No. 24-440

In the Supreme Court of the United States

HAROLD R. BERK, PETITIONER,

v.

WILSON C. CHOY, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

JAKE W. MURPHY
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 80202
(303) 863-1000

DEVIN M. ADAMS
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 4000
700 Louisiana Street
Houston, TX 77002
(713) 576-2400

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
ANTHONY J. FRANZE
KOLYA D. GLICK
SAMUEL I. FERENC
DANA KAGAN MCGINLEY
JILLIAN M. WILLIAMS
JENNIFER F. KAPLAN
KATIE WENG
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Cases—Continued Page(s)

Statutes

Rules Page(s)

Rules—Continued Page(s)

Other Authorities

Other Authorities—Continued Page(s)

In the Supreme Court of the United States

No. 24-440

HAROLD R. BERK, PETITIONER

v.

WILSON C. CHOY, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

Delaware's affidavit-of-merit law cuts deeply into the Federal Rules of Civil Procedure, shredding a half dozen rules in the process. But this case can be decided on its conflict with only two: Rules 8 and 9.

Rule 8 sets the "General Rules of Pleading." Rule 9 sets the rules for "Pleading Special Matters." Delaware's law rewrites both: it demands that "[a] complaint [be] accompanied by . . . [a]n affidavit of merit as to each defendant signed by an expert witness." Del. Code Ann. tit. 18, § 6853(a)(1). Pleading rules set forth what is required to have a case proceed to discovery. Section 6853 is a pleading rule, plain as day. By dictating that a complaint needs an accompanying affidavit it goes beyond what Rules 8 and 9 require. The conflict is direct under any standard.

The collision goes beyond Rules 8 and 9. Rule 3 says filing a complaint starts a suit; Delaware says not without an affidavit. Rule 11 makes a lawyer's signature the guarantor of good faith; Delaware piles on an expert's verification. Rule 12 imposes no requirement to produce

evidence to state a claim; Delaware's law does. Rule 26 sets the timing of expert disclosures; Delaware demands them before suit begins. Rule 37 leaves discovery sanctions to judicial discretion; Delaware makes dismissal mandatory.

Respondents have little to say about these conflicts. Instead, they put virtually all of their eggs in a new basket: Rule 11. Respondents' newfound *lead argument* relies on a long-dormant proviso in Rule 11(a)—not argued below, not the basis of the decision below, and not adopted by any of the courts of appeals that have considered the question. The best respondents muster is that Wright & Miller call the argument "plausibl[e]." 5A *Wright & Miller's Federal Practice and Procedure* § 1339 (4th ed. 2025). But Rule 11(a) offers no escape. Its proviso simply prevented a few pre-1938 federal rules and statutes from displacement by Rule 11's abolition of verification and affidavit rules in federal court.

Respondents' Rule 11 argument is meritless. Rule 11 did not, as respondents maintain, override a century of equity practice by requiring federal courts to enforce the dozens and dozens of state pleading-verification laws in force when the Rules took effect. *See* Charles E. Clark, *Handbook of the Law of Code Pleading* 217-18 nn.21-23 (2d ed. 1947); *see also* pp. 9-16, *infra*.

At bottom, respondents' vision of federal procedure is irredeemably flawed, unsound in theory, and unworkable in practice. They would make federal procedure hopelessly convoluted and wasteful, with endless battles over which rules govern. They would have federal courts contort state laws into shapes no state ever intended. The Court should not go down that road. *Hanna* and *Shady Grove* point the way: the Federal Rules control.

ARGUMENT

I. THE CLASH BETWEEN DELAWARE'S LAW AND THE FEDERAL RULES IS UNMISTAKABLE

Delaware's statute conflicts with the Federal Rules. Where the Rules "answer the same question" as a state law, the Rules govern. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Multiple Rules "answer the same question[s]" Delaware's law answers.

A. The Conflict With Rules 8 and 9 Is Plain

Delaware's statute clashes with Rules 8 and 9. Rules 8 and 9 set forth the pleading rules in federal court. When a plaintiff satisfies those requirements, the case proceeds. *See Pledger v. Lynch*, 5 F.4th 511, 519 (4th Cir. 2021); *Gallivan v. United States*, 943 F.3d 291, 293 (6th Cir. 2019). Delaware's law adds a requirement: every complaint must be "accompan[ied]" by an expert affidavit. The problem is simple: a complaint can satisfy Rules 8 and 9 yet still be dismissed for failing Delaware's requirement.

1. Respondents insist there is no conflict because Rules 8 and 9 deal with pleadings and "[a]n affidavit of merit is not a pleading." Beebe Br. 26; Choy Br. 16 (similar). They reason that an affidavit of merit is not "attached to a complaint," is "filed in a separate envelope," and may be "temporally distinct" if filed after an extension. Beebe Br. 23, 25-26, 28; Choy Br. 37-39.

But Rules 8 and 9 set the "[r]ules of [p]leading" in federal court, and Section 6853 establishes different pleading rules: "[T]he complaint … shall not be docketed" if no affidavit is filed, Del. Code Ann. tit. 18, § 6853(a)(1); the affidavit must state that "there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant," *id.*, unless "the complaint alleges a rebuttable inference of medical negligence," *id.* § 6853(b); defendants are "not

required to take any action with respect to the complaint . . . until 20 days after plaintiff has filed the affidavit . . . ." *id.* § 6853(a)(4). It is hard to imagine a law designating when a complaint can be docketed, what it must say, and when the defendant must file a responsive pleading as anything but a pleading rule.

The line between Delaware's affidavit of merit statute and a pleading is "entirely artificial." *Shady Grove*, 559 U.S. at 399. The conflict "inquiry is a functional one." *Pledger*, 5 F.4th at 522 (citing *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987)). Delaware's affidavit of merit functions just like a complaint. Like a complaint, it is "a[] formal document" that "sets forth . . . allegations." Beebe Br. 26 (quoting *Pleading*, Black's Law Dictionary (12th ed. 2024)). Like a complaint, filing the affidavit triggers the defendant's response deadline. Functionally, it is no different from requiring plaintiffs to file a second, sealed, supercharged, physician-verified complaint alleging healthcare negligence. And, as this case confirms, securing one addressing multiple defendants who each played different roles can be extraordinarily difficult.

2. Respondents argue no conflict exists because the Delaware law is like the state laws in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949). Beebe Br. 26-27; Choy Br. 20-21, 27. But the laws in those cases bear no resemblance to Delaware's § 6853.

In *Cohen* and *Woods*, the state laws did not govern the pleadings at all, much less require that "the complaint [be] accompanied by" anything "unless the complaint" made specified allegations. The law in *Cohen* provided that in certain shareholder suits, a plaintiff would be liable for all expenses and attorneys' fees of the defense if the plaintiff did not prevail, and required the plaintiff to post a bond to cover those expenses. 337 U.S. at 544-45 & n.1. The majority emphasized that the state law "create[d] a

new liability where none existed before" and that the bond was not "a mere procedural device," rendering it separate and apart from then-Federal Rule 23's procedural requirements for shareholder suits. *Id.* at 555-56. Delaware's law does not create new liability, and even respondents concede that it "contains … procedural instructions." Choy Br. 28.

The law in *Woods* is even further afield. That law prohibited a foreign corporation to "bring or maintain any action or suit in any of the courts" of the state unless the corporation appointed an agent for service of process. 337 U.S. at 536 n.1. Thus in *Woods*, as in *Cohen*, the law had nothing to do with pleading. *Id.*; *Cohen*, 337 U.S. at 544-45 & n.1.[1]

3. There is a more fundamental issue lurking here—*Shady Grove* made clear that the Federal Rules answer questions beyond their literal text. A basic question Rules 8 and 9 answer is: what evidence must a plaintiff present to a court to move a suit beyond the pleading stage and "unlock the doors of discovery"? *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The answer Rules 8 and 9 give is unambiguous and foundational: *none*. *See, e.g.*, *id.*; *Gallivan*, 943 F.3d at 293. Delaware thinks sometimes it should be *some*—but that is a question Rules 8 and 9 already answer, and they answer it differently.

B. The Conflict With A Host of Other Federal Rules Is Equally Flagrant

Delaware's law conflicts with multiple additional Federal Rules.

---

[1] The vitality of the fractured majority decisions in *Cohen* and *Woods* is questionable given this Court's later *Erie* jurisprudence culminating with *Shady Grove*. While concurring and dissenting opinions in *Shady Grove* relied on *Cohen* and *Woods*, the majority did not deem either decision worthy of mention.

1. Rule 12 and Delaware's law "answer[] the same question." Rule 12 makes clear that a complaint survives if it alleges facts "sufficient to state a claim to relief that is plausible on its face," and it "does not demand evidentiary support—in an affidavit or any other form—for a claim to be plausible." *Gallivan*, 943 F.3d at 293 (citations omitted); *Pledger*, 5 F.4th at 519 (similar). Yet respondents argue that Delaware's law does exactly that: they contend it imposes an "evidentiary requirement," and a case should be dismissed before discovery for failure to meet it. Beebe Br. 23, 26; *see* Choy Br. 41.

Respondents argue there is no conflict because this case was dismissed outside of Rule 12. Beebe Br. 29; *see* Choy Br. 41. But that makes it worse. Only Rule 56 permits termination of a case pre-trial on the basis of evidentiary sufficiency—yet the district court did not invoke Rule 56. The court treated Delaware's law as new authority to dismiss a case outside Rules 12 and 56, making it precisely the state-created dismissal device *Shady Grove* forbids.

Beebe argues that some federal courts permit motions to dismiss outside of Rule 12, Beebe Br. 30, but ignores that—unlike here—those motions are creatures of federal law (not state law). *See* 5C *Wright & Miller's Federal Practice and Procedure* § 1360 (3d ed. 2025).

2. Rule 3 also clashes with Delaware's law. Rule 3 says an action commences when a complaint is filed. Delaware's law precludes commencement without an affidavit, forbidding even docketing the complaint. Choy argues that the affidavit is not actually required to "commence" an action because "[i]t can be filed later"—after an extension—"as Petitioner did here." Choy Br. 36. But that fact does nothing to alleviate the conflict because the request for an extension is still a precondition to commencement. Beebe relegates Rule 3 to a footnote, asserting that *Cohen* and *Woods* "foreclose Petitioner's

reliance on Rule 3." Beebe Br. 27 n.11. But as noted, those decisions are either inapposite, abrogated, or both.

3. Rule 11 prohibits laws like Delaware's. Rule 11(a) says that unless a statute or rule states otherwise, pleadings "need not be . . . accompanied by an affidavit." Fed. R. Civ. P. 11(a). Delaware's law requires a complaint to be accompanied by an affidavit within 60 days of filing suit. Del. Code Ann. tit. 18, § 6853(a)(1), (2). A starker conflict one could not find. Respondents argue that Rule 11 permits Delaware's law because the law does not actually require pleadings to be "accompanied by an affidavit" because the affidavit can be submitted up to 60 days after the complaint. Choy Br. 39-40; Beebe Br. 28-29. But "accompany" means "to go along with." *Accompany*, Black's Law Dictionary (12th ed. 2024). And Delaware's law requires an affidavit "to go along with" the complaint—extension or no extension.

4. Rule 26 also collides with Delaware's law. *Contra* Choy Br. 41-42; Beebe Br. 31-32. Rule 26 dictates *when* expert evidence must be produced; Delaware's law does too. Under Rule 26, a plaintiff need not produce expert evidence until Rule 26 requires it; by respondents' own admission, Delaware's law demands an expert affidavit before the suit is even filed. Beebe Br. 1; Choy Br. 6. This case confirms the difficulty of securing pre-suit evidence from experts reluctant to critique other professionals. Rule 37 likewise conflicts. It leaves sanctions to judicial discretion; Delaware instead makes dismissal mandatory.

C. The Federal Rules Are Valid and Do Not Violate the Rules Enabling Act

Rules 3, 8, 9, 11, 12, 26, and 37 are valid. A Federal Rule is valid when it "really regulate[s] procedure," *i.e.*, "the judicial process" or "the manner and the means" for enforcing substantive rights. *Shady Grove*, 559 U.S. at 407 (plurality opinion) (cleaned up); *accord Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946); *Sibbach v.*

Wilson & Co., Inc., 312 U.S 1, 14 (1941). The Rules at issue do just that.

Recognizing that a frontal assault on the Rules is foreclosed, respondents try another tack, insisting that the Rules Enabling Act permits courts to rewrite the Rules on an ad hoc "as applied" basis. Beebe Br. 38, 41-42; *see* Choy Br. 49-52. The Court has long rejected that approach. *See Shady Grove*, 559 U.S. at 409-13 & nn.9-12 (plurality opinion) (collecting cases); *Sibbach*, 312 U.S. at 13-14; *Murphree*, 326 U.S. at 445; *Schlagenhauf v. Holder*, 379 U.S. 104, 113-14 (1964); *Hanna*, 380 U.S. at 464-65; *Burlington*, 480 U.S. at 5-6; *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 552-54 (1991). Courts "cannot contort [a Federal Rule's] text, even to avert a collision with state law that might render it invalid." *Shady Grove*, 559 U.S. at 406.

Neither *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), nor *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), is to the contrary. *Contra* Beebe Br. 38-39; Choy Br. 50. In both cases, the Court *interpreted* Rule 23's requirements in light of the Enabling Act. *See Tyson Foods*, 577 U.S. at 455; *Wal-Mart*, 564 U.S. at 366-67. But respondents are not asking for an interpretation; they are asking for "contort[ion] . . . to avert a collision." *Shady Grove*, 559 U.S. at 406. Because Federal Rules 3, 8, 9, 11, 12, 26, and 37 regulate procedure, they are valid and displace conflicting state law.

But even under respondents' proposed rewrite-as-you-go framework, the Rules Enabling Act would not help them. The relevant Federal Rules displace Delaware's law even under the test proposed by Justice Stevens in *Shady Grove* because Delaware's law is procedural and not "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring); Pet. Br. 33-34.

II. RULE 11(a) DOES NOT AUTHORIZE AFFIDAVIT-OF-MERIT LAWS

Rule 11(a) does not authorize states to require that federal complaints be "accompanied" by affidavits. When Rule 11(a) says "a pleading need not be verified or accompanied by an affidavit" "[u]nless a rule or statute specifically states otherwise," it is referring to federal rules and federal statutes. The Rule's text, context, history, and purpose make that clear.

A.1. Text and context. The key phrase here is "a rule or statute." Standing alone, the word "statute" sheds little light on whether Rule 11 refers to all statutes or only federal ones. The word "statute" in federal law—without more—typically refers to federal statutes.[2] But some suggest it could also be used more broadly to mean state statutes. *See* 5A *Wright & Miller's Federal Practice and Procedure* § 1339 (4th ed. 2025). "If we had nothing but this single word to go on, there would be a good case for including" state statutes within Rule 11(a). *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 628 (2022).

"This is where context comes in." *ZF Auto.*, 596 U.S. at 628; *Biden v. Nebraska*, 600 U.S. 477, 511 (2023) (Barrett, J., concurring). "Statute" does not stand alone—it belongs to the phrase "a rule or statute." *ZF Auto.*, 596 U.S. at 628. And accompanied by the word "rule," it is clear that the word "statute" refers exclusively to federal

---

[2] *See Nelson v. United States*, 40 F.4th 1105, 1112-13 (10th Cir. 2022) (holding that the "use of 'statute' alone" in 28 U.S.C. § 2412 "most naturally refers only to federal statutes"); *Joe v. United States*, 772 F.2d 1535, 1537 (11th Cir. 1985) (per curiam); *see also Truskett v. Closser*, 236 U.S. 223, 228 (1915) (finding "provided by law" means "Federal law, not state law"); *cf. Jerome v. United States*, 318 U.S. 101, 104 (1943) (explaining it is "generally assume[d], in the absence of a plain indication to the contrary, that Congress . . . is not making the application of the federal [law] dependent on state law").

statutes. *See id.* ("[T]wo words together may assume a more particular meaning than those words in isolation" (quoting *FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011))).

The word "rule" here does not have a natural non-federal referent. When used in the Federal Rules, the word "rule" could plausibly refer to a federal court local rule or another Federal Rule. But there is no natural way to read the word "rule" in Rule 11(a), or elsewhere in the Rules, to refer to something created by a state.

The Federal Rules as a whole bear out this commonsense interpretation. The Federal Rules never use the word "rule" standing alone to refer to anything other than rules created by federal law.[3] While they also use "these rules," Beebe Br. 17, that phrase is narrower than "a rule" which can also include—and often does include—local federal court rules. *See* Rules of the Dist. Ct. of the U.S. for D.C. R. 17 (1937) (local rule requiring verified petitions for special writs permitted by Rule 11(a)); *Proceedings of the Institute at Washington, D.C. October 6, 7, 8, 1938 and of the Symposium at New York City October 17-18, 19, 1938*, at 213 (Edward H. Hammond, ed., 1939) (Statement of Justice Oscar R. Luhring).

---

[3] *See* Fed. R. Civ. P. 7(b)(2) ("The rules governing . . . matters of form in pleadings apply to motions and other papers."); Fed. R. Civ. P. 35(b)(6) ("This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules."); *see* Fed. R. Civ. P. 35 advisory committee's note to 1970 amendment (examples of "rules other than Rule 35(b)" are "Rules 34 or 26(b)(3) or (4)"); Fed. R. Civ. P. 40 ("Each court must provide by rule for scheduling trials."); Fed. R. Civ. P. 54(d)(2)(B)(ii) ("[S]pecify the judgment and the statute, rule, or other grounds entitling the movant to the award [of attorney's fees]"); Fed. R. Civ. P. 78(b) ("By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.").

Thus, the words rule and statute in Rule 11(a) "complement one another," *ZF Auto.*, 596 U.S. at 631. The former refers to other Federal Rules and court local rules, and the latter refers to federal statutes.

That reading of the word "statute" in Rule 11(a) is borne out by the use of the word "statute" when it appears alone elsewhere in the Federal Rules. Numerous Federal Rules use the word "statute" standing alone to mean only federal statutes.[4] Just like those other Rules, when Rule 11(a) says a pleading need not be verified or accompanied by an affidavit "[u]nless a rule or statute specifically states otherwise," it is referring to federal rules and federal statutes.

2. History. History confirms Rule 11(a)'s limitation to federal rules and federal statutes. *See ZF Auto.*, 596 U.S. at 631. The "rule or statute" proviso was included to ensure Rule 11 did not displace preexisting federal rules and statutes requiring verification or affidavits. The 1937 advisory committee said so explicitly: "This rule expressly *continues* any statute which requires a pleading to be verified or accompanied by an affidavit." Fed. R. Civ. P. 11 advisory committee's note to 1937 adoption (emphasis added). The use of the word "continues" in the note would

---

[4] *See* Fed. R. Civ. P. 6(a)(4) (the time of day required for filing may be modified by "statute"); Fed. R. Civ. P. 16(c)(2)(I) (court may order use of "special procedures to assist in resolving the dispute when authorized by statute"); Fed. R. Civ. P. 23(g)(1) (court must appoint class counsel unless a "statute provides otherwise"); Fed. R. Civ. P. 53(a)(1) ("statute" may authorize appointment of special masters to perform functions beyond those enumerated in Rule 53(a)(1)); Fed. R. Civ. P. 54(d)(2)(B) (motion for attorney's fees must, *inter alia*, specify the legal basis for the request "[u]nless a statute" provides otherwise); Fed. R. Civ. P. Rule 81(a)(5) (Federal Rules apply in proceedings to enforce "a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings").

be odd if the committee understood the proviso would open the door to future state statutes. And indeed, the committee pointed only to preexisting federal statutes and rules that would "continue," and did not identify any state statutes or rules. *See id.* (identifying 28 U.S.C. §§ 381, 762 and Rules 23(b) and 65). The Court has relied on Rule 11's advisory committee's notes in the past. *See Bus. Guides, Inc.*, 498 U.S. at 544. Here, they are virtually dispositive.

The advisory committee also noted that Rule 11 "is substantially the content" of Equity Rules 24 and 21—another signal that the drafters intended to eliminate state verification requirements. Even before the Federal Rules, federal courts did not apply state procedural law when sitting in equity. James Love Hopkins, *The New Federal Equity Rules* 13-14 (1913). Rule 11 adhered "to the practice under equity rule 24, rather than the state practice, in eliminating verification of pleadings and substituting therefor the requirement that every pleading shall be signed by at least one attorney." Elwood Hutcheson, *The New Federal Rules of Civil Procedure*, 13 Wash. L. Rev. & St. B.J. 198, 208 (1938); *see* Clark, *Code Pleading*, *supra* at 217 n.21. When Rule 11 carried forward equity rule 24's rejection of state pleading rules in federal court, it brought "the old soil" with it. *United States v. Hansen*, 599 U.S. 762, 778 (2023); *see* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure I. the Background*, 44 Yale L.J. 387, 394 (1935).

The common understanding of Rule 11(a) at the time of its enactment and in all the years since is that the proviso in the Rule refers only to federal rules and statutes. That is powerful evidence of its original meaning. *See FDA v. R. J. Reynolds Vapor Co.*, 145 S. Ct. 1984, 1992 (2025) (interpretation with "long lineage" is "telling"); *Bostock v. Clayton Cnty.*, 590 U.S. 644, 798 (2020) (Kavanaugh, J., dissenting); *cf. Ariz. State*

Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824-25 (2015) (Roberts, C.J., dissenting).

When the Federal Rules took effect in 1938, numerous states required affidavits and verifications for pleadings. *See* Clark, *Code Pleading*, *supra* at 217-18 nn.21-23, 219 nn.27-28 (collecting patchwork of affidavit and verification requirements from more than 30 states). Several of those states still require affidavits and verifications when pleading today. *See, e.g.*, Cal. Civ. Proc. Code § 446; N.Y. C.P.L.R. § 3020; Tex. R. Civ. P. 93. The drafters of the Rules were aware of state affidavit requirements—Charles Clark wrote the book on code pleading. Yet they made no mention of the idea that Rule 11 would bring state affidavit and verification requirements into federal court. They said the opposite: "Rule 11 does away with the all too barren formality of an oath to pleadings." Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 463 (1943).

Commentators, too, have long interpreted Rule 11(a) to abolish verification or affidavits unless a federal rule or statute provides otherwise. Hutcheson, *The New Federal Rules*, *supra* at 208; Royal H. Brin, Jr., *Verification of Pleadings in Federal Court As Affected by Requirements of State Statutes*, 25 Ins. Counsel J. 219, 223 (1958) ("[I]t would now seem to be at least reasonably safe for even a cautious practitioner to omit verification of pleadings in federal court where it would be required by state statute or rule."); 2 *Moore's Federal Practice* § 11.10[2] (3d ed. 2025) ("A pleading does not have to be verified or accompanied by an affidavit, unless there is a specific provision to that effect in a federal rule or statute."); 5A *Wright & Miller's Federal Practice and Procedure* § 1339 (4th ed. 2025) ("This language has been presumed to refer to federal statutes and rules, in which case it would mean that a federal court need not follow a forum state practice

requiring verification or the attachment of an affidavit to the pleadings.").[5]

Only a handful of litigants have ever attempted to argue Rule 11(a) refers to state statutes, and every court of appeals that has considered the question has held that Rule 11(a) refers only to federal rules and statutes.[6]

3. Purpose. Rule 11's "purpose," *ZF Auto.*, 596 U.S. at 632, also points firmly away from respondents' interpretation. Rule 11's purpose was to eliminate verification and affidavit requirements in federal court. Clark, *Simplified Pleading*, *supra* at 463. It would have been beyond strange for the Rule's drafters to have then required their use when pleading under the law of *more than* 30 states.

The Rules were also about uniformity and simplicity and, on that score, reading Rule 11(a) to permit state affidavit requirements is even more bizarre. The drafters of the Federal Rules were seeking an escape from the chaos of the Conformity Acts and code pleading, under which "there were forty-nine different categories of procedure in the federal courts in actions at law." Alexander Holtzoff, *Origin and Sources of the Federal*

---

[5] Steven S. Gensler, *Federal Rules of Civil Procedure: Rules and Commentary* (2010) (Rule 11 "supersedes any contrary state law verification requirement"); Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 253 (2010) ("In light of judicial precedent, the apparent intent of Rule 11, and the overall federal orientation of the Rule's structure, the logical conclusion is that the exception applies only to federal enactments.").

[6] *See Albright v. Christensen*, 24 F.4th 1039, 1045 n.2 (6th Cir. 2022) (rejecting argument that Rule 11(a) refers to state statutes); *Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007) (same); *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1360 (11th Cir. 2014) (same); *Employers Mut. Lib. Ins. Co. of Wis. v. Blunt*, 227 F.2d 312 (5th Cir. 1955) (per curiam) (same).

Rules of Civil Procedure, 30 N.Y.U. L. Rev. 1057, 1057 (1955). Nothing could be less conducive to simplicity and uniformity than preserving specialized oath pleading requirements that vary from state to state.

Finally, given the myriad ways that permitting states to require affidavits in federal court conflicts with the basic structure of federal procedure—clashing with Rules 3, 8, 9, 12, 26, and 37—the Rules would not have used the "subtle device" of a proviso in Rule 11(a) to authorize such a massive incursion on their basic structure. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); *accord Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

B.1. Respondents counter that "the plain-text" of Rule 11(a) establishes that it applies to state statutes. Choy Br. 31; Beebe Br. 15-16. Beebe argues "[t]he phrase 'a rule or statute' is not naturally read to mean some rules or statutes to the exclusion of others" and "[a]n ordinary speaker of the English language would recognize Section 6853 of the Delaware Code as 'a … statute.'" Beebe Br. 16.

The basic problem with respondents' argument is that it proves too much. The phrase "a rule or statute" is meaningless standing alone. *Biden v. Nebraska*, 600 U.S. 477, 511 (2023) (Barrett, J., concurring) ("To strip a word from its context is to strip that word of its meaning."); *Gundy v. United States*, 588 U.S. 128, 141 (2019) ("This Court has long refused to construe words 'in a vacuum'"). England has statutes. Baseball has rules. And they could purport to say something about affidavits in federal court. But no one would think Rule 11(a) is referring to them. Reading Rule 11(a) to refer to federal rules and statutes does not "add[] a word that the Rule conspicuously omits." Choy Br. 31. It just reads the word "statute" in context.

2. Respondents argue that in fact "context" supports their interpretation because when the Federal Rules

"apply only to federal statutes, they [say] so expressly." Choy Br. 32; Beebe Br. 16. The problem with that argument is that it is false. The Federal Rules repeatedly use the word "statute" standing alone to mean federal statutes. *See* p. 11 & n.4, *supra* (citing Rules 6(a)(4), 16(c)(2)(I), 23(g)(1), 53(a)(1), 54(d)(2)(B), 81(a)(5)). Beebe tries to bolster its argument by pointing out that in two places—Rules 5.1 and 24—the word "a statute" means both state and federal. Beebe Br. 17. But that does not move the ball. It does not establish that the word "statute" when used alone in the Federal Rules always refers to both state and federal statutes. Indeed, we know it does not generally or in Rule 11 in particular. *See* pp. 10-11 & n.4, *supra*.

3. Respondents insist that, even if the Court is unpersuaded by their other arguments, the Court should find Rule 11(a) ambiguous and construe it to reach state statutes. Choy Br. 34-35; Beebe Br. 18-19. The proviso is not ambiguous. Just because the word "statute" could have two readings in the abstract, that does not make Rule 11(a) ambiguous. *Cf. King v. Burwell*, 576 U.S. 473, 492 (2015); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). There is no ambiguity here. Rule 11 does not permit the application of state affidavit requirements in federal court because to do so would fundamentally alter the pleading rules in federal court diversity suits at the whims of every state.

III. RESPONDENTS' PROPOSED APPROACH TO FEDERAL PROCEDURE INVITES CHAOS

A. Respondents do not dispute that *Shady Grove*'s plain-meaning approach provides a test that is simpler, clearer, more efficient, and more predictable than the one they propose. Choy Br. 18; Beebe Br. 37. They accept their approach would lead to endless litigation over how to crack apart state law to extract the substance while

leaving the procedure. *See* Beebe Br. 2, 12, 14-15, 35-36; Choy Br. 26-28.

Except for their concession that Delaware's timing rules would not apply in federal court, Beebe Br. 36, respondents never explain how their vague approach works, never say *which* aspects of Delaware's law must apply in federal court, and never hazard a guess where the line might be drawn. Nor do respondents explain how their rule would apply to the bevy of other statutes that federal courts would have to contort to conform to federal procedure, Pet. Br. 21-23, 36-37, instead offering the unsatisfying bromide that "[o]ther state-law provisions would require a separate analysis," Choy Br. 47 n.16. Respondents do not say what that "separate analysis" would be or how it could possibly work.

B. Respondents' rule invites all the procedural ills that the Federal Rules sought to cure. Pet. Br. 35-37. As the brief *amicus curiae* of Civil Procedure Professors demonstrates, Delaware's law is the poster child for the procedural chaos they invite this Court to endorse. *See* Brief of Civil Procedure Professors as *Amici Curiae* 12-24.

To offer just one example, Delaware's law contemplates a category of off-the-docket filings, which are generally foreign to the federal courts. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion). It requires an affidavit to be "filed with the court in a sealed envelope," writing on the envelope that the affidavit is "CONFIDENTIAL" and "MAY ONLY BE VIEWED BY A JUDGE OF THE SUPERIOR COURT." Del. Code Ann. tit. 18, § 6853(a)(1). That novel sealed submission requirement promises to trap wary and unwary litigants alike: A plaintiff has no guidance as to whether he should send his affidavit of merit in a sealed envelope to the "superior court," whether he should use the same envelope but

address it to the federal district judge, whether he should file the affidavit on the public docket, or whether he should follow the court's local rules for submitting documents in camera. Indeed, it is not clear if *any* of those approaches is the correct one or if none are.

Respondents stress, Choy Br. 5-6, that secrecy is integral to Delaware's law, but they never articulate how it could work in federal court. Respondents do not explain whether the procedure for "in camera" review of an affidavit upon a motion by the defendant, Del. Code Ann. tit. 18, § 6853(d), is a necessary "substantive" component of the law, or merely a state-law procedural nicety that federal judges can discard by forcing plaintiffs to publicly disclose the affidavits that the statute suggests should be secret. Nor do respondents reconcile the statute's promise that an expert may not be questioned about the affidavit, *id.*, with the promise of broad discovery under Rule 26, and the wide latitude that federal courts grant parties to cross-examine experts with any prior inconsistent statements, *see* Fed. R. Evid. 613(b). Every district judge will need to decide whether the statute's secrecy provisions are "substantive" enough to apply in federal court.

Respondents' crack-and-extract approach similarly provides federal courts (and litigants) no guidance on the critical question of how to *enforce* whatever they deem to be the "substantive" provisions of Delaware's statute. While the statute assigns the "Prothonotary" or "clerk of the court" the responsibility to "refuse" a complaint that is not accompanied by an affidavit, Del. Code Ann. tit. 18, § 6853(a), respondents seem to argue that in federal court district judges (and not the clerk) should hold that power, Choy Br. 11-12. Respondents insist that Rule 12 does not govern the judge's dismissal power, *id.* at 27 n.10, yet they offer no alternative except to implicitly endorse the

unwritten ad hoc "show cause" procedure that the district court used here, *id.* at 11-12.

These problems are not unique to the Delaware statute. *See* Pet. Br. 39-42. Respondents' approach ensures that procedure will vary wildly—and will be hotly disputed—whenever state procedural law is involved in a federal case. Run-of-the-mill civil diversity suits are regular fare for federal courts, 28 U.S.C. § 1332(a). And supplemental jurisdiction only increases the volume of state law issues that federal judges must confront. *Id.* § 1367(a).[7]

C. Respondents' answer to all this is that § 6853 is substantive and the federal courts just have to put up with the chaos. Not so. Delaware's law is procedural, and *Erie* does not compel importing procedural rules into federal court. Respondents argue that the line between substance and procedure should be drawn based on the Delaware law's effects. Choy Br. 43-47; Beebe Br. 42-44. Delaware's law is procedural under that test. It has no effect on the substantive law of professional negligence. And the Delaware law's effect on forum choices, litigation outcomes, and primary conduct in the world is "not so huge[]" as to merit treatment as "substantive" even under respondents' approach. *Shady Grove*, 559 U.S. at 456 n.13 (Ginsburg, J., dissenting).

Regardless, *Shady Grove* announced a different test, under which § 6853 is squarely procedural. A rule is procedural "[i]f it governs only 'the manner and the

---

[7] On the one hand, because the statute applies to every "health-care negligence lawsuit" filed in Delaware (not just those arising under Delaware substantive law), Del. Code Ann. tit. 18, § 6853(a), respondents' rule would require a thorny choice-of-law analysis for any non-Delaware malpractice claim filed in a Delaware federal court. On the other hand, if § 6853 were truly substantive, it would apply in a Delaware malpractice claim filed even in other states' courts—but it is written to apply only in Delaware courts.

means' by which the litigants' rights are 'enforced.'" *Shady Grove*, 559 U.S. at 407. Delaware's law does exactly that. It does not define claim elements, alter the standard of care, cap damages, or change burdens of proof. It applies to non-Delaware claims filed in Delaware, and does not apply to Delaware claims filed elsewhere. And once the affidavit is filed, it is obsolete. The affidavit is a box to be checked as part of the process of pleading.

D. Respondents declare that, even if their approach is less than ideal, federalism demands it. Choy Br. 2, 18, 20, 24, 51; Beebe Br. 37. But respondents find no refuge in federalism. Pet. Br. 41-43. Delaware did not join other states as an *amicus*. And federalism is not advanced by forcing federal courts to mangle state laws. It is respected by letting Delaware's law apply where Delaware said it applies: in Delaware's own courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JAKE W. MURPHY
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 3100
1144 Fifteenth Street
Denver, CO 8020
(303) 863-1000

DEVIN M. ADAMS
ARNOLD & PORTER
KAYE SCHOLER LLP
Suite 4000
700 Louisiana Street
Houston, TX 77002
(713) 576-2400

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
ANTHONY J. FRANZE
KOLYA D. GLICK
SAMUEL I. FERENC
DANA KAGAN MCGINLEY
JILLIAN M. WILLIAMS
JENNIFER F. KAPLAN
KATIE WENG
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

August 2025