IN THE SUPREME COURT OF FLORIDA

JEAN CHARLES, JR., as next Friend and duly appointed Guardian of his sister, MARIE CHARLES, and her minor children, ANGEL ALSTON, and JAZMIN HOUSTON, minors, and PERVIN ALSTON,

Appellants,

v. Case No. SC15-2180

SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC. d/b/a/ Baptist Medical Center-South, KRISTIN FERNANDEZ, D.O., YUVAL S. NAOT, M.D., SAFEER A. ASHRAF, M.D., INTEGRATED COMMUNITY ONCOLOGY NETWORK, LLC, a Florida limited liability corporation, ANDREW NAMEN, M.D., GREGORY J. SENGSTOCK, M.D., JOHN D. PENNINGTON, M.D., and EUGENE R. BEBEAU, M.D.,

Appellees.
_____/

BRIEF OF AMICUS CURIAE
FLORIDA CONSUMER ACTION NETWORK
IN SUPPORT OF THE APPELLANTS

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IDENTITY OF AMICUS ANDINTEREST IN THE CASE

Florida Consumer Action Network ("FCAN") is a statewide, non-profit, non-partisan grassroots consumer organization incorporated in Florida in 1984. Its purpose is to influence public policy by organizing and educating citizens in those areas where consumer voices may not be effectively heard and understood. FCAN prefers positive approaches to influence public policy. It seeks to challenge economic (among others) injustice in this state by working for change on issues affecting the average Florida consumer's quality of life. FCAN has been granted leave to serve as amicus curiae in numerous prior appellate proceedings in Florida courts, including this Court, in support of consumer and other legal rights.

FCAN has a substantial interest in this case because a decision in favor of the Respondent would have the effect of severely restricting access to documents that are presently available under Article X, section 25 of the Florida Constitution which is more commonly known as Amendment 7. This constitutional right to access records is available to all citizens in Florida, and FCAN believes it is important to work to protect the right of consumers to have access to such information.

SUMMARY OF THE ARGUMENT

The First District's Opinion permits health care providers to unilaterally decide which documents fall under the provisions of the PSQIA (and therefore are not required to be provided under Amendment 7), and provides for no judicial oversight of that decision. Courts have previously held that there is no legal basis for allowing a health care provider to be the final decision maker on whether documents are to be produced under Amendment 7. Further, the issue of a health care provider's responsibility to properly classify documents must be examined in light of the history where such providers have steadfastly resisted producing documents over the past decade for a plethora of now rejected reasons. In considering protection of the constitutional right to such documents, this Court must consider the Amendment itself, as well as the previous decisions rejecting challenges to Amendment 7, including those premised on alleged federal preemption and constitutional violations.

ARGUMENT

FCAN files this brief in an effort to protect the right of consumers of medical services in Florida to have access to the constitutionally specified documents within the scope of Amendment 7. Presently, the Florida Constitution guarantees consumers access to information which can be of great importance to them when making critical (and indeed life or death) decisions concerning health care. As this Court has stated, "one of the primary purposes of the amendment is to provide a patient contemplating treatment by a medical provider access to that provider's past history of adverse medical incidents." *Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 489 n.6 (Fla. 2008).

This constitutional right must be protected, and the First District's Opinion undermines any protection that a consumer might have to ensure that the documents required by Amendment 7 are available. Indeed, the First District's Opinion gives health care providers the unilateral ability to determine which documents are protected by the PSQIA, and removes any judicial oversight As the Opinion states:

> It could be suggested that the providers' unilateral, unreviewable decision as to what is placed in its PSE system could open the doors to "gamesmanship." That is, a provider could potentially dump everything into its PSE system, rendering it privileged and confidential, in an effort to thwart discovery.

Opinion, at 14.

The Opinion suggests that such "gamesmanship" would be "unlikely" to occur because of the PSQIA's definitions, and because the PSQIA and state law contain certain reporting requirements. In essence, the Opinion removes any check whatsoever from healthcare providers to ensure that they are complying with the law, be it through honest mistake or some form of "gamesmanship." The health care provider thus becomes the sole decision maker about documents should be produced, and the First District's words in another Amendment 7 case should be considered where the health care provider argued that it should determine what was an "adverse medical incident" under Amendment 7:

> Respondents have cited no legal authority, however, not have we found any, that would allow the health care provider subject to Amendment 7 to act as the final arbiter in determining whether a medical incident, here both unintended and harmful to the patient, was 'adverse' for purposes of complying with or denying request for production of the of medical records of the incident. Such ultimately is the court's decision upon a proper consideration of the nature of the records requested and the broad coverage of Amendment 7.

Baldwin v. Shands Teaching Hosp., 45 So. 3d 118, 124 (Fla. 1st DCA 2010). The important constitutional right of access guaranteed by Amendment 7 should not be left in the hands of a health care provider who has a very strong incentive not to provide what could be damning documents. *See, e.g., First Healthcare Corp.*

v. Hamilton, 740 So. 2d 1189, 1194 (Fla. 4th DCA 1999) (upholding sanctions against a health care provider who used a "semantic shell game" in an attempt not to produce relevant documents).

While FCAN cannot speak to any health care providers' motives, and does not suggest anything improper occurred in this case, it is important to note the history of various health care providers' attempts to avoid Amendment 7's requirements since it became part of the Florida Constitution in 2004. Health care providers have spent over a decade raising one unsuccessful challenge after another, and they have resisted their constitutional obligations at every turn. As will be more fully addressed below, these attempts have ranged from attacks on the Amendment itself (addressed by this Court in *Buster*), to other preemption arguments, to constitutional challenges, to the all too common practice of requiring exorbitant amounts of money from those requesting documents in an attempt to thwart compliance with the request. *See* Initial Brief of Appellants, at 24 (noting that "Baptist has also demanded that the Charles family pre-pay between $143,000 and $326,000 for the research costs to separate the state mandated information from the PSWP stored in the PSEs.").

It is respectfully suggested that the history of opposition to Amendment 7 is relevant to this matter, and given that history, it is entirely inappropriate to give

health care providers the keys to lock away information which then can never be reviewed by the courts of this state. FCAN will briefly address Amendment 7 itself, this Court's *Buster* decision, general challenges to the scope of Amendment 7, and then discuss federal challenges to Amendment 7 arising under the Health Care Quality Improvement Act of 1986 and the Impairment of Contracts Clause.

Amendment 7

On November 2, 2004, the citizens of the State of Florida approved proposed constitutional Amendment 7 by a vote of roughly 4 to 1.[1] Amendment 7 changed existing Florida law and gave patients the right to obtain records of adverse medical incidents, and the Amendment was codified at Article X, section 25 of the Florida Constitution.

Amendment 7 provides:

> § 25. Patients' right to know about adverse medical incidents
>
> (a) In addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.
>
> (b) In providing such access, the identity of patients involved in the incidents shall not be disclosed,

[1]The Amendment passed by a vote of 81.2 percent in favor, and 18.8 percent against. *Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 480 n.1 (Fla. 2008).

and any privacy restrictions imposed by federal law shall be maintained.

(c) For purposes of this section, the following terms have the following meanings:

(1) The phrases "health care facility" and "health care provider" have the meaning given in general law related to a patient's rights and responsibilities.

(2) The term "patient" means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.

(3) The phrase "adverse medical incident" means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

(4) The phrase "have access to any records" means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be "provided" by reference to the location at which the records are publicly available.

Art. X, Sec. 25 Fla. Const.

This Court's *Buster* Decision

On March 6, 2008, this Court upheld Amendment 7 against three challenges raised by the health care providers in that case. Specifically, this Court held that it was self-executing, that it applied to records created before its adoption in 2004, and rendered various conflicting Florida Statutes unconstitutional, including a statute purporting to "implement" the amendment, Florida Statutes section 381.028. *Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008). *Buster*'s conclusion contains the following statement:

> We believe that Amendment 7 heralds a change in the public policy of this state to lift the shroud of privilege and confidentiality in order to foster disclosure of information that will allow patients to better determine from whom they should seek healthcare, evaluate the quality and fitness of health care providers currently rendering service to them, and allow them access to information gathered through the self-policing processes during the discovery period of litigation filed by injured patients or the estates of deceased patients against their health care providers.

Id. at 494 (quoting *Florida Hosp. Waterman v. Buster*, 932 So. 2d 344, 355-56 (Fla. 5th DCA 2006), *approved in part, quashed in part by Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008)). Unfortunately, the shroud of privilege and confidentiality was not so easily removed.

General Attempts to Avoid Producing Documents

Given that Amendment 7 grants the citizens of Florida a constitutional right

to access certain documents, traditional discovery objections raised by health care providers have been rejected by the courts. A litigant in a medical malpractice action, or other litigation, can make an Amendment 7 request during discovery. There is no "standing" requirement, nor a need by the requesting party to demonstrate a "proper purpose" for the request. *See Amisub North Ridge Hosp., Inc. v. Sonaglia*, 995 So. 2d 999 (Fla. 4th DCA 2008).

In the context of litigation, Amendment 7 request is a unique discovery vehicle. Unlike customary discovery requests, Amendment 7 request is not subject to objections on the grounds of burdensomeness or overbreadth. *Morton Plant Hosp. Assoc. v. Shahbas*, 960 So. 2d 820 (Fla. 2d DCA 2007); *Columbia Hosp. Corp. of South Broward v. Fain*, 16 So. 3d 236 (Fla. 4th DCA 2009). Additionally, there is no requirement that the Amendment 7 records requested be relevant to any issue in the case. *See Amisub, Shahab.* Amendment 7 preempts the work product doctrine to the extent it relates to fact work product, albeit not opinion work product. *See Lakeland Reg'l Med. Ctr. v. Neely*, 8 So. 3d 1268 (Fla. 2d DCA 2009); *Florida Eye Clinic, P.A. v. Gmach,* 14 So. 3d 1044 (Fla. 5th DCA 2009).

Alleged Preemption Under the HCQIA

Heath care providers have argued that the Health Care Quality Improvement Act of 1986 (the "HCQIA") preempted Amendment 7. The HCQIA was created to

prevent incompetent doctors from moving from state to state and hiding records of their performance, and was designed to encourage doctors from participating in effective peer review by granting them immunity for their participation. *West Florida Reg'l Med. Ctr. v. See*, 79 So. 3d 1, 18 (Fla. 2012). The HCQIA contains an express savings clause for state laws governing disclosure. "Nothing in this subsection shall prevent the disclosure of information by a party which is otherwise authorized, under applicable state law, to make such disclosures." 42 U.S.C. § 11137(b)(1); West Florida, 79 So. 3d at 19. The PSQIA, at issue here, contains a similar provision concerning the intent to preserve state law. *See,* 42 U.S.C. § 299b-22(g)(2).

While that federal legislation was designed to encourage and enhance medical peer review investigations, record-keeping, and information-sharing, this Court held that Amendment 7 did not interfere with the application or effectiveness of that legislature scheme. The "HCQIA does not preempt Amendment 7 through implied conflict preemption because the objectives and purposes of each do not conflict." *Id.* at 20. *See also Columbia Hosp. Corp. of South Broward v. Fain*, 16 So. 3d 236 (Fla. 4th DCA 2009) (holding that Amendment 7 was not preempted by the HCQIA).

Alleged Violation of the Impairment of Contracts Clause

Health care providers have argued that hospital bylaws and medical staff rules and regulations constitute a binding contract between the health care provider and the physicians on its staff, and thus allowing discovery of Amendment 7 materials will constitute a violation of the Contract Clause. The issue of Amendment 7 potentially violating the Contract Clause was specifically considered and rejected in *Columbia Hospital Corporation of South Broward v. Fain*, 16 So. 3d 236 (Fla. 4th DCA 2009). In that case, the court noted that the hospital argued that "Amendment 7 is unconstitutional as it impairs its contracts with its doctors because those contracts have confidentiality provisions." *Fain*, 16 So. 2d at 243. However, the *Fain* court noted that this Court in *Buster* held that "providers and facilities did not have vested, substantive statutory rights to keep peer review secret." *Id.* at 243 (citing *Buster*, 984 So. 2d at 490-91). The argument put forth by the hospital in *Fain* was, in essence, that its doctors, contrary to *Buster*, in fact do have vested, contractual rights concerning confidentiality that, as the *Fain* court noted, "cannot be taken away by constitutional amendment." *Id. Fain* rejected that argument.

Moreover, the *Fain* court noted that, to establish a violation of the Contract Clause, a party must demonstrate that the constitutional amendment that allegedly

impairs the contractual rights results in a *substantial* impairment. *Id.* at 243. Importantly, *Fain* recognized that "*reasonable* impairments on contracts are permissible." *Id.* (emphasis added). *Fain* further correctly noted that courts apply a balancing test "which measures the level of impairment against the public purpose to be served. *Id.* Further, "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *Id.* (citing *Pomponio v. Claridge of Pomponio Condo., Inc.* 378 So. 2d 774 (Fla. 1979), and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (25) (1977)). The First District likewise rejected a contracts clause challenge in *West Florida Regional Medical Center v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009).

CONCLUSION

In considering the important issues raised by this case, the Court should carefully consider the ability of health care providers to unilaterally determine which documents fall within the PSQIA and consider whether such a holding would thwart the right to records of adverse medical incidents under the Florida Constitution. The history of baseless challenges to Amendment 7 requests suggests placing this responsibility with health care providers alone would be improper.

Respectfully submitted,

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I CERTIFY that the foregoing was e-filed pursuant to Florida Rule of Judicial Administration 2.525 and that the foregoing was served by email in compliance with Florida Rule of Judicial Administration 2.516(b)(1)(A) to:

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