No. 24-440

In the Supreme Court of the United States

HAROLD R. BERK, PETITIONER,

v.

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

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

REPLY BRIEF FOR THE PETITIONER

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This case presents an exceedingly important question about the rules of procedure that apply in federal courts. As the *amicus* brief of some of the nation's leading civil procedure scholars explains, this action implicates "a significant conflict among the circuits," and "plainly meets all of this Court's criteria for granting review under Rule 10." *Amicus* Br. 2.

Respondents make no persuasive arguments against review. First, they do not dispute that the question presented is exceptionally important, and their attempt to explain away the obvious circuit split blinks reality. The conflict this case presents is square and longstanding and has been widely recognized by scholars and courts—including by courts *in the split*. Respondents' merits argument fares no better. The conflict between the Federal Rules and Delaware's affidavit of merit (AOM) statute is undeniable. And respondents' tacked-on vehicle argument identifies not one obstacle to review.

Guidance from this Court about how to determine whether a Federal Rule of Civil Procedure displaces a state law or rule that "attempts to answer the same question" is essential for courts confronting these conflicts nationwide. The Court should grant certiorari.

ARGUMENT

I. THE CIRCUIT CONFLICT IS SQUARE

A. The Conflict in this Case is Widely Recognized

The conflict in this case is plain and widely acknowledged. *See* Pet. 2 n.1. As the Second Circuit recognized in *Corley v. United States*, circuits "are divided about whether analogous state law certification requirements should be given effect in a federal court." 11 F.4th 79, 87 (2d Cir. 2021) (cleaned up). Courts and commentators have been explicit about which courts are in this split. *See id.* at 88-89 (joining Sixth Circuit, rejecting Tenth); 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4511 & nn.95-108.50 (3d ed. 2024) (Tenth and Third Circuits on one side; Sixth on the other). There is no ambiguity in these analyses; the circuits are hopelessly divided over how to conduct conflicts analysis "[w]hen both a federal rule and a state law 'attempt[] to answer the same question.'" *Corley*, 11 F.4th at 88 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010) (majority op.)).

B. Courts On the Long Side of the Split Have Expressly Rejected Any Distinction Between FTCA and Diversity Cases

Respondents argue, without merit, that the entrenched circuit conflict this case raises is "illusory and overstated" because cases founded on "federal question jurisdiction" do not count as part of the circuit conflict. Opp. 2; *see also* Opp. 16. That argument fails three times over. *First*, it ignores that courts in the split have

expressly *rejected* the argument that different conflicts analyses apply in federal question and diversity cases. *Second*, it ignores that the conflicts analysis nearly every court in the split has applied purported to be the same, asking whether a state AOM statute "attempts to answer the same question" as a federal rule. *Third*, it fails as a matter of common sense: The basis for federal jurisdiction makes no difference as to whether a federal court should apply state procedural rules.[1]

Take *Corley*, for example, one of the Federal Tort Claims Act (FTCA) cases respondents claim is inapposite. In that case, the Second Circuit considered a Connecticut requirement that "a party must affix to the complaint 'a certificate'" supported by "a written and signed opinion of a . . . health care provider . . . that there appears to be evidence of medical negligence." 11 F.4th at 85 (quoting Conn. Gen. Stat. § 52-190a(a)). Judge Lynch, writing for a unanimous panel, deemed that rule a "heightened pleading requirement" "in direct contrast" with the Federal Rules of Civil Procedure. *Id.* at 89. While Federal Rule 8 "embodies a policy of 'notice pleading,'" and requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," the Connecticut law demanded "specific types of documentary evidence to establish a plausible claim," the court found. *Id.* (citing Fed. R. Civ. P. 8(a)(2)). In conducting that analysis, the Second Circuit expressly rejected a distinction urged by the Government—and respondents here—"that *Shady Grove*'s conflict analysis

[1] The Third Circuit's outlier decision in *Wilson v. United States*, 79 F.4th 312 (3d Cir. 2023), which respondents highlight, is the only case to draw that distinction. But everyone knows why it did so: to route around that circuit's precedent holding that state AOM statutes do not conflict with any federal rules. *Wilson*'s strained reasoning and illogical result only further demonstrates why the Court should *grant* review here.

does not apply outside of diversity jurisdiction cases." *Id.* at 88. If respondents here are right, Judge Lynch wasted several pages on a *Shady Grove* conflict analysis that was wholly unnecessary.

So, too, in *Gallivan v. United States*, where the Sixth Circuit rejected federal application of another state AOM provision. 943 F.3d 291 (2019). There, the district court concluded—like the Third Circuit here—that an Ohio rule "requir[ing] a person alleging medical negligence to include a medical professional's affidavit stating that the claim has merit" required dismissal of a complaint lacking the affidavit. *Id.* at 293. The Sixth Circuit disagreed, finding Ohio's AOM rule in conflict with Rules 8, 9, and 12 of the Federal Rules of Civil Procedure, and thus displaced in federal court. *Id.* at 293-94. Again, the *Shady Grove* conflicts analysis that Judge Thapar performed to reach that ruling would be unnecessary if respondents were right that the source of federal jurisdiction matters. *Id.* at 293-94. Instead, like Judge Lynch, Judge Thapar expressly rejected the argument that "conflict analysis doesn't apply in FTCA cases," *id.* at 294, because "it doesn't make sense for federal courts to have one system of procedural rules in diversity cases and another in FTCA cases," *id.* at 295; *see also Young v. United States*, 942 F.3d 349, 351 (7th Cir. 2019) (Easterbrook, J.) ("Many cases hold that federal, not state, rules apply to procedural matters … in all federal suits."). Yet respondents puzzlingly assert that *Gallivan* excluded diversity cases from its result—a claim belied by *Gallivan*'s immediate progeny, *Albright v. Christensen*, 24 F.4th 1039 (6th Cir. 2022). In *Albright*, which respondents ignore entirely, the Sixth Circuit expressly applied *Gallivan* to hold that Michigan's AOM statute does not apply in *diversity* actions. *Id.* at 1044-46. The decision in that diversity case irreconcilably conflicts with the Third Circuit's decision in this diversity case.

Respondents' purported FTCA-diversity distinction is thus dead on arrival; the eventuality they say this Court should await before granting review on this issue has already occurred. *Contra* Opp. 3, 18, 27-28.

There is more. The Fourth Circuit matched *Gallivan* in *Pledger v. Lynch*, 5 F.4th 511 (2021), by declining to apply a West Virginia statute requiring would-be plaintiffs to acquire a "screening certificate of merit" before filing suit. *Id.* at 518 (quoting W. Va. Code § 55-7B-6(b)). Judge Harris, writing for the panel majority, "beg[an] with the fundamental and uncontroversial point that the Federal Rules of Civil Procedure generally govern all civil actions in federal court." *Id. Pledger* did not say, as respondents' framing suggests, that the Federal Rules govern *FTCA* actions or *federal-question* cases. Instead, *Pledger* spoke to "*all civil actions in federal court*," *id.* (emphasis added), brought in diversity or otherwise. From that foundation, the Fourth Circuit applied the same *Shady Grove* framework and concluded that "the Federal Rules governing the sufficiency of pleadings … answer the 'question in dispute' here," rendering West Virginia's AOM requirement inapplicable. *Id.* at 519.

Respondents identify nothing else distinguishing those cases from this one. Opp. 15-16. They rest on the illusory diversity-federal question distinction, which they claim explains why the outcomes were different and dissolves any circuit split. *Id.* at 16. But that is simply untrue, as is clear from the face of the decisions just described, especially the Sixth Circuit's decision in the diversity case *Albright*. Well-reasoned opinions have rejected respondents' distinction as meritless and set themselves opposite the Third and Tenth Circuits on the question presented.

C. The Delaware AOM Statute is Materially Similar to the Other AOM Statutes Examined in the Split

Respondents' other attack on the split is equally meritless. Respondents argue there can be no split because of "critical differences between the requirements imposed by various States"—*i.e.*, the various AOM statutes differ too much. Opp. 18. At the outset, that claim might be more persuasive had the Third Circuit ever met an AOM it did not like. But it has embraced each and every one. In fact, the court below specifically noted that its previous decisions on the Pennsylvania and New Jersey AOM provisions—including *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258 (3d Cir. 2011), and *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000)—compelled its ruling here. Pet. App. 5a. This despite petitioner's extensive discussion of differences in function between the Delaware AOM statute and its Pennsylvania and New Jersey counterparts. C.A. Doc. No. 39, at 45-50.

The fact is the AOM provisions at issue in the cases in the split are similar to Delaware's in all relevant respects. All of them were found inapplicable in federal court because they required a medical malpractice plaintiff to submit something the Federal Rules do not require to plead their claim.

- In *Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019), the plaintiff needed to include with the complaint a medical professional's affidavit stating that the claim has merit. *Id.* at 293 (citing Ohio Civ. R. 10(D)(2)).
- In *Young v. United States*, 942 F.3d 349 (7th Cir. 2019), the plaintiff needed to attach to the complaint "an affidavit stating that 'there is a reasonable and meritorious cause' for litigation" and "a physician's report to support the affidavit's assertions." *Id.* at 350 (quoting 735 Ill. Comp. Stat. § 5/2-622).

- In *Corley v. United States*, 11 F.4th 79 (2d Cir. 2021), the plaintiff needed to attach to the complaint "a certificate … [stating] that … reasonable inquiry gave rise to a good faith belief that grounds exist for an action." *Id.* at 85 (quoting Conn. Gen. Stat. § 52-190a(a)). "To show the existence of such good faith," the certificate had to attach "a written and signed opinion of a similar health care provider … that there appears to be evidence of medical negligence," including a "detailed basis for the formation of such opinion." *Id.* (quoting Conn. Gen. Stat. § 52-190a(a)).
- In *Pledger v. Lynch*, 5 F.4th 511 (4th Cir. 2021), the plaintiff needed to serve, in advance of filing the complaint, a "screening certificate of merit" from a health care provider, qualified as an expert under state law, that set out and explained the provider's judgment that the "applicable standard of care was breached" in a way that "resulted in injury or death." *Id.* at 518 (quoting W. Va. Code § 55-7B-6(b)).
- In *Passmore v. Baylor Health Care System*, 823 F.3d 292 (5th Cir. 2016), the plaintiff needed to serve an expert report within 120 days after the filing of a defendant's original answer. *Id.* at 293.

Respondents argue there is some legally significant difference between Delaware's AOM requirements and these. But "the devil is in the details." Opp. 21. And respondents do not explain how or why the details of these statutes are different from Delaware's in any relevant way. The Third Circuit below did not purport to distinguish the cases in the split on the basis that the statutes implicated were materially different (Pet. App. 8a n.10)—because they are not. As respondents aptly put it, all the provisions "require some form of early-stage documentation from the plaintiff that a colorable claim exists." Opp. 3. The Third and Tenth Circuits see such a requirement as posing no conflict with the Federal

Rules; the Second, Fourth, Fifth, Sixth, and Seventh take the opposite view. And all the courts in the split have correctly taken the issue at the same level of generality. Respondents manufacture complexity where none exists. Their voluminous account of state statutes shows only how disruptive it would be for federal courts to be dragooned into applying a plethora of "exotic state procedural rules" if respondents' view prevailed. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, C.J., concurring).

II. THE DECISION BELOW IS WRONG

The decision below, and the Third Circuit precedents it applied, misconstrue this Court's cases and the purposes of the Federal Rules. The question is not, as respondents posit, whether "state law and federal procedural rules can co-exist." Opp. 26. Of course they can. The relevant inquiry is "whether the Federal Rules 'answer the question in dispute' (as they do here)." *Gallivan*, 943 F.3d at 296 (cleaned up) (quoting *Shady Grove*, 559 U.S. at 398); *see Corley*, 11 F.4th at 88 ("[A]t the heart of this appeal lies a federalism question similar to the one raised in the familiar *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which instructs federal courts sitting in diversity to apply state substantive law and federal procedural rules."). Fifty states cannot dictate whether a claim gets through the doors of a federal courthouse. The Federal Rules do that.

"Rules 8(a), 9, 11, and 12 are on point." *Albright*, 24 F.4th at 1047. Rule 8 requires only a short and plain statement to state a claim—no further documents are required. Rule 9 provides the narrow set of circumstances in which the pleading requirements for federal court may be heightened. *See Pledger*, 5 F.4th at 519-20. Rule 11 attempts "to weed unjustifiable claims out of the system." *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1539 (10th Cir. 1996). And Rule 12 provides the

exclusive grounds for dismissing an action, which do not include failure to provide a document. *See Pledger*, 5 F.4th at 520.

Yet the Third Circuit found the Delaware AOM law—requiring additional documents to meet a heightened pleading standard—did not conflict with the Federal Rules. That conclusion was wrong. Rule 8 "excludes other requirements that must be satisfied for a complaint to state a claim for relief." *Gallivan*, 943 F.3d at 293 (quoting *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1352 (11th Cir. 2018)). It nowhere requires attachments, *see Young*, 942 F.3d at 351, and certainly does not require the merits screening demanded by Delaware law. Rule 9 *does* permit heightened pleading standards—but it restricts its application to a "few situations," including "when a party alleges fraud or mistake." *Gallivan*, 943 F.3d at 293. Rule 11 declares that "a pleading need *not* be verified or accompanied by an affidavit"—which is the polar opposite of the Delaware AOM law. *Pledger*, 5 F.4th at 520 (quoting Fed. R. Civ. P. 11(a)). The Delaware law also expressly aims to deter frivolous lawsuits—the very goal Rule 11 seeks to accomplish. *Id.* (citing Fed. R. Civ. P. 11(a)-(d)). And while Rule 12 allows complaints to progress where they allege facts "sufficient to state a claim to relief that is plausible on its face," the Delaware AOM statute will not even let a complaint be *docketed* without its required attachments. *Cf. Gallivan*, 943 F.3d at 293 (quoting *Majestic Bldg. Maint., Inc. v. Huntington Bancshares Inc.*, 864 F.3d 455, 458 (6th Cir. 2017)). But "a complaint in federal court cannot properly be dismissed because it lacks an affidavit" or a "report." *Young*, 942 F.3d at 351. There is simply no way to square affidavit-of-merit requirements with the basic rules of federal civil procedure. *See Amicus* Br. 14-21.

III. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE IS AN IDEAL VEHICLE

This case raises an important question and is an optimal vehicle to resolve it. Pet. 24-26. The issue is a pure question of law; it was squarely adjudicated below; and it was outcome-determinative. There are no conceivable obstacles to resolving it here.

Respondents identify no barriers to the Court's review. *See* Opp. 27-28. Respondents argue that the decision below is non-precedential, but that is irrelevant. "[T]he fact that the Court of Appeals' order … is unpublished carries no weight in [the Court's] decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987). Indeed, the Court routinely grants certiorari from unpublished decisions. *See, e.g.*, *Dupree v. Younger*, 598 U.S. 729 (2023); *Lomax v. Ortiz-Marquez*, 590 U.S. 595 (2020); *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019). Respondents also argue petitioner should have sought rehearing en banc. But seeking *en banc* review is not a prerequisite to certiorari. *See, e.g.*, *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022) (granting review where *en banc* review was not sought). And even if the Third Circuit had granted *en banc* rehearing, it could not have mended the circuit split given the Tenth Circuit's precedent on the question presented. *See Trierweiler*, 90 F.3d at 1537-39. Experience also suggests a petition would have been futile. *See* Order, *Schmigel v. Uchal*, No. 14-3476 (3d Cir. Oct. 2, 2015) (denying *en banc* petition challenging Third Circuit's approach to this issue after *Shady Grove*).

As the petition explained, and the *amicus* brief established, the question presented is immensely important to the appropriate and orderly application of the Federal Rules of Civil Procedure. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (citation

omitted). The law in the Third and Tenth Circuits is at odds with the fundamental precepts of the Federal Rules and the law of a half-dozen other circuits. Only this Court can restore uniformity to federal law on this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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