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The Rules of the Malpractice Game: Affidavit of Merit Statutes, Erie, and the Cautionary Tale of an Overbroad Application of Rule 11

Deanna Arpi Youssoufian

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The Rules of the Malpractice Game

AFFIDAVIT OF MERIT STATUTES, *ERIE*, AND THE CAUTIONARY TALE OF AN OVERBROAD APPLICATION OF RULE 11

INTRODUCTION

In 2018, the American Medical Association (AMA) reported that 34 percent of physicians surveyed as part of the Physician Practice Benchmark Survey had been sued during their careers, and 16.8 percent had been sued more than once over the course of their careers.[1] Of the total number of suits reported, 68 percent of claims "were dropped, dismissed, or withdrawn," and only 7 percent of claims ultimately concluded with a trial verdict.[2] These dropped, dismissed, and withdrawn claims impose a significant cost on defendants and health care institutions, averaging $30,475 per claim and accounting for 38.4 percent of total expenses across all types of claim dispositions.[3] In addition to financial strain, these suits can also cause emotional strain and jeopardize the professional reputation of their targeted defendants.[4] As a result, the AMA is pushing for state medical liability reform measures to protect physicians from the "emotional, reputational, and financial risk" associated with these damaging lawsuits.[5]

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[1] JOSÉ R. GUARDADO, AM. MED. ASS'N, POLICY RESEARCH PERSPECTIVES: MEDICAL LIABILITY CLAIM FREQUENCY AMONG U.S. PHYSICIANS 8 (2017), https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/government/advocacy/policy-research-perspective-medical-liability-claim-frequency.pdf [https://perma.cc/L6K8-4ENH].

[2] *Id.* at 2.

[3] JOSÉ R. GUARDADO, AM. MED. ASS'N, POLICY RESEARCH PERSPECTIVES: MEDICAL PROFESSIONAL LIABILITY INSURANCE INDEMNITY PAYMENTS, EXPENSES, AND CLAIM DISPOSITION, 2006-2015 3 (2018), https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/government/advocacy/policy-research-perspective-liability-insurance-claim.pdf [https://perma.cc/7LE7-MRKG]. While disparities exist along physician specialty divisions, with some specialties experiencing markedly higher rates of malpractice suits, these claims are still far-reaching across the profession. *See* GUARDADO, *supra* note 1, at 8–10.

[4] AM. MED. ASS'N, MEDICAL LIABILITY REFORM NOW! THE FACTS YOU NEED TO KNOW TO ADDRESS THE BROKEN MEDICAL LIABILITY SYSTEM 1 (2022), https://www.ama-assn.org/system/files/mlr-now.pdf [https://perma.cc/9V2V-T7P2].

[5] *Id.*

Physicians are not the only professionals subject to a high volume of costly negligence lawsuits.[6] In any given year, a private practice attorney has between a 4 and 17 percent chance of being sued, according to the American Bar Association.[7] Investigative journalists in the United States and abroad are also increasingly facing lawsuits in their professional capacities.[8] As part of a movement to combat potentially frivolous lawsuits and meritless claims, state legislatures have enacted professional malpractice legislation which, while their specific protections vary, often require that plaintiffs file an affidavit or certificate of merit signed by a licensed professional, stating that the practice or work that is the subject of the complaint fell outside of professional standards.[9] Many of these statutes also include a provision outlining special motions to dismiss as tools available to defendants, and empower courts to dismiss claims when a plaintiff does not comply with the affidavit requirement.[10]

Naturally, these affidavit of merit (AOM) statutes raise concerns with *Erie*/choice-of-law doctrine[11] for federal courts sitting in diversity, which are tasked with applying state substantive and federal procedural law,[12] as they determine whether the state law applies.[13] The circuit courts of appeals have addressed a range of potential conflicts between the application of AOM statutes in diverse federal courts and the Federal Rules of Civil Procedure, including, for example, with Rules 8, 9, 11, 12, 26, and 56.[14] Of particular importance to this

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[6] *Ten Tips to Assist in Avoiding a Malpractice Claim*, CNA PRO. COUNS., at 1, https://bit.ly/3FWafyV [https://perma.cc/F65P-LUC5]; Peter Coe, *Slapps: The Rise of Lawsuits Targeting Investigative Journalists*, THE CONVERSATION (Oct. 27, 2021, 8:56 AM), https://theconversation.com/slapps-the-rise-of-lawsuits-targeting-investigative-journalists-169505 [https://perma.cc/G9HP-52JD].

[7] *Ten Tips to Assist in Avoiding a Malpractice Claim*, *supra* note 6.

[8] Coe, *supra* note 6.

[9] Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 11, 2021), https://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx [https://perma.cc/FE95-K5VU].

[10] *Id.*

[11] This note will use the term "*Erie* doctrine."

[12] Hanna v. Plumer, 380 U.S. 460, 465 (1965).

[13] Thomas Williams, *Survey of Federal Courts of Appeals Cases Addressing Applicability of Anti-SLAPP Statutes in Federal Court*, HAYNES & BOONE, LLP (Oct. 21, 2019), https://www.haynesboone.com/news/publications/survey-of-federal-courts-of-appeals-cases-addressing-applicability-of-anti-slapp-statutes [https://perma.cc/WLG2-L7WQ].

[14] *See* Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1540 (10th Cir. 1996) (Rule 11); Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 262–64 (3d Cir. 2011) (Rules 7, 8, 9, 11, and 41); Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1357–62 (11th Cir. 2014) (Rule 11); Pledger v. Lynch, 5 F.4th 511, 519–21 (4th Cir. 2021) (Rules 8, 9, 11, and 12); Albright v. Christensen, 24 F.4th 1039, 1045–49 (6th Cir. 2022) (Rules 3, 8, 9, 11, and 12); *infra* note 77.

note is the potential conflict with Rule 11, which provides that "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit."[15] However, there has been little scholarly consideration of this issue to date.[16]

At the time of this writing, five courts of appeals have spoken on the issue of AOM statutes and their potential collision with Rule 11. The Fourth, Sixth, and Eleventh Circuit Courts found a direct collision between the respective state AOM statutes and Rule 11, finding it impossible for a court to apply both a state statute that requires an affidavit and the federal rule that says such an affidavit is not necessary.[17] The Third and Tenth Circuit Courts found no such collision with Rule 11, reasoning that these statutes only operate in specific circumstances and towards particular parties, and that failure to apply the state law would frustrate the twin aims of the *Erie* doctrine[18]: "discouragement of forum shopping and avoidance of inequitable administration of the laws."[19]

This note argues for a narrower application of Rule 11 by reading its exception as inclusive of state rules and statutes. A narrower application of Rule 11 would more faithfully promote the twin aims and underlying principles of the evolving *Erie* doctrine, as well as bolster the state policy motivations behind these AOM statutes: to promote conservation of judicial resources, and to combat frivolous lawsuits and meritless claims in professional malpractice suits for which Rule 11 is ill-equipped to handle on its own.[20]

Part I of this note provides background on AOM statutes and the policy motivations behind them. Part II reviews *Erie* doctrine as articulated by the Supreme Court, including the twin aims of *Erie* and how courts consider and promote these aims in case law. Part III explores the circuit split on whether AOM statutes conflict with Rule 11, as applied to federal courts sitting in diversity. Finally, Part IV proposes a solution to the circuit split by advocating for federal courts to adopt an inclusive reading of the Rule 11 exception for superseding rules and statutes, and thus overall, a narrower application of Rule 11 to

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[15] FED. R. CIV. P. 11(a). This note will refer to this statement as the "Rule 11 exception."

[16] Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statute*s, 159 U. PA. L. REV. 217, 251 (2010).

[17] *Pledger*, 5 F.4th at 531; *Albright*, 24 F.4th at 1045 n.3; *Royalty Network*, 756 F.3d at 1360–61

[18] *Liggon-Redding*, 659 F.3d at 263; *Trierweiler*, 90 F.3d at 1540.

[19] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[20] *See infra* note 124.

avoid conflict with these AOM statutes, per precedent and the Supreme Court's teachings of federal rule construction. In doing so, the courts would more faithfully advance the twin aims of the *Erie* doctrine without delving into the more subjective steps of the doctrine's analysis and promote the policy motivations behind these statutes. Most importantly, applying these statutes in federal court would better protect professionals from the emotional and financial strain of being hauled into court for potentially frivolous lawsuits, while promoting crucial principles of federalism and separation of powers underlying both the *Erie* doctrine and our system of governance as a whole.

I. FRIVOLOUS LAWSUITS AND AOM STATUTES

Frivolous lawsuits are suits with bad faith claims that have no meritorious basis and instead are intended to disturb, intimidate, or drain the resources of an opposing party or their practice.[21] These lawsuits may also involve claims that seek an overinflated award for damages,[22] and the plaintiff may even be fully aware that their claim would fail on the merits.[23] Frivolous lawsuits can also impose a significant cost on defending individuals, both in time and financial expense.[24] For example, whereas simple New York personal injury cases that require few to no experts can cost approximately $15,000, more complex cases that require additional experts, witnesses, and attorney hours can easily cost at least $100,000.[25]

These costs extend beyond the individual party and are imposed on taxpayers, state economies, and the judicial system.[26] For example, a study conducted by Citizens Against

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[21] *Frivolous*, LEGAL INFO. INST. (June 2020), https://www.law.cornell.edu/wex/frivolous# [https://perma.cc/6ANV-SBKG]; *Frivolous Lawsuit Disputes*, LEGALMATCH, https://www.legalmatch.com/law-library/article/what-is-a-frivolous-lawsuit.html [https://perma.cc/R6X4-Y5ST]; *What's a Frivolous Lawsuit?*, ENJURIS, https://www.enjuris.com/blog/questions/frivolous-lawsuits/ [https://perma.cc/M82A-PLYE].

[22] *Frivolous Lawsuit Disputes*, *supra* note 21.

[23] *Id.*

[24] *Id.* Some state statutes, however, allow the court to award the defending party reasonable costs for their involvement in the litigation. *See, e.g.*, FLA. STAT. § 57.105(1) (West, Westlaw through signed legislation effective Feb. 24, 2022) ("[T]he court shall award a reasonable attorney's fee . . . to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense . . . when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense . . . .").

[25] *The Cost of Taking Your Personal Injury Case to Court*, ALLLAW, https://www.alllaw.com/articles/nolo/personal-injury/cost-case-court.html [https://perma.cc/9K8T-MPRQ].

[26] CITIZENS AGAINST LAWSUIT ABUSE, ECONOMIC BENEFITS OF TORT REFORM 2 (2018), https://www.nfib.com/assets/CALA-FL-Economic-Impact-Report-2018-2.pdf [https://perma.cc/5F4F-2G44].

Lawsuit Abuse and the National Federation of Independent Business found that excessive tort suits cost the Florida economy $7.6 billion in annual direct costs.[27] In terms of the judiciary, frivolous lawsuits consume already scarce judicial resources and prevent individuals with meritorious claims from receiving judicial relief.[28] States have thus enacted AOM statutes to curb the number of potentially meritless lawsuits filed for professional activities and to combat these resulting economic issues.[29]

AOM statutes aim to protect both specific groups of professionals, such as physicians,[30] architects, engineers, and land surveyors,[31] and licensed professionals more generally.[32] These statutes often require an AOM from an expert in the same profession as the individual defendant, declaring that there is a reasonable basis for the filed action.[33] Other states impose a slightly different procedure, requiring the plaintiff's attorney to consult a professional expert and file such an affidavit after that consultation.[34] By setting these requirements, these laws seek to ensure "that there exists a reasonable probability that the

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[27] *Id.*

[28] *See* Eric H. Franklin, *How to Avoid the Constraints of Rule 10b-5(b): A First Circuit Guide for Underwriters*, 43 J. MARSHALL L. REV. 931, 957 (2010).

[29] Edward F. Beitz & Susan J. Zingone, *Understanding the Affidavit of Merit Statute and the Rare Application of the Common Knowledge Exception*, WHITE & WILLIAMS LLP (May 7, 2020), https://www.whiteandwilliams.com/resources-alerts-Understanding-the-Affidavit-of-Merit-Statute-and-the-Rare-Application-of-the-Common-Knowledge-Exception.html [https://perma.cc/6V5R-EWU8].

[30] *See, e.g.*, 735 ILL. COMP. STAT. 5/2-622 (West, Westlaw through P.A. 102-695 of the 2021 Reg. Sess.) (providing requirements for filing an action where a party "seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice").

[31] *See, e.g.*, CAL. CIV. PROC. CODE § 411.35 (West, Westlaw through ch. 14 of 2022 Reg. Sess.) (providing requirements for filing professional negligence claims against certified architects, registered professional engineers, and licensed land surveyors in California).

[32] *See, e.g.*, COLO. REV. STAT. § 13-20-602 (West, Westlaw through signed legislation effective Mar. 30, 2022 of the Second Reg. Sess., 73d Gen. Assemb. (2022)) (providing requirements for filing professional negligence suits against licensed professionals and acupuncturists, as defined by state statute); *see also* Morton, *supra* note 9; GOLDBERG SEGALLA LLP, 50-STATE SURVEY OF AFFIDAVIT OF MERIT STATUTES (Feb. 2015), https://professionalliabilitymatters.com/wp-content/uploads/2015/02/GS-3471935-v3-PL_Matters_AOM_Chart_REVISED.pdf [https://perma.cc/4JQB-VG58].

[33] *See, e.g.*, DEL. CODE ANN. tit. 18, § 6853 (West, Westlaw through ch. 284 of the 151st Gen. Assemb. (2021–2022)) (requiring an AOM "stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant" in a health care negligence suit).

[34] *See* CAL. CIV. PROC. CODE § 411.35, where for actions "arising out of the professional negligence of a person holding a valid architect's certificate," an attorney must execute a certificate of merit; *see also* CONN. GEN. STAT. § 52-190a (West, Westlaw through the 2022 Supp. to the Gen. Stats. of Conn., Revision of 1958, Revised to Jan. 1, 2022), requiring the party's attorney (or the party if pro se) in a medical negligence suit to file a certificate attesting that after "reasonable inquiry," which includes "a written and signed opinion of a similar health care provider," there is "good faith belief that grounds exist for an action against each named defendant."

defendant's actions deviated from accepted standards of care."[35] Although licensed professionals are usually individuals, the definition of this term can extend to other professional entities.[36] For example, New Jersey's AOM statute explicitly includes health care facilities in its scope, thus requiring plaintiffs to file an affidavit in order to state a claim against such a facility.[37]

AOM requirements have also been included as part of anti-"SLAPP" legislation, combating Strategic Lawsuits Against Public Participation, or "SLAPP" suits.[38] Coined by Professors Pring and Canan of the University of Denver, "SLAPP" suits are civil suits typically involving libel, slander, or restraint of business tort claims.[39] As with other frivolous lawsuits, their purpose is often not to seek legal recourse, but rather to bury the defendants in lengthy and expensive litigation, specifically as a means of silencing them.[40] SLAPP suits can target individuals across practices and industries, including high-profile members of society, and as a result have gained widespread public attention.[41] While often taking the form of "defamation,

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[35] *See, e.g.*, Andrea Bonvicino et al., *New Jersey Supreme Court to Address Affidavit of Merit Requirement for Vicarious Liability Claims*, JD SUPRA (July 22, 2021), https://www.jdsupra.com/legalnews/new-jersey-supreme-court-to-address-4657817/ [https://perma.cc/9QDU-W939] (discussing New Jersey's AOM statute).

[36] *Id.*

[37] *Id.*; N.J. STAT. ANN. §§ 2A:53A-26 to :53A-27 (West, Westlaw through L.2021, c. 480 and J.R. No. 9).

[38] *Anti-SLAPP Laws on Trial*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/journals/news-media-and-law-summer-2012/anti-slapp-laws-trial/ [https://perma.cc/7ZHV-P737].

[39] *What Is a SLAPP Suit?*, AM. C.L. UNION OF OHIO, https://www.acluohio.org/en/what-slapp-suit [https://perma.cc/AYQ5-HF9H].

[40] *Understanding Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/resources/anti-slapp-laws/ [https://perma.cc/8KMX-PYD7]; *see SLAPP Suit*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/slapp_suit [https://perma.cc/2T7T-69LW]; Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/introduction-anti-slapp-guide/ [https://perma.cc/5YXG-MGV7].

[41] JUSTIN BORG-BARTHET, EUR. PARLIAMENT'S POL'Y DEP'T FOR CITIZENS' RTS. & CONST. AFFS., THE USE OF SLAPPS TO SILENCE JOURNALISTS, NGOS AND CIVIL SOCIETY 5 (2001), https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf [https://perma.cc/33GV-TN63]; *see SLAPPS Against Consumer Speech*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/slapps-against-consumers [https://perma.cc/U8AT-V2XH] (discussing examples of high-profile SLAPP suits, including Oprah Winfrey defending a suit in 1996 against Texas cattle ranchers alleging upwards of $12 million in damages after her "Dangerous Food" show discussing mad cow disease); *see also* The Editorial Board, *New York's Chance to Combat Frivolous Lawsuits*, N.Y. TIMES (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/opinion/new-york-slapp-lawsuits.html [https://perma.cc/B8TH-W69M] (discussing former President Trump's use of SLAPP suits against journalists); Simona Weil, *Court Rules that New York's New Anti-SLAPP Law Applies Retroactively*, JD SUPRA (July 21, 2021), https://www.jdsupra.com/legalnews/court-rules-that-new-york-s-new-anti-8316275/ [https://perma.cc/NQR8-4Y7K] (discussing pop star Kesha's victory against a music producer's lawsuit with the New York State court applying the new anti-SLAPP law retroactively); Last Week Tonight with John Oliver, *SLAPP Suits: Last Week Tonight with John Oliver*

nuisance, interference with a contract," or other tortious misconduct, the plaintiff's goal in filing a SLAPP suit is often to "intimidate those who disagree with them or their activities by draining the target's financial resources," frequently resulting in meritless claims.[42] By primarily focusing on First Amendment freedom of speech and petition rights, anti-SLAPP legislation aims to protect individuals, journalists, and other defendants from these frivolous lawsuits aimed against them to silence criticism.[43] While thirty-one states and the District of Columbia have adopted anti-SLAPP legislation,[44] there is a growing movement among proponents of free speech to institute anti-SLAPP laws at the federal level.[45]

II. BRIEF REVIEW OF *ERIE* DOCTRINE AND ANALYSIS

Derived from the landmark case of *Erie Railroad Co. v. Tompkins*,[46] the *Erie* doctrine dictates which laws federal courts sitting in diversity should apply when adjudicating state law claims.[47] Under the doctrine, diverse federal courts adjudicating

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(HBO), YOUTUBE (Nov. 11, 2019), https://www.youtube.com/watch?v=UN8bJb8biZU [https://perma.cc/8EWG-9M9D] (discussing the alleged SLAPP suit against HBO on John Oliver's popular late night comedy show).

[42] Brandi M. Snow, *SLAPP Suits*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1019/slapp-suits [https://perma.cc/R9XR-7HTB]; *What Is a SLAPP?*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/what-is-a-slapp [https://perma.cc/GPH9-EXDS]; *see also What Is a SLAPP Suit?*, C.L. DEF. CTR., https://cldc.org/anti-slapp/ [https://perma.cc/GMB5-WBC6]; *What Is a Strategic Lawsuit Against Public Participation (SLAPP)?*, CAL. ANTI-SLAPP PROJECT, https://www.casp.net/sued-for-freedom-of-speech-california/what-is-a-first-amendment-slapp/ [https://perma.cc/AEG6-GPGF].

[43] *See* Snow, *supra* note 42; *What Is a SLAPP Suit?*, *supra* note 42; *What Is a Strategic Lawsuit Against Public Participation (SLAPP)?*, *supra* note 42. SLAPP suits can target both individual laypersons and professionals, such as journalists. *See* Theresa M. House, *New York's New and Improved Anti-SLAPP Law Effective Immediately*, ARNOLD & PORTER (Nov. 17, 2020), https://www.arnoldporter.com/en/perspectives/publications/2020/11/new-yorks-new-anti-slapp-law [https://perma.cc/3VMK-S533]. While this note refers to protection of the "professional," the analyses apply equally to individual defendants outside of their professional capacities.

[44] Austin Vining & Sarah Matthews, *supra* note 40.

[45] Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2020), https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law/ [https://perma.cc/7Q7U-JUHU].

[46] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[47] *Erie Doctrine*, LEGAL INFO. INST. (May 2021), https://www.law.cornell.edu/wex/erie_doctrine [https://perma.cc/MQ6T-KVE4]. A federal court exercising subject matter jurisdiction under 28 U.S.C. § 1332 (diversity and alienage jurisdiction) is termed to be "sitting in diversity." *See, e.g.*, Westfield Ins. Co. v. Tech Dry, Inc., 336 F.3d 503, 506 (3d Cir. 2003) ("[T]his court is sitting in diversity, *see* 28 U.S.C. § 1332 . . . ."). Exercising this jurisdiction requires that the suit meet the required amount in controversy (at least $75,000) and the parties be of completely diverse citizenship, where "no plaintiff shares a state of citizenship with any defendant." *Diversity Jurisdiction*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/diversity_jurisdiction [https://perma.cc/D6S5-4W6E]; 28 U.S.C. § 1332.

state law claims must "apply state substantive law and federal procedural law."[48] This scheme serves two purposes, often referred to as the "twin aims" of *Erie*: (1) to discourage forum shopping, and (2) to avoid an inequitable distribution of the laws "generated by substantially different rules applying to a state law action by virtue of 'the accident of diversity of citizenship.'"[49] Courts want to avoid litigants gaining an unfair advantage of having the flexibility to file in federal court, or generally choosing which forum would apply laws more favorable to their issue, over others with the same issue who do not meet the complete diversity requirement, as well as prevent different outcomes to the same issue if filed in federal versus state court.[50]

In theory, this scheme is quite straightforward; however, in practice, federal courts are often faced with deciding whether a state statute is a procedural or substantive law when it may exhibit qualities of both—a notoriously "murky" exercise.[51] In such a case, courts engage in a two-track analysis, as defined in *Hanna v. Plumer*, depending on if a federal rule might "resolv[e] [the] same issue" as the state law.[52] If there is such a federal rule proposed by one of the parties,[53] the court engages in a "guided *Erie*" analysis.[54] Under this track, the court must determine if the rule is applicable to the issue, or "whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the [c]ourt."[55] This could hinge on whether the court engages in a broad or narrow reading of the rule's scope.[56] If it is applicable, then the court must determine if the rule is valid under the Constitution and the Rules Enabling Act, which provides that the rule cannot

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[48] Hanna v. Plumer, 380 U.S. 460, 465 (1965).

[49] Michael Steven Green, *The Twin Aims of Erie*, 88 NOTRE DAME L. REV. 1865, 1875 (2013) (quoting Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)); *see also Hanna*, 380 U.S. at 467–69.

[50] *See id.*

[51] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010) ("We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid.").

[52] Adam N. Steinman, *What Is the Erie Doctrine? (and What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 261 (2008); *see Hanna*, 380 U.S. at 471.

[53] Occasionally, a court may also propose such a rule for consideration *sua sponte*. *See* Albright v. Christensen, 24 F.4th 1039, 1045 n.3 (6th Cir. 2002) ("Albright did not argue that Rule 11 conflicts with [the state statute] . . . [b]ut it would be disingenuous to ignore a rule that so obviously conflicts with the [AOM] requirement.").

[54] Steinman, *supra* note 52, at 261.

[55] Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980).

[56] *See, e.g.*, Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 6–7 (1987) (adopting a broad reading of the state statute); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 431–33 (1996) (adopting a narrow reading of the state statute).

"abridge, enlarge or modify any substantive right."[57] If the rule is both valid and applicable, then the court must apply it instead of the state law.[58] However, if the proposed federal rule does not resolve the issue, is not valid or applicable, or there is no such federal rule, the court engages in "unguided *Erie*" analysis and balances the interests involved in applying the "judicially created federal standard that is not embodied in positive federal law such as a Federal Rule" with the state rule.[59]

While the Supreme Court has continued to apply the *Hanna* framework, the doctrine is still evolving. This is demonstrated by the fractured opinions in the progeny case law, which also reflect the continuing tension between respecting state legislation and giving the federal rules their due weight of presumptive application. For example, in *Gasperini v. Center for Humanities*, the Court emphasized a "sensitivity to important state interests and regulatory policies,"[60] while in *Burlington Northern Railroad Co. v. Woods*, the Court underscored that the federal rules are presumptively valid "under both the constitutional and statutory constraints."[61]

Most significantly, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, the Court, proceeding in plurality, produced fractured opinions on whether a New York law prohibiting class actions in suits pursuing statutory minimum damages was in direct conflict with Rule 23.[62] The Court found that, in guided *Erie* analysis under the *Hanna* framework, a court's primary objective is to determine the scope of the federal directive, and the legislative intent behind the state rule is not dispositive.[63] Justice Scalia, in his persuasive, nonbinding opinion, underscored the presumptive validity of the federal rules, and noted that the Court has never found a federal rule to be invalid.[64] Meanwhile, Justice Ginsburg in her dissent found the state statute applicable, reminding the Court to, "[i]n

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[57] 28 U.S.C. § 2072; Hanna v. Plumer, 380 U.S. 460, 464 (1965). The validity threshold under the Rules Enabling Act and the Constitution is quite low, where a rule is deemed valid if it "really regulates procedure." Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

[58] *Burlington N. R.R.*, 480 U.S. at 4–5; *see Hanna*, 380 U.S. at 463–65. See *infra* note 64 and accompanying text for whether a court has ever found a federal rule invalid.

[59] Steinman, *supra* note 54, at 262; *see Hanna*, 380 U.S. at 471. This overall process of engaging with either of the two *Hanna* analyses to determine whether the federal rule or state law applies is referred to in this note as the "*Hanna* framework."

[60] *Gasperini*, 518 U.S. at 427 n.7.

[61] *Burlington N. R.R. Co.*, 480 U.S. at 6.

[62] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 395–97 (2010).

[63] *See id.* at 399–400, 403 n.6.

[64] *Id.* at 406–07 (Scalia, J., plurality opinion) ("Applying that test [that a Rule must 'really regulate procedure'], we have rejected every statutory challenge to a Federal Rule that has come before us." (internal citation omitted)).

interpreting the scope of the Rules . . . [,] be[ ] mindful of the limits on [the court's] authority."[65] In doing so, and with Rule 23 "silent" on the remedies issue, she found the state statute was able to coexist with Rule 23.[66] Based on this understanding, the state statute simply serves as an additional requirement to proceed with a class action suit to recover the contested amount of penalties.[67] Finally, Justice Stevens in his concurring opinion noted that there are some state procedural rules that a federal court must apply in diversity cases because they function as a part of the state's definition of substantive rights and remedies.[68] Emerging from these fractured opinions, an open question also remains as to how much a court can use the underlying state and federal interests to determine the validity and applicability of federal rules and state law.[69]

The *Erie* doctrine rests on two core principles of our system of governance: federalism (balancing power between state and federal governments) and separation of powers (between the branches of government).[70] The scheme outlined in *Erie* was developed in response to, and to overturn, *Swift v. Tyson*.[71] There, the Court misread 28 U.S.C. § 1652 in finding that applying "the laws of the several states"[72] in federal court "meant that federal courts were free to ignore state substantive law established by common law through that state's judiciary . . . and could apply what they saw as the true general common law."[73] Justice Brandeis, writing for the *Erie* majority, found this decisional process incorrectly allowed the judiciary to create a sort of "federal general common law" when "Congress has no power to declare substantive rules of common law applicable in a state . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts."[74] Thus, the Court aimed to rectify this offense of federalism[75] and to "realign[ ] the federal-state judicial balance of power" to ensure state substantive powers are not diminished.[76]

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[65] *Id.* at 438 (Ginsberg, J., dissenting); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (noting that the Rules Enabling Act "counsel[s] against adventurous application of the [federal rules]").

[66] *Shady Grove*, 559 U.S. at 450 (Ginsberg, J., dissenting).

[67] *Id.* at 437, 450.

[68] *Id.* at 418–19 (Stevens, J., concurring in part and concurring in judgment).

[69] Jay Tidmarsh, *Forward: Erie's Gift*, 44 AKRON L. REV. 897, 900 (2011).

[70] *The Separation of Powers—Battle of the Branches*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/learning-material/separation-of-powers [https://perma.cc/VPM7-ZVZE].

[71] Swift v. Tyson, 41 U.S. 1 (1842).

[72] 28 U.S.C. § 1652.

[73] *Erie Doctrine*, *supra* note 47; 28 U.S.C. § 1652.

[74] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[75] *See Erie Doctrine*, *supra* note 47.

[76] Glenn S. Koppel, *The Fruits of Shady Grove: Seeing the Forest for the Trees*, 44 AKRON L. REV. 999, 1013 (2011).

III. AOM STATUTES AND RULE 11

AOM statutes can present *Erie* conflicts with many federal rules, including Rule 11.[77] Rule 11(a) includes that every pleading, motion, and paper "must be signed by at least one attorney" or the party themselves if that party is a pro se litigant.[78] In making these representations to the court, Rule 11(b) dictates that an attorney or pro se litigant certifies, *inter*

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[77] Solving the potential collision issue with Rule 11 is just but one piece of the puzzle for application of AOM statutes in diverse federal courts. Other related issues include potential collisions with Rules 8, 9, 12, 26, and 56.

Rule 8, in governing the sufficiency of pleadings, and Rule 9, in governing how to plead special matters, together may conflict with AOM statutes requiring the affidavits to be filed with the pleadings. FED. R. CIV. P. 8, 9. For example, the Third Circuit found no direct conflict between New Jersey's AOM statute and Rules 8 and 9, which "dictate the content of the pleadings and the degree of specificity that is required" on which the statute has no effect on either because "[it] is not a pleading, is not filed until after the pleadings are closed, and does not contain a statement of the factual basis for the claim." Chamberlain v. Giampapa, 210 F.3d 154, 160 (3d Cir. 2000). Conversely, the Sixth Circuit found that "Rule 8 implicitly 'excludes other requirements that must be satisfied for a complaint to state a claim for relief . . . [a]nd Rule 9 . . . specif[ies] the few situations where heightened pleading *is* required . . . none of [which] apply here." Gallivan v. United States, 943 F.3d 291, 293 (6th Cir. 2019) (quoting Carbone v. Cable News Network, 910 F.3d 1345, 1352 (11th Cir. 2018)) (emphasis in original). *See also* Larca v. United States, 302 F.R.D. 148, 159 (N.D. Ohio 2014) (reasoning that, "As Federal Rules 8 and 9 answer the question before the Court—the sufficiency of the plaintiff's complaint—[the Ohio rule requiring an AOM] conflicts with these Rules by adding requirements.").

Further, because the affidavits must be signed by licensed professionals, courts have addressed whether they conflict with Rule 26's requirements for disclosures and expert witnesses. FED. R. CIV. P. 26. For example, one court found that the state affidavit requirement and Rule 26 "cannot operate simultaneously without one being subordinated to the other" because the affidavit sets for "substantially the same information" as required by Rule 26(a)(2) in two different time periods—the affidavit within three months of commencement of the action, and the names and reports of witnesses for discovery on the agreed-upon timeline by the parties. Serocki v. MeritCare Health Sys., 312 F. Supp. 2d 1201, 1208 (D.S.D. 2004).

Finally, because many of these AOM statutes including special motions to dismiss, they may present issues with Rules 12 and 56 governing motions to dismiss and summary judgment, respectively. FED. R. CIV. P. 12, 56. The First, Fifth, and Ninth Circuits have found no such conflict between the rules and state anti-SLAPP statutes empowering defendants with special motions to dismiss, while the DC Circuit has argued in dicta that the DC anti-SLAPP statute does not apply in federal court because it answers the same question as Rules 12 and 56. *See* Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010); Henry v. Lake Charles Am. Press, 566 F.3d 164 (5th Cir. 2009); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999); Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328 (D.C. Cir. 2015). This potential collision is often tied to AOM requirements because many of these statutes empower courts with grounds for dismissal for failure to provide affidavits as required by the statute. *See, e.g.*, COLO. REV. STAT. § 13-20-602(4) (West, Westlaw through signed legislation effective Feb. 24, 2022 of the Second Reg. Sess., 73d Gen. Assemb. (2022)) ("The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint . . . ."); GA. CODE ANN. § 9-11-9.1(f) (West, Westlaw through Act 518 of the 2022 Reg. Sess.) (Except in the case of a mistake, "[i]f a plaintiff fails to file an affidavit . . . and the defendant raises the failure to file [it] by motion to dismiss . . . such complaint shall not be subject to the renewal provisions of [state law].").

[78] FED. R. CIV. P. 11(a).

alia, that "(1) [the lawsuit] is not being presented for any improper purpose . . . (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument . . . [and] (3) . . . have evidentiary support . . ."[79] Crucially, as mentioned above, Rule 11(a) includes that "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit."[80]

A. Circuit Courts Finding a Direct Collision

As of the writing of this note, three federal courts of appeals have found a collision between the Rule 11 exception and a state AOM statute. The Fourth, Sixth, and Eleventh Circuit Courts found that Rule 11 is sufficiently broad so as to directly collide with the state statute, and that affidavit requirements are procedural rules, making them inapplicable in federal court.[81]

In *Royalty Network, Inc. v. Harris*, the Eleventh Circuit found that the Georgia anti-SLAPP statute requiring the plaintiff to file a written verification that the claim is "well grounded in fact, . . . warranted under existing law, and . . . not made for an improper purpose" is a procedural rule, and therefore is inapplicable in federal court.[82] Instead, Rule 11 was "sufficiently broad to control the issue" of whether a pleading needs to be verified because it requires that any document presented to the court is certified by the attorney or unrepresented party submitting it, which therefore impermissibly collides with the AOM requirement.[83] Further, the statute was not saved by the Rule 11 exception.[84] The court relied on the Fifth Circuit decision in *Follenfant v. Rogers*, a case concerning Texas Rule of Civil Procedure 93, which held that "state rules requiring verified pleadings . . . are wholly inapposite [in federal court]."[85] Even though the statute was "enacted for substantive or important purposes," the court reasoned that the state's intentions cannot supersede the text of the statute.[86] Therefore, the state statute was inapplicable.[87]

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[79] *Id.* 11(b).

[80] *Id.* 11(a).

[81] Pledger v. Lynch, 5 F.4th 511, 520 (4th Cir. 2021); Albright v. Christensen, 24 F.4th 1039, 1045–46 (6th Cir. 2022); Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1354 (11th Cir. 2014).

[82] *Royalty Network*, 756 F.3d at 1354.

[83] *Id.* at 1357–58.

[84] *Id.* at 1360–61.

[85] Follenfant v. Rogers, 359 F.2d 30, 32 n.2 (5th Cir. 1966). See *infra* notes 120–122 and accompanying text for discussion on Judge Jordan's disagreement with *Follenfant*.

[86] *Royalty Network*, 756 F.3d at 1361.

[87] *Id.* at 1355.

Additionally, the Fourth Circuit in *Pledger v. Lynch* recently addressed collisions between the affidavit requirement in West Virginia's Medical Professional Liability Act and Rule 11 when a plaintiff filed a claim under the Federal Tort Claims Act (FTCA).[88] The court found, *inter alia*, that the requirement for an AOM from an "expert" health care provider at least thirty days prior to filing was a procedural rule directly conflicting with Rule 11.[89] The court employed similar reasoning to the *Royalty Network* court, finding that the mandatory procedural mechanism, as a prerequisite to filing a suit, was "impossible to reconcile" with Rule 11.[90] The court specifically rejected questioning whether the state law "significantly affect[s] the result of a litigation" because the court was engaging in guided *Erie* analysis with a valid and applicable federal rule, and this consideration was only required under unguided *Erie* analysis.[91] Even so, as a prerequisite to filing a suit, the court reasoned that it does "nothing to change the scope of the [party's] *liability*," further supporting their reading of the requirement as a procedural rule.[92] Thus, with both Rule 11 and the state statute addressing the same issue of frivolous filings and having no effect other than the procedure for filing an FTCA claim, the court found it impossible to apply both directives.[93]

Most recently, and in a very brief opinion with reasoning relegated largely to just two footnotes, the Sixth Circuit in *Albright v. Christensen* followed the *Pledger* court as persuasive authority to find that the Michigan AOM statute requiring a medical malpractice plaintiff to file an affidavit signed by a health professional impermissibly conflicts with Rule 11.[94] The court reasoned, per *Royalty Network*, that the Rule 11 exception refers only to federal directives, and thus the federal rule must apply over the Michigan statute.[95] Although the appellants did not raise the argument that the statute conflicts with Rule 11, the court felt it "disingenuous" to not address the "obvious[] conflict[]" between them.[96]

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[88] Pledger v. Lynch, 5 F.4th 511, 520 (4th Cir. 2021).

[89] *Id.*

[90] *Id.*

[91] *Id.* at 521 (alteration in original).

[92] *Id.* at 523 (emphasis in original) (quoting Gallivan v. United States, 943 F.3d 291, 295 (6th Cir. 2019)).

[93] *Id.* at 523–24.

[94] *See* Albright v. Christensen, 24 F.4th 1039, 1045–46 (6th Cir. 2022).

[95] *Id.* at 1045 n.2.

[96] *Id.* at 1045 n.3.

B. *Circuit Courts Finding No Collision*

Conversely, two other federal courts of appeals have found no such collision between Rule 11 and the respective state statutes. As discussed below, both the Third and Tenth Circuit Courts found the state statutes narrowly tailored and operating in a different realm than Rule 11, thus rendering both applicable in federal court without causing a collision. Further, both courts emphasize policy motivations and explicitly recognize the legitimate state interests and legislative intentions being advanced by the respective statutes.

In *Liggon-Redding v. Estate of Sugarman*, the Third Circuit found that Rule 11 was not sufficiently broad so as to directly collide with the Pennsylvania law requiring an AOM within sixty days of filing a professional negligence claim.[97] While Rule 11 and the Pennsylvania law overlap in their purpose of weeding out frivolous litigation, the court reasoned that each "controls its own intended area of influence."[98] Because Rule 11 was not on point under this reading, the court proceeded to engage in unguided *Erie* analysis and considered whether applying the state statute would promote the twin aims of *Erie*.[99] The court found that not applying the state statute would be outcome-determinative in cases such as this one because litigants with meritless claims could more easily pursue litigation in federal court with diversity jurisdiction compared to in Pennsylvania state courts, thus encouraging forum shopping.[100] Given that one of the aims of the *Erie* doctrine is to prevent discrimination between citizens and noncitizens as a means of discouraging forum shopping, the court concluded that the Pennsylvania statute must apply.[101] The court also emphasized the statute's underlying legislative intent while considering its compatibility with other federal rules: to ensure the merit of professional negligence claims, and to conserve valuable judicial time and resources for such meritorious claims.[102]

Similarly, in *Trierweiler v. Croxton and Trench Holding Corp.*, the Tenth Circuit found that Rule 11 could coexist with Colorado's AOM statute requiring a plaintiff's attorney to certify

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[97] Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 259–60 (3d Cir. 2011).

[98] *Id.* at 263.

[99] *Id.* at 264.

[100] *Id.*

[101] *Id.* at 263. The court also found that there was no conflict between the statute's dismissal procedures for failure to comply with the certificate requirement with Rule 11's sanctions procedures, using much of the same reasoning regarding scope of the rule and statute, but that issue and reasoning is out of this note's scope. *Id.*

[102] *Liggon-Redding*, 659 F.3d at 262–63.

within sixty days from the filing date that an expert found the claims were meritorious.[103] Although Rule 11 and the statute overlap in purpose, the court found that the statute is "more narrowly tailored [by] requiring the attorney to affirm that a professional in the field finds the claim to have 'substantial justification.'"[104] In doing so, the laws target different stakeholders: where "[the state statute] penalizes the party, Rule 11 targets the attorney."[105] Importantly, the statute is also narrowly tailored to protect a particular class of defendants, which furthers state interests not vindicated by Rule 11.[106] The court thus engaged in unguided *Erie* analysis and reasoned that because "[t]he statute is 'bound up' with the substantive right embodied in the state cause of action for professional negligence," it is a substantive rule which must be applied under diversity jurisdiction.[107] Further, similar to the *Liggon-Redding* court, the court found that refusal to apply the state law here would create significantly different results if litigating the case in state compared to federal court, and would impose an inequitable result through the use of a penalty on state plaintiffs, but not on plaintiffs in federal court, resulting in a frustration of at least one of the *Erie* twin aims.[108]

C. *Concurring and Dissenting Opinions in Favor of Finding No Collision*

Neither *Liggon-Redding* nor *Trierweiler* produced separate opinions from the respective majorities.[109] However, the majority opinions in *Pledger* and *Royalty Network* were each met with spirited dissenting-in-part and concurring opinions, respectively.[110]

In *Pledger*, Judge Quattlebaum made four distinct arguments relevant to Rule 11 in his opinion dissenting-in-part from the majority. First, he engaged in a similar analysis as the *Liggon-Redding* and *Trierweiler* courts to find that overlap between Rule 11 and the state statute does not make them

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[103] *See* Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1539–41 (10th Cir. 1996).

[104] *Id.* at 1540 (quoting COLO. REV. STAT. Ann. § 13-20-602(3)(a)(II)) (West, Westlaw through Feb. 24, 2022 of the Second Reg. Sess., 73d Gen. Assemb. (2022)).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 1541.

[108] *Id.* at 1540–41.

[109] *See* Liggon-Redding v. Estate of Sugarman, 659 F.3d 258 (3d Cir. 2011); *Trierweiler*, 90 F.3d at 1523.

[110] The *Albright* majority opinion was also met with a concurring-in-part and dissenting-in-part opinion, but it did not discuss the Rule 11 issue. *See* Albright v. Christensen, 24 F.4th 1039, 1049–50 (6th Cir. 2022) (Siler, J., dissenting in part).

impermissibly collide.[111] In fact, Judge Quattlebaum contended that to reason that Rule 11 and the state statute govern the same issue of whether the plaintiff of a medical malpractice action must file an affidavit prior to filing a suit under the FTCA "stretches *Shady Grove* past its intended context."[112] Second, he criticized the majority for "taking *eight* bites at the apple" by stitching together eight different federal rules (and not simply Rule 11, for example) to find a collision with the statute, which is contrary to the "precise wielding of *Shady Grove*."[113] Third, he found that all eight of these rules and the entirety of the federal rules are silent on the specific issue of an AOM requirement, and he critiqued the majority for reading this silence as "an affirmative mandate that the requirement does not apply in federal court."[114] Finally, Judge Quattlebaum also engaged in the substantive/procedural law debate, and found that, although the statute possesses some procedural characteristics, it leaned substantive.[115] This is because the AOM requirement at issue was found in "a statute outlining a state-law cause of action and the boundaries of liability" rather than the state rules of civil procedure.[116] Further, "substantive liability only flows from compliance" with the affidavit mandate.[117]

Judge Jordan in his *Royalty Network* concurrence made a very different argument from Judge Quattlebaum, as well as the Third and Tenth Circuits. While he also found no direct collision between the state statute at issue and Rule 11,[118] he believed the majority, and the precedent case from the Fifth Circuit on which their reasoning is based, were incorrect in reading the Rule 11

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[111] Pledger v. Lynch, 5 F.4th, 511, 531 (Quattlebaum, J., dissenting in part).

[112] *Id.* at 528; *see also* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987) (reasoning that "[t]he initial step is to determine whether, *when fairly construed*, the scope of [the Federal Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law" (emphasis added) (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980))).

[113] *Pledger*, 5 F.4th at 530 (Quattlebaum, J., dissenting in part) (emphasis in original).

[114] *Id.* at 532.

[115] *Id.* at 534.

[116] *Id.* at 535.

[117] *Id.* at 534. Indeed, Judge Quattlebaum questions whether the court should engage in *Erie* analysis in the first place, as the court was not sitting in diversity, but rather had statutory jurisdiction under 28 U.S.C. § 1346(b)(1). *Id.* at 528–29. An important underlying assumption of *Erie* doctrine is that it applies to federal courts regardless of the jurisdictional basis. *See generally* Alexander A. Reinert, *Erie Step Zero*, 85 FORDHAM L. REV. 2341 (2017) (arguing that the "common wisdom" of applying *Erie* doctrine in all federal cases, no matter the basis for jurisdiction, is incorrect); D. Chanslor Gallenstein, *Whose Law Is It Anyway? The Erie Doctrine, State Law Affidavits of Merit, and the Federal Tort Claims Act*, 60 U. LOUISVILLE L. REV. 19 (2021) (discussing whether to engage in *Erie* analysis for FTCA claims in federal court). However, this assumption is out of this note's scope.

[118] Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1363 (11th Cir. 2014) (Jordan, J., concurring).

exception as only including federal rules or statutes.[119] Specifically, he objected to the *Follenfant* decision, and believed that the Fifth Circuit misread the exception's silence as confining to federal rules only.[120] This reading, he reasoned, is contrary to both *Shady Grove*'s teachings of reading ambiguous federal rules in a manner to avoid "substantial variations" in state and federal litigation, and the Supreme Court's advisement to read the rule by itself, and not by the Advisory Committee's descriptions.[121] Even further, he found the *Follenfant* decision so "broad sweep[ing]" as to create a conflict where there is none otherwise.[122] But, because of this misreading, Judge Jordan felt his and the court's hands were tied, and thus concurred in judgment only because of this precedent.[123]

IV. RESOLVING THE CIRCUIT SPLIT: READING THE RULE 11 EXCEPTION TO INCLUDE STATE RULES AND STATUTES

The split decisions between the circuit courts of appeals demonstrate frustration by both courts deciding these cases and parties litigating them on multiple levels with these statutes and Rule 11: (1) whether Rule 11 is sufficiently broad so as to directly collide with the given statute; (2) more pointedly, whether the Rule 11 exception applies to include state statutes; and (3) whether these statutes and requirements are procedural or substantive in nature, thereby determining their applicability in federal court.

An effective solution to this split in decisions, and to address each of these issues, is for courts to adopt a reading of the Rule 11 exception to include state directives, thus limiting the scope of Rule 11 over these more precisely tailored AOM statutes. In doing so, courts can not only avoid engaging in difficult choice-of-law decisions and analysis but can also better promote both the twin aims of the *Erie* doctrine and the valid state interest of combating frivolous litigation for which Rule 11 is ill-equipped to handle on its own.[124] Most importantly, an inclusive reading of Rule 11 promotes the

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1362.

[124] *See* Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 264 (3d Cir. 2011) ("[I]f [the state statute] is considered procedural, and thus inapplicable in federal courts, it would, theoretically, be easier to pursue frivolous or meritless professional malpractice cases in federal court (without a certificate of merit requirement) in diversity and pendent jurisdictions cases, than in Pennsylvania state courts (with such a requirement)."); Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1540 (10th Cir. 1996) ("By protecting a particular class of defendants, and by expediting such cases, the [state] statute vindicates substantive interests of Colorado not covered by Rule 11.").

principles of federalism and separation of powers underlying the *Erie* doctrine and our governance system.[125]

A. *Consistency with Precedent and* Erie *Teachings of Federal Rule Construction*

Indeed, a court's reading of the scope of the Rule 11 exception could be the dispositive factor in deciding whether AOM statutes are applied in federal court.[126] By finding that the exception covers both state and federal directives, courts can avoid *Erie* analysis of the state statute and Rule 11 altogether.[127] Such a reading of the exception is not novel, as courts at the district level have previously read the rule's silence on its applicability as inclusive of state directives.[128] And while the *Royalty Network* and *Albright* courts justified reading the exception exclusively by following *Follenfant*,[129] a perspective such as Judge Quattlebaum's[130] may find that *Follenfant* was correctly decided but that it is inapplicable in cases involving AOM statutes. The holding of *Follenfant* can be understood as being limited to state rules of civil procedure—which were not at issue in *Royalty Network*, *Pledger*, and *Albright*[131]—and inapplicable in cases involving state-law causes of action and substantive liability.

The fact remains, however, that Rule 11 is silent as to its scope. Should courts read this silence as excluding or including state statutes from the Rule 11 exception? One argument is that "history and logic" indicate that the exception was intended to only cover federal statutes, and not state statutes.[132] In particular, the examples in the Advisory Committee's note to the rule are all federal statutes, and the note's language "suggests that the rulemakers' concern was assuring that the continuity of certain federal statutes was not disrupted."[133] While the Rules Enabling

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[125] *See* Pledger v. Lynch, 5 F.4th 511, 52 (4th Cir. 2021) (Quattlebaum, J., dissenting in part) ("But as esoteric as these concepts [of the relationship between federal and state law and *Erie* doctrine], underneath them are important principles of federalism. What is the proper balance of power between the federal government and the states? How do the Supremacy Clause and the Tenth Amendment interact?").

[126] Grossberg, *supra* note 16, at 251.

[127] *Id.*

[128] *See, e.g.*, RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co., 981 F. Supp. 334, 345 (D.N.J. 1997) (concluding "Rule 11 specifically allows room for the operation of other statutes which may require an affidavit"); Thompson by Thompson v. Kishwaukee Valley Med. Grp., No. 86-1483, 1986 WL 11381, at *2 (N.D. Ill. 1986) (concluding "[t]here is nothing in Rule 11 which limits the exception only to federal statutes").

[129] *See supra* Section III.A.

[130] *See supra* notes 115–119 and accompanying text.

[131] *See supra* Section III.A.

[132] Grossberg, *supra* note 16, at 252.

[133] *Id.*

Act does not empower the rulemakers to prevent the application of state statutes, it does empower them to supersede federal laws under 28 U.S.C. § 2072(b), and therefore the exception should be read as the rulemakers not exercising this ability to supersede federal laws.[134] However, the Supreme Court has underscored that "it is the Rule itself, not the Advisory Committee's description of it, that governs,"[135] and so the rule's note is not instructive. In fact, the Court has even declined to read in limitations in other provisions of Rule 11.[136] For example, in *Business Guides v. Chromatic Communications Enterprises*, the Court declined to read the phrase "attorney or party" in Rule 11 as "attorney or *unrepresented* party."[137]

This brings courts back to square one of reading the exception and determining its scope. To that end, the Supreme Court instructs under the *Erie* doctrine that courts "should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation.'"[138] This scheme would then prompt courts to read the exception as inclusive of state directives.[139] Indeed, courts may be well served to consider Justice Ginsburg's dissenting (but nonetheless instructive) guidance to read the federal rules "with awareness of, and sensitivity to, important state regulatory policies," as per *Erie* precedent,[140] which Judge Quattlebaum accuses the *Pledger* majority of ignoring.[141]

B. *A More Effective Promotion of the Twin Aims of* Erie

Courts should adopt an inclusive reading of the Rule 11 exception to more effectively promote the twin aims of *Erie* and the guiding principles of the doctrine, as the *Liggon-Redding* and *Trierweiler* courts detailed.[142] Indeed, courts should be sensitive to faithfully promoting the twin aims of *Erie* in their analyses. While the *Pledger* majority asserts that "[w]hether a

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[134] *Id.* at 253.

[135] Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1363 (11th Cir. 2014) (Jordan, J., concurring) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011)).

[136] *Id.*

[137] Bus. Guides, Inc. v. Chromatic Commc'ns. Enters., Inc., 498 U.S. 533, 544 (1991).

[138] *Royalty Network*, 756 F.3d at 1363 (Jordan, J., concurring) (alteration in original) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 405 n.7 (2010)).

[139] *See id.*

[140] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 437 (2010) (Ginsburg, J., dissenting).

[141] Pledger v. Lynch, 5 F.4th 511, 529–30 (4th Cir. 2021) (Quattlebaum, J., dissenting in part).

[142] *See supra* notes 100–101, 108.

state law . . . 'significantly affect[s] the result of a litigation' [is a] question[] [the court] ask[s]" only during unguided *Erie*,[143] the Supreme Court has directed otherwise. In fact, this outcome-determination test serves an important function across the entire *Erie* doctrine because of the twin aims. The Supreme Court in *Shady Grove* advises a court to read the federal rule in question, if ambiguous, so as to avoid differences in outcomes between litigating the same suit in state or federal court, in furtherance of the twin aims.[144] So, while the outcome-determination test is employed when engaging in unguided *Erie* analysis,[145] as the *Pledger* court correctly notes, here the Court is also instructing the lower courts to employ this analysis when evaluating the scope of an ambiguous federal rule compared to the state law—a step under guided *Erie* analysis.[146] Even Justice Scalia, who authored the *Shady Grove* opinion, reminds the Court in *Stewart Organization, Inc. v. Ricoh Corp.* that, when reasoning whether the rule controls an issue, "a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits."[147] The twin aims seem to rear their heads beyond unguided *Erie* and into the principles of guided *Erie* analysis.[148]

C. A More Effective Promotion of Legislative Aims

Courts should further adopt an inclusive reading of the Rule 11 exception to promote the valid policy motivations of AOM statutes, including conservation of judicial resources and protecting specific classes of defendants from frivolous lawsuits.[149]

Rule 11 applies to all parties in an action and as mentioned previously, instructs how parties must make representations to the court. While the *Pledger* majority found that Rule 11 serves the same function as these statutes in combating frivolous lawsuits,[150] the *Trierweiler* court and Judge Quattlebaum in his *Pledger* dissent

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[143] *Pledger*, 5 F.4th at 521 (quoting *Shady Grove*, 559 U.S. at 406).

[144] *Shady Grove*, 559 U.S. at 405 n.7; *see also* Royalty Network Inc. v. Harris, 756 F.3d 1351, 1363 (11th Cir. 2014) (Jordan, J., concurring).

[145] *See* Hanna v. Plumer, 380 U.S. 460, 471–73 (1965).

[146] *See id.*

[147] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 38 (1988) (Scalia, J., dissenting).

[148] *See supra* notes 49–60 and accompanying text.

[149] *See* Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1536 (10th Cir. 1996) ("These differences [between the Colorado and Michigan professional negligence laws] reflect an approach, on Colorado's part, of reducing the burdens imposed on attorneys by (1) expediting resolution of malpractice suits as efficiently as possible and weeding out frivolous claims, and (2) limiting the period within which plaintiffs can sue." (citation omitted)).

[150] Pledger v. Lynch, 5 F.4th 511, 520 (4th Cir. 2021).

provide more persuasive understandings of the relationship between these two sources of law. Because the respective state statutes apply specifically to professional malpractice issues and specific classes of defendants, they are more narrowly tailored than Rule 11.[151] Thus, these statutes "vindicate[ ] substantive interests of [the state] not covered by Rule 11" of reducing frivolous lawsuits and meritless claims in professional malpractice cases.[152] Indeed, a court should not be asking whether the federal rule and state statute overlap.[153] Instead, the court should ask, "when fairly construed, [whether] the scope of [the Federal Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to '*control* the issue' before the court, thereby leaving no room for operation of [the state] law."[154] For example, the *Liggon-Redding* court found that the Pennsylvania statute and Rule 11 operate in separate spheres of influence entirely "without any conflict."[155] Whether or not the statutes provide overlapping protections, operation of such targeted legislation in federal court can more specifically protect practitioners acting in a professional capacity from the "emotional, reputational and financial risk" of meritless lawsuits than Rule 11 on its own.[156]

Indeed, post-*Shady Grove*, courts may still consider these legislative interests in the *Erie* inquiry,[157] but an open question remains as to how much weight they should afford them.[158] In deciding this, courts face the tension between "the Scalia plurality and the Ginsburg dissent."[159] While "[t]he Scalia plurality finds no room to read with sensitivity [to state interests], and accordingly lets the federal rule-on-point trounce a significant state policy,"[160] Justice Ginsburg vehemently opposes diminishing consideration of state interests.[161] However, Professor Stan Cox of New England Law | Boston finds that the *Erie* court itself already weighed in on

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[151] *See supra* notes 104–106, 112 and accompanying text.

[152] *Trierweiler*, 90 F.3d at 1540.

[153] *Id.* at 1539.

[154] *Id.* at 1539–40 (second and third alterations in original) (emphasis added) (quoting Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)).

[155] Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 263 (3d Cir. 2011) ("[B]ecause each rule controls its own . . . area of influence without any conflict, [the state statute] is not 'superfluous' since its promulgation was specifically intended to ferret out claims lacking merit in the interest of preserving judicial resources and promoting judicial economy.").

[156] AM. MED. ASS'N, *supra* note 4, at 1; *see supra* note 124.

[157] This requirement was first articulated by the Court in *Walker*, and then reaffirmed in *Gasperini* as a requirement to "[read] the Federal Rules . . . with sensitivity to important state interests and regulatory policies." Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996); *see also* Stan Cox, *Putting Hanna to Rest in Shady Grove*, 44 CREIGHTON L. REV. 43, 45 (2010).

[158] Tidmarsh, *supra* note 69, at 900.

[159] Cox, *supra* note 157, at 45.

[160] *Id.*

[161] *Id.*

the issue, and leans towards Justice Ginsburg's approach.[162] Although the legislative intent "cannot override the statute's clear text," it need not and should not be so callously disregarded as in the *Royalty Network* court's Rules Enabling Act analysis.[163]

This scheme of "weighing the importance of state interests" also helps to minimize the invitation to courts to "play games" with the facts of the case so as to drive analysis under their chosen prong of the *Hanna* framework.[164] Because "[courts] do not always apply [the two-pronged scheme] when push comes to shove,"[165] and instead read the federal rules in manners so as to avoid engaging in *Erie* analysis and finding conflict between them and state laws, this results in an inconsistent meaning of the federal rules depending on the context.[166] Thus, judges and lawyers alike are disserved by the *Walker*/*Gasperini* instruction to "read with sensitivity" because their statutory construction exercise becomes simply a "back door attempt[ ] " to resolve competing federal and state policies.[167] While courts wait for "more accurate guidance" from the Supreme Court, an inclusive reading of the Rule 11 exception validates state legislative interests simply by allowing application of AOM statutes in diverse federal courts, without guessing how much weight the interests should be given.[168]

D. *The Court's Avoidance of Engaging in the "Murky" Steps of* Erie *Analysis*

An inclusive reading of the Rule 11 exception would additionally allow courts to avoid engaging in the more nebulous judgments in *Erie* analysis. Courts do not look forward to delving into the "murky" waters of *Erie* analysis,[169] as the line separating whether a statute is defined as procedural or substantive is

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[162] *Id.*

[163] *See* Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1361 (11th Cir. 2014) ("[I]t is irrelevant to our Rules Enabling Act analysis that [the statute] may have been enacted for substantive or important purposes . . . because the state legislature's objectives 'cannot override the statute's clear text.'" (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 403 (2010))).

[164] Cox, *supra* note 157, at 44.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 45. Indeed, because of this, Professor Cox advocates for completely abandoning the *Hanna* approach in favor of a simpler test of simply considering the weight of the importance of the state interests. *Id.* at 44.

[168] *Id.*

[169] *See, e.g.*, Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1355, 1362 (11th Cir. 2014) ("[B]ecause we conclude a valid federal rule controls the question before us, we do not reach the second *Hanna* prong and thus do not wade into *Erie*'s murky waters."); Pledger v. Lynch, 5 F.4th 511, 519 (4th Cir. 2021) ("But if there is a valid Federal Rule that answers the 'same question' as the MLPA, then our work is done, and we apply the Federal Rules without wading in to the 'murky waters' of *Erie*.").

notoriously blurry.[170] *Erie* doctrine draws the line between "substantive" and "procedural" laws only insofar as their functions, where "'substantive rights' [include] rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure."[171]

With this vague guidance, courts may reasonably read these statutes to have elements of both forms.[172] For example, Judge Quattlebaum found different elements of the West Virginia statute demonstrate either procedural or substantive characteristics.[173] Further, under a "common sense view, a procedure [rule] could affect substance yet remain in the procedure pile."[174] Indeed, just as Professor Cox noted the ability of courts to take liberties to read the rules in a consequently inconsistent manner so as to avoid *Erie* issues,[175] so too can courts engage in this strategic decision-making in furtherance of an objective outside of the strict determination of whether a rule is substantive or procedural. Notably, Professor Jennifer Hendricks of the University of Tennessee College of Law finds that the *Erie* cases since *Gasperini* reflect a "shifting coalition of [Supreme Court] justices" who have since "claimed for themselves the prerogative to fashion law that purportedly accommodates the interests of both sovereigns" by taking a middle ground to the substantive-procedural rule divide and trying to "work out" the state law's governance in federal court.[176]

The tone of the majority opinions in both *Liggon-Redding* and *Trierweiler*, for example, imply such a strategic decision-making by the court by expressing the imperativeness of applying the state statute in question. In *Liggon-Redding*, the court notes that in furtherance of *Erie* doctrine and the twin aims, "the Pennsylvania rule *must* be applied."[177] In *Trierweiler*, the court very explicitly notes that policy motivations drive the

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[170] *See, e.g.*, Pledger v. Lynch, 5 F.4th 511, 535 (4th Cir. 2021) ("To be sure, this question is not clear cut."); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 416 (1996) ("Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor.").

[171] Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941)).

[172] *See* Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1594 (2012) ("But the distinction between substantive rights and procedure has caused significant confusion because it is unclear where substance ends and procedure begins. The 'hazy' line between substance and procedure was recognized by the *Erie* Court itself . . . .").

[173] *See Pledger*, 5 F.4th at 531 (Quattlebaum, J., dissenting in part).

[174] Campos, *supra* note 172, at 1596.

[175] Cox, *supra* note 157, at 44.

[176] Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 105–06 (2011).

[177] Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 264 (3d Cir. 2011) (emphasis added).

court toward giving effect to the state statute, so influentially as to "*militate* toward applying the state rule," and engages in this discussion even before considering the substantive/procedural question.[178] Avoiding this substantive/procedural conflict, and particularly its subjective reasoning, altogether would avoid the resulting "problems of administrability [and] lack of adequate guidance to lower courts" for which appeals courts have been criticized when engaging in this debate.[179]

E. Federalism and Separation of Powers Issues with an Exclusive Reading of the Exception

Finally, the effects of reading the Rule 11 exception exclusively extend beyond the application of these statutes alone in federal courts. Rather, such a reading threatens to disrupt the separation of powers between the legislative and judicial branches, and the balance of power between state and federal governments.

First, an exclusive reading of the exception raises serious separation of powers concerns. Indeed, the *Erie* court's response to *Swift* was precisely made with separation of powers in mind, "as Congress is the branch tasked with making [the] law, and the judiciary usurped lawmaking power by applying federal common law as they saw fit."[180] Instead, for example, as Judge Quattlebaum cautions, the breadth of the *Pledger* decision extends so far as to potentially bar application of many other state statutes, including those that are considered substantive.[181] The majority, as Judge Quattlebaum understands, reasons that the silence of Rule 11 is "an affirmative mandate that the [AOM] requirement does not apply in federal court."[182] Under this logic, countless state statutes would be rendered inapplicable because the rule does not explicitly mention them in its text.[183] Such a broad reach would undermine the very central principle of *Erie* doctrine in applying federal procedural and state substantive law,[184] as now the judiciary would be, as a consequence, dictating substantive law. As Judge Quattlebaum says, "[t]his cannot be how it works."[185]

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[178] Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1540 (10th Cir. 1996) (emphasis added).

[179] Hendricks, *supra* note 176, at 106.

[180] *Erie Doctrine*, *supra* note 47.

[181] Pledger v. Lynch, 5 F.4th 511, 532 (4th Cir. 2021) (Quattlebaum, J., dissenting in part).

[182] *Id.*

[183] *See id.* at 531.

[184] *See* Hanna v. Plumer, 380 U.S. 460, 465–66 (1965).

[185] *Id.*

Second, a broad reading of the federal rules, and a narrow reading of the exception, threatens to shift the balance of power in favor of the federal government against the Constitution's parameters.[186] For example, Judge Quattlebaum observes that "the majority stretches *Shady Grove* past its intended context," impeding states from setting rules "for state-law causes of action"—a violation of the Tenth Amendment.[187] While questions of the proper balance between state and federal powers and the interaction between two key constitutional provisions (the Tenth Amendment for states and the Supremacy Clause for the federal government) remain open, such important concerns should alert courts considering the scope of the federal rules to "wake . . . from [their] *Erie*-induced slumber."[188]

Out of an "awareness of, and sensitivity to, important state regulatory policies," Justice Ginsburg in her *Shady Grove* dissent raises that "[o]ur decisions . . . caution us to ask, before undermining state legislation: Is this conflict really necessary?"[189] Yet, she may have asked this question alluding to these federalism concerns as well. In considering the doctrine's significance, Justice Ginsburg turns to Justice Harlan's remark in his concurring opinion in *Hanna*, where he described *Erie* as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between state and federal systems."[190] These shared federalism concerns underscore the significant consequences of a misreading, overbroadening, and overapplication of federal directives in *Erie* doctrine.

CONCLUSION

The notoriously "murky" waters of *Erie* doctrine are no less murky when considering AOM statutes aimed to protect practitioners and licensed professionals.[191] Indeed, the current split among the circuit courts of appeals in their decisions of whether

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[186] *See Pledger*, 5 F.4th at 529–30 (Quattlebaum, J., dissenting in part).

[187] *Id.* at 528.

[188] *Id.* at 527. The Supremacy Clause of the U.S. Constitution provides that "federal law preempts contrary state law." Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 162; U.S. CONST. art. 6 cl. 2. The Tenth Amendment "restrains the power of Congress" by reserving powers to the states which are neither prohibited from them nor delegated to the federal government. James L. Buchwalter, Annotation, *Construction and Application of 10th Amendment by United States Supreme Court*, 66 A.L.R. Fed. 2d § 159 (2012); U.S. CONST. amend. X.

[189] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 437 (2010) (Ginsburg, J., dissenting).

[190] *Id.* (quoting Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring)).

[191] *Id.* at 398.

these statutes apply in federal court reflects the murky nature of determining substantive versus procedural rules and their impacts on federal litigation. Yet the murky waters cannot cause courts to lose sight of the repercussions of these decisions to the bench, bar, litigants, and potential litigants.[192]

An effective solution to this split in decisions is to limit the reach of Rule 11 by reading its exception inclusively so as to allow state directives to be exempt from the rule's instruction that pleadings "need not be . . . accompanied by an affidavit."[193] Whether they are deemed purely substantive or purely procedural in nature would not matter, as this reading of the Rule 11 exception would still render them applicable in federal courts.[194] Importantly, this reading scheme and application of these statutes would ensure that *Erie* principles are more faithfully promoted,[195] state interests are better vindicated than simply under Rule 11's purview,[196] and that courts could avoid serious federalism imbalances and infractions.[197] Most importantly, individuals and professionals suddenly finding themselves as defendants to frivolous litigation would be substantially protected from the potential "emotional, reputational and financial" impact of these suits.[198] While the *Erie* waters may remain murky, when faced with the opportunity to dually protect both our system of governance and its participants, the decision remains crystal clear.

Deanna Arpi Youssoufian[†]

[192] *See* Hendricks, *supra* note 176, at 105–06.

[193] FED. R. CIV. P. 11(a).

[194] *See supra* Section IV.D.

[195] *See supra* Section IV.B.

[196] *See supra* Section IV.C.

[197] *See supra* Section IV.E.

[198] AM. MED. ASS'N., *supra* note 4, at 1; *see supra* Section IV.C.

[†] J.D. Candidate, Brooklyn Law School, 2023; Ed.M., Harvard University, 2017; B.A., Barnard College, Columbia University, 2016. My thanks to the *Brooklyn Law Review* staff for their sharp review and editing throughout the publication process. My sincerest thanks as well to Professor Robin Effron for her invaluable guidance and feedback. Finally, thank you to my family for their unwavering support, and especially to my parents, who taught me that there are no shortcuts to the successes that hard work, relentless dedication, and perseverance can bring.