

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.)
- - - - -

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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 preserve, a
12 patchwork of state affidavit rules like
13 Delaware's.

14 Under Respondents' reading, Rule 11
15 abolished nothing at all. Respondents call
16 Delaware's rule substantive, but Delaware's law
17 is procedural from tip to tail. It designates
18 when a complaint can be docketed, what it must
19 say, and when the defendant must file a
20 responsive pleading. It doesn't define
21 malpractice or alter any substantive standard
22 of care. By its terms, it applies to all
23 malpractice actions in Delaware regardless of
24 the state whose law governs the claim. And by
25 its terms, it does not apply to malpractice

1 actions brought under Delaware law in the
2 courts of other states. This is a procedural
3 law.

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

9 I welcome the Court's questions.

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

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

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

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

1 to ask the court to look at the affidavit of
2 merit and determine whether it is sufficient.

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

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

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

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

23 MR. TUTT: I think --

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

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

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

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

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

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

16 MR. TUTT: Yes, Your Honor.

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

19 MR. TUTT: Yes, Your Honor.

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

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

1 think --

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

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

7 JUSTICE SOTOMAYOR: Not at the
8 pleading stage.

9 MR. TUTT: Yes, Your Honor.

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

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

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

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

24 MR. TUTT: Yes. I -- I think Delaware
25 designed this statute for Delaware courts as a

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

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

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

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

1 here and so the federal rule has to apply,
2 concisely say what you think the best rules to
3 point to were. What would the reasoning be?

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

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

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

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

25 MR. TUTT: Those -- those pose

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

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

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

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

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

1 could speak specifically to examples.

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

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

25 JUSTICE JACKSON: So can I --

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

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

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

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

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

7 JUSTICE JACKSON: So getting back
8 to --

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

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

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

1 you slice it and dice it like that or apply it
2 as a categorical rule, it -- it still works the
3 same way.

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

9 JUSTICE JACKSON: Can I just ask you
10 about one of them? Because getting back to
11 Justice Barrett's question, I thought your sort
12 of clearest, most narrow, direct conflict was
13 with Rule 3.

14 And I know that you mention it, but
15 you really rely on 8 and 9 in ways that I don't
16 know are necessary.

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

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

25 And under federal law, no such thing

1 is required. The federal law says that the
2 action commences by filing a complaint with the
3 court.

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

7 In fact, this is a factual distinction
8 that could support a conflict, could it not?

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

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

22 And Justice Barrett points out that
23 there's a -- this is an affidavit, it's not a
24 pleading. There are distinctions there that I
25 think would allow for a credible argument that

1 there is no conflict because we're talking
2 about later stages and it's evidentiary and all
3 of these things, whereas this initial point,
4 like, what do you need for the clerk to accept
5 your document and start this case, is different
6 in these two different realms.

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

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

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

21 JUSTICE KAGAN: Yeah. I mean, the
22 fundamental thing, isn't it, is the entire
23 thrust of the federal rules, most particularly
24 in Rule 8 and 9, which is it was meant to
25 establish a notice pleading system where all

1 you had to do was to say: Here I am, here's
2 my claim, I'm going to be seeking damages, the
3 end, and everything else was supposed to happen
4 later in the normal course of things.

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

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

1 JUSTICE GORSUCH: Mr. Tutt, I -- what
2 you say is compelling in a lot of ways, but
3 your friend on the other side is going to say
4 Gasperini and that there the Court did this
5 crack-and-extract thing and took what they
6 could of it and ditched what they didn't --
7 couldn't.

8 What do we do about Gasperini from
9 your point of view?

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

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

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

23 JUSTICE GORSUCH: So you think Shady
24 Grove properly understood, and I think you're
25 embracing even Justice Scalia's opinion that's

1 not for the full court, says, once we're in the
2 Federal Rules of land -- Federal Rules of Civil
3 Procedure land, we're not going to play with
4 Hanna, we're not going to play with Gasperini.

5 Is that -- is that a fair summary of
6 your position?

7 MR. TUTT: Yes, that is -- that is
8 exactly it.

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

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

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

1 states -- all right, you get -- you know the
2 argument, okay.

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

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

13 JUSTICE GORSUCH: I -- I wondered,
14 yeah.

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

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

21 MR. TUTT: Yes, Your Honor.

22 JUSTICE GORSUCH: And is an AOM a
23 pleading?

24 MR. TUTT: Yes, and an AOM -- you
25 know, an --

1 JUSTICE GORSUCH: It's not by one of
2 the parties. I mean, it's -- it's -- it's a --
3 it's a third-party document.

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

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

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

19 JUSTICE GORSUCH: He's not pleading
20 for you. He's an expert witness.

21 MR. TUTT: Right. Who is -- who is --
22 who --

23 JUSTICE GORSUCH: Thank -- thank you.

24 MR. TUTT: Yes, Your Honor.

25 JUSTICE JACKSON: Can I just go back

1 for a second to Justice Kagan's point about
2 notice/pleading because, as I understood it,
3 this affidavit of merit is not discoverable,
4 it's not evidentiary, it can't be admitted,
5 it's sort of a black-box thing.

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

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

15 It doesn't do anything.

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

1 something evidentiary in the course of the
2 case, that it really is making a difference.

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

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

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

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

21 MR. TUTT: It's -- it's adding an
22 extra piece of proof that you need to develop
23 before you even get the aid of discovery,
24 right? So you don't get the chance to depose
25 anybody about what actually happened, so you

1 have to develop this expert testimony based on
2 whatever facts are available to you, which may
3 be a very limited understanding of what
4 actually happened.

5 But I -- I -- I want to go to this
6 idea of adding something extra. If you -- we
7 don't think you could make someone attach a
8 contract to a complaint or attach a policy --
9 an insurance policy to a complaint to plead a
10 case in federal court. That would just be
11 adding something extra under state law, but it
12 would be fundamentally inconsistent with Rules
13 8 and 9, which don't say you have to do
14 something like that.

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

24 MR. TUTT: That -- that is -- that is
25 our fundamental submission about Rule 12 and

1 why we think there is a Rule 12 conflict here.

2 JUSTICE BARRETT: But it seems to me
3 that that kind of dovetails with Rules 8 and 9
4 in -- in showing you what the universe is.

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

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

1 someone in his profession has said he's acted
2 problematically. Do you know the reasons why?

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

13 So there are numerous reasons that
14 they might have tried to keep it sealed.

15 JUSTICE GORSUCH: You know, I just
16 wonder because, if we're going to play the
17 crack-and-extract game, in federal court,
18 everything's got to be public, and do we defeat
19 some of those policy concerns, whatever they
20 may be?

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

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE ALITO: I don't know that
5 we've ever invoked Schrödinger's cat in --

6 (Laughter.)

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

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

24 And if that's true, then we do think
25 that that makes it basically functionally a

1 pleading. It's basically give us some secret
2 allegations.

3 JUSTICE ALITO: Under both rules, it's
4 a pleading?

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

6 JUSTICE ALITO: Under both Rule 8 and
7 11, it's a pleading?

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

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

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

1 do you need?

2 MR. TUTT: Well, I think the most
3 telling discovery could simply be asking the
4 individuals at the facility where -- so he
5 alleges that when they were fitting him with
6 medical equipment, they actually caused the
7 injury. Individuals at the -- at the doctor's
8 office caused the injury.

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

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

24 MR. TUTT: Yes. I mean, under the
25 Federal Rules of Civil Procedure, you know, you

1 would have to put in your 56(d) and say this is
2 what I need and this is why I need it. And the
3 judge has a great deal of discretion --

4 JUSTICE ALITO: Thank you.

5 MR. TUTT: -- in determining whether
6 to --

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 Justice Kagan?

10 Justice Barrett?

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

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

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

1 JUSTICE KAVANAUGH: Right. And it's
2 important, I think, to focus on that because
3 the word "conflict," like I said, can mean
4 different things. Thank you.

5 MR. TUTT: Yes.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

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

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

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

24 So Justice Stevens in -- in Shady
25 Grove used a different test, said that Sibbach

1 didn't set that forth. Even if you used
2 Justice Stevens's test, this would pass under
3 Justice Stevens's -- so bound up with, you
4 know, rights that it -- that it functions as
5 a -- a substantive rule of state law.

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

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

18 JUSTICE BARRETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

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

25 MR. TUTT: Only in the sense that you

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

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. TUTT: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Mr. Yarger.

13 ORAL ARGUMENT OF FREDERICK R. YARGER
14 ON BEHALF OF THE RESPONDENTS

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

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

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

1 Respondents never challenged the
2 pleadings under Rule 12 or otherwise.
3 Respondents didn't argue the affidavit had to
4 be filed with the complaint under Rule 11 or
5 disclosed in discovery under Rule 26.

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

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

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

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

13 I welcome the Court's questions.

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

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

1 entered discovery.

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

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

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

1 to, but it's -- it's -- it's got to be filed
2 very early in the lawsuit.

3 Would -- would that be all right?

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

7 JUSTICE KAGAN: That's what we're
8 calling it.

9 MR. YARGER: That's what we're calling
10 it.

11 JUSTICE KAGAN: We're calling it an
12 affidavit of merit.

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

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

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

1 pleadings itself --

2 JUSTICE KAGAN: But -- but I'm -- what
3 I'm -- the hypothetical I'm giving you is -- is
4 all we do is call it something different and
5 we're back to a code/pleading system.

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

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

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

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

24 Suppose there was a state that said
25 too many darn contract suits, so we're going to

1 make people come up with affidavits from an
2 economist denoting all the different damages
3 that apply, and we're going to do this also,
4 you've got to do it within the first 10 days.

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

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

1 of the federal rules.

2 MR. YARGER: Sure. So a couple of
3 responses.

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

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

10 MR. YARGER: Understood.

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

17 MR. YARGER: I think they're called
18 reconstruction experts, but --

19 JUSTICE KAGAN: -- it was the
20 defendant's fault.

21 MR. YARGER: Sure.

22 JUSTICE KAGAN: I mean, every kind of
23 suit has something that you have to prove and
24 we're going to make you file something before
25 the suit gets started about why it is that

1 you're going to be able to show in the end that
2 you meet the elements of the -- of the suit.

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

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

1 Our only point, and I think the only
2 question under Hanna, and this is very
3 important, is that if those requirements can be
4 enforced in federal court using the federal
5 rules without any conflict, there's no occasion
6 for a federal court to disregard the retire --
7 the requirement in all cases for all time
8 forever in federal court, which really is
9 Petitioner's position.

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

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

23 And if Cohen can allow states to
24 regulate causes of action for shareholder
25 derivative suits, which are wholly within the

1 state power to regulate, Delaware ought to be
2 able, like most states, regulate medical
3 negligence claims, which the parties agree are
4 entirely within the power of state legislatures
5 to regulate.

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

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

12 JUSTICE JACKSON: But I'm saying under
13 Rule 12 --

14 MR. YARGER: Sure.

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

22 MR. YARGER: Right. And our point,
23 again, there was no conflict here because we
24 actually answered the complaint. The pleadings
25 were closed. Had we wished to enforce that

1 requirement, we could have filed a motion under
2 Rule 6(b) for an extension of time.

3 JUSTICE JACKSON: Looking only at the
4 rules, looking at the rules --

5 MR. YARGER: The federal rules?

6 JUSTICE JACKSON: Yes. Both rules --

7 MR. YARGER: Yes.

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

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

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

24 So you're now rewriting the Delaware
25 rule to fit it into the federal rule.

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

3 JUSTICE SOTOMAYOR: You're rewriting
4 so that it's convenient for your argument.

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

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

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

18 JUSTICE SOTOMAYOR: All right.

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

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

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

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

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

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

15 MR. YARGER: That's correct.

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

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

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

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

1 judgments we would just be running -- paving
2 right over in federal court. What do we do
3 about that?

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

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

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

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

17 JUSTICE GORSUCH: It's not
18 discoverable in federal court.

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

21 JUSTICE GORSUCH: Well --

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

24 JUSTICE GORSUCH: Is it privileged?

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

1 JUSTICE GORSUCH: Under state law?

2 MR. YARGER: It's a tremendously
3 important.

4 JUSTICE GORSUCH: We know that it --

5 MR. YARGER: In medical negligence
6 cases, doctors face lawsuits all the time. The
7 plaintiffs --

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

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

15 JUSTICE GORSUCH: I -- I understand.
16 Okay. All right. Well -- all right. Put that
17 one aside.

18 Take the broader question that we are
19 -- we're picking and choosing and by what
20 authority do federal courts have.

21 MR. YARGER: Well, we --

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

25 MR. YARGER: Sure. One easy place to

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

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

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

22 JUSTICE GORSUCH: Thank you.

23 MR. YARGER: And that's our only
24 point. And that's what the trial court did
25 here. There was no conflict.

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

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

17 MR. YARGER: Sure.

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

23 MR. YARGER: I -- I -- I don't think
24 it's irrelevant, but, first, let me say the
25 statute doesn't tell you what to do if more

1 time is given and the plaintiff never actually
2 produces the affidavit. Case law does. It's
3 very clear under Delaware law that the case has
4 to be dismissed.

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

13 And what the Court said is Rule 3 is
14 the mechanism by which you start the federal
15 case for federal deadlines. But it doesn't do
16 away with other state law requirements that
17 have to be satisfied in order for a particular
18 plaintiff to maintain a cause of action. So
19 there's no conflict here.

20 Under the terms of the statute, you
21 can get more time, so clearly you can commence
22 a case without filing the affidavit.

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

1 court may, upon timely motion, grant a 60-day
2 extension for the time of filing the affidavit.

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

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

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

23 JUSTICE KAGAN: Suppose Delaware
24 required not one affidavit of merit but four
25 affidavit of merits, each from a different

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

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

12 MR. YARGER: Well --

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

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

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

24 MR. YARGER: Sure.

25 JUSTICE KAGAN: -- in the process.

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

5 Under your theory, Delaware could do
6 that.

7 MR. YARGER: I don't --

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

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

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

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

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

24 JUSTICE KAGAN: You don't have to do
25 the Erie analysis because the federal rules are

1 there to tell you that that conflicts with it.

2 You never get to the Erie analysis.

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

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

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

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

19 JUSTICE KAGAN: Yes, but I --

20 -- Rule 8 and not --

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

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

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

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

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

25 So if Cohen can condition a

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

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

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

15 MR. YARGER: I define it the way that
16 Hanna defines it.

17 JUSTICE KAVANAUGH: How about Shady
18 Grove?

19 MR. YARGER: Even Shady -- Shady
20 Grove. That's actually a great case.

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

23 MR. YARGER: It -- it answers the same
24 question, but the court made clear, the two
25 could not coexist at all. The -- the trial

1 court in Shady Grove --

2 JUSTICE KAVANAUGH: Just -- well, just
3 because they were different.

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

11 So it was a ruling that said I can't
12 even look at Rule 23.

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

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

22 JUSTICE KAVANAUGH: And you don't
23 think, or do you, that "conflict" encompasses
24 when there are just additional requirements?

25 MR. YARGER: I -- I don't, because

1 Walker tells us that's exactly how you don't
2 read "conflict." It said --

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

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

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

13 MR. YARGER: Well, the -- the way I
14 understand --

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

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

1 true of the -- the New York statute in Shady
2 Grove.

3 And it's been true in -- in other
4 cases too.

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

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

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

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

24 The essential argument is that Rule 11
25 is clearly about the verification of pleadings.

1 MR. YARGER: Right.

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

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

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

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

22 And the court -- the Delaware Supreme
23 Court has made clear, it doesn't even restrict
24 the experts or what they can say in the case.
25 If you want to use the expert who provided the

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

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas, anything further?

11 Justice Alito?

12 Justice Sotomayor?

13 Justice Kagan?

14 Justice Gorsuch?

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

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

24 JUSTICE GORSUCH: Okay. But now
25 you're saying it doesn't have to accompany the

1 complaint. In fact, it could happen months
2 before or months later.

3 MR. YARGER: Which is true.

4 JUSTICE GORSUCH: Okay. So, thank
5 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 creates a privilege, and who --
6 who even holds this privilege, the doctor or
7 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.

22 It has nothing to do with the merits
23 of -- of your claim. It's simply security
24 against losing the suit. Walker is even
25 further afield. It's a case about whether a

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

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

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

24 And so even if you thought
25 consultation with an expert, which is how

1 Respondents have framed it, might be
2 permissible, you know, say in your complaint I
3 consulted with an expert, but actually having
4 them then sign an affidavit and give it to the
5 court is a whole different thing.

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

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

1 So Shady Grove, I -- as I read it,
2 said, you know, the question is what claims can
3 be maintained as a class action, so it was all
4 about, you know, could you add requirements to
5 Rule 23 and the court said no. So, you know, I
6 think this case is really quite on all fours
7 with Shady Grove.

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Tutt. Mr. Yarger. The case is submitted.

15 (Whereupon, at 12:27 p.m., the case
16 was submitted.)

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Official - Subject to Final Review

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