

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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HAROLD R. BERK,)
Petitioner,)
v.) No. 24-440
WILSON C. CHOY, ET AL.,)
Respondents.)
- - - - -

Pages: 1 through 69

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HAROLD R. BERK,)
Petitioner,)
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Respondents.)

Monday, October 6, 2025

FREDERICK R. YARGER, ESQUIRE, Denver, Colorado; on
behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:25 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 24-440, Berk versus Choy.
5 Mr. Tutt.

6 ORAL ARGUMENT OF ANDREW T. TUTT

7 ON BEHALF OF THE PETITIONER

8 MR. TUTT: Thank you, Mr. Chief
9 Justice, and may it please the Court:
10 Delaware law provides that no medical
11 malpractice complaint may even be docketed
12 unless it is accompanied by an expert
13 affidavit. That requirement conflicts with
14 more than a half dozen Federal Rules of Civil
15 Procedure. It conflicts with Rules 8 and 9,
16 which set forth what a plaintiff must do to
17 state a claim in federal court, and it
18 conflicts with Rule 11, which bars verification
19 and affidavit requirements unless a federal
20 rule or statute provides otherwise.

21 Given its unavoidable conflicts with
22 multiple federal rules, Delaware's law cannot
23 apply in federal court.

24 Seeing that these conflicts are
25 insurmountable, Respondents seek refuge in Rule

1 11(a), which says a pleading need not be
2 verified or accompanied by an affidavit "unless
3 a rule or statute specifically states
4 otherwise." They say "statute" in that proviso
5 means state statute. But context matters, and
6 Respondents ignored it. A mountain of context
7 confirms that the word "statute" in Rule 11(a)
8 refers to federal laws, not state laws. The
9 rule's text, context, history, and purpose make
10 Respondents' Rule 11(a) argument impossible.

11 Rule 11 was meant to abolish, not
12 preserve, a patchwork of state affidavit rules
13 like Delaware's. Under Respondents' reading,
14 Rule 11 abolished nothing at all.

15 Respondents call Delaware's rule
16 substantive, but Delaware's law is procedural
17 from tip to tail. It designates when a
18 complaint can be docketed, what it must say,
19 and when the defendant must file a responsive
20 pleading. It doesn't define malpractice or
21 alter any substantive standard of care. By its
22 terms, it applies to all malpractice actions in
23 Delaware regardless of the state whose law
24 governs the claim. And by its terms, it does
25 not apply to malpractice actions brought under

1 Delaware law in the courts of other states.

2 This is a procedural law.

3 The federal rules form a comprehensive
4 scheme for the fast, fair, efficient resolution
5 of cases in federal courts. Delaware's law
6 cuts an ugly gash through that scheme. It has
7 no place in federal court.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Was there a motion to
10 dismiss filed in this case?

11 MR. TUTT: There was -- there was not.
12 This was -- there was a motion to show cause in
13 this case at least on the -- on the
14 affidavit-of-merit issue.

15 JUSTICE THOMAS: Is that the way -- is
16 that normal under Federal Rules of Civil
17 Procedure?

18 MR. TUTT: It is -- it is not. It is
19 not the traditional way in which a case is -- a
20 complaint's sufficiency is tested or a case's
21 legal sufficiency is tested. But it is
22 authorized by the Delaware law. So the motion
23 was made pursuant to Delaware's law, which
24 permits a party to seek in camera review to --
25 to ask the court to look at the affidavit of

1 merit and determine whether it is sufficient.

2 So that was the motion that was made
3 by all defendants, and that -- the court then
4 looked at the affidavit and determined it was
5 insufficient because it -- the -- it did not
6 actually include an affidavit.

7 JUSTICE THOMAS: So wouldn't it be --
8 wouldn't this have been disposed of in a
9 different manner had this not been Delaware or
10 a state that had a similar requirement?

11 MR. TUTT: Yeah, this -- this case
12 would have -- would have proceeded instead to
13 continue to expert discovery, where Mr. Berk
14 would have been required to then have his
15 expert testimony disclosed and go through the
16 process of discovery and expert --

17 JUSTICE SOTOMAYOR: Why couldn't they
18 have just made either a motion to dismiss and
19 ask for it to be converted into a motion for
20 summary judgment if an affidavit wasn't
21 provided?

22 MR. TUTT: I think --

23 JUSTICE SOTOMAYOR: They -- they
24 had --

25 MR. TUTT: Yeah. Yes, Your Honor.

1 JUSTICE SOTOMAYOR: My point is that
2 this is a totally different procedure, correct,
3 than what the federal rules set forth?

4 MR. TUTT: It -- it is a -- it is a
5 totally different procedure. It is a procedure
6 created by the statute to facilitate the
7 procedure created by the statute.

8 JUSTICE SOTOMAYOR: Can I talk to you
9 about -- I know you have a bunch of different
10 rules that you say this violates, 3, 8, 9, 11,
11 I don't know, 12.

12 But the essence of all those rules is
13 that the federal rules require a concise and
14 precise statement of your claim.

15 MR. TUTT: Yes, Your Honor.

16 JUSTICE SOTOMAYOR: And that it has to
17 be legally sufficient, correct?

18 MR. TUTT: Yes, Your Honor.

19 JUSTICE SOTOMAYOR: The affidavit rule
20 instead is talking not about legal sufficiency;
21 it's talking about factual sufficiency,
22 correct?

23 MR. TUTT: So that is Respondents'
24 position, and I'm happy to embrace it because I
25 think --

1 JUSTICE SOTOMAYOR: Well, they're
2 right. It's factual sufficiency. But that's
3 not the purpose of the federal rules, is it?

4 MR. TUTT: No, not at the -- not at
5 this stage of the litigation.

6 JUSTICE SOTOMAYOR: Not at the
7 pleading stage.

8 MR. TUTT: Yes, Your Honor.

9 JUSTICE SOTOMAYOR: All right. Now,
10 having said that, I think you were right in
11 saying that for us or for us or for the Court
12 to incorporate 6853, it would be a selective
13 incorporation by us, right? The federal rules
14 require that an answer be served in 20 days;
15 the Delaware rule says the answer doesn't have
16 to be served until the complaint -- until the
17 affidavit's filed.

18 So it's changing all the federal
19 procedural rules as well, isn't it?

20 MR. TUTT: Yes, Your Honor. That --

21 JUSTICE SOTOMAYOR: And that's also
22 why we can't incorporate it, correct?

23 MR. TUTT: Yes. I -- I think Delaware
24 designed this statute for Delaware courts as a
25 comprehensive scheme where each of the pieces

1 fit together so that Delaware courts can apply
2 this procedural requirement. But you could
3 only -- and I think Respondents agree -- only
4 bring some of these requirements into federal
5 court. It just would not be possible to bring
6 everything from the Delaware law into federal
7 court.

8 JUSTICE BARRETT: As you read the
9 Delaware law, do you think it is even
10 purporting to say what must be done in federal
11 court?

12 MR. TUTT: We do not. We think it
13 actually says that Delaware courts are to apply
14 this rule.

15 JUSTICE BARRETT: And let me ask you
16 this: If you had to concisely say, you know,
17 as Justice Sotomayor said, you identify a
18 number of different rules that you think
19 preclude application of this Delaware rule in
20 federal court -- let's put aside the Rule 11.
21 Let's say I'm not persuaded by that. Concisely
22 say to me, if we were going to write this
23 opinion and we were going to say that under
24 Hanna versus Plumer, there's a direct conflict
25 here and so the federal rule has to apply,

1 concisely say what you think the best rules to
2 point to were. What would the reasoning be?

3 MR. TUTT: So Rules 8 and 9 set forth
4 what a plaintiff must do to state a claim in
5 federal court, and Delaware's law adds an
6 additional evidentiary requirement that you
7 have to --

8 JUSTICE BARRETT: But 8 says just
9 pleadings. And an affidavit's not a pleading.
10 So tell me why Rule 8 precludes this.

11 MR. TUTT: So Rule 8 precludes this
12 because Rule 8 implicitly forecloses the
13 application -- the requirement that -- that you
14 come to court with a bunch of evidence, just as
15 it would preclude coming to court with new
16 particularity requirements or other
17 requirements that you would have to put into
18 the complaint.

19 JUSTICE BARRETT: How would your
20 position -- or what would your position be in,
21 say, states that have these mediation or
22 arbitration or board of review requirements to
23 file med-mal claims before they come to court?

24 MR. TUTT: Those -- those pose
25 difficult questions for conflicts analysis

1 under the federal rules. Each of them is -- is
2 different. They have very different
3 requirements. Some of them are non-binding.
4 Some of them create evidence that is then used
5 on the merits later in the case, but because
6 it's serious evidence against the plaintiff, it
7 deters the suit.

8 So it's -- it's not clear that all of
9 them would pass, but I think many of them would
10 pass.

11 JUSTICE BARRETT: But you think that
12 deciding your case does not require us to say
13 anything so broad as to say that states can't
14 apply any kinds of procedures that try to
15 address the problem that the Delaware law is
16 trying to address?

17 MR. TUTT: Absolutely. Not only that,
18 I think that this really leaves open an
19 incredible array of ways that states can
20 address the problem of medical malpractice
21 suits.

22 JUSTICE KAVANAUGH: Can you give some
23 examples? Because the amicus briefs really
24 focus on that, you know, problem. So if you
25 could speak specifically to examples.

1 MR. TUTT: So a -- the most basic one
2 that's always been known is -- is attorney fee
3 shifting. So, if you bring a frivolous case,
4 you're going to pay, or just a bad case even,
5 you're going to pay your opponent's costs and
6 their attorneys. That is a -- that would be a
7 powerful weapon against malpractice plaintiffs
8 that are seeking strike suits.

9 Obviously, states have -- have enacted
10 shorter statutes of limitations for these types
11 of claims to make sure that if you suffer
12 malpractice, you come to court quickly to
13 assert it. They put caps on damages. They
14 increased the -- the burden that a plaintiff
15 must carry to actually win one of these cases.
16 So, for instance, you actually must prove your
17 case in most cases through expert testimony.
18 So, at some point, a doctor is going to have to
19 come in and actually say there was medical
20 malpractice. You can't just come into court
21 and say: I was really hurt. Jury, give me
22 money because this -- this doctor is, you know,
23 a wealthy doctor. So --

24 JUSTICE JACKSON: So can I --

25 CHIEF JUSTICE ROBERTS: Well, are

1 you -- does -- is your argument reduced to the
2 proposition that there is no such thing as a
3 cause of action for medical malpractice in
4 Delaware? What there is is a cause of action
5 for medical malpractice that is confirmed by an
6 independent affidavit of another practitioner?

7 MR. TUTT: So I -- I don't think that
8 that's what Delaware has. I think that -- that
9 the clearest evidence is that this statute
10 doesn't just apply to Delaware causes of
11 action.

12 So, if you came in to Delaware court
13 and you were bringing a medical malpractice
14 suit under Florida law, it would have to still
15 apply.

16 And I'll tell you why. The pro- --
17 the prothonotary is not to docket the complaint
18 in Delaware court in -- unless it has an
19 affidavit of merit. But the prothonotary is
20 not an expert in choice-of-law analysis and so
21 is going to just have to look at the face of
22 the complaint to determine whether or not it's
23 a medical malpractice claim that requires the
24 affidavit.

25 So we think there actually is a

1 separate cause of action for medical
2 malpractice, and on top of it is a procedure
3 that is designed to weed out certain suits by
4 just putting in a procedural roadblock for the
5 bringing of a medical malpractice suit.

6 JUSTICE JACKSON: So getting back
7 to --

8 JUSTICE ALITO: What if the claim --
9 what if the claim under Delaware law had to
10 be -- what if Delaware law made it clear that a
11 party cannot recover for medical malpractice
12 unless the party submits an affidavit of the
13 type that's involved here? It's a limitation
14 on malpractice under -- under Delaware law.
15 That would be permissible, would it not?

16 MR. TUTT: It -- it would -- it would
17 not under our theory of the case be permissible
18 because it would be an artificial distinction,
19 as the Court discussed in Shady Grove.

20 It would be the same way in which the
21 New York law in Shady Grove could have been
22 written as an individual limitation on
23 collective actions in each of the different
24 penalty statutes. And the Court said, whether
25 you slice it and dice it like that or apply it

1 as a categorical rule, it -- it still works the
2 same way.

3 So, in -- in function, it is the same
4 impermissible procedural requirement. And, you
5 know, we think that there are just so many
6 ways that this statute cannot apply in federal
7 court --

8 JUSTICE JACKSON: Can I just ask you
9 about one of them? Because getting back to
10 Justice Barrett's question, I thought your sort
11 of clearest, most narrow, direct conflict was
12 with Rule 3, and I know that you mention it,
13 but you really rely on 8 and 9 in ways that I
14 don't know are necessary.

15 I thought the theory was that we have
16 this Delaware law saying what is necessary to
17 file or initiate a malpractice lawsuit as a
18 matter of procedure. You have to have this
19 separate AOM.

20 Notably, it's not evidence. It is
21 just what is a necessary step to initiate this
22 lawsuit.

23 And under federal law, no such thing
24 is required. The federal law says that the
25 action commences by filing a complaint with the

1 court.

2 So why isn't that just clear, narrow,
3 direct? It doesn't rely on any thoughts about
4 factual versus legal.

5 In fact, this is a factual distinction
6 that could support a conflict, could it not?

7 MR. TUTT: Yes, Your Honor. I mean,
8 we -- we do assert that there's a conflict with
9 Rule 3. The -- part of the reason is that the
10 lower courts in -- on our side of the circuit
11 conflict have really looked to Rules 8 and 9
12 and seen that as the fundamental sort of site
13 of the conflict with the Federal Rules of Civil
14 Procedure.

15 JUSTICE JACKSON: It seems more
16 complicated to me because it does require -- it
17 sort of -- piggybacking on what Justice
18 Sotomayor was saying, we're looking at what is
19 legally sufficient in 8 and 9.

20 And Justice Barrett points out that
21 there's a -- this is an affidavit, it's not a
22 pleading. There are distinctions there that I
23 think would allow for a credible argument that
24 there is no conflict because we're talking
25 about later stages and it's evidentiary and all

1 of these things, whereas this initial point,
2 like, what do you need for the clerk to accept
3 your document and start this case, is different
4 in these two different realms.

5 MR. TUTT: Yes, Your Honor. And we --
6 we obviously agree wholeheartedly with that
7 theory of the case and it really is as simple
8 as that syllogism.

9 JUSTICE KAGAN: Well, if that were --
10 if that were right, if you are -- if you're
11 just relying on Rule 3, Delaware goes and
12 changes its statute and says you have to file
13 it 20 days later, right, then you don't have
14 Rule 3 anymore.

15 MR. TUTT: That's -- that -- that is
16 true. That -- that is the -- the narrowness of
17 it is that you would only be addressing
18 Delaware --

19 JUSTICE KAGAN: Yeah. I mean, the
20 fundamental thing, isn't it, is the entire
21 thrust of the federal rules, most particularly
22 in Rule 8 and 9, which is it was meant to
23 establish a notice/pleading system where all
24 you had to do was to say: Here I am, here's
25 my claim, I'm going to be seeking damages, the

1 end, and everything else was supposed to happen
2 later in the normal course of things.

3 And then a defendant had a bunch of
4 different opportunities, starting with Rule 12
5 and then continuing on with Rule 56 summary
6 judgment, or using summary judgment even
7 pre-discovery in various circumstances, to
8 get rid of the suit. And that's basically the
9 structure of the federal rules.

10 MR. TUTT: Yes. And I -- you know, I
11 think that that is -- puts -- puts the finger
12 right on why we put so much weight on 8 and 9.
13 I mean, these -- this statute, like the similar
14 statutes, is fundamentally at odds with that
15 notice/pleading structure that the federal
16 rules rely on, and it creates lots of problems
17 in federal court to try to import these sorts
18 of things because all the other federal rules
19 are built on the foundation of notice/pleading
20 and the idea that the suit starts with the
21 submission simply of this paper that says your
22 claim for relief, your statement of
23 jurisdiction, and -- and your demand.

24 JUSTICE GORSUCH: Mr. Tutt, I -- what
25 you say is compelling in a lot of ways, but

1 your friend on the other side is going to say
2 Gasperini and that there the Court did this
3 crack-and-extract thing and took what they
4 could of it and ditched what they didn't --
5 couldn't.

6 What do we do about Gasperini from
7 your point of view?

8 MR. TUTT: Well, so the Court
9 determined in Gasperini, the Court majority
10 determined, that there was no direct conflict
11 with Rule 59, that Rule 59 provided a mechanism
12 for the enforcement of the substantive New York
13 standard for reviewing excessive jury verdicts.

14 JUSTICE GORSUCH: Right. How would
15 you have us distinguish it, is my question.

16 MR. TUTT: So -- so we -- we are a
17 direct conflict case. So we are a Shady Grove
18 case where, because a federal rule unavoidably
19 conflicts, you don't get to the murky waters of
20 Erie, which was what happened in that --

21 JUSTICE GORSUCH: So you think Shady
22 Grove properly understood, and I think you're
23 embracing even Justice Scalia's opinion that's
24 not for the full court, says, once we're in the
25 Federal Rules of land -- Federal Rules of Civil

1 Procedure land, we're not going to play with
2 Hanna, we're not going to play with Gasperini.

3 Is that -- is that a fair summary of
4 your position?

5 MR. TUTT: Yes, that is -- that is
6 exactly it.

7 JUSTICE GORSUCH: And, certainly,
8 there are some judges, Judge Ferguson and
9 others, who would have us adopt such a rule, I
10 appreciate that, for simplicity's sake for
11 district courts.

12 Can I just turn real quick to your
13 Rule 11 response, because your friend on the
14 other side makes a big deal out of it. And you
15 say: Well, it's distinguishable because it
16 only speaks to federal statutes.

17 And he's going to get up here, and
18 I know -- I -- I know he's going to say: Well,
19 look at the original Federal Rules of Civil
20 Procedure. They expressly distinguish between
21 federal statutes and statute simpliciter and,
22 therefore, when we see statute simpliciter,
23 as we do in Rule 11(a), we should encompass
24 states -- all right, you get -- you know the
25 argument, okay.

1 And assuming -- assuming there's some
2 force to that, do you have some other argument?
3 For example, could one say that 11(a) has to do
4 with pleadings and verifying the pleading,
5 either the attorney or -- or the plaintiff,
6 defendant, whatever, has to verify the
7 pleading, and an AOM ain't any of those things?

8 MR. TUTT: Absolutely, Your Honor. We
9 could have developed this argument more in our
10 reply brief if we had had more words.

11 JUSTICE GORSUCH: I -- I wondered,
12 yeah.

13 MR. TUTT: But the -- there is a
14 contemplation that, you know, an affidavit and
15 a verification have an understood meaning in
16 federal court. And -- and --

17 JUSTICE GORSUCH: With respect to
18 pleadings, which that word is in the rule.

19 MR. TUTT: Yes, Your Honor.

20 JUSTICE GORSUCH: And is an AOM a
21 pleading?

22 MR. TUTT: Yes, and an AOM -- you
23 know, an --

24 JUSTICE GORSUCH: It's not by one of
25 the parties. I mean, it's -- it's -- it's a --

1 it's -- it's a third-party document.

2 MR. TUTT: We -- we take -- we concede
3 it is not literally a pleading, although we
4 think functionally, actually, they're trying to
5 smuggle in the idea that you have to have a
6 doctor come in and essentially vouch for you in
7 your complaint.

8 But I agree with you that it's not
9 what we expect to see when we talk about
10 verification of a complaint or we talk about
11 an -- a -- a affidavit in support of a
12 complaint, which is designed to support the
13 allegations therein by the actual pleader.

14 This is, I have to go get an expert
15 witness who has to be a specially qualified
16 person, a very precise person.

17 JUSTICE GORSUCH: He's not pleading
18 for you. He's an expert witness.

19 MR. TUTT: Right. Who is -- who is --
20 who --

21 JUSTICE GORSUCH: Thank -- thank you.

22 MR. TUTT: Yes, Your Honor.

23 JUSTICE JACKSON: Can I just go back
24 for a second to Justice Kagan's point about
25 notice/pleading because, as I understood it,

1 this affidavit of merit is not discoverable,
2 it's not evidentiary, it can't be admitted,
3 it's sort of a black-box thing.

4 So why isn't that consistent still
5 with a notice/pleading kind of scenario?

6 MR. TUTT: I think this goes to
7 something we call Schrödinger's law about the
8 Delaware law. If it doesn't do anything
9 evidentiary because it's totally secret,
10 totally sealed, can't be used in the case, then
11 it's got to be a pleading requirement because
12 what else is it supposed to be doing? It
13 doesn't do anything.

14 JUSTICE JACKSON: So then where does
15 the conflict come? I don't understand. I
16 mean, it -- it -- it could be -- it could be an
17 additional thing. It doesn't have to be a
18 conflict. If -- if -- if it is a -- it seems
19 to me that we only have a conflict from the
20 standpoint of worrying about this extra thing
21 that you have to require being in conflict with
22 a notice/pleading dynamic if the thing that is
23 extra, this AOM, is requiring you to do
24 something evidentiary in the course of the
25 case, that it really is making a difference.

1 It doesn't seem to me that -- from the
2 Delaware law that this is even really evaluated
3 by anybody. You just have to have it and the
4 court has to see that it exists, and then
5 that's what is required to initiate your
6 lawsuit.

7 So how is -- maybe I'm not
8 understanding, but how -- how is that
9 inconsistent with a notice/pleading kind of
10 dynamic?

11 MR. TUTT: The -- the fundamental
12 inconsistency is that you don't have to prove
13 your case to file -- have your case already
14 proven to come into federal court and -- and
15 plead your case. You know, it's the --

16 JUSTICE JACKSON: So you're -- you're
17 equating this AOM with proof that you have a
18 case?

19 MR. TUTT: It's -- it's adding an
20 extra piece of proof that you need to develop
21 before you even get the aid of discovery,
22 right? So you don't get the chance to depose
23 anybody about what actually happened, so you
24 have to develop this expert testimony based on
25 whatever facts are available to you, which may

1 be a very limited understanding of what
2 actually happened.

3 But I -- I -- I want to go to this
4 idea of adding something extra. If you -- we
5 don't think you could make someone attach a
6 contract to a complaint or attach a policy --
7 an insurance policy to a complaint to plead a
8 case in federal court. That would just be
9 adding something extra under state law, but it
10 would be fundamentally inconsistent with Rules
11 8 and 9, which don't say you have to do
12 something like that.

13 JUSTICE BARRETT: Wouldn't it also be
14 inconsistent with Rule 12(d), which says that
15 if you're going to be judging a motion to
16 dismiss, it has to be on the pleadings alone,
17 so you would be closing your eyes to these
18 other things, so that if you disobey the
19 Delaware requirement of attaching an AOM, that
20 really has no effect on the court's assessment
21 of any kind of Rule 12 motion?

22 MR. TUTT: That -- that is -- that is
23 our fundamental submission about Rule 12 and
24 why we think there is a Rule 12 conflict here.

25 JUSTICE BARRETT: But it seems to me

1 that that kind of dovetails with Rules 8 and 9
2 in -- in showing you what the universe is.

3 MR. TUTT: Yes, exactly, and showing
4 the interconnected nature of these rules and
5 how, if you could just add -- if a state could
6 make you add something to a complaint, it would
7 have all of these domino effects on, well, what
8 would be the motion by which you would then
9 test the sufficiency of that? Delaware had to
10 create a special provision for testing the
11 motion because you're not allowed to see the
12 affidavit, so you have to make a motion for in
13 camera review because you don't even know if
14 it's insufficient. And --

15 JUSTICE GORSUCH: Yeah. Why -- why
16 Delaware has that sealing requirement -- I
17 mean, it seems to me it could be a couple of
18 things. One, you want to protect the doctor
19 who's coming in on the plaintiff's side from
20 retribution and encourage him to come forward.
21 Alternatively, you might be trying to protect
22 the defendant doctor from allegations before
23 and until somebody says that he's acted --
24 someone in his profession has said he's acted
25 problematically. Do you know the reasons why?

1 MR. TUTT: I -- I -- I don't know the
2 reason. And, you know, there's even another
3 possible policy reason, which is quite often,
4 in medical malpractice cases, the person who
5 submitted the affidavit of merit went on a
6 partial record, and so, when you go to get an
7 expert witness, you actually have to change
8 horses because you don't want to have that
9 doctor testify to the prior inconsistent
10 statements. So -- if there are any.

11 So there are numerous reasons that
12 they might have tried to keep it sealed.

13 JUSTICE GORSUCH: Yeah, no, I just
14 wonder because, if we're going to play the
15 crack-and-extract game, in federal court,
16 everything's got to be public, and do we defeat
17 some of those policy concerns, whatever they
18 may be?

19 MR. TUTT: Well -- and I don't -- I
20 don't know -- I don't know how it could be kept
21 secret in federal court.

22 JUSTICE GORSUCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: I don't know that
3 we've ever invoked Schrödinger's cat in --
4 (Laughter.)

5 JUSTICE ALITO: -- our analysis of
6 statutes or rules, but what are you saying?
7 Is -- is the affidavit of merit a pleading for
8 purposes -- we've got Rule 8 and Rule 11. Is
9 it a -- is it a pleading for one and not a
10 pleading for the other?

11 MR. TUTT: So the -- the -- the way
12 that the statute is described in various
13 places, it's either as it doesn't have any
14 impact on the case -- it's not evidence that's
15 used at the trial. In fact, it has to stay
16 secret. The defendants never get to see it, so
17 they can't even use it tactically in the case,
18 in which case how is it evidence? It's just a
19 procedural barrier. You have to just give the
20 papers to the judge and that's it, and then
21 it's out of the case.

22 And if that's true, then we do think
23 that that makes it basically functionally a
24 pleading. It's basically give us some secret
25 allegations.

1 JUSTICE ALITO: Under both rules, it's
2 a pleading?

3 MR. TUTT: Say it again? I apologize.

4 JUSTICE ALITO: Under both Rule 8 and
5 Rule 11, it's a pleading?

6 MR. TUTT: We -- we would say it's a
7 pleading rule. So Rules 8 and 9 set forth the
8 pleading rules in federal court. And it -- it
9 functionally acts like a pleading by creating
10 more allegations. Imagine it -- it wasn't the
11 doctor who had to submit the AOM. Imagine you
12 had to submit extra, you know, particularity
13 evidence to plead a case.

14 All they've done is make the
15 particularity requirement -- they've assigned
16 it to some other person who has to come in and
17 substantiate your case. So, in that way --

18 JUSTICE ALITO: On the -- on the facts
19 of this case, so your client hurt his foot. He
20 was treated by a doctor in Delaware.
21 Presumably, he got a report, what the doctor
22 did. He goes home to Florida. Maybe he sees
23 another doctor. What exactly -- what discovery
24 do you need?

25 MR. TUTT: Well, I think the most

1 telling discovery could simply be asking the
2 individuals at the facility where -- so he
3 alleges that when they were fitting him with
4 medical equipment, they actually caused the
5 injury. Individuals at the -- at the doctor's
6 office caused the injury.

7 Deposing them or deposing people who
8 work with them could be helpful. Looking for
9 contemporaneous communications, all these
10 things are permitted, and, in fact, they're the
11 purpose of Rule 26. And so, if you have, you
12 know, people sending messages to each other
13 that say, like, we really need to change the
14 policy where we just put this on people's feet,
15 you know, because it's -- it's probably
16 malpractice, you know, that would then inform
17 another medical professional's ability to
18 render an expert opinion.

19 JUSTICE ALITO: Could -- could the
20 district court grant summary judgment before
21 allowing all that discovery?

22 MR. TUTT: Yes. I mean, under the
23 Federal Rules of Civil Procedure, you know, you
24 would have to put in your 56(d) and say this is
25 what I need and this is why I need it. And the

1 judge has a great deal of discretion --

2 JUSTICE ALITO: Thank you.

3 MR. TUTT: -- in determining whether
4 to --

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor?

7 Justice Kagan?

8 Justice Barrett?

9 JUSTICE KAVANAUGH: I just want to ask
10 about the word "conflict" because that's a word
11 that means different things to different people
12 just to make sure I'm clear about this.

13 You're not suggesting, in fact, you're
14 arguing impossibility is not the standard here.
15 So, even if it's possible to comply with the
16 federal rule and the state statute, there still
17 is a conflict because, under Shady Grove, it
18 says, does it answer the same question,
19 correct?

20 MR. TUTT: Yes. Yes, Your Honor. And
21 I have been using a shorthand, but the test is:
22 Answers the same question. So addresses itself
23 to the same question.

24 JUSTICE KAVANAUGH: Right. And it's
25 important, I think, to focus on that because

1 the word "conflict," like I said, can mean
2 different things. Thank you.

3 MR. TUTT: Yes.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: Mr. Tutt, I want to
7 give you a minute to address the Rules Enabling
8 Act question. So let's say that we agree with
9 you, let's just assume that we agree with you,
10 and we think the federal rules answer this
11 question and control.

12 What do you think about the Shady
13 Grove versus Sibbach or Shady Grove and Sibbach
14 question about what is the test for the
15 validity of the rule?

16 MR. TUTT: So we wholeheartedly
17 embrace Sibbach's test. We think it is the
18 pre-existing law. And so it's whether it
19 regulates the manner and means of enforcing
20 rights. That's whether -- that's what makes it
21 procedural under the Rules Enabling Act.

22 So Justice Stevens in -- in Shady
23 Grove used a different test, said that Sibbach
24 didn't set that forth. Even if you used
25 Justice Stevens's test, this would pass under

1 Justice Stevens's -- so bound up with, you
2 know, rights that it -- that it functions as
3 a -- a substantive rule of state law.

4 JUSTICE BARRETT: Do you understand
5 Justice Stevens's test to be consistent with
6 Sibbach or retreat from Sibbach or what?

7 MR. TUTT: We -- we don't consider it
8 consistent with Sibbach. Justice Stevens took
9 a different perspective on that. But, you
10 know, it couldn't -- the text couldn't be
11 clearer of Sibbach. It's block-quoted in Shady
12 Grove for that reason, like, look, like, it
13 really says this, and it says, as long as it's
14 really addressed to procedure, it's valid under
15 the Rules Enabling Act.

16 JUSTICE BARRETT: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: Do we need to
20 resolve any conflict between Sibbach and
21 Justice Stevens's test in order to rule in your
22 favor?

23 MR. TUTT: Only in the sense that you
24 have to go on a longer journey to -- to use
25 Justice Stevens's analysis, unless you say even

1 using Justice Stevens's analysis, we would
2 reach the same result here because he says it's
3 a very high bar. It has to be -- you have to
4 have no doubt that it's bound up with state
5 procedure.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 MR. TUTT: Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Mr. Yarger.

11 ORAL ARGUMENT OF FREDERICK R. YARGER

12 ON BEHALF OF THE RESPONDENTS

13 MR. YARGER: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 Rather than identify one federal rule
16 that applied here, in fact, collided with the
17 Delaware statute, Petitioner identifies
18 separate -- seven separate rules and
19 manufactures conflicts with all of them.

20 All of those conflicts are entirely
21 hypothetical. The trial court did not hold and
22 Respondents did not argue below that this case
23 could not be commenced under Rule 3.

24 Respondents never challenged the
25 pleadings under Rule 12 or otherwise.

1 Respondents didn't argue the affidavit had to
2 be filed with the complaint under Rule 11 or
3 disclosed in discovery under Rule 26.

4 What this Court held in Hanna is that
5 trial courts in the federal system must enforce
6 state laws using federal modes of enforcement
7 even though the federal rules are not identical
8 to state court procedures.

9 Here, the trial court held and
10 Respondents argued only that the Delaware
11 affidavit-of-merit requirement had to be
12 satisfied to maintain a cause of action for
13 medical negligence under Delaware law, and
14 because Petitioner couldn't obtain that
15 affidavit, this case had to be dismissed.

16 The only question in dispute under
17 Hanna is whether the affidavit-of-merit
18 requirement can be enforced in federal court at
19 all. It can. It can be enforced through
20 dismissal under Rule 41, as courts have held,
21 or it can be enforced through early summary
22 judgment, as both the Seventh Circuit and Third
23 Circuit have held.

24 Petitioner takes the extreme position
25 that a federal court must ignore the entirety

1 of a state statute if any part of it might
2 conflict with a federal rule in some case.
3 This Court has rejected that approach, which is
4 why Petitioner in -- in the briefing
5 effectively concedes that to prevail, he has to
6 convince the Court to overrule at least three
7 of its decisions: Cohen, Woods, and Gasperini.
8 That intrusion on the jurisprudence of Hanna is
9 both unnecessary and would interfere with
10 federalism.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: You raise, though,
13 this -- the affidavit-of-merit argument in your
14 answer and not in a motion to dismiss. Could
15 you have raised it under another Federal Rule
16 of Civil Procedure?

17 MR. YARGER: In fact, we simply
18 answered the complaint, Justice Thomas. We
19 didn't claim that the pleadings could not be
20 closed. What we did do is we filed a motion
21 for in camera review with the trial court, and
22 then the case proceeded, the pleadings were
23 closed, and the case, in fact, entered --
24 entered discovery.

25 There are two -- at least two ways you

1 can raise an affidavit-of-merit requirement
2 consistent with the federal rules. As I said,
3 Rule 41(b), which allows for involuntary
4 dismissals if a plaintiff cannot comply with
5 the court order. Here, the court did order
6 Petitioner to comply with the
7 affidavit-of-merit requirement.

8 Or you can raise it through summary
9 judgment. So either of those approaches are
10 perfectly consistent with the federal rules and
11 don't create any conflicts.

12 JUSTICE KAGAN: So, Mr. Yarger,
13 suppose a state said, you know, this
14 notice/pleading stuff, we're really a little
15 bit tired of it and we want to go back to code
16 pleading, and so we're going to enact a
17 requirement and it says -- it's going to say,
18 for some category of suits or for all -- all
19 suits, who knows, you -- you have to do code
20 pleading. We're -- we're not going to insist
21 you do it in a complaint. You can just do it
22 in a separate document. Call it an affidavit
23 of merit. Call it a non-pleading if you want
24 to, but it's -- it's -- it's got to be filed
25 very early in the lawsuit.

1 Would -- would that be all right?

2 MR. YARGER: If it's an affidavit
3 that's separate from the pleadings, it can be
4 enforced --

5 JUSTICE KAGAN: That's what we're
6 calling it.

7 MR. YARGER: That's what we're calling
8 it.

9 JUSTICE KAGAN: We're calling it an
10 affidavit of merit.

11 MR. YARGER: Of course, my position is
12 you can enforce that. I think the question
13 is --

14 JUSTICE KAGAN: So you can enforce
15 that. I mean, that is -- is, like, exactly
16 what Rule 8 and, indeed, the entire structure
17 of the federal rules was designed to prevent.
18 What -- what -- you know, if there was one
19 thing that the federal rules did, it was to say
20 notice/pleading uniformly throughout the nation
21 in federal courts.

22 MR. YARGER: And this is not a rule of
23 pleading, which is our point. The -- the
24 pleadings itself --

25 JUSTICE KAGAN: But -- but I'm -- what

1 I'm -- the hypothetical I'm giving you is -- is
2 all we do is call it something different and
3 we're back to a code/pleading system.

4 MR. YARGER: Well, understood. And if
5 that's the case, Your Honor, Erie, of course,
6 is going to kick in, and that's the second step
7 in the analysis.

8 JUSTICE KAGAN: I don't know how we
9 get -- why do we have to get to Erie? I mean,
10 it's just got to be the case under Hanna, et
11 cetera, that you look at Rule 8, you look at
12 Rule 9, you look at Rule 12, and the whole
13 package of it says no code/pleading in federal
14 courts.

15 MR. YARGER: Well, and -- if it, in
16 fact, conflicts with Rules 8, 9, and 12, which
17 the affidavit requirement here does not, it --

18 JUSTICE KAGAN: Well, I guess the
19 question is why it does not. Okay. I'll give
20 you -- I'll give you some -- some more
21 examples.

22 Suppose there was a state that said
23 too many darn contract suits, so we're going to
24 make people come up with affidavits from an
25 economist denoting all the different damages

1 that apply, and we're going to do this also,
2 you've got to do it within the first 10 days.

3 MR. YARGER: I -- I think the key
4 question in all those cases, Your Honor, is how
5 do the parties bring those issues to the trial
6 court and present them through the Rules of
7 Civil Procedure. There are mechanisms --

8 JUSTICE KAGAN: Well, I guess what I'm
9 suggesting is that you -- you don't do that
10 through the Rules of Civil Procedure because
11 the Rules of Civil Procedure, although they
12 don't say you cannot apply additional
13 requirements like that, the rules mean, in the
14 same way that they meant in Hanna, in the same
15 way that they meant in Shady Grove, that, no,
16 if you try to impose requirements that make
17 medical malpractice claims, contract claims,
18 trade secret claims, you know, on and on and
19 on, if you make them subject to special
20 requirements whereby the plaintiff has to come
21 forward with some sort of proof that their
22 claim is good before anything starts, that
23 that's inconsistent with the entire structure
24 of the federal rules.

25 MR. YARGER: Sure. So a couple of

1 responses.

2 One, the -- the affidavit here is a
3 separate requirement apart from the proof and
4 the evidence in the case.

5 JUSTICE KAGAN: I mean, we're going to
6 make -- we're going to label all of these
7 affidavits.

8 MR. YARGER: Understood.

9 JUSTICE KAGAN: You have to -- you
10 have to file your trade secret. You have to
11 file your economist's report. You have to file
12 an affidavit if you're in a car accident from
13 one of those accidentologists saying that the
14 thing was -- was your -- was --

15 MR. YARGER: I think they're called
16 reconstruction experts, but --

17 JUSTICE KAGAN: -- it was the
18 defendant's fault.

19 MR. YARGER: Sure.

20 JUSTICE KAGAN: I mean, every kind of
21 suit has something that you have to prove and
22 we're going to make you file something before
23 the suit gets started about why it is that
24 you're going to be able to show in the end that
25 you meet the elements of the -- of the suit.

1 MR. YARGER: And -- and I bring up the
2 fact that this is outside the evidence and
3 outside the pleadings because it's much more
4 like the bond requirement at issue in Cohen,
5 which was a requirement that the State of New
6 Jersey had placed on certain types of suits,
7 derivative suits, and it could be raised at any
8 time during the course of the proceedings, and
9 if it was not satisfied, the case had to be
10 dismissed.

11 And Petitioner -- that's why
12 Petitioner wants the Court to overrule Cohen,
13 because it's a -- a significant barrier that he
14 has to affirming application of Delaware's
15 affidavit-of-merit requirement in federal
16 court. It's not part of the pleadings. It
17 doesn't constrain the evidence in the case.
18 The Delaware Supreme Court has said that very
19 clearly. It's a separate requirement necessary
20 to demonstrate that a plaintiff has done the
21 appropriate consultation with a medical expert
22 to -- to say just what the statute says, which
23 is that there's reasonable grounds to proceed.

24 Our only point, and I think the only
25 question under Hanna, and this is very

1 important, is that if those requirements can be
2 enforced in federal court using the federal
3 rules without any conflict, there's no occasion
4 for a federal court to disregard the retire --
5 the -- the requirement in all cases for all
6 time forever in federal court, which really is
7 Petitioner's position.

8 In Hanna, the court -- the conflict,
9 Justice Kavanaugh, was unavoidable. That's
10 what the conflict has to be. There, there was
11 no way for the Court not to adjudicate the
12 conflict because the trial court had dismissed
13 the case due to the method of service the
14 plaintiff had decided to use. It was either
15 apply the state rule of service or the federal
16 rule. There was no choice between the two.

17 Here, at no point did any party or the
18 trial court attempt ever to do anything that
19 created any kind of conflict with the federal
20 rules, which is our point.

21 And if Cohen can allow states to
22 regulate causes of action for shareholder
23 derivative suits, which are wholly within the
24 state power to regulate, Delaware ought to be
25 able, like most states, regulate medical

1 negligence claims, which the parties agree are
2 entirely within the power of state legislatures
3 to regulate.

4 JUSTICE JACKSON: What about the
5 conflict with respect to the timing of
6 responding to the complaint?

7 MR. YARGER: Well, it's my -- it's the
8 same answer. There is no conflict. There was
9 no conflict.

10 JUSTICE JACKSON: But -- but I'm
11 saying under Rule 12 --

12 MR. YARGER: Sure.

13 JUSTICE JACKSON: -- you have a
14 certain amount of time and it runs from when
15 the complaint is filed. Under Delaware law,
16 you have a certain amount of time, but it runs
17 from when the AOM is filed, and those don't
18 have to be the same thing because you could
19 have gotten an extension for the AOM.

20 MR. YARGER: Right. And our point,
21 again, there was no conflict here because we
22 actually answered the complaint. The pleadings
23 were closed. Had we wished to enforce that
24 requirement, we could have filed a motion under
25 Rule 6(b) for an extension of time.

1 JUSTICE JACKSON: Looking only at the
2 rules, looking at the rules --

3 MR. YARGER: The federal rules?

4 JUSTICE JACKSON: Yes. Both rules --

5 MR. YARGER: Yes.

6 JUSTICE JACKSON: -- I mean, don't we
7 have a conflict just on the basic quest --
8 question of when is your answer due?

9 MR. YARGER: I don't think you do
10 because it's Rule 12 unless you move for more
11 time. And in that way, the conflict would
12 never arise in federal court, unless you
13 brought it to the court's attention and said, I
14 don't want to answer this complaint; I want to
15 pause everything in time for plaintiff to
16 obtain an affidavit of merit.

17 JUSTICE SOTOMAYOR: You're rewriting
18 the Delaware law. The Delaware -- Delaware law
19 doesn't require you getting permission for an
20 extension. It says you don't file an answer
21 until the affidavit's served, period.

22 So you're now rewriting the Delaware
23 rule to fit it into the federal rule.

24 MR. YARGER: Well, I wouldn't say
25 we're rewriting it. Everybody agrees --

1 JUSTICE SOTOMAYOR: Well, you're --
2 you're rewriting so that it's convenient for
3 your argument.

4 MR. YARGER: Everyone agrees that an
5 affidavit of merit has to be obtained. The
6 Delaware courts have freely granted extensions
7 to obtain those affidavits. They've even said
8 that an extension be granted after the fact.

9 JUSTICE SOTOMAYOR: But now you're
10 telling federal courts they must.

11 MR. YARGER: Well, what I'm -- what
12 I'm saying is that unless and until a federal
13 litigant comes into court using federal modes
14 of enforcement, which is what Hanna said, and
15 raises the issue for the court's decision and
16 there is a conflict --

17 JUSTICE SOTOMAYOR: Ah.

18 MR. YARGER: -- there's no occasion to
19 use Hanna.

20 JUSTICE SOTOMAYOR: Thank you,
21 counsel.

22 JUSTICE GORSUCH: Well, Mr. Yarger,
23 let me just pick up on that with you for a
24 second. So, as I understand the Delaware
25 statute, you -- you must file this under seal.

1 Nobody looks at it except for the judge. And,
2 in fact, it's supposed to be filed with the
3 state clerk, and they call them something else
4 there, but there you are. And the case cannot
5 proceed, whereas I think you're acknowledging
6 in federal court that wouldn't apply because,
7 once a complaint is filed, the case is off and
8 running and that's a public document and you
9 have to answer or move within a certain number
10 of days. Right?

11 MR. YARGER: The affidavit is a public
12 document?

13 JUSTICE GORSUCH: Well, no, the
14 complaint --

15 MR. YARGER: The complaint. Yes,
16 that's correct.

17 JUSTICE GORSUCH: -- in federal court
18 is a public document. And that's all that's
19 required to get the case up and running, and a
20 defendant has to respond, right? So there's
21 a -- there's a delta there, and you are
22 cracking and extracting, as your friend on the
23 other side likes to say, some things from the
24 Delaware rule that you would apply in federal
25 court and other things that you wouldn't.

1 Isn't that fair?

2 MR. YARGER: Well, and I think that is
3 true of many state statutes and substantive
4 rules laid out in state court decisions. It's
5 never been true of Erie that in order to apply
6 state law in federal court, you have to take
7 everything -- single sentence written by a
8 state supreme court and apply that in federal
9 court.

10 JUSTICE GORSUCH: Well, how do we know
11 what the Delaware state legislature would do?
12 I mean, we're -- we're -- we're creating this
13 Frankenstein of a statute, right? We're taking
14 bits and pieces and adapting it, and -- and
15 I -- I understand your point, but what
16 authority does a federal court have to rewrite
17 Delaware law in that fashion?

18 And, you know, I mean, maybe the
19 affidavit has to be public and discoverable
20 in -- in federal court, and that seems wholly
21 antithetical to the -- the statute. Whatever
22 the purposes were for making it private, there
23 are obviously good and important reasons for
24 keeping it private. And for it to be --
25 precede the suit and not to allow the suit to

1 get off the ground, those were all important
2 policy judgments we would just be running --
3 paving right over in federal court. What do we
4 do about that?

5 MR. YARGER: Sure. So let me answer
6 the -- the confidentiality issue first and then
7 the broader question.

8 The confidentiality issue is easy.
9 It's a state law privilege that federal courts
10 have to enforce through Rule 501 of the Rules
11 of Evidence. Sealing is just a mechanism by
12 which you assure the privilege.

13 JUSTICE GORSUCH: Would it be
14 discoverable by the other side, though, even if
15 it's sealed?

16 MR. YARGER: No, it's not
17 discoverable.

18 JUSTICE GORSUCH: It's not
19 discoverable in federal court?

20 MR. YARGER: Yes, it's not
21 discoverable.

22 JUSTICE GORSUCH: Well --

23 MR. YARGER: Because it's privileged.
24 Just -- and privilege is a tremendous --

25 JUSTICE GORSUCH: Is it privileged?

1 MR. YARGER: Yes, it's privileged.

2 JUSTICE GORSUCH: Under state law?

3 MR. YARGER: It's tremendously
4 important.

5 JUSTICE GORSUCH: Do we know that
6 it --

7 MR. YARGER: In medical negligence
8 cases, doctors face lawsuits all the time where
9 plaintiffs are --

10 JUSTICE GORSUCH: Do we know that it
11 is privileged? I understand it's supposed to
12 be filed under seal. Is that a recognized
13 privilege under state law?

14 MR. YARGER: Under subsection (d) of
15 the statute, it is not discoverable. That is
16 privileged.

17 JUSTICE GORSUCH: I -- I understand.
18 Okay. All right. Well -- all right. Put that
19 one aside. Take the broader question that we
20 are -- we're picking and choosing and by what
21 authority do federal courts have.

22 MR. YARGER: Well, one --

23 JUSTICE GORSUCH: I'd be interested to
24 see what Mr. Tutt has to say about the
25 discoverability point.

1 MR. YARGER: Sure. One easy place to
2 look is the Delaware Supreme Court. And there
3 is no dispute that if a plaintiff can't obtain
4 an affidavit, even after the 60 days after the
5 fact, a case has to be dismissed.

6 We've cited some cases in the -- the
7 briefing from the Delaware Supreme Court that
8 apply this statute fairly flexibly, giving
9 plaintiffs more time even after the time has
10 expired. But the one thing they do say is that
11 if you want to maintain the cause of action
12 under state law, you have to obtain the
13 affidavit.

14 And this really was part of the
15 reasoning of the Seventh Circuit, and the Third
16 Circuit has held the same thing. The -- the
17 requirement to obtain the affidavit and the
18 ability to enforce that requirement while the
19 suit is pending and certainly before trial are
20 the two key aspects. Both of those aspects can
21 be enforced using existing federal rules
22 without conflicting with any of them.

23 JUSTICE GORSUCH: Thank you.

24 MR. YARGER: And that's our only
25 point. And that's what the trial court did

1 here. There was no conflict.

2 JUSTICE JACKSON: Can you -- can you
3 just help me to understand why -- and this is
4 kind of particular -- you say the case has to
5 be dismissed if the affidavit isn't filed, but
6 when I look at the actual language of the
7 statute, it says the clerk of the court shall
8 refuse to file the complaint and it should not
9 be docketed with the court.

10 That is actually technically a
11 different dynamic than having accepted it and
12 it being dismissed. And so what I don't
13 understand is why we don't just have a plain
14 conflict with Rule 3, which is the rule that
15 tells us in federal court when a case is
16 commenced, when you file it, when it's
17 docketed.

18 MR. YARGER: Sure.

19 JUSTICE JACKSON: This says you
20 can't -- the clerk has to refuse to docket the
21 case, not that the judge has to dismiss it.
22 And I think that's a relevant distinction. Am
23 I wrong about that?

24 MR. YARGER: I -- I -- I don't think
25 it's irrelevant, but, first, let me say the

1 statute also doesn't tell you what to do if
2 more time is given and the plaintiff never
3 actually produces the affidavit. Case law
4 does. It's very clear under Delaware law that
5 the case has to be dismissed.

6 Second, to the extent there is a -- is
7 a conflict with Rule 3, I think Walker -- this
8 Court's decision in the Walker case, which is
9 about commencing a case under Rule 3 and
10 whether commencing a case under Rule 3
11 conflicted with a state requirement that said
12 you have to commence a case for purposes of a
13 state law cause of action through service.

14 And what the Court said is Rule 3 is
15 the mechanism by which you start the federal
16 case for federal deadlines, but it doesn't do
17 away with other state law requirements that
18 have to be satisfied in order for a particular
19 plaintiff to maintain a cause of action.

20 So there's no conflict here. Under
21 the terms of the statute, you can get more
22 time, so, clearly, you can commence a case
23 without filing the affidavit.

24 JUSTICE JACKSON: But that's not what
25 it says. I mean, if you look at the statute --

1 I'm looking now -- it says that the -- the
2 court may, upon timely motion, grant a 60-day
3 extension for the time of filing the affidavit.

4 But we know that if the affidavit
5 isn't filed, the complaint isn't docketed with
6 the court.

7 MR. YARGER: Well, it doesn't say
8 quite that. It says you can seek the motion.
9 Clearly, it has to be on the docket for the
10 court to grant the motion. And you're --
11 you're given more time while that motion is
12 pending with the court. So even the plain
13 terms of it don't actually prevent docketing of
14 the case absent filing of the affidavit.

15 But I -- I do agree with you, Justice
16 Jackson, you know, Rule 3 governs commencement
17 in the federal system. And then the question
18 is, what do you do with this requirement?
19 Petitioner's position is it can never be
20 enforced ever in any federal case for all time.
21 Our position is, if it can be enforced using
22 the federal modes of enforcement without
23 conflict, then you need to give it effect.

24 JUSTICE KAGAN: Suppose Delaware
25 required not one affidavit of merit but four

1 affidavit of merits, each from a different
2 doctor, so you had to find four doctors. And
3 suppose that Delaware, instead of demanding
4 that each of these doctors said that there were
5 reasonable grounds for a med-mal suit, said
6 that each of these doctors had to say that, in
7 fact, there was a violation of the standard of
8 care.

9 So you had to find four doctors all
10 saying -- testifying that there was a violation
11 of the standard of care before your lawsuit
12 really began. Fine?

13 MR. YARGER: Well --

14 JUSTICE KAGAN: Got to be fine under
15 your theory.

16 MR. YARGER: -- I'm -- I'm going to
17 say fine because states almost universally,
18 across the country, require as a condition of
19 proving a medical negligence case, typically,
20 experts demonstrating breach of the standard of
21 care and causation. That's typically two
22 experts, sometimes more than that.

23 JUSTICE KAGAN: Eventually, at a
24 certain point --

25 MR. YARGER: Sure.

1 JUSTICE KAGAN: -- in the process.

2 But -- but Delaware is saying right now, when
3 you start the suit, you have to have in your
4 back pocket four doctors who say there was a
5 violation of the standard of care.

6 Under your theory, Delaware could do
7 that.

8 MR. YARGER: I don't --

9 JUSTICE KAGAN: And New York could do
10 something similar with respect to a different
11 kind of lawsuit.

12 Then California could do something
13 similar with respect to a different kind of
14 law school -- suit.

15 All of these requirements effectively
16 forcing a person to prove her case before the
17 case really gets started.

18 That's -- that's -- that's like if
19 there's -- if there's anything you know is a
20 violation of the whole idea of the federal
21 rules, that's it.

22 MR. YARGER: Well, again, I think you
23 have to do the Erie analysis. And that was the
24 same concern in --

25 JUSTICE KAGAN: You don't have to do

1 the Erie analysis because the federal rules are
2 there to tell you that that conflicts with it.
3 You never get to the Erie analysis.

4 MR. YARGER: So, understood, Justice
5 Kagan.

6 That was sort of the theme of cases
7 like Woods and Cohen, was this argument:
8 We can't be having states impose these
9 conditions --

10 JUSTICE KAGAN: Are -- are you really
11 saying that Wood and Cohen are likely
12 hypotheticals that I just gave you which forces
13 a person to prove its case in the first week?

14 MR. YARGER: Well, this -- this --
15 the Delaware requirement doesn't require a -- a
16 plaintiff to prove its case in the first week.
17 It just has to show consultation with an expert
18 that demonstrates reasonable grounds, not
19 plausibility under --

20 JUSTICE KAGAN: Yes, but I --

21 MR. YARGER: -- Rule 8 and not --

22 JUSTICE KAGAN: -- just said
23 there's -- there's no way under your theory
24 that the reasonable grounds is any different
25 from a likelihood of success, is any different

1 from, yes, there was a violation of the
2 standard of care.

3 MR. YARGER: Oh, I -- I don't think
4 it's -- I don't think it's nearly that onerous.
5 And the Delaware Supreme Court has made very
6 clear that it's not that onerous.

7 Literally, the affidavit needs only
8 say exactly what the statutory text or the
9 functional equivalent says. And that was the
10 Dishmon case from -- from Delaware Supreme
11 Court in 2011.

12 So it's a prophylactic measure. It --
13 I do think it's similar to a bond requirement.
14 Do this thing. Satisfy this requirement. If
15 you can't do that, you -- you can't maintain
16 the cause of action. And that's all Delaware
17 is doing.

18 And other states have done it to
19 good effect through their medical malpractice
20 reform laws. And as the American Hospital
21 Association brief explains, they have been
22 very, very important in limiting frivolous
23 medical negligence cases just like this one,
24 which was filed by a pro se plaintiff who
25 couldn't obtain that sort of basic prophylactic

1 measure.

2 So, if Cohen can condition a
3 shareholder derivative suit on obtaining a
4 bond, it's really hard to understand why
5 Delaware can't regulate claims for medical
6 malpractice by requiring an affidavit.

7 And if petitioners or if -- if
8 defendants can bring those issues to the court
9 using the federal rules without conflict, Hanna
10 says you have to enforce those requirements
11 because the modes of enforcing them don't have
12 to be the same, but the law has to be applied
13 the same across the two judicial systems.

14 JUSTICE KAVANAUGH: You've used the
15 word "conflict" quite a bit. How are you --
16 how are you defining that?

17 MR. YARGER: I define it the way
18 that -- that Hanna defines it.

19 JUSTICE KAVANAUGH: How about Shady
20 Grove?

21 MR. YARGER: Even Shady -- Shady
22 Grove. That's actually a great case.

23 JUSTICE KAVANAUGH: Answers the same
24 question. Yeah, that's different than --

25 MR. YARGER: It -- it answers the same

1 question, but the Court made clear the two
2 could not coexist at all. The -- the trial
3 court in Shady Grove --

4 JUSTICE KAVANAUGH: Just -- well, just
5 because they were different.

6 MR. YARGER: Not just because they
7 were different, Your Honor. Remember, in Shady
8 Grove, the case was dismissed at the outset on
9 a jurisdictional ground because the Court said
10 I can't use the class action device at all to
11 package claims together and meet the amount in
12 controversy requirement.

13 So it was a ruling that said: I can't
14 even look at Rule 23.

15 That was a conflict. There was no way
16 at all to apply Rule 23 the way that the trial
17 court had applied it there. That was an
18 unavoidable collision answering the question in
19 dispute in a way that required displacing state
20 law in Shady Grove.

21 So we're using the -- the term
22 "conflict" or "collision" in the same way as
23 the Court was using it there.

24 JUSTICE KAVANAUGH: And you don't
25 think, or do you, that "conflict" encompasses

1 when there are just additional requirements?

2 MR. YARGER: I -- I don't, because
3 Walker tells us that's exactly how you don't
4 read "conflict." It said --

5 JUSTICE KAVANAUGH: Well, but Shady
6 Grove says additional requirements. I mean,
7 that's -- that's in Shady Grove on 401.

8 You're right -- I mean, obviously,
9 Shady Grove struggled with Walker. It's in one
10 of those classic footnotes. So I -- I take
11 your point on Walker.

12 But, in the text of Shady Grove, it
13 was talking about additional requirements at
14 least as I read it.

15 MR. YARGER: Well, the -- the way I
16 understand --

17 JUSTICE KAVANAUGH: And that, in turn,
18 would answer the same question, which was the
19 test Shady Grove set, which was a little more
20 refined than the prior test at least as I've
21 read it all.

22 MR. YARGER: I -- I -- I think Shady
23 Grove didn't do away with the requirement that
24 the conflict has to be real and actually
25 presented in order for federal courts to just

1 do away with state statutes in their entirety
2 in -- in federal court. I think that much was
3 true of the -- the New York statute in Shady
4 Grove, and -- and it's been true in -- in other
5 cases too.

6 Semtek, which interpreted Rule 41, it
7 said, well, we could apply this to preclude the
8 state law of claim preclusion or we could apply
9 it to incorporate the state law of claim
10 preclusion.

11 There, it wasn't an on/off switch,
12 and it wasn't we can apply one or the other.
13 The Court said no, no, we apply Rule 41, but we
14 do so in a way that preserves the substantive
15 state law of claim preclusion.

16 So that's the difference between sort
17 of the Semtek example and the Shady Grove
18 example where there's just no way to reconcile
19 the two.

20 JUSTICE JACKSON: Can you take a
21 moment and touch on your -- the Rule 11
22 argument and the concern that Rule 11 is
23 completely inapposite and, therefore, both of
24 you have it wrong when you point to that?

25 The essential argument is that Rule 11

1 is clearly about the verification of pleadings.

2 MR. YARGER: Right.

3 JUSTICE JACKSON: That it's talking
4 about the signature that might be necessary,
5 and that to the extent it's referencing an
6 affidavit, it's in that context. It's not
7 talking about these kinds of affidavits or
8 affidavits in general.

9 MR. YARGER: Well, I -- I agree with
10 you. I don't think you need to rule -- read
11 11(a) to apply to the affidavit-of-merit
12 requirement or not. That was my point.

13 The pleadings in this case closed. We
14 never said: Oh, geez, you have to dismiss the
15 com- -- the complaint and I can't answer it
16 because the affidavit wasn't file -- filed
17 alongside the complaint. And that was my -- my
18 point with Justice Kagan.

19 The affidavit does something different
20 than tell you what's in the complaint and
21 whether or not it can be believed. It's a
22 separate requirement.

23 And the court -- the Delaware Supreme
24 Court has made clear it doesn't even restrict
25 the experts or what they can say in the case.

1 If you want to use the expert who provided the
2 affidavit in your merits case, you have to
3 disclose that expert separately and comply with
4 the Delaware Rules of Civil Procedure, which
5 require similar expert disclosures as the
6 federal system because the systems are -- are
7 largely the same.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything further?

12 Justice Alito?

13 Justice Sotomayor?

14 Justice Kagan?

15 Justice Gorsuch?

16 JUSTICE GORSUCH: I hate to belabor
17 it, but just your conversation with Justice
18 Jackson, you know, Rule 11 features very
19 prominently in your brief, but you seem to be
20 backing away from it here.

21 MR. YARGER: I'm not backing away from
22 it. We -- we said in our briefing that to the
23 extent that the affidavit has to accompany the
24 complaint, Rule 11(a) provides an easy answer.

25 JUSTICE GORSUCH: Okay. But now

1 you're saying it doesn't have to accompany the
2 complaint. In fact, it could happen months
3 before or months later.

4 MR. YARGER: Which is true.

5 JUSTICE GORSUCH: Okay. So thank you.

6 MR. YARGER: Yes.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 Justice Barrett?

10 Justice Jackson, anything?

11 Thank you, counsel.

12 MR. YARGER: Thank you.

13 CHIEF JUSTICE ROBERTS: Rebuttal,
14 Mr. Yarger?

15 REBUTTAL ARGUMENT OF ANDREW T. TUTT

16 ON BEHALF OF THE PETITIONER

17 MR. TUTT: Thank you, Your Honor.

18 Just a few points.

19 I'll just start with Justice Gorsuch's
20 point about whether this is privileged under
21 state law. It doesn't say the word
22 "privileged." It only applies to discovery in
23 medical negligence actions.

24 You -- the federal court would
25 essentially have to procedurally freelance to

1 sort of say, well, Delaware probably wants this
2 to be privileged in order to actually make it
3 work within the federal procedural scheme.

4 So I just don't -- I -- this is news
5 to me that it -- that it creates a privilege,
6 and who -- who even holds this privilege, the
7 doctor or the -- the plaintiff? It's unclear.

8 We're not trying to overrule anything.
9 We're the party here saying, apply Shady Grove.
10 Use the answers, the same question, framework,
11 and reach the result that that inevitably
12 requires, which is that this Delaware statute
13 answers the same question as -- as many Federal
14 Rules of Civil Procedure, and to the extent
15 that it does, it's in conflict.

16 Cohen didn't govern pleadings. It was
17 a case about whether or not you have to post
18 bond. The court in the case said things like,
19 you know, it creates a new liability that
20 didn't exist before. That makes it, you know,
21 manifestly substantive. It has nothing to do
22 with the merits of -- of your claim. It's
23 simply a security against losing the suit.

24 Walker is even further afield. It's a
25 case about whether a corporation that doesn't

1 appoint a corporate agent in the state can
2 maintain a suit in the state. That just -- or
3 I'm sorry, not Walker. That's Woods.

4 Walker is about Rule 3 and whether,
5 for certain state statutes of limitation, the
6 "commence the action" language of Rule 3 was
7 intended to -- to displace the state statute of
8 limitations. That just has nothing to do with
9 the nature of the Rule 3 conflict, for
10 instance, in this case, which, literally, the
11 Delaware statute changes when the answer is
12 due. I mean, this commence -- this is about
13 "commences the action."

14 Justice Kagan's point that you have to
15 prove your case before it's even started, that
16 is the fundamental thrust of this Delaware law
17 and laws like this. You need to come to court
18 with evidence that -- that was discovered
19 outside the discovery process and you need not
20 only to have it, but you need to submit it and
21 you need to do it through a certain procedure.

22 And so, even if you thought
23 consultation with an expert, which is how
24 Respondents have framed it, might be
25 permissible, you know, say in your complaint I

1 consulted with an expert, but actually having
2 them then sign an affidavit and give it to the
3 court is a whole different thing.

4 You know, these affidavits are
5 extremely hard to procure. You know, my
6 client's treating physician said that he had a
7 good malpractice case and -- but wouldn't sign
8 the affidavit because it's a big deal to sign
9 these affidavits. So they're -- they're more
10 than a barrier. Even if you have a meritorious
11 case, they can be a barrier that keeps you out.

12 In -- in terms of talking about, like,
13 what could they require, how many affidavits
14 could they require, what kinds of affidavits
15 could they require, we sort of have been using
16 the 12 nuns formulation, you know, like to
17 bring a contract action, you have to have 12
18 nuns, you know, swear that this is a -- that
19 this really is the parol evidence that would
20 support your contract claim. Just, it would --
21 it would allow states to smuggle in whatever
22 procedural system they want through the back
23 door of we're going to label it an affidavit.

24 So Shady Grove, as I read it, said,
25 you know, the question is what claims can be

1 maintained as a class action, so it was all
2 about, you know, could you add requirements to
3 Rule 23, and the Court said no. So, you know,
4 I think that this case is -- is really quite on
5 all fours with Shady Grove.

6 I just want to say the federal rules
7 answer the same question the Delaware law
8 answers, and they answer them differently.
9 Under Hanna and Shady Grove, that's
10 dispositive. We urge you to reverse.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Tutt, Mr. Yarger. The case is submitted.

13 (Whereupon, at 12:27 p.m., the case
14 was submitted.)
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