the system created by those rules in diversity cases, which is what the Third Circuit permitted here.

The Federal Rules are not just a collection of independent directions as to how individual parts of a civil case should be handled. Rather, they are an integrated whole in which a change in one provision – here primarily Rule 8 – has ramifications for other Rules, such as Rules 12 and 56 which provide countervailing avenues for defendants to obtain dismissal of cases in which the plaintiff is unable to establish that the law provides the relief sought. Section 6853 also pushes back the discovery phase, including the submission of expert testimony, in a way that seriously disadvantages plaintiffs. It is not that the choices made in section 6853 are wrong; rather, it is that they are different and work to undo the system created by the Federal Rules.

An analogy to baseball may help illustrate the point. The mound is 60 feet 6 inches from home plate and is in the center of a system in which the bases are 90 feet apart. Suppose a proposal was made to move the mound three feet forward to help the pitcher. That might be a good idea or a bad one, but no one would think of making that change without considering the consequences for the game as a whole. Would there be fewer runs scored, but more strikeouts and fewer walks? Would pitchers have fewer sore arms and last longer? Would there be fewer home runs, and how would all this affect the fans who pay to see the game played? No one would undertake to make such a change without thinking through all of these questions.

Section 6853 is not just a law that requires the filing of an additional medical affidavit. It is plain that the Delaware legislature did not think about the Federal Rules of Civil Procedure or about how the federal courts operate. It apparently thought only about the Delaware court system and was unaware of the different tradeoffs that the federal system has made. Accordingly, it failed to recognize that the federal system would be undermined by insisting that this Delaware law should be super-imposed on the Federal Rules even though it is physically possible to write a complaint that complies with Rule 8 and also meets the further requirements of Delaware law.

Finally, as this Court observed in *Sibbach v. Wilson & Co.,* 312 U.S. 1, 14 (1941), the fact that an important policy of a state is disregarded when applying a Federal Rule (there Rule 35) is irrelevant because "the authorization of a

comprehensive system of court rules was a departure in policy, and … the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated [by the Federal Rules] in the interest of speedy, fair and exact determination of the truth."

CONCLUSION

For the foregoing reasons and those contained in the petition, the Court should grant the petition and reverse the decision below.

Respectfully Submitted

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STATUTORY ADDENDUM

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18 Delaware Code § 6853

Affidavit of Merit, expert medical testimony

(a) No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:

(1) An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant. If the required affidavit does not accompany the complaint or if a motion to extend the time to file said affidavit as permitted by paragraph (a)(2) of this section has not been filed with the court, then the Prothonotary or clerk of the court shall refuse to file the complaint and it shall not be docketed with the court. The affidavit of merit and curriculum vitae shall be filed with the court in a sealed envelope which envelope shall state on its face:

> "CONFIDENTIAL SUBJECT TO 18 DEL. C., SECTION 6853. THE CONTENTS OF THIS ENVELOPE MAY ONLY BE VIEWED BY A JUDGE OF THE SUPERIOR COURT."

Notwithstanding any law or rule to the contrary the affidavit of merit shall be and shall remain sealed and confidential, except as provided in subsection (d) of this section, shall not be a public record and is exempt from Chapter 100 of Title 29.

(2) The court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit of merit. Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review.

(3) A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend. The filing of a motion to extend the time for filing an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion.

(4) The defendant or defendants not required to take any action with respect to the complaint in such cases until 20 days after plaintiff has filed the affidavit or affidavits of merit.

(b) An affidavit of merit shall be unnecessary if the complaint alleges a rebuttable inference of medical negligence, the grounds of which are set forth below in subsection (e) of this section.

(c) Qualifications of expert and contents of affidavit. The affidavit or affidavits of merit shall set forth the expert's opinion that there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant or defendants and that the breach was a proximate cause of injury or injuries claimed in the complaint. An expert signing an affidavit of merit shall be licensed to practice medicine as of the date of the affidavit; and in the 3 years immediately preceding the alleged negligent act has been

engaged in the treatment of patients and/or in the teaching/academic side of medicine in the same or similar field of medicine as the defendant or defendants, and the expert shall be Board certified in the same or similar field of medicine if the defendant or defendants is Board certified. The Board Certification requirement shall not apply to an expert that began the practice of medicine prior to the existence of Board certification in the applicable specialty.

(d) Upon motion by the defendant the court shall determine in *camera* if the affidavit of merit complies with paragraph (a)(1) and subsection (c) of this section. The affidavit of merit shall not be discoverable in any medical negligence action. The affidavit of merit itself, and the fact that an expert has signed the affidavit of merit, shall not be admissible nor may the expert be questioned in any respect about the existence of said affidavit in the underlying medical negligence action or any subsequent unrelated medical negligence action in which that expert is a witness.

(e) No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death, except that such expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence; provided, however, that a rebuttable inference that

personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances:

(1) A foreign object was unintentionally left within the body of the patient following surgery;

(2) An explosion or fire originating in a substance used in treatment occurred in the course of treatment; or

(3) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body.

Except as otherwise provided herein, there shall be no inference or presumption of negligence on the part of a health-care provider.

18 Delaware Code § 6801
Definitions

(4) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health-care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement.

(5) "Health-care provider" means a person, corporation, facility or institution licensed by this State pursuant to Title 24, excluding Chapter 11 thereof, or Title 16 to provide health-care or professional services or any officers, employees or agents thereof acting within the scope of their employment; provided, however, that the term

"health-care provider" shall not mean or include any nursing service or nursing facility conducted by or for those who rely upon treatment solely by spiritual means in accordance with the creed or tenets of any generally recognized church or religious denomination.