No. 20-217

In the Supreme Court of the United States

RICHARD BALTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, makes the United States liable for certain torts "to the same extent as a private individual under like circumstances" under applicable state law. 28 U.S.C. 2674; see 28 U.S.C. 1346(b)(1). The Virginia Medical Malpractice Act, Va. Code Ann. § 8.01-20.1 (2015), provides that before requesting service of process on a defendant in a medical malpractice action, the plaintiff must obtain a certifying expert's written opinion that the defendant "deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed." Upon written request, the plaintiff must provide the defendant with a form affirming that he had obtained the necessary expert opinion when service was requested. *Ibid.*

The question presented is whether the government is entitled to summary judgment if the plaintiff fails to obtain a qualifying expert opinion prior to service of process in an FTCA action asserting medical malpractice claims arising in Virginia.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Balter v. *United States*, No. 17-cv-1188 (Mar. 27, 2019)

United States Court of Appeals (4th Cir.):

Balter v. *United States*, No. 19-6741 (Dec. 23, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is not published in the Federal Reporter but is reprinted at 788 Fed. Appx. 245. The opinion of the district court (Pet. App. A1-A13) is not published in the Federal Supplement but is available at 2019 WL 1394368.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2019. A petition for rehearing was denied on March 23, 2020 (Pet. App. C1). The petition for a writ of certiorari was filed on August 19, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, contains a limited waiver of sovereign immunity and creates a tort cause of action against the United States for wrongful acts or omissions "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Under that cause of action, "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual," subject to certain exceptions not applicable here. 28 U.S.C. 2674.

2. The Virginia Medical Malpractice Act (VMMA), Va. Code Ann. § 8.01-20.1 (2015), provides that before requesting service of process in a medical malpractice action, a plaintiff is required to "obtain[] * * * a written opinion signed by" a professional whom the "plaintiff reasonably believes would qualify as an expert witness" stating "that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed." *Ibid.* Certification is not required if "the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." *Ibid.* This exception applies only in "certain rare instances," *Beverly Enterprises-Virginia, Inc.* v. *Nichols*, 441 S.E.2d 1, 3 (Va. 1994), such as when an at-risk patient falls or chokes after being left unattended, *id.* at 3-4, or

when a doctor leaves a foreign object in a patient's body, *Easterling* v. *Walton*, 156 S.E.2d 787, 791 (Va. 1967).

The VMMA further provides that "[u]pon written request of any defendant," a plaintiff is required to "provide the defendant with a certification form that affirms that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested or affirms that the plaintiff did not need to obtain a certifying expert witness opinion." Va. Code Ann. § 8.01-20.1 (2015). If the plaintiff failed to obtain the required expert opinion before he requested service of process on the defendant, "the court shall impose sanctions according to the provisions of [section] 8.01-271.1 and may dismiss the case with prejudice." *Ibid.* Sanctions may include "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including reasonable attorney fees." *Id.* § 8.01-271.1(D) (Supp. 2020).

3. Petitioner is a federal prisoner incarcerated at the Federal Correctional Institution Petersburg in Petersburg, Virginia. Pet. App. A1.[1] In 2015, petitioner was diagnosed with "moderate degenerative disc disease" and "mild osteoarthritis of the hips," for which staff physicians prescribed painkillers. Am. Compl. ¶¶ 21-22; Pet. App. A2. During a hospital visit in August 2015, an MRI of petitioner's lower spine revealed a herniated disc and compression fracture of the spine, for which petitioner underwent surgery and physical ther-

[1] Petitioner, who was convicted of murder for hire and mail fraud, D. Ct. Doc. 38-4, at 2 (July 3, 2018), has filed at least 130 administrative remedy requests since his incarceration in 2013, D. Ct. Doc. 38-5, at 2 (July 3, 2018).

apy; petitioner was also found to be in acute renal failure. Pet. App. A2-A3. A second MRI over a year later revealed a pinched nerve. *Id.* at A3.

Petitioner filed an FTCA suit against the United States in the United States District Court for the Eastern District of Virginia, alleging that Bureau of Prisons physicians committed medical malpractice by, among other things, prescribing painkillers and failing to timely perform the first MRI. Am. Compl. ¶¶ 5-15. Petitioner requested damages of $850,000. *Id.* at ¶ 92.

Following service of the complaint on the United States, the government asked petitioner to certify that he had obtained a written expert opinion as required by Section 8.01-20.1 or explain why he had not done so. D. Ct. Doc. 38-2 (July 3, 2018). Petitioner responded that he had not obtained the required written opinion because his case fell within the requirement's limited exception for cases that do not require expert testimony. D. Ct. Doc. 38-3 (July 3, 2018).

The government thereafter filed motions seeking dismissal of certain of petitioner's claims for failure to exhaust administrative remedies, and summary judgment on petitioner's remaining claims for failure to obtain the written expert opinion required by Section 8.01-20.1. See Pet. App. A1, A4-A12.

4. The district court granted both motions. See Pet. App. A1-A13. With respect to the government's motion to dismiss, the court held that petitioner had failed to administratively exhaust a subset of his claims, and rejected his arguments that such exhaustion was not required. See *id.* at A4-A7. Petitioner no longer contests the dismissal of those claims. See Pet. 8 n.8.

With respect to the government's motion for summary judgment, the district court held that because petitioner's claims "surround events taking place in Virginia, * * * the Virginia Medical Malpractice Act * * * provides the framework upon which to analyze plaintiff's FTCA claims." Pet. App A8. The court observed that petitioner conceded he had not obtained the expert certification required by Section 8.01-20.1, and rejected each of the grounds petitioner offered for why such a certification was not required here. *Id.* at A8-A12.

First, the district court rejected petitioner's argument that his suit is covered by the state-law exception for medical malpractice claims where the "alleged act of negligence clearly lies within the range of the jury's common knowledge and experience," Va. Code Ann. § 8.01-20.1 (2015), concluding that the case involved "a quintessential professional medical judgment" and could therefore "be resolved only by reference to expert opinion testimony," Pet. App. A9 (citation omitted). The court observed that "whether a delay of five days in performing an emergent MRI breached the standard of care is not within the common knowledge of the jury." *Ibid.* And while petitioner had indicated he was in the process of seeking an expert certification, the court held that doing so after the suit had already been filed would not comply with the requirements of Section 8.01-20.1. *Id.* at A10.

Second, the district court rejected petitioner's arguments that "summary judgment cannot be granted in this district without discovery" or before a briefing schedule has been set. Pet. App. A10; see *id.* at A10-A11. The court held that petitioner had not shown he needed discovery in order to address the issue of

whether he had previously obtained the expert certification required by Virginia law, and that the local rules did not contain any requirement that a briefing schedule be formally set before a motion for summary judgment can be considered. See *id.* at A10-A11.

Third, the district court rejected petitioner's request that it appoint an expert witness in the case. Pet. App. A11.

Fourth, the district court rejected petitioner's arguments that the government's motion for summary judgment was actually a motion to dismiss pursuant to Rule 12(b)(1) or Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pet. App. A11. The court noted that the government's motion relied on material outside of the pleadings—petitioner's acknowledgment that he had not obtained the certification required by Virginia law prior to providing service to the government—and was therefore appropriately considered under Rule 56. See *ibid.*

Finally, the district court rejected petitioner's argument that Section 8.01-20.1 is unconstitutional because it denies plaintiffs access to the courts. Pet. App. A11-A12.

Petitioner did not raise, and the district court did not consider, any argument that Section 8.01-20.1 is inapplicable in a federal suit brought under the FTCA. See Pet. App. A1-A13; D. Ct. Doc. 42 (July 27, 2018).

5. Petitioner appealed. In the court of appeals, he renewed his arguments that he had adequately exhausted all of his claims, Pet. C.A. Br. 15-20, and that Section 8.01-20.1 was unconstitutional inasmuch as it denied him access to the courts, *id.* at 20-23. Petitioner once again did not argue that Section 8.01-20.1 was inapplicable in a federal suit brought under the FTCA.

In an unpublished, one-paragraph opinion, the court of appeals "affirm[ed] for the reasons stated by the district court." Pet. App. B2.

6. Petitioner filed a petition for panel rehearing, arguing for the first time that he should not have been required to comply with Section 8.01-20.1 when he filed his FTCA complaint because the requirement conflicts with Federal Rules of Civil Procedure 8, 9, 11, and 12. Pet. for Reh'g 5-15. The court of appeals denied the petition. Pet. App. C1.

ARGUMENT

Petitioner contends (Pet. 6-22) that the district court erred by applying the requirements of Va. Code Ann. § 8.01-20.1 (2015) to his suit under the FTCA, and that the court of appeals' decision affirming that judgment conflicts with the decisions of other courts of appeals addressing the application of other States' affidavit-of-merit statutes in federal court. Neither the district court nor the court of appeals addressed that issue, however, because petitioner did not dispute that Section 8.01-20.1 was applicable to his claims until after the court of appeals had already entered its decision. Nor is it clear that petitioner's current argument would have produced a different result had he raised it in the district court. No further review is warranted.

1. State law is "the source of substantive liability under the FTCA." *Federal Deposit Ins. Co.* v. *Meyer*, 510 U.S. 471, 478 (1994). Because the FTCA imposes liability against the United States "to the same extent as a private individual under like circumstances" under applicable state law, 28 U.S.C. 2674, the FTCA incorporates substantive state-law standards and requirements, which then operate as federal law. See, *e.g.*, *Jackson* v. *United States*, 881 F.2d 707, 712 (9th Cir.

1989) ("federal law specifically makes state law controlling to the extent needed to fix the government's substantive liability" under the FTCA). Procedural requirements in FTCA suits, by contrast, are governed by the Federal Rules of Civil Procedure or, with regard to some requirements, by the FTCA itself. See, *e.g.*, *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 405 (2015) (considering whether the FTCA statute of limitations is subject to tolling).

Accordingly, whether a particular state affidavit-of-merit requirement applies in federal court depends on whether that requirement is substantive or merely procedural. See, *e.g.*, *Young* v. *United States*, 942 F.3d 349, 351 (7th Cir. 2019) (holding that an Illinois affidavit-of-merit statute "applies in federal court to the extent that it is a rule of *substance*; but to the extent that it is a rule of *procedure* it gives way to Rule 8 and other doctrines that determine how litigation proceeds in a federal tribunal"), cert. denied, No. 19-8587 (Oct. 5, 2020). The answer to that question can vary between different state statutes, and even between different provisions of the same statute. See *ibid.*; see also Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: the* Erie *Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 222 (2010) (explaining that state-law certificate-of-merit requirements in medical malpractice cases "vary widely in their exact provisions"); Br. in Opp. at 8-9, 15-18, *Young* v. *United States*, No. 19-8587 (Aug. 24, 2020).[2]

2. Petitioner now argues (Pet. 6-22) that Section 8.01-20.1 creates a procedural requirement inapplicable in federal court, but he did not properly present that

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[2] We have served petitioner with a copy of the government's brief in opposition in *Young*, *supra* (No. 19-8587).

issue to the lower courts, and they did not pass on it. Accordingly, no review of the issue is warranted here.

In the district court, petitioner did not contend that Section 8.01-20.1 was inapplicable, but rather that he had *complied* with its requirements by asserting an "alleged act of negligence [that] clearly lies within the range of the jury's common knowledge and experience." Va. Code Ann. § 8.01-20.1 (2015). See Pet. App. A9. And he argued in the alternative that because Section 8.01-20.1 would prevent him from asserting his claims, it violated his constitutional right of access to the courts. See Pet. App. A11-A12. The district court properly rejected those arguments, see *id.* at A9-A12, which presume the applicability of Section 8.01-20.1.

Petitioner's briefing on appeal likewise did not argue that Section 8.01-20.1 created a procedural requirement inapplicable in federal court: his opening brief argued (as relevant here) only that Section 8.01-20.1 violated his constitutional right to access the courts, see Pet. C.A. Br. 20-23, and petitioner did not file a reply brief. The court of appeals thus had no reason to consider whether the requirement established by Section 8.01-20.1 is procedural or substantive, and its unpublished per curiam opinion accordingly did not do so. See Pet. App. B2. And while petitioner subsequently raised a version of his current argument that Section 8.01-20.1 establishes a procedural rather than a substantive requirement in his petition for panel rehearing, the panel appropriately declined to address that argument in light of the principle that "[p]anel rehearing is not a vehicle for presenting new arguments" because a "panel cannot have 'overlooked or misapprehended' an issue that was not presented to it." *Easley* v. *Reuss*, 532 F.3d

592, 593-594 (7th Cir. 2008) (per curiam) (quoting Fed. R. App. P. 40(a)(2)); see *id.* at 594 (collecting cases).

Given petitioner's failure properly to raise his current argument in the lower courts, further review in this Court is unwarranted. This Court is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and ordinarily does not address issues that were neither pressed nor passed upon below. See, *e.g.*, *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018); *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984) (holding that a party's failure to raise issue before rehearing stage in the court of appeals "precludes [this Court's] consideration"). Petitioner identifies no special basis that would call for doing so here.

3. In any event, it is far from clear that the district court's application of Section 8.01-20.1 in the circumstances of this case was incorrect.

The lower courts have properly recognized that state laws requiring plaintiffs to adduce expert testimony at trial or in order to withstand summary judgment are substantive, and accordingly are incorporated into federal law by the FTCA. See, *e.g.*, *Gipson* v. *United States*, 631 F.3d 448, 451–452 (7th Cir. 2011) (Indiana statute requiring an expert's report to show the standard of medical care applies under the FTCA); *Gero* v. *United States Gov't*, 808 Fed. Appx. 516, 517 (9th Cir. 2020) (district court properly granted summary judgment to the United States where the FTCA plaintiff failed to submit expert medical evidence to support his medical malpractice claim as required under California law).

The provision of Virginia law at issue here serves a similar interest, imposing "a presumptive requirement of expert testimony." *Summers* v. *Syptak*, 801 S.E.2d

422, 426 (Va. 2017). That requirement reflects Virginia's determination that "[e]xpert testimony is ordinarily necessary to establish the appropriate standard of care, a deviation from that standard, and that such deviation was the proximate cause of damages." *Beverly Enterprises-Virginia, Inc.* v. *Nichols*, 441 S.E.2d 1, 3 (Va. 1994); see also *Raines* v. *Lutz*, 341 S.E.2d 194, 196 (Va. 1986).

Unlike some other States' affidavit-of-merit requirements that courts of appeals have found inapplicable in federal court, moreover, Section 8.01-20.1 does not require a plaintiff to attach additional material to the complaint or otherwise modify the requirements imposed by Federal Rules of Civil Procedure 8, 9, 11, or 12. See *Gallivan* v. *United States*, 943 F.3d 291, 293-294 (6th Cir. 2019) (holding that an Ohio rule requiring a plaintiff to include an affidavit of merit with the complaint is inapplicable in federal court); *Young*, 942 F.3d at 351 (holding that the Illinois affidavit-of-merit statute's requirement that a plaintiff attach a medical professional's affidavit to his complaint is inapplicable in federal court); see also Pet. 17-20. Instead, Section 8.01-20.1 imposes a real-world consultation requirement on the plaintiff that is independent of, and may post-date, the filing of the complaint, which the district court enforced here by granting the government's motion for summary judgment. See *Young*, 942 F.3d at 351-352 (holding that the Illinois requirement of an affidavit from a medical professional supporting the plaintiff's claims could be enforced in federal court at the summary judgment stage).

It is at the very least not clear that the decisions of other courts of appeals to which petitioner points (Pet. 8-9, 12-13, 18-19) would have required the district court

to deny the government's motion for summary judgment here. Because petitioner did not properly raise the issue on appeal—and because the court of appeals' decision is unpublished and did not address the issue either implicitly or explicitly—the decision below does not create a conflict with those decisions of other courts of appeals, much less one warranting review by this Court. Nor does it preclude the court of appeals from considering the issue petitioner seeks to present here in a future case in which it is properly raised, or from taking account of decisions of other circuits on that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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