No. 00-1313

In the Supreme Court of the United States

STERLING DREW, ET AL., PETITIONERS

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

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT S. GREENSPAN
EDWARD HIMMELFARB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the government has an obligation, when an administrative claim filed under the Federal Tort Claims Act is based on a false factual predicate, to develop alternative factual scenarios that might support a different claim not raised in the administrative claim.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 00-1313

STERLING DREW, ET AL., PETITIONERS

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

OPINIONS BELOW

The vacated opinion of the court of appeals (Pet. App. 1a-33a) is reported at 217 F.3d 193. The en banc order of the court of appeals affirming the judgment of the district court by an equally divided vote (Pet. App. 34a-35a) is reported at 231 F.3d 937. The order of the district court (Pet. App. 38a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2000. The petition for a writ of certiorari was filed on February 15, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Sterling Drew was born on December 30, 1995, to Martha Drew and Jebediah Drew, an enlisted serviceman in the Air Force. Sterling was delivered with several birth defects. Pet. App. 4a.

Petitioners filed an administrative claim with the Air Force seeking $15 million in damages and describing the basis of their claim as follows:

> Spontaneous delivery of male infant with imperforated anus, ventricular septal defect, left facial palsy, umbilical hernia and inguinal hernia at Shaw Air Force Base Hospital.
>
> Depo-Provera injection given to claimant in early pregnancy.

Id. at 148a. The administrative claim said nothing about the advice and counseling given Ms. Drew about risks relating to Depo-Provera, a birth-control medication, and there were no supporting materials included with the administrative claim.

During the Air Force's investigation of this claim, Ms. Drew, accompanied by counsel, told investigators that her last injection of Depo-Provera was on February 1 or 2, 1995. C.A. Pet. for Reh'g 2 & n.1. Because this was a few days short of *eleven months* before Sterling was born, the Air Force concluded that the injection could not have been given in early pregnancy.[1] On December 23, 1997, the Air Force denied the claim. Pet. App. 5a.

---

[1] Ms. Drew's medical records include no record of an injection in February 1995; the last recorded injection prior to Ms. Drew's pregnancy with Sterling was on October 24, 1994. Pet. App. 145a.

2. Petitioners then filed a complaint in district court alleging that Sterling had suffered birth defects because the medical staff at Shaw AFB had negligently administered Depo-Provera to Ms. Drew while she was pregnant with Sterling. Pet. App. 83a-89a.

Along with their complaint, petitioners supplied interrogatory answers pursuant to local district court rule. These answers explained that petitioners were claiming that "malpractice was committed in the administration of this Depo-Provera, in that it was in fact given to [Ms. Drew] when she was pregnant with the minor child, Sterling Drew." C.A. App. 13-14.

The government took a pre-answer deposition of Ms. Drew. At her deposition, Ms. Drew renounced the factual basis for her claim. Asked when she had received a Depo-Provera injection while pregnant with Sterling, Ms. Drew testified:

> I didn't. No. My complaint was not that I received it while I was pregnant, but that I in fact got pregnant while I had it in my system.

Pet. App. 130a. That is, Ms. Drew was now complaining that she "became pregnant when [she] should not have because [she was] using Depo-Provera." *Id.* at 131a.[2]

---

[2] Ms. Drew also testified that she *was* informed about the risk of birth defects before she was given her first injection of Depo-Provera in July 1994; at that time, Capt. Miller, an Air Force nurse, told her that if she wanted to get pregnant after having received an injection, she should take another form of birth control for a year before trying to get pregnant. Pet. App. 131a-133a. The reason, Miller told her, was that "if you got pregnant while you had Depo-Provera in your system * * * it could cause birth defects in the baby." *Id.* at 133a. Ms. Drew understood the information that Miller gave her about birth defects. *Id.* at 139a. She also claimed that Miller had told her that there was only a 0.1% chance of

The government moved to dismiss the complaint based on Ms. Drew's admission that she did not receive an injection of Depo-Provera while pregnant. Shortly thereafter, petitioners moved for leave to amend their complaint "to conform the Complaint" to her testimony. C.A. App. 109. The court granted the motion without addressing the government's argument that the court lacked jurisdiction because petitioners had not filed an administrative claim alleging that Ms. Drew became pregnant while on Depo-Provera. Pet. App. 82a & n.4. The amended complaint alleged that Ms. Drew had been falsely told before using Depo-Provera that the drug was "100% effective in preventing live births," and that while she was using Depo-Provera as her sole method of birth control, she became pregnant with Sterling. *Id.* at 75a. It also alleged that Sterling was born with birth defects. *Id.* at 76a.

The district court granted the government's motion to dismiss the amended complaint, observing that petitioners had expressly based their administrative claim on the allegation that the Air Force had improperly administered Depo-Provera while Ms. Drew was pregnant, and that petitioners had filed their lawsuit based on that same allegation. Pet. App. 40a-41a. The court noted that the allegation "has now been discredited by Martha's own testimony." *Id.* at 41a. It was only after Ms. Drew's testimony that petitioners "first raise[d], or even appear[ed] to be aware of, their informed consent claim." *Ibid.* While "they believed as late as the time they filed this lawsuit that their claims were based on Martha receiving a Depo[-]Provera injection while she was pregnant," they were now "argu[ing] that *despite*

---

getting pregnant while on Depo-Provera and that, if she did, it was certain she would miscarry. *Id.* at 140a.

their own lack of knowledge, the United States was placed on notice of the true nature of their claims earlier when they filed the administrative claim." *Ibid.* Accordingly, the court held that it lacked jurisdiction, because the administrative claim was not sufficient to put the government on notice of that informed consent claim. *Ibid.*

3. Over a dissent, a panel of the court of appeals vacated and remanded. Pet. App. 1a-33a. The panel majority first hypothesized an administrative claim just like the one actually filed here but without the words "in early pregnancy." *Id.* at 11a-12a. Had this hypothetical claim been filed, the panel majority stated, it would have implied not just negligence but a failure to obtain informed consent. Relying on *Frantz* v. *United States*, 29 F.3d 222 (5th Cir. 1994), the panel majority concluded that an informed consent claim is by its very nature included within a general allegation of negligent care and treatment and that the hypothetical administrative claim would have required the government to investigate the possibility of an informed consent claim. Pet. App. 12a-16a.

The panel majority then dismissed the three words "in early pregnancy" as "a minor factual inaccuracy," Pet. App. 20a, that did not "so narrow[] the scope of a reasonable investigation" that the government could be "excused from failing to discover the essence of [petitioners'] claim." *Id.* at 16a, 20a. Seizing upon the Air Force's letter denying the administrative claim, a letter first placed in the record after argument in the court of appeals, *id.* at 18a-19a n.8, the panel majority concluded that the government knew that "[Ms.] Drew could not have been given Depo-Provera during her pregnancy," *id.* at 17a, and that it therefore had an obligation to investigate fully "by asking the right questions." *Id.* at

19a. The panel majority recognized that its holding was "in some tension" with *Murrey* v. *United States*, 73 F.3d 1448 (7th Cir. 1996), Pet. App. 21a, but it disagreed with that decision to the extent that the decision required "a more detailed exposition" in the administrative claim. *Id.* at 22a.

The dissent concluded that petitioners were not simply asserting a different legal theory but instead were "creat[ing], essentially from thin air, a factual predicate entirely different than that originally asserted and investigated." Pet. App. 26a. It rejected the notion that "in early pregnancy" was a "minor factual inaccuracy," explaining that it could be considered minor only by measuring the number, not the meaning, of the words. *Id.* at 30a-31a n.5. The dissent reasoned further that not every malpractice claim necessarily includes within it an informed consent claim, *id.* at 27a-28a, and that indeed, the facts alleged in this administrative claim were actually inconsistent with an informed consent claim, because the duty of informed consent would have arisen months before Ms. Drew's pregnancy. *Id.* at 30a. The dissent pointed out that petitioners' counsel, an experienced malpractice lawyer, failed to make an informed consent claim based on the facts stated in the administrative claim. *Id.* at 31a. It also noted that the medical records available to the government tended to refute an informed consent claim because Ms. Drew continued to use Depo-Provera after Sterling was born. *Id.* at 31a-32a.

4. On the government's petition, the court of appeals vacated the panel opinion and ordered rehearing en banc. Pet. App. 36a-37a. Following argument, the en banc court of appeals issued an order affirming the judgment of the district court by an equally divided vote. *Id.* at 34a-35a.

ARGUMENT

Petitioners incorrectly contend that there is a circuit split on the question whether an action under the Federal Tort Claims Act (FTCA) must be dismissed if the administrative claim did not include sufficient factual detail. There is no such circuit split. Although there is a more limited circuit split on the question whether an administrative claim alleging medical negligence necessarily implies an informed consent claim, that limited circuit split is not presented in this case. Even if petitioners were correct that an informed consent claim is necessarily included in every medical malpractice claim, they could not benefit from that rule, because the relevant malpractice claim was not exhausted. The medical malpractice claim they exhausted sought damages regarding an injection of Depo-Provera "in early pregnancy," but Ms. Drew subsequently admitted that there was no such injection. Only after her deposition did she claim that she had become pregnant while using Depo-Provera. Thus the medical malpractice claim that assertedly includes by implication the informed consent claim was itself never raised in the administrative process.

Other than the panel of the court of appeals, whose decision was vacated en banc, no court has ever held that the government, when presented with demonstrably false factual assertions in the administrative claim, has an obligation to determine whether the true history suggests a different claim. Further review is therefore not warranted.

1. Contrary to petitioners' contention (Pet. 7-21), the circuits are in full agreement regarding the requirements for alleging facts in an administrative claim under the FTCA.

The FTCA requires that a claimant exhaust his administrative remedies by "first present[ing] the claim to the appropriate Federal agency." 28 U.S.C. 2675(a). The purpose of this provision is "to encourage prompt settlement of claims and to ensure fairness to FTCA litigants." *Burchfield* v. *United States*, 168 F.3d 1252, 1255 (11th Cir. 1999). A district court has jurisdiction over a lawsuit under the FTCA only if (1) the claimant has presented his claim to the agency in accordance with Section 2675(a), *McNeil* v. *United States*, 508 U.S. 106, 113 (1993), and (2) the agency either has denied the claim or has failed to grant or deny it within six months of the claim's submission.

To present a claim to an agency, a claimant files a Standard Form 95 that includes the specifics required by the form's instructions. Such an administrative claim is adequate for exhaustion purposes "if the notice (1) is sufficient to enable the agency to investigate and (2) places a 'sum certain' value on [the] claim." *Ahmed* v. *United States*, 30 F.3d 514, 517 (4th Cir. 1994) (internal quotation marks omitted). To suffice to enable the agency to investigate, the claim must allege facts describing the incident, which must be "sufficiently detailed so that the United States can evaluate its exposure as far as liability is concerned." Pet. App. 10a (internal quotation marks omitted); 28 C.F.R. 14.4(b) (listing evidence or information that "the [personal injury] claimant may be required to submit"). The claimant is not, however, required to plead legal theories; an administrative claim "encompasses any cause of action fairly implicit in the facts." *Murrey*, 73 F.3d at 1452. But "a plaintiff cannot 'present one claim to the agency and then maintain suit on the basis of a different set of facts.'" *Deloria* v. *Veterans Admin.*, 927 F.2d

1009, 1012 (7th Cir. 1991) (quoting *Dundon* v. *United States*, 559 F. Supp. 469, 476 (E.D.N.Y. 1983)).

There is no dispute about these general principles. Every circuit has agreed on the general requirement that the administrative claim provide sufficient factual detail to provide notice to the government sufficient to allow it to investigate.[3] There is no reason for further

---

[3] *Corte-Real* v. *United States*, 949 F.2d 484, 486 (1st Cir. 1991) ("The purpose of the administrative claim presentment requirements in Section 2675(b) and the applicable regulations is to give notice to the Government sufficient to allow it to investigate the alleged negligent episode to determine if settlement would be in the best interests of all.") (internal quotation marks omitted); *Keene Corp.* v. *United States*, 700 F.2d 836, 842 (2d Cir. 1983) (Section 2675 "requires that the Notice of Claim provide sufficient information both to permit an investigation and to estimate the claim's worth."), cert. denied, 464 U.S. 864 (1984); *Tucker* v. *United States Postal Serv.*, 676 F.2d 954 (3d Cir. 1982) (claim sufficient without itemized medical bills); *Ahmed*, 30 F.3d at 517 (claim satisfies statute "if the notice (1) is sufficient to enable the agency to investigate and (2) places a 'sum certain' value on [the] claim") (internal quotation marks omitted); *Transco Leasing Corp.* v. *United States*, 896 F.2d 1435, 1442, amended, 905 F.2d 61 (5th Cir. 1990) ("A claim is properly presented within the meaning of § 2675(a) when the agency is given sufficient written notice to commence investigation and the claimant places a value on the claim."); *Glarner* v. *United States*, 30 F.3d 697, 700 (6th Cir. 1994) ("In order for a person to file a tort claim under the FTCA, it is required that he 1) give written notice of a claim sufficient to enable the agency to investigate the claim and 2) place a value (or 'sum certain') on the claim."); *Charlton* v. *United States*, 743 F.2d 557, 559 (7th Cir. 1984) (Section 2675 requires "giving of sufficient notice to enable the agency to investigate the claim and the setting of a 'sum certain.'"); *Farmers State Sav. Bank* v. *Farmers Home Admin.*, 866 F.2d 276, 277 (8th Cir. 1989) ("a claimant satisfies the notice requirement of section 2675 if he provides in writing (1) sufficient information for the agency to investigate the claims, and (2) the amount of damages sought") (citations omitted); *Warren* v. *United*

review on the issue and it would be impractical for this Court to try to parse just how specific the facts alleged in an administrative claim must be.

2. There is, however, a narrow conflict in the circuits on the question whether general allegations of medical negligence put an agency on notice of a possible informed consent claim. Of the circuits that have addressed this issue, only a single circuit has agreed with the position taken by petitioners here. Compare *Frantz*, 29 F.3d at 224 ("[b]y its very nature, the

---

States Dep't of the Interior, 724 F.2d 776, 779 (9th Cir. 1984) (en banc) (Section 2675 "requires claimants to (1) give an agency sufficient written notice to commence investigation and (2) place a value on the claim."); *Cizek* v. *United States*, 953 F.2d 1232, 1233 (10th Cir. 1992) (Section 2675 "requires claimants to present their claims to the appropriate federal agency before suing the United States by filing (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim.") (internal quotation marks omitted); *Orlando Helicopter Airways* v. *United States*, 75 F.3d 622, 625 (11th Cir. 1996) ("Section 2675(a) is satisfied if the claimant (1) gave the appropriate agency written notice of the tort claim to enable the agency to investigate; and (2) stated a sum certain as to the value of the claim."); *GAF Corp.* v. *United States*, 818 F.2d 901, 919 (D.C. Cir. 1987) ("Section 2675(a) requires a claimant to file (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum-certain damages claim."). See also 28 C.F.R. 14.2(a) ("[A] claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.").

informed consent claim is included in the Frantzes' allegation of negligence in their administrative claim," so the administrative claim based on "negligence in surgery" sufficed to exhaust an informed consent claim), with Pet. App. 35a (affirming judgment of district court, Pet. App. 38a-41a); *Murrey*, 73 F.3d at 1453 ("the administrative claim must narrate facts from which a legally trained reader would infer a failure to obtain informed consent" but an allegation that physicians assured him and his family that surgery was the only available therapy and would extend his life by 15 years was enough);[4] *Bush* v. *United States*, 703 F.2d 491, 495 (11th Cir. 1983) ("Neither the claim nor the attached medical evaluation contained any challenge to the consent form signed by Mr. Bush prior to surgery.") (footnote omitted). See also *Butler* v. *United States*, No. 97-5081, 1998 WL 314317, at *2 (10th Cir. June 2, 1998), 149 F.3d 1190 (Table) ("As far as we can tell, no language in Butler's administrative claim would alert the reader thereof that one aspect of Butler's claim of negligence was lack of informed consent.").

The divided panel opinion lacks any precedential force and so does not contribute to the split of authority. More important, this case does not present an opportunity to resolve this narrow conflict because

---

[4] *Murrey* ultimately decided that there was sufficient notice of the informed consent claim based on the statement that "On November 15, 1989, Tom [Murrey] entered the Veterans Hospital in North Chicago to undergo a radical prostatectomy. He was extremely fearful of this surgery. However, VA physicians assured him and his family that surgery was the only available therapy, and that it would extend his life by 15 years," see 73 F.3d at 1452. Although the Seventh Circuit distinguished *Frantz* in *Murrey*, the result in *Murrey* suggests that the conflict may be of little practical effect in many cases.

petitioners cannot succeed here even under the *Frantz* rule that an informed consent claim is necessarily included in any claim of medical negligence. The unique and salient feature of the present case is that, in her deposition, Ms. Drew flatly renounced the factual predicate of the administrative claim petitioners had filed and claimed a wholly new factual predicate that had never been put before the Air Force. When she was asked the date on which she had received a Depo-Provera injection while pregnant with Sterling, Ms. Drew testified:

> I didn't. No. My complaint was not that I received it while I was pregnant, but that I in fact got pregnant while I had it in my system.

Pet. App. 130a.[5]

Accordingly, to discern petitioner's amended federal court complaint from the administrative claim, the Air Force would not only have needed to infer an absent informed consent claim, but somehow surmise that the relevant informed consent problem occurred during a different time frame, which involved different risks. In other words, the Air Force first would have had to take a leap from the medical negligence actually alleged in

---

[5] The significance of an injection of Depo-Provera "in early pregnancy" is that the manufacturer of the drug warns against administering the drug to pregnant women, and the Air Force's practice is to test women for pregnancy before they are allowed to have the injection. Despite the significance of this issue, the petition glosses over Ms. Drew's renunciation of her claim, the central event that led to dismissal of the lawsuit. For example, the petition states merely that after filing suit petitioners "moved to amend their Complaint to restate their claim for medical negligence, as one based upon a lack of a informed consent," Pet. 4, as if this amendment were not the result of Ms. Drew's about-face at her deposition.

the administrative claim (Depo-Provera was given "in early pregnancy") to surmise that Ms. Drew may have been complaining about a basically different incident with different attendant risks (the administration of the drug *before* pregnancy) based on facts that conflicted with the claim actually presented. See *id.* at 30a (panel dissent) ("the facts as alleged in the administrative [claim] are inconsistent with [an informed consent] claim because the duty of informed consent, as now alleged, would have arisen months before Ms. Drew's pregnancy"). Second, only after taking that first leap, would the Air Force have had to take a further leap to infer an informed consent claim regarding that factually conflicting incident.

There is simply no basis for requiring the Air Force to make the first surmise. Accordingly, this case does not present an appropriate vehicle to resolve the narrow circuit conflict about whether a claim of medical negligence necessarily includes an informed consent claim, and further review is not warranted.[6]

3. Furthermore, both the district court's holding that the government cannot be deemed on notice of an informed consent claim of which petitioners themselves lacked knowledge, Pet. App. 41a, and the en banc decision of the court of appeals affirming the judgment

---

[6] Even if this conflict were presented here, the court of appeals properly refused to adopt the holding of *Frantz*. An informed consent claim is conceptually distinct from general medical negligence or even negligence with respect to surgery or medication. Moreover, if it were true that an informed consent claim is "a specific subset of the larger universe of 'medical malpractice actions,'" Pet. App. 15a, it would logically follow that some claims in the larger universe of medical negligence *do not* include informed consent. Medical negligence takes a large number of different forms, only one of which is a failure to obtain informed consent.

of the district court, were correct. The en banc court of appeals properly vacated the panel decision, which imposed an unprecedented duty on the government, when an administrative claim is based on a false factual predicate, to develop alternative factual scenarios that might support a valid claim.

When a factually false administrative claim is presented, as here, the proper course for the government to take is to deny the claim and in an egregious case to refer the matter for possible prosecution, not to try to invent and investigate potential claims based on facts that *conflict* with those alleged in the administrative claim. If the government were obligated to investigate these hypothetical claims, it would be far more difficult to conclude the agency's investigation of the claim within the six months provided by Section 2675(a), and it thus would increase the likelihood that plaintiffs will sue before the agency has had the opportunity to evaluate fully the merits of the claim and to decide whether settlement is desirable. It would force agencies to deplete their limited resources by pursuing investigations of potential claims based on facts that are inconsistent with the facts actually alleged in the administrative claim. It also would encourage claimants to evade the limits of Section 2675(a) by setting forth vague and even factually baseless claims in the hope that the agency will figure out what their claim should be by "asking the right questions." Pet. App. 19a.

The vacated panel decision was the only authority for imposition of such an obligation. Because it has been vacated, no further review is warranted.

4. Finally, petitioners contend that their administrative claim was sufficient regardless of which side of the circuit conflict is accepted because under South

Carolina law every medical negligence claim includes an informed consent claim. Pet. 21-26. If that were true, it would be another reason for declining further review of the case, because petitioners thus essentially would be asserting an error in applying South Carolina law and the case would not present an opportunity to resolve the circuit split that they assert is present (but which is not, in fact, implicated by their case). But it is false. The South Carolina decision they rely on does not hold that every medical negligence claim includes an implicit informed consent claim; rather, it establishes that an informed consent claim exists under South Carolina law and sounds in negligence (as opposed to battery). *Hook* v. *Rothstein*, 316 S.E.2d 690, 695, 700 (S.C. Ct. App.), cert. denied, 320 S.E.2d 35 (S.C. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
ROBERT S. GREENSPAN
EDWARD HIMMELFARB
Attorneys

APRIL 2001