IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SOUTHERN BAPTIST HOSPITAL
OF FLORIDA, INC.,

Petitioner,

v.

Case No. 1D15-0109
L.T. Case No. 2012-CA-002677

JEAN CHARLES, JR., as next
friend and duly appointed guardian
of his sister, MARIE CHARLES, *et al.*,

Respondents.
_____/

PETITIONER'S RESPONSE TO MOTION FOR CERTIFICATION

Petitioner, Southern Baptist Hospital of Florida, Inc., opposes the Charles Respondents' Motion for Certification, dated November 2, 2015.[1]

In its recent opinion, this Court spoke decisively and with one voice. A unanimous panel faithfully applied the plain and unambiguous language of the federal Patient Safety and Quality Improvement Act of 2005 (the "Act") and provided a definitive answer to a discrete question of federal law. This Court's opinion indicates neither doubt nor division; it removes uncertainty, leaves behind no inter-district conflict, and binds all trial courts of this State.

[1] In this response, "Respondents" refers to the Charles Respondents, who are plaintiffs below, and excludes the nominal respondents, who are defendants below.

Respondents seek certification even though further review will substantially delay resolution of their claims—perhaps for years—and *none* of the documents at issue relates to Respondents themselves or to the incident that occasioned this litigation. In fact, of the tens of thousands of documents that Respondents seek, the handful of pages that relate to Marie Charles were produced more than a year ago. This Court should exercise its sound discretion and deny the motion.

Legal Standard

Article V, Section 3(b)(4), Florida Constitution, authorizes the Supreme Court to review any decision of a District Court that the District Court certifies to be in "direct conflict" with the decision of another District Court, or which passes upon a question that the District Court certifies to be of "great public importance."

The decision to grant or withhold certification resides within the sole and exclusive province of this Court. *Rupp v. Jackson*, 238 So. 2d 86, 88 (Fla. 1970); *Novack v. Novack*, 195 So. 2d 199, 200 (Fla. 1967); *Zirin v. Charles Pfizer & Co*., 128 So. 2d 594, 597 (Fla. 1961). It is well-settled that District Courts of Appeal are not mere "way stations" to the Florida Supreme Court: they are Florida's courts of final appellate jurisdiction. *See Miller v. State*, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008); *Taylor v. Knight*, 234 So. 2d 156, 157 (Fla. 1st DCA 1970).

Certification of a Direct Conflict

Respondents first invite the Court to acknowledge direct conflict with *Bethesda Hospital, Inc. v. Gomez-Columbo*, Case No. 4D15-1080 (Fla. 4th DCA Apr. 22, 2015)—a three-sentence, unpublished order. The Court should decline.

It is farm from clear that the unpublished order in *Bethesda Hospital* is in "direct conflict" with this Court's opinion. The legal and factual bases of the decision in *Bethesda Hospital* do not appear on the face of the three-sentence order. The order relates no findings of fact and does not explain the rationale of the decision. It simply states that the trial court's interpretation of the Act was not a "departure from the essential requirements of law"—the high standard for certiorari review—and cites the plurality opinion in *Tibbs v. Bunnell*, 448 S.W.3d 796 (Ky. 2014).[2]

Respondents have not established, therefore, that this Court's opinion and *Bethesda Hospital* are in direct conflict—that is, that the two decisions are "based practically on the same state of facts and announce antagonistic conclusions." *Ansin v. Thurston*, 101 So. 2d 808, 811 (Fla. 1958) (quoting 21 C.J.S. *Courts* § 462)). Courts have declined to certify direct conflict where, as here, the grounds of the allegedly conflicting decision—and the existence of direct conflict—are unclear.

[2] Though Respondents allude to a "majority opinion" in *Tibbs*, *see* Mot. at 1, only three of seven Justices of the Kentucky Supreme Court joined the lead opinion. In *Bethesda Hospital*, the court failed to note that *Tibbs* was a plurality opinion and thus seems to have labored under the same misimpression as Respondents.

See Irons v. State, 787 So. 2d 975, 976 (Fla. 5th DCA 2001) ("We decline to certify conflict . . . because the position of our sister court . . . seems unclear to us.").

Bethesda Hospital does not, moreover, create interdistrict conflict. Unpublished orders have no precedential value. *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 133 (Fla. 2d DCA 2015); *Ullah v. State*, 679 So. 2d 1242, 1243 (Fla. 1st DCA 1996). Thus, all trial courts of this State, including those in the Fourth District, are bound by this Court's controlling decision. *See Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992); *State v. Carpenter*, 158 So. 3d 693, 695-96 (Fla. 1st DCA 2015); *Aurora Loan Servs. LLC v. Senchuk*, 36 So. 3d 716, 721 (Fla. 1st DCA 2010). Conflict jurisdiction enables the Supreme Court to create uniformity among judicial districts, *see Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985) ("Our concern in cases based on our conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law."); *Ansin*, 101 So. 2d at 811 ("A limitation of review to decisions in 'direct conflict' clearly evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants."), but no interdistrict conflict exists in this case because *Bethesda Hospital* has no *stare decisis* effect.

Indeed, the denial of a petition for writ of certiorari by an appellate court is not a decision on the merits and cannot be cited as authority. *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 253 (Fla. 2002); *S. Bell Tel. & Tel. Co. v.*

Bell, 116 So. 2d 617, 619 (Fla. 1959); *Maddox v. State*, 862 So. 2d 783, 785 n.1 (Fla. 2d DCA 2003). Thus, while the order in *Bethesda Hospital* states in conclusory fashion that the petition was denied on the merits, any discussion of the merits in the denial of a petition for writ of certiorari is dictum. *Shaps*, 826 So. 2d at 253.

This is not a case in which the Supreme Court must intercede to resolve a conflict in the binding decisions of two District Courts. If another District Court were to render a binding decision that directly conflicts with this Court's opinion, then the question may present itself in a better posture for further appellate review.

Finally, Respondents cite no case in which a District Court that had rendered a written, binding opinion certified conflict with an opaque, unpublished order of another District Court. In *Department of Law Enforcement v. House*, 678 So. 2d 1284 (Fla. 1996), the court that rendered the unpublished order certified conflict with an earlier, written opinion of another court. It did not attempt to discern (as Respondents ask this Court to do) whether the earlier, unpublished order of another court directly conflicted with its own opinion. In the other cases that Respondents cite, the district court certified a question of great public importance—not conflict—in an unpublished order, *see Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1379 (Fla. 1993), or the Supreme Court identified express and direct conflict between a written opinion and an unpublished order, *see Miles v. Weingrad*, 164 So. 3d 1208, 1210-11 (Fla. 2015), *Sutton v. State*, 975 So.

2d 1073, 1074 (Fla. 2008). In none of these cases did a court find direct conflict between its own binding precedent and the unpublished order of another court.

Certification of a Question of Great Public Importance

In the alternative, Respondents ask this Court to certify a question of great public importance. This Court's decision was important—and so too are many of this Court's decisions. It does not, however, call for further appellate proceedings.

This Court was not divided and expressed no uncertainty. Its decision was dictated by a straightforward application of the plain and unambiguous language of federal law. *See* 2015 WL 6499139, at *4 (Fla. 1st DCA Oct. 28, 2015) ("[T]he Act is clear and unambiguous such that the language must be given its plain and obvious meaning."); *id*. ("The Act clearly and unambiguously defines what is [patient safety work product ("PSWP")] . . . ."); *id*. ("[T]he documents at issue clearly meet the definition of PSWP . . . ."); *id*. at *5 ("[T]he Act clearly defines what can and what cannot constitute PSWP."); *id*. at *6 ("The plain language of the Act is clear."); *id*. ("The plain language of the Act is clear."). Where, as here, the resolution of a case depends on a direct application of plain language, certification of a question of great public importance is unwarranted. *Cf. Diaz de la Portilla v. State*, 142 So. 3d 928, 935 (Fla. 1st DCA 2014) (noting the uncertainty of the law and certifying a question of great public importance); *Seagrave v. State*, 768 So. 2d 1121, 1123 (Fla. 1st DCA 2000) (same); *Barnes v. Clark Sand Co*., 721 So. 2d

329, 333 (Fla. 1st DCA 1998) (same); *Martinez v. State*, 557 So. 2d 160, 161 (Fla. 1st DCA 1990) (declining to certify a question of great public importance where the appellant failed to present "substantial arguments" in support of his position).

Second, this Court's decision neither creates nor perpetuates—but rather eliminates—ambiguity and uncertainty in the jurisprudence of this State. Its decision provides a clear and authoritative answer that now binds all trial courts of this State. This is not a case in which litigation is apt to become "more frequent," *Ordini v. Ordini*, 701 So. 2d 663, 666 (Fla. 4th DCA 1997), or where the decision will "spark a new wave of litigation," *Martix Emp. Leasing, Inc. v. Hadley*, 78 So. 3d 621, 635 (Fla. 1st DCA 2011) (Padovano, J., dissenting). This Court's decision settles the question and provides a "definitive answer" on which all courts of this State can rely until another appellate court renders a binding decision that conflicts with this Court's determination. *See id*. There is no need to initiate a second stage of appellate review, further delay the proceedings below, and require all parties—including Respondents—to wait while the Supreme Court reviews this Court's decision with respect to documents that have no relevance to Respondents' claims.

Respondents next assail the "opponents" of Amendment 7, who, it is said, conspired to "thwart the will of Florida voters." Mot. at 5. But this Court's decision arose not from a conspiracy to "thwart the will of Florida voters," but from an unambiguous act of Congress. Congress intended to establish a protected envi-

ronment in which medical errors can be collected, disclosed, and studied in confidence and without fear of exposure. It created a national system for the collection and reporting of patient safety work product and encouraged all types of providers to participate in the system—not just hospitals and not just providers in Florida. If Florida were able to prevent providers in this State from participating in the national system, then the purpose of the federal Act would be defeated. This Court faithfully interpreted the statute and, as it must, applied the Supremacy Clause.

Respondents proclaim that the Act "kills Amendment 7." *Id.* It does no such thing. The Act confers federal protection on a specific class of documents that qualify as patient safety work product and, to that extent only, preempts Amendment 7. As discovery in this case has verified, the Act in no way limits Amendment 7's applicability to documents that are not patient safety work product. *See* 2015 WL 6499139, at *7 n.2 ("At oral argument, Baptist did not dispute that the Code 15 Reports and Annual Reports were subject to production as they were not housed within Baptist's PSE system."). On the other hand, Respondents' interpretation renders federal law a "dead letter" and subverts the Supremacy Clause. *See* 2015 WL 6499139, at *7.[3] Respondents have never articulated a legal

[3] Respondents assert without corroboration that the Act was "shepherded through Congress with virtually no attention or input from the general public," Mot. at 5—as though voter-approved state constitutional provisions can outmuscle federal laws that were enacted without "attention or input from the general public." Of course, they cannot. The popularity or unpopularity of state and federal laws,

theory that gives meaning to the Act and does not subordinate federal to state law.

Finally, the question that Respondents ask this Court to certify—whether the Act preempts Amendment 7—was not the critical, operative question in this case. The central question was not whether federal law preempts state law—that question has been settled for more than two centuries—but whether the documents at issue are patient safety work product. If so, preemption follows as a matter of course. Respondents did not contend otherwise, but argued that the documents do not qualify as patient safety work product, despite the plain language of the Act.

This Court's decision requires no review. Respondents have shown no reason to subject the parties to the costs and burdens of further appellate proceedings.

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and the circumstances surrounding their enactment, are irrelevant to the preemption analysis. The most obscure federal laws preempt even the most popular state laws that conflict with them. The Act, however, was not carelessly enacted. Indeed, Respondents have described at length the Act's involved and extensive legislative history. *See* Resp'ts Resp. to Pet. for Writ of Cert. at 14-21 (Apr. 27, 2015).

Respectfully submitted this seventeenth day of November, 2015.

/s/ George N. Meros, Jr.

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CERTIFICATE OF SERVICE

I certify that the foregoing response was served by electronic transmission (except where a different method is indicated) this seventeenth day of November, 2015, on the individuals identified on the Service List that follows.

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