**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**
**Case No. 20-11555**

SHANDS TEACHING HOSPITAL & CLINICS, INC., d/b/a UF HEALTH SHANDS, a Florida non-profit corporation,

Plaintiff-Appellant,

v.

District Court Case No.: 1:17-cv-245-AW-GRJ

GEORGE LORENZO MORGAN, an individual,

Defendant-Appellee.
_____/

Appeal from the United States District Court
For the Northern District of Florida, Gainesville Division

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# PRINCIPAL BRIEF OF APPELLEE

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EDWARDS & RAGATZ, P.A.

**Thomas Stoneham Edwards, Jr.**
Florida Bar No. 395821
tse@edwardsragatz.com
4401 Salisbury Rd, Ste 200
Jacksonville, Florida 32216
Telephone: (904) 399-1609

PERRY & VLOEDMAN

**Andrew Vloedman**
Florida Bar No. 327468
andy.vloedman@gmail.com
2790 NW 43rd St, Ste 200
Gainesville, Florida 32606
Telephone: (352) 373-4141

CREED & GOWDY, P.A.

**Bryan S. Gowdy**
Florida Bar No. 176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
**Meredith A. Ross**
Florida Bar No. 120137
mross@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075

*Attorneys for Defendant-Appellee George Lorenzo Morgan*

**APPELLEE'S CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Eleventh Circuit Rule 26.1-1, Appellee certifies that the Certificate of Interested Persons filed by the Appellant in its Principal Brief is a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

By:/s/ *Bryan S. Gowdy*
Bryan S. Gowdy

## STATEMENT REGARDING ORAL ARGUMENT

Mr. Morgan does not request oral argument. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

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## STATEMENT OF THE ISSUE

Whether the district court erred in dismissing Shands' complaint for lack of subject-matter jurisdiction.

## STATEMENT OF THE CASE

Shands' statement of the case omits pertinent facts regarding Mr. Morgan's state-law records request. Shands also misstates Mr. Morgan's position on the PSQIA and Amendment 7, overstates the Department of Health and Human Services' position on the same, and misstates the PSQIA's legislative history. Mr. Morgan therefore includes additional facts and corrections below.

### A. Pursuant to Florida law, Mr. Morgan requested from Shands records relating to any adverse medical incident that occurred during his hospitalization.

On March 31, 2017, Mr. Morgan was admitted to Shands' hospital. Docs. 1 ¶8; 48-5. During the course of his admission, he suffered a fall resulting in a significant head injury. Docs. 1 ¶8; 48-5.

Several months later, Mr. Morgan's counsel sent Shands a letter requesting, under Article X, Section 25 of the Florida Constitution ("Amendment 7"), "[a] copy of any records made or received in the course of business by [Shands] relating to any adverse medical incident which occurred during Mr. Morgan's hospitalization at Shands with an admit date of March 31, 2017." Doc. 48-5. Mr. Morgan's letter tracked Amendment 7's language, which provides that "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." Fla. Const. art. X, § 25. Amendment 7 defines "adverse medical incident" as "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." Fla. Const. art. X, § 25.

Shands refused to produce any documents. Doc. 48-6. Shands instead asserted the requested information was "protected from disclosure as confidential and privileged Patient Safety Work Product, pursuant to the Patient Safety Quality Improvement Act of 2005 (PSQIA)." Doc. 48-6. However, Shands did not acknowledge a significant exception to the PSQIA's protection: by its plain language, it does not apply to "information that is collected, maintained, or developed separately, or [information that] exists separately, from a patient safety evaluation system," or information that is an "original patient or provider record." 42 U.S.C. §299b-21(7)(B)(i),(ii).

Mr. Morgan's counsel asked Shands to reconsider its objection in light of *Charles v. Southern Baptist Hospital of Florida, Inc.*, 209 So. 3d 1199 (Fla. 2017). Doc. 48-7. In *Charles*, the Florida Supreme Court had held that adverse medical incident reports are not protected as "patient safety work product because Florida

statutes and administrative rules require providers to create and maintain these records and Amendment 7 provides patients with a constitutional right to access these records." 209 So. 3d at 1211. The Supreme Court denied the *Charles* hospital's petition for certiorari on Monday, October 2, 2017. *S. Baptist Hosp. of Fla., Inc. v. Charles*, 138 S. Ct. 129 (2017). Later that same week, on Friday, October 6, 2017, Shands filed the instant suit against its patient, Mr. Morgan. Doc. 1.

**B. Shands sued Mr. Morgan and refused to concede that he had suffered any "adverse medical incident" under Florida law.**

In this suit, Shands asked the district court to declare that (1) the documents responsive to Mr. Morgan's state-law request are protected from disclosure by the PSQIA, and (2) the PSQIA preempts Amendment 7. Doc. 1 at 7-8. Although Amendment 7 only requires Shands to disclose documents "relating to any adverse medical incident," Fla. Const. art. 10, § 25, Shands did not allege that the fall suffered by Mr. Morgan was an "adverse medical incident." *See generally* Doc. 1. Shands' position on whether Mr. Morgan suffered an adverse medical incident, such that Amendment 7 would apply in the first instance, was that "the court needs to help us." Doc. 66-1 at 71. Throughout the district-court litigation, Shands has refused to concede that Mr. Morgan suffered any "adverse medical incident" under Florida law. *E.g.*, Doc. 89 at 12-13.

The instant federal suit is not the only ongoing litigation between Shands and Mr. Morgan. Mr. Morgan filed a still-pending medical malpractice action against

Shands in Florida state court on October 3, 2019. *See Morgan v. Shands Teaching Hosps. and Clinics, Inc.*, Case No. 01 2019 CA 3371.[1]

**C. Mr. Morgan has clarified that he is seeking only the information that Shands was obligated to collect, maintain, or develop under any non-PSQIA law, not Shands' "voluntary" information.**

After Shands sued him, Mr. Morgan clarified that he was only seeking information that Shands was legally obligated to collect, maintain, and develop. Docs. 96 at 5, 17-20; 109 at 7-10; 114-1. That is, regardless of whether or not Amendment 7 would permit it, Mr. Morgan was not seeking Shands' "voluntary" information; he was only seeking those documents that any non-PSQIA federal or state law mandated Shands to collect, maintain, or develop. Docs. 96 at 5, 17-20; 109 at 7-10; 114-1.

The distinction between voluntary and mandatory information is significant because, as Shands acknowledges in its brief, the PSQIA does not protect "separate" information, including "information that is collected, maintained, or developed separately, or [that] exists separately," from a patient safety evaluation system. Appellant's Br. at 9 (quoting 42 U.S.C. §299b-21(7)(B)(i), (ii)). Indeed, the PSQIA

[1] This Court may take judicial notice of the state court's records, even if they were not part of the district court's record. *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984); *see also Paez v. Sec'y, Fla. Dep't of Corrs.*, 947 F.3d 649, 652 (11th Cir. 2020) (a federal court may take judicial notice of a state court's online docket). Mr. Morgan has included the state court's online docket in an addendum to this brief. (A: 3-4.)

expressly preserves state-law mandates, including the required discovery, reporting, and recordkeeping of non-privileged information. 42 U.S.C. § 299b-21(7)(B)(iii). Thus, as the Florida Supreme Court has observed, the PSQIA, by its plain language, is a "voluntary reporting system" intended "to function harmoniously within existing state reporting and discovery laws." *Charles*, 209 So. 3d at 1217.

**D. Mr. Morgan's position is that the PSQIA does not preempt Amendment 7 because Amendment 7 documents are not patient safety work product.**

In its brief, Shands claims that Mr. Morgan's position is that Shands "can be required to produce documents privileged by PSQIA." Appellant's Br. at 24. Shands has—once again—misstated Mr. Morgan's position. Mr. Morgan's position is, and has been, that the requested Amendment 7 documents are not patient safety work product in the first instance, as defined by the PSQIA, because Shands has mandatory obligations under Florida law to maintain, collect, or develop information on adverse medical incidents separately from a privileged database. *E.g.*, Doc. 69 at 29-39.

**E. Shands has overstated the Department of Health and Human Services' position in this litigation.**

In addition to suing its patient, Mr. Morgan, Shands also sued the Secretary of the United States Department of Health and Human Services (HHS). Doc. 1 at 1-8. The district court dismissed Shands' claims against HHS for lack of subject matter

jurisdiction, Doc. 30 at 1-7, and Shands has voluntarily dismissed HHS from this appeal.

In its brief, Shands represents that "HHS agreed that PSQIA preempts Amendment 7." Appellant's Br. at 4. This is an overstatement of HHS's position in the district-court litigation. In its amended motion to dismiss Shands' complaint, HHS stated only that the PSQIA would preempt Florida law to the extent that it would "otherwise require the production of [patient safety work product]." Doc. 20 at 15. Thus, contrary to Shands' suggestion in its brief, HHS has not taken the position that the PSQIA necessarily preempts Amendment 7 in its entirety.

Indeed, in its regulations, HHS has agreed that state-mandated information is not patient safety work product. HHS has stated: "Information is not patient safety work product if it is collected to comply with external obligations," including "state incident reporting requirements." Patient Safety and Quality Improvement Act, 73 Fed. Reg. 70732, 70742 (Nov. 21, 2008) (codified at C.F.R. pt. 3). HHS also has interpreted "original provider records," which are not patient safety work product, to include state-mandated information. HHS Guidance Regarding Patient Safety Work Product and Providers' External Obligations, 81 Fed. Reg. 32655, 32658 (May 24, 2016).

**F. Shands has mistakenly relied on, and misstated, non-textual sources to describe the PSQIA's "purpose."**

Shands has filled its statement of the case with citations to non-textual legislative history to state the purported "purpose" of the PSQIA. *E.g.,* Appellant's Br. 6-7. But a law's "purpose must be derived from [its] text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 2, at 56 (2012). Use of such non-textual sources "creates mischief," giving "something for everyone." *Id*. § 66, at 377. The use is like "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Id.* Because Shands' statement relies heavily on its friends (Appellant's Br. 6-7), this statement cites the portions of the legislative history, overlooked by Shands, that disagree with Shands and its friends.

Shands incorrectly implies that the drafters of a 1999 report of the Institute of Medicine intended to dispense with litigation as a means of holding medical professionals and organizations accountable. Appellant's Br. 6-7, 25 (citing Institute of Medicine, *To Err is Human: Building a Safer Health System* 10 (1999)) (hereinafter "IOM Report"). In fact, the drafters of the report were not of a single mind on this subject:

> The issue of whether data submitted to reporting systems should be protected from disclosure, particularly in litigation, arose early in the committee discussions. Members of the committee had different views.

> Some believed all information should be protected because access to the information by outsiders created concerns with potential litigation and interfered with disclosure of errors and taking actions to improve safety. Others believed that information should be disclosed because the public has a right to know. Liability is part of the system of accountability and serves a legitimate role in holding people responsible for their actions.
>
> The [committee's] recommendations . . . reflect the committee's recognition of the legitimacy of the alternative views. The committee believes that errors that are identified through a mandatory reporting system and are part of a public system of accountability should **not** be protected from discovery. Other events that are reported inside health care organizations or to voluntary systems should be protected because they often focus on lesser injuries or non-injurious events that have the potential to cause serious harm to patients, but have not produced a serious adverse event that requires reporting to the mandatory system.

IOM Report 110 (emphasis added) (A: 8).[2]

The 1999 IOM report (which is cited in the PSQIA's legislative history (Appellant's Br. 6-7)) drew a line that protected voluntarily reported information and that allowed the continued disclosure of information subject to mandatory reporting requirements (like those in Florida's law and regulations):

> The committee believes there is an important role for both mandatory and voluntary reporting systems. Mandatory reporting of serious adverse events is essential for public accountability and the current practices are too lax, both in enforcement of the requirements for reporting and in the regulatory responses to these reports. The public has the right to expect health care organizations to respond to evidence of safety hazards by taking whatever steps are necessary to make it difficult or impossible for a similar event to occur in the future. The public also has the right to be informed about unsafe conditions. Requests by providers for confidentiality and protection from liability

[2] The excerpts of the IOM report and portions of the PSQIA's legislative history cited herein are included in an addendum to this brief. (A:5-8.)

> seem inappropriate in this context. At the same time, the committee recognizes that appropriately designed voluntary reporting systems have the potential to yield information that will impact significantly on patient safety and can be widely disseminated. The reports and analyses in these reporting systems should be protected from disclosure for legal liability purposes.

IOM Report 102 (emphasis added) (A: 7).

The compromise reflected in the 1999 IOM report also appears in the PSQIA's legislative history. The PSQIA was enacted with broad, bipartisan support (unanimous consent in the Senate; 428-3 in the House).[3] Senator Jeffords, an independent, was the sponsor in the 109th Congress (2005-06) of Senate Bill 544, which eventually was enacted into law as the PSQIA.[4] He spoke about the bill on the Senate floor on July 22, 2005, the day after it was adopted by the Senate. 151 Cong. Rec. S8741-44 (daily ed. July 22, 2005) (A: 9-12). He conceded that the enacted bill "reflect[ed] difficult negotiations and many compromises over almost 5 years of consideration," and he commended his colleagues for "reconcil[ing] disagreements that have previously stopped th[e] legislation from moving forward." *Id.* at S8743-44 (A: 11, 12). Notably, the bill that Senator Jeffords introduced in the

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[3] *Final Vote for Roll Call 434,* http://clerk.house.gov/evs/2005/roll434.xml (last visited Dec. 28, 2020); *Actions Overview S. 544 – 109th Congress (2005-2006)*, Congress.gov, https://www.congress.gov/bill/109th-congress/senate-bill/544/actions (last visited Dec. 29, 2020).

[4] *Summary: S. 544 – 109th Congress (2005-06),* Congress.gov, https://www.congress.gov/bill/109th-congress/senate-bill/544 (last visited Dec. 29, 2020).

108th Congress—which never was enacted—had none of the language eventually enacted in subparagraph (B) of 42 U.S.C. § 299b-21(7).[5] Moreover, the Senate report that Shands repeatedly cites in its brief (Appellant's Br. 6, 7, 25, 26) "accompanied [the] 2003 proposed version of the [PSQIA] that was not enacted." *Tibbs v. Bunnell*, 448 S.W.3d 796, 802 (Ky. 2014).

Senator Jeffords recognized the PSQIA would not "reduce or affect" any other legal requirements related to health information or alter any existing rights or remedies belonging to injured patients:

> This legislation does nothing to reduce or affect other Federal, State or local legal requirements pertaining to health related information. Nor does this bill alter any existing rights or remedies available to injured patients. The bottom line is that this legislation neither strengthens nor weakens the existing system of tort and liability law.

151 Cong. Rec. S8743-44 (daily ed. July 22, 2005). Rather than merge existing requirements into the new PSQIA system, Senator Jeffords intended for the PSQIA to "create[] a new, parallel system of information collection and analysis." *Id.* at S8744 (emphasis added).

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[5] *Compare* S. 720, 108th Cong. § 3, at 5-6, 9-10 (Mar. 26, 2003) (proposing to add §§ 921(2), 922(a)&(b) to Title IX of the Public Health Service Act (42 U.S.C. § 299 et seq.) (A: 13-28), *with* Patient Safety and Quality Improvement Act of 2005, Pub. L. No. 109-41, § 2, 119 Stat. 424, 426 (July 29, 2005) (adding § 921(7)(B) to Title IX of the Public Health Service Act (42 U.S.C. § 299 et seq.)) Senator Jeffords' original bill broadly defined "Patient Safety Data" and made all such data privileged. (A: 17-18, 21).

Senator Jeffords was not alone in this intent. Senator Enzi, the Republican chair of the committee reporting the bill, stated that information not privileged before the Act's enactment would be not privileged after the Act's enactment:

> It is not the intent of this legislation to establish a legal shield for information that is already currently collected or maintained separate from the new patient safety process, such as a patient's medical record. That is, information which is currently available to plaintiffs' attorneys or others will remain available just as it is today. Rather, what this legislation does is create a new zone of protection to assure that the assembly, deliberation, analysis, and reporting by providers to patient safety organizations of what we are calling "Patient Safety Work Product" will be treated as confidential and will be legally privileged.

*Id.* at S8741 (emphasis added).

Senator Kennedy expressed a similar intent. On the day the Senate passed the bill, he said on the floor that the bill "does not accidentally shield persons who have negligently or intentionally caused harm to patients." 151 Cong. Rec. S8713 (daily ed. July 21, 2005) (A: 29). And, he remarked, the legislation "uph[eld] existing state laws on reporting patient safety information." *Id.*

The Senate report on which Shands relies also conveyed a congressional intent that the PSQIA did not preempt state-law requirements for the reporting or disclosure of information:

> It is vital to note that these protections do not extend backward to underlying factual information contained within or referred to in patient safety data reported to a PSO. In other words, the adverse event or the medical error itself is not privileged; it is the analysis of and subsequent corrective actions related to the adverse event or medical errors that are privileged. The underlying information remains unprivileged and

> available for reporting to authorities under mandatory or voluntary reporting initiatives. In practice, however, information that an adverse event or medical error has occurred is available through other record keeping systems (such as the patient's medical record, nursing notes, billing information, insurance forms). Because such information of adverse events or medical errors is available or can be collected or developed independent of the reporting system contemplated by this legislation, these protections **do not preempt** current or preclude future Federal, State or local requirements for the reporting or disclosure of information that ensures accountability or furthers informed consumer choice (e.g., hospital-acquired infections, medical errors, adverse or sentinel health care events, and medical outcomes) other than patient safety data. These protections do not provide a basis for providers to refuse to comply with such reporting requirements simply because they have reported the same or similar information through the reporting system contemplated by this legislation nor do they preclude providers from voluntarily reporting such information pursuant to voluntary reporting initiatives. As long as there is another source of the information reported to the PSO–even if it is the same information as is reported–the protections in **this legislation will not operate to prevent its release or disclosure** because the information would come from the other sources, not from patient safety data.

S. Rep. No. 108-196, at 5-6 (2003) (emphasis added) (A: 34).

This intent not to shield previously available information can also be found in the House committee report. It stated the Act did not "prevent a provider from complying with authorized requests for information that has been collected, developed, maintained, or exists separately from a patient safety evaluation system." H.R. Rep. No. 109-197, at 9 (2005) (A: 67). It also stated: "In general, information that is available to the public today will continue to be available." *Id.*

## STANDARD OF REVIEW

Mr. Morgan agrees with Shands that the standard of review is *de novo*.

## SUMMARY OF ARGUMENT

Shands has sued its patient in federal court to resolve a potential federal preemption defense in an anticipated state-law discovery dispute. The district court correctly determined it lacked subject-matter jurisdiction to referee this discovery dispute via a declaratory judgment, and dismissed Shands' complaint.

As an initial matter, Shands' complaint for declaratory relief does not satisfy the well-pleaded complaint rule. It is black-letter law that federal question jurisdiction cannot be based upon a federal defense. This rule holds true in the context of a declaratory judgment action. It is the character of the anticipated lawsuit by the declaratory judgment defendant—and not of the declaratory plaintiff's defense—that will determine whether federal question jurisdiction exists. Here, because the cause of action anticipated by Shands—Mr. Morgan's request for records under the Florida constitution—plainly arises under state law, there is no federal question jurisdiction by operation of the well-pleaded complaint rule.

Shands fares no better under the substantial federal question doctrine. This doctrine provides a federal court with jurisdiction over a "slim," "small," and "special" category of state-law claims that nevertheless turn on federal law. This doctrine is not an exception to the well-pleaded complaint rule. Even if it were,

Shands cannot establish that Mr. Morgan's state-law claim for records necessarily depends on the resolution of a substantial, disputed question of federal law. The only potential federal issue in this case is Shands' preemption defense. But, by its very nature, a federal defense to a state-law claim is never "necessarily" raised in a case. Likewise, a federal preemption defense, no matter how "substantial," is not grounds for federal-question jurisdiction. Try as it may, Shands cannot rely on a potential federal defense to manufacture federal jurisdiction over a state-law discovery dispute.

Shands has resorted to federal court because it is dissatisfied with the Florida Supreme Court's decision in *Charles*, and it would like a federal court to reject it. But discovery disputes in state-law tort actions belong in state court, not federal court. Accepting jurisdiction in this case would greatly upset the federal-state balance of judicial responsibility, and it could result in a potentially enormous shift of traditionally state-law cases into federal court. This Court should not—and cannot—expand its federal-question jurisdiction to accommodate Shands' desire to circumvent the Florida Supreme Court's opinion in *Charles*.

## ARGUMENT

### THE DISTRICT COURT CORRECTLY DISMISSED SHANDS' COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION.

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies

> outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

Shands sought relief under the Declaratory Judgment Act. *See generally* Doc. 1. But the Declaratory Judgment Act "is not an independent source of jurisdiction." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960). Nor could Shands avail itself of diversity jurisdiction, *see* 28 U.S.C. § 1332, because the parties are both Florida citizens. Doc. 1, ¶¶1, 3; Doc. 9, ¶¶1, 3.

Of course, subject-matter jurisdiction would exist if Shands' action "ar[ose] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. But it does not. The well-pleaded complaint rule governs whether "arising under" jurisdiction exists, and Shands cannot satisfy this rule. *See* §I, *infra* at 16-20. Shands likewise cannot satisfy the requirements for jurisdiction under the substantial federal question doctrine. *See* §II, *infra* at 20-39. This Court must affirm the district court's judgment dismissing this case for lack of subject-matter jurisdiction.

## I. Shands' declaratory action does not satisfy the well-pleaded complaint rule because it merely raises a defense to an anticipated state-law action by Mr. Morgan.

Typically, under the well-pleaded complaint rule, "a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon federal law.'" *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (citation

omitted and alteration adopted). The reason for this general rule is simple: "the plaintiff is the master of the complaint [and] may, by eschewing claims based on federal law, choose to have the cause heard in state court." *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987); *accord Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

A necessary corollary of the well-pleaded complaint rule is that "[f]ederal question jurisdiction . . . cannot be based upon a federal defense." *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1378 (11th Cir. 1998). This is so regardless of whether the defense is "valid." *See Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325, 1329 (11th Cir. 1998). And it holds true "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983). The law has been this way for "well over 125 years, a fact taught in every first-year civil procedure course." *See RES-GA Cobblestone, L.L.C. v. Blake Constr. and Dev., L.L.C.*, 718 F.3d 1308, 1311 n.1 (11th Cir. 2013).

These principles are relatively straightforward to apply in most cases. But declaratory-judgment actions are not like most cases. Specifically, "in many actions for declaratory judgment, the realistic position of the parties is reversed." *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952). That is, the party who would typically be the defendant decides to "ward off possible action of the [plaintiff] by

seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted." *See Wycoff*, 344 U.S. at 248.

In the declaratory-judgment context, then, the well-pleaded complaint rule "operates uniquely." *Wisc. Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 620 (7th Cir. 2011). Instead of looking solely to the face of the declaratory-judgment complaint, the focus is on "the anticipated lawsuit by the declaratory judgment defendant." *City of Huntsville v. City of Madison*, 24 F.3d 169, 172 (11th Cir. 1994); *accord Wycoff*, 344 U.S. at 248 ("Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court."). Federal-question jurisdiction will exist if the "well-pleaded complaint alleges facts demonstrating the defendant could file a coercive action arising under federal law." *Patel v. Hamilton Med. Ctr., Inc.*, 967 F.3d 1190, 1194 (11th Cir. 2020). If the rule were applied otherwise, federal courts would be inundated with "a vast current of litigation indubitably arising under State law." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950).

Under this rule, then, "[f]ederal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Wycoff*,

344 U.S. at 248. But that is precisely what Shands is attempting to do here. Shands has come to federal court to litigate its preemption defense in anticipation of an action by Mr. Morgan to obtain records under the Florida Constitution. *See* Doc. 1 at 2 (asking the court "to declare that [federal law] preempts . . . the Florida Constitution" such that certain medical records requested by Mr. Morgan "are not subject to disclosure to [him]"). Shands' potential federal defense to a state-law request for records is not enough to confer federal jurisdiction under the strictures of the well-pleaded complaint rule. *See* cases cited *supra* at 17-18; *see also Hudson Ins. Co. v. Am. Elec. Corp.*, 957 F.2d 826, 828–29 (11th Cir. 1992) (subject-matter jurisdiction lacking where the federal issues raised in the declaratory action were "mere potential defenses to [the anticipated] state-created cause of action").[6]

Likewise, it is obvious that any action threatened by Mr. Morgan against Shands arises under state law, not federal law. Mr. Morgan is seeking the production of records under the Florida Constitution. Doc. 1 ¶8. Whether Mr. Morgan pursues these records in the context of a medical-malpractice action or some other state-law action does not matter because, as the district court aptly explained, "the right

[6] It is of no significance that the defense at issue is one of federal preemption. "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully v. First Nat'l Bank*, 299 U.S. 109, 116 (1936) (Cardozo, J.); *see also Brown v. Conn. Gen. Life Ins. Co.*, 934 F.2d 1193, 1196 (11th Cir. 1991) ("[A] preempted state claim does not arise under the laws of the United States and cannot authorize removal to federal court.").

Morgan asserts—the right to the documents—turns on state law." Doc. 122 at 3 n.2. Shands' complaint does not—and cannot—demonstrate that Mr. Morgan could file a coercive action under federal law.

Indeed, nowhere in Shands' brief does it even contend that it has satisfied the well-pleaded complaint rule. *See generally* Appellant's Br. Rather, below and now on appeal, Shands has argued for a so-called "exception" to the rule—the "substantial federal question" doctrine. Doc. 116 at 1; Appellant's Br. at 17-32. As we explain next, however, the substantial federal question doctrine does not displace the well-pleaded complaint rule and, even if it did, Shands cannot satisfy the doctrine's requirements.

## II. Shands' declaratory action does not satisfy the substantial federal question doctrine because Mr. Morgan's state-law claim for records would not necessarily depend on the resolution of a substantial question of federal law.

Although exceptional—it applies only in a "special," "small," and "slim" category of cases, *see Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citations omitted)—the substantial federal question doctrine is not an exception to the well-pleaded complaint rule. As cases from the Supreme Court and this Court make plain, the strictures of the well-pleaded complaint rule continue to apply even in cases that implicate the substantial federal question doctrine. *See* §II.A, *infra* at 21-23. And, even if they do not, Shands cannot otherwise satisfy the doctrine's requirements. *See* §II.B, *infra* at 24-39.

### A. The substantial federal question doctrine is not an exception to the well-pleaded complaint rule.

Although some courts have described the substantial federal question doctrine as an "exception" to the well-pleaded complaint rule, *e.g.,* Doc. 122 at 4, it is not. As the Supreme Court has made clear, this doctrine merely describes a circumstance—albeit a limited one—under which "arising under" jurisdiction may exist consistent with the well-pleaded complaint rule. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 689-90 (2006) ("A case 'arises under' federal law within the meaning of § 1331, this Court has said, if 'a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" (citation omitted, alteration adopted, and emphasis added)). Thus, because Shands cannot satisfy the well-pleaded complaint rule, *see* §I, *supra* at 16-20, it likewise cannot satisfy the substantial federal question doctrine.

A recent case from the U.S. Supreme Court is illustrative. *See Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.4 (2020). In *Atlantic*, a group of landowners sued the owner of a copper smelter in state court under state law. *Id.* at 1345. The defendant raised a federal law as an affirmative defense to one of the landowners' requested remedies, claiming that the remedy was preempted. *See id.* at 1348. In addressing jurisdiction, the Court recognized that a suit typically "arises under the law that creates the cause of action." *Id.* at 1349-50 (citation omitted). But the Court

also noted the substantial federal question doctrine. *See id.* at 1350 n.4. And, critically, the Court said that the doctrine did not apply, even though the defendant had raised a federal defense. *See id.* ("No element of the landowners' state common law claims necessarily raises a federal issue. [The defendant] raises the Act as an affirmative defense, but '[f]ederal jurisdiction cannot be predicated on an actual or anticipated defense.'" (citation omitted)).[7]

This Court has likewise recognized that the substantial federal question doctrine operates in conjunction with the well-pleaded complaint rule. That is, the requirement of the well-pleaded complaint rule that jurisdiction hinges on claims, not defenses, continues to apply even under the substantial federal question doctrine. *See Patel*, 967 F.3d at 1195 (declining to apply substantial federal question doctrine where declaratory action did not establish that defendant could file coercive action under federal law); *Dunlap v. G&L Holding Grp, Inc.*, 381 F.3d 1285, 1290 (11th Cir. 2004) ("[F]or a state-law claim to raise substantial questions of federal law, 'federal law must be an essential element of [the plaintiff's] claim . . . .'" (alteration adopted and citation omitted)). Other circuit courts have reached the same

[7] One might argue this statement in *Atlantic* was dictum. "However, there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). "[D]icta from the Supreme Court is not something to be lightly cast aside." *Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997); *see also* Bryan A. Garner et. al, *The Law of Judicial Precedent* § 4, at 69-72 (discussing vertical dicta).

conclusion. *See, e.g., Chi. Trib. Co. v. Bd. of Tr. of Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir. 2012) (Easterbrook, C.J.) ("*Grable*[8] does not alter the rule that a potential federal defense is not enough to create federal jurisdiction"); *Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 542 (9th Cir. 2011) ("*Grable* stands for the proposition that a state-law claim will present a justiciable federal question only if it satisfies *both* the well-pleaded complaint rule *and* passes the 'implicate[s] significant federal issues' test.")

The only federal issue in this case is a preemption defense. Because federal jurisdiction cannot be predicated on a defense—substantial or not—the district court lacked subject-matter jurisdiction. *See* cases cited *supra* at 17-19. In other words, the well-pleaded complaint rule still controls, even where a party seeks to invoke the substantial federal question doctrine. Because Shands cannot satisfy the well-pleaded complaint rule, *see supra* §I at 16-20, it likewise cannot avail itself of the substantial federal question doctrine. But, even if it could, Shands has nevertheless failed to meet the additional requirements for jurisdiction under the doctrine, as we explain next.

[8] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) provides the Supreme Court's modern test for the substantial federal question doctrine. *See Gunn*, 568 U.S. at 258 (noting that in *Grable* the Court "condensed [its] prior cases" in an effort "to bring some order to th[e] unruly doctrine").

### B. Shands cannot satisfy the requirements for jurisdiction under the substantial federal question doctrine.

The substantial federal question doctrine provides a federal court with jurisdiction over a "slim," "small," and "special" category of state-law claims that nevertheless turn on a substantial issue of federal law. *Empire Healthchoice*, 547 U.S. at 699, 701. For this doctrine to apply, the federal issue must be "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258; *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016) (noting that *Gunn* frames the "same standard" in *Grable* as a "four-part test"). Shands has failed to prove that Mr. Morgan's state-law claim for records necessarily depends on the resolution of a substantial, disputed question of federal law. *Infra* §§II.B.i-iv, at 24-39.

#### i. Mr. Morgan's state-law claim does not necessarily raise a federal question.

"[F]ederal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U.S. at 13 (emphasis added). Federal law is plainly not a necessary element of Mr. Morgan's state-law request for records. Rather, the only potential federal question in this case is a federal defense to Mr. Morgan's record request. But, by their very nature, a federal defense to a state-law

claim will never "necessarily" be raised in a case, as it is entirely up to the defendant to raise it. *See Patel*, 967 F.3d at 1195 ("Nor do we see how a state claim could ever 'necessarily raise' a federal issue under the Health Care Quality Improvement Act, which creates only an affirmative defense. After all, affirmative defenses do not necessarily arise in suits. A defendant can forfeit an affirmative defense by failing to raise it, and '[a]n affirmative defense, once forfeited, is excluded from the case.'").

Shands' preemption defense is no different. *E.g., Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987) ("Federal pre-emption is ordinarily a federal defense to the plaintiff's suit."). Shands' defense is not "necessarily raised" by Mr. Morgan's state-law claim because, as the district court recognized, "the federal issue of preemption would be injected only if Shands raised it." Doc. 122 at 5; *accord Patel*, 967 F.3d at 1195. And, although Shands claims that its preemption defense exists "wholly independent of any state-court litigation" such that it is not a defense "at all," this assertion makes no sense. Appellant's Br. at 22. Shands is not entitled to an advisory opinion from a federal court on the viability of its preemption argument, separate and apart from an actual controversy between two parties on the matter. This is black-letter law. *See Stevens v. Osuna*, 877 F.3d 1293, 1312 (11th Cir. 2017) ("[A] declaratory judgment may only be issued in the case of an actual controversy. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.") (citation and quotations omitted).

Shands' defense is not "necessarily raised" by Mr. Morgan's state-law claim for an additional reason: there are threshold state-law issues that could render any federal-preemption determination moot. Doc. 122 at 6. That is, Mr. Morgan's state-law claim for records does not present a "nearly pure issue of law;" it instead presents "fact-bound and situation-specific" issues under state law. *Cf. Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1299 (11th Cir. 2008) (recognizing that the resolution of "nearly pure issue[s] of law" provide "the strongest basis for resort to . . . a federal forum" on a federal issue) (citation and quotations omitted). These state-law issues must be resolved prior to any consideration of federal preemption. *E.g., Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319, 1328 (11th Cir. 2017) ("[b]ecause preemption is a principle derived from the Supremacy Clause," a court "must first analyze whether each claim can stand under state law, and only then decide the preemption questions where necessary.").

Specifically, in this litigation, Shands has disputed a foundational issue: whether Mr. Morgan suffered an adverse medical incident as defined by Amendment 7. Doc. 66-1 at 70-72, 101-104; Doc. 89 at 12-13. Indeed, in its brief, Shands asserts that its preemption defense can be resolved "whether [the documents requested by Mr. Morgan] are covered by Amendment 7 or not." Appellant's Br. at 21. But, yet again, Shands' argument is contrary to basic and fundamental jurisdictional principles. Whether the documents are "covered by Amendment 7 or not" is a

threshold, state-law determination that would have to be made before any preemption defense would be justiciable. If the documents are not covered by Amendment 7, then Mr. Morgan may not have any right to access them, Shands may have no obligation to produce them, and there would be no preemption controversy for any federal court to resolve. *See, e.g., Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) ("Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.").

Finally, the Second Circuit case cited by Shands does not support its "necessarily raised" argument. Appellant's Br at 20 (citing *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1020 (2d Cir. 2014)). In *NASDAQ OMX Group*, the Second Circuit reviewed the declaratory defendant's state-law claims against NASDAQ (concerning injuries and damages suffered as a result of the Facebook IPO) to determine whether it had federal-question jurisdiction. 770 F.3d at 1020. It determined the state-law claims necessarily raised issues of federal law, including "the contours of NASDAQ's federal duty to maintain a fair and orderly market, the scope of that duty, and whether the failure of NASDAQ's systems during the Facebook IPO amounted to a breach of that duty." *Id.* at 1023.

According to Shands, under the authority of *NASDAQ OMX Group*, this Court should look to "the duty underlying the claim" to determine whether it "necessarily raises a disputed federal issue." Appellant's Br. at 20. Even assuming

this proposition of law is true, it does not help Shands here. The "claim" is Mr. Morgan's request for records, not Shands' potential preemption defense. *Cf. NASDAQ OMX Grp.,* 770 F.3d at 1020-21 (reviewing state-law claim of declaratory defendant). Any "duty" underlying Mr. Morgan's request for documents plainly arises under state law, not federal law. *See* Fla. Const. art. X, § 25 (providing that "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.").

**ii. Any federal question is not actually disputed.**

Even assuming Mr. Morgan's state-law claim for records necessarily raises a federal issue, which it does not, that federal issue is not necessarily disputed.

Mr. Morgan's position is that he is entitled only to the information that Shands is obligated to collect, maintain, or develop under any non-PSQIA state or federal law. *See* §C, *supra* at 5-6. That is, regardless of whether or not Amendment 7 would permit it, Mr. Morgan is not seeking Shands' "voluntary" information. As such, the issue of whether Shands was required to collect, maintain, or develop the requested information under Florida law would have to be decided before reaching any issue of preemption. *See e.g., Mink*, 860 F.3d at 1328; *see* Doc. 122 at 6 (stating that "[w]hether Shands was required to gather the subject documents . . . would have to be decided first."). If Shands is correct that the information is not required by Florida

law (which Mr. Morgan will dispute), then there will be no federal preemption question in dispute for any court to resolve, because Mr. Morgan is not seeking Shands' "voluntary" information. *See* §C, *supra* at 5-6. As such, Shands' federal preemption defense is neither necessarily raised by Mr. Morgan's state-law claim, nor necessarily disputed by the parties in this case.

#### iii. Mr. Morgan's state-law claim does not raise a "substantial" federal question.

Shands likewise cannot meet the third requirement for the doctrine because its preemption defense is not "substantial." Shands' argument to the contrary misapprehends the substantiality analysis, *see* §II.B.iii.a, *infra* at 29-31, and inappropriately focuses on the merits of the Florida Supreme Court's decision in *Charles*, *see* §II.B.iii.b, *infra* at 32-36.

##### *a. Shands conflates the question of preemption with the question of jurisdiction.*

The gist of Shands' argument is that the "substantiality" prong is satisfied because the question of PSQIA preemption is substantial and important. Appellant's Br. at 23-26. Shands is mistaken. Although the adjudication of Shands' preemption defense may—or may not—be important to the ultimate outcome of Mr. Morgan's state-law claims, "a federal preemption defense, no matter how substantial, is not grounds for § 1331 jurisdiction." *Burrell v. Bayer Corp.*, 918 F.3d 372, 386 (4th Cir. 2019); *accord Franchise Tax Bd.*, 463 U.S. at 14.

Regardless, even if Shands' preemption defense could confer jurisdiction on a federal court, it does not bear any hallmarks of substantiality. "As a practical matter, a 'substantial' question generally will involve a 'pure question of law,' rather than being 'fact-bound and situation-specific.'" *Burrell*, 918 F.3d at 385; *accord Adventure Outdoors*, 552 F. 3d at 1300. This is because "the crux of what makes a question 'substantial' for § 1331 purposes is that it is 'importan[t] . . . to the federal system as a whole," and not just to the 'particular parties in the immediate suit.'" *Burrell*, 918 F.3d at 385 (quoting *Gunn*, 568 U.S. at 260).

This Court's opinion in *Adventure Outdoors* is instructive on the substantiality issue. There, this Court determined the plaintiffs' state-law defamation claims necessarily raised a disputed federal issue because the plaintiffs would have to prove the defendants broke federal law to prove the falsity of the allegedly defamatory statements. *Adventure Outdoors*, 552 F.3d at 1298. However, the Eleventh Circuit determined the federal issue was not substantial because, despite defendants' protestations to the contrary, resolution of the plaintiffs' defamation claim "ultimately would require an evaluation of [plaintiffs'] factual argument." *Id.* at 1300 (rejecting defendants' attempt to "mischaracterize the nature of the dispute").

The same is true here. The resolution of Shands' federal preemption defense would not end this case. Doc. 122 at 7 (acknowledging that, "regardless of whether Shands prevails on its preemption argument, factual and legal issues remain."). The

result of this case will instead be mired in its individual facts concerning the nature of the medical incident, the nature of the information requested by Mr. Morgan, and the nature of the information in Shands' possession. Shands' potential federal preemption defense—even if it were necessarily raised and actually disputed—could not qualify as substantial under these circumstances. *See Adventure Outdoors*, 552 F.3d at 1299-1300; *see also Empire Healthchoice*, 547 U.S. at 701 (concluding carrier's healthcare reimbursement claim against enrollee in federal health insurance program was "fact-bound and situation-specific" and that federal preemption clause did not confer federal jurisdiction); *Gunn*, 568 U.S. at 261 (concluding federal issue not substantial where "question is posed in a merely hypothetical sense").

Like any federal legislation, the PSQIA may be "important." "But Shands has not pointed to anything indicating Congress viewed its PSQIA preemption any differently than countless other areas of federal preemption." Doc. 122 at 8. Furthermore, any desire by Congress to enact a uniform set of federal protections for hospitals like Shands "is a question of preemption law, distinct from congressional intent to vest jurisdiction over such claims in a state or federal forum." *Cf. Burrell*, 918 F.3d at 388 (quoting). Shands cannot satisfy the substantiality inquiry.

***b. The Florida Supreme Court's opinion in* Charles*—which is consistent with the plain language of the PSQIA—has no place in the substantiality analysis.***

Shands devotes the remainder of its "substantiality" analysis to criticizing the Florida Supreme Court's decision in *Charles*. Appellant's Br. at 26-31. Shands does not like the Florida Supreme Court's opinion in *Charles.* It would like a federal court to reject it. But the remedy for an unfavorable opinion from the Florida Supreme Court is a petition for certiorari to the United States Supreme Court, not a declaratory action in federal court. *See Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 816 (1986) (observing that uniformity concerns are "considerably mitigated" by the Supreme Court's power "to review the decision of a federal issue in a state cause of action").

Shands' obvious dissatisfaction with *Charles* is irrelevant to the jurisdictional question before this Court. State courts "are generally presumed competent to interpret and apply federal law." *Adventure Outdoors*, 552 F.3d at 1301 (citation and quotations omitted); *accord Empire Healthchoice,* 547 U.S. at 701. And "the possibility that a state court will incorrectly resolve a state claim is not, by itself, enough to trigger . . . [federal] jurisdiction, even if the potential error finds its root in a misunderstanding of [federal] law." *See Gunn*, 568 U.S. at 263.

Regardless, *Charles* was not wrongly decided, and it is not an outlier.[9] The Florida Supreme Court in *Charles* did not "nullify" the PSQIA, as Shands claims. Appellant's Br. at 26. It simply held that "adverse medical incident reports are not patient safety work product" because they fall within the PSQIA's exception for information "collected, maintained, or developed separately, or exist[ing] separately, from a patient safety evaluation system." *Charles*, 209 So. 3d at 1211 (quoting 42 U.S.C. § 299b-21(7)(B)(ii)). Likewise, the Kentucky Supreme Court has held that, although a hospital may collect both patient safety work product and state-mandated information within its patient safety evaluation system, "doing so does not relieve the [hospital] from complying with those state requirements and, to the extent information collected in the [hospital's] internal safety evaluation system is needed to comply with those state requirements, it is not privileged." *Baptist Health Richmond, Inc. v. Clouse*, 497 S.W. 3d 759, 766 (Ky. 2016).[10] These cases are

[9] In criticizing *Charles*, Shands relies on *Florida Health Sciences Center, Inc. v. Azar*, 420 F. Supp. 3d 1300 (M.D. Fla. 2019), a Middle District of Florida case that is set for oral argument before this Court on January 12, 2021. The undersigned has filed an amicus brief in that appeal on behalf of Mr. Morgan, the Florida Justice Association, and another patient defending Amendment 7's validity. Amicus Brief of The Florida Justice Association, Nadia Caro, and George Lorenzo Morgan, *Fla. Health Scis. Ctr. v. Azar*, No. 19-14383 (11th Cir. March 12, 2020).

[10] The Kentucky Supreme Court had previously issued a plurality opinion on the issue. *See Tibbs v. Bunnell*, 448 S.W.3d 796 (Ky. 2014). The plurality opinion in *Tibbs* concluded that the PSQIA, by its plain and express terms, does not "protect information 'collected, maintained or developed separately, or existing separately from a patient safety evaluation system' even if collected by a Patient Safety Evaluation System and reported to a Patient Safety Organization." *Id.* at 803-04.

consistent with the plain language of the PSQIA, which expressly preserves—rather than preempts—reporting and recordkeeping obligations under state law. 42 U.S.C. § 299b-21(7)(B)(iii)(II) & (III); *see id.* § 299b-22(g)(5).

Shands' assertion that other courts have "rejected" the premise of *Charles* is inaccurate. Appellant's Br. at 27-30. Indeed, one of the cases highlighted by Shands, *University of Kentucky v. Bunnell*, 532 S.W.3d 658 (Ky. Ct. App. 2017), favors Mr. Morgan's position, and disfavors Shands. There, the Court of Appeals of Kentucky concluded that any "information prepared for a purpose other than reporting to a [patient safety organization]" was not patient safety work product. *Id.* at 671. The *Bunnell* court expressly held: "Obviously, if a law requires a hospital's recordkeeping or reporting of information, for any reason, that requirement is an external obligation." 532 S.W.3d at 673. The *Bunnell* court further held that patient safety work product must be "superfluous to the documentation necessary for patient care or regulatory compliance." *Id.* at 668. Thus, under *Bunnell*, if Shands' information "meets a state requirement," whether kept internally or reported externally, it cannot qualify as patient safety work product. *Id.* at 671-74.

Shands' reliance on *Daley v. Teruel*, 107 N.E.3d 1028 (Ill. App. Ct. 2018), is likewise misplaced. [11] Unlike Shands, the *Daley* court recognized that the "crux of

[11] The *Daley* court found *Charles* "plainly distinguishable" because (1) unlike the documents in *Charles*, the documents in *Daley* were patient safety work product, and (2) unlike in Florida, there was no state constitutional provision mandating a

the [PSQIA] exceptions are that, where health care providers create records for more than one purpose, the record themselves do not qualify as patient safety work product because the intent of the [PSQIA] 'is to protect the additional information created through voluntary patient safety activities, not to protect records created through providers' mandatory collection activities.'" 107 N.E.3d at 1039 (quoting HHS's 2016 supplemental guidance). Although the *Daley* court ultimately concluded that the documents at issue in that case were not collected to comply with external obligations, it did so because "Illinois's Adverse Events Law [was] not even operational." *Id.* at 1043. Thus, unlike Shands here, the hospital there did not have any state-law obligation to report any adverse health care events.[12]

The other cases mentioned by *Shands* are not persuasive. In *Quimbey v. Community Health Systems Professional Services Corp.*, 222 F. Supp. 3d 1038

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patient's right to access medical records. *Id.* at 1046. The *Daley* court also stated it did "not quite follow the legal reasoning employed in *Charles* to find that the Patient Safety Act did not contain an express preemption provision." *Id.* In this regard, the *Daley* court misread *Charles.* The Florida Supreme Court in *Charles* held only that the PSQIA did "not contain any express statement of preemption relating to Amendment 7," because Amendment 7 documents are not patient safety work product. *Charles*, 209 So. 3d at 1213 (emphasis added).

[12] Although state-mandated reporting and recordkeeping obligations vary from state to state, Florida's adverse-incident reporting system is not unusual. According to a 2014 report, roughly half of the states have authorized adverse-event reporting systems, with the intent to improve patient safety. *See* Nat'l Acad. for State Health Pol'y, 2014 Guide to State Adverse Event Reporting Systems 4, 9-10 (2014), https://www.nashp.org/wp-content/uploads/2015/02/2014_Guide_to_State_Adverse_Event_Reporting_Systems.pdf (last visited January 6, 2021).

(D.N.M. 2016), the magistrate judge did not engage in any substantive analysis of the exceptions to the PSQIA's definition of patient safety work product. *Taylor v. Hy-Vee, Inc.*, No. 15-9718, 2016 WL 7405669, at *2 (D. Kan. Dec. 22, 2016), an unpublished opinion, appropriately recognized that "information generated or assembled for some other purpose, even if the information relates to quality improvement measures, is not considered patient safety work product." *See also id.* at *3 (holding data had not been "generated or assembled for some other purpose" other than for reporting to a PSO). However, to the extent that *Taylor* is also read to hold that state-mandated information is patient safety work product, that opinion is inconsistent with the plain language of the PSQIA. *See* 42 U.S.C. § 299b-21(7)(B) (describing exceptions to PSQIA).

The Florida Supreme Court did not get it wrong in *Charles.* But even if it did, this Court would lack jurisdiction to "correct" it. Shands' preemption defense is not "substantial," and its disregard for *Charles* does not confer subject matter jurisdiction on a federal court.

**iv. The balance of federal and state judicial responsibilities weighs against upholding federal jurisdiction in this case.**

Finally, Shands cannot make the showing required under the fourth prong: that federal consideration of this state-law discovery dispute (and a multitude of cases just like it) would be consistent with the "congressionally approved balance of

federal and state judicial responsibilities." *See Grable*, 545 U.S. at 314. This Court is not in the business of resolving state-law discovery disputes. Nor should it be.

Courts primarily consider two factors in evaluating this final requirement: (1) whether a federal private right of action exists, and (2) whether an exercise of federal jurisdiction would expand the number of cases brought before federal courts. *Grable*, 545 U.S. at 314-15; *accord Adventure Outdoors*, 552 F.3d at 1302. As to the first factor, Congress has not granted medical providers a right to sue to enforce provisions of the PSQIA. The absence of a federal private right of action thus militates against recognizing jurisdiction in this case. *Adventure Outdoors*, 552 U.S. at 1302-03.

As to the second factor, the exercise of federal jurisdiction to resolve a potential federal defense in a fact-bound, state-law records request would greatly expand the number of cases brought before federal courts. Hospitals have been eager to file more of these lawsuits in federal court. *See Shands Jacksonville Med. Ctr., Inc. v. Azar*, No. 3:19-cv-00579-TJC-MCR, 2020 WL 3073906, at *4 (M.D. Fla. June 10, 2020) (dismissing Shands' request for declaratory relief because "accepting jurisdiction would disrupt the federal-state balance"); *Fla. Health Scis. Ctr.,* 420 F. Supp. 3d at 1302-03 (hospital seeking declaratory relief in Amendment 7 document dispute). But "Congress could not have envisioned that in passing the [PSQIA] it was opening the federal courthouse door to what in essence is a Florida medical

malpractice discovery dispute." *Shands*, 2020 WL 3073906, at *4-5. This Court should not "open the doors of the federal courts" to state-law discovery disputes that only implicate federal defenses, particularly where the availability of the federal defense is fact-bound and situation specific. *Cf. Adventure Outdoors*, 552 F.3d at 1302-03 (refusing to "open the doors of the federal courts in this circuit whenever a defamation defendant accuses a plaintiff of violating federal law.").

Indeed, Shands' requested relief—essentially, a declaration that the Florida Supreme Court got it wrong in *Charles*—emphasizes how accepting jurisdiction in this case would upset the federal-state balance of judicial responsibility. Doc. 1 at 7-8. Only the Florida Supreme Court's interpretation in *Charles* of the PSQIA—and not any decision by this Court or any other federal court (except the U.S. Supreme Court)—would serve as binding precedent on the Florida state courts where these Amendment 7 discovery disputes occur all the time. *See, e.g., Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007) ("Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts."); Garner, *supra* § 80, at 691 (same). Inevitably, "[b]ecause Florida state courts would still be required to follow *Charles*, healthcare organizations seeking protection would file federal declaratory actions every time they are faced with an Amendment 7 request that potentially conflicts with the [PSQIA]." *Shands*, 2020 WL 3073906 at *4.

Allowing federal consideration of a state-law discovery dispute would "herald[] a potentially enormous shift of traditionally state cases into federal courts." *Grable*, 545 U.S. at 319. This cannot be what Congress envisioned in enacting the PSQIA.

## CONCLUSION

Shand has not met its burden to establish federal-question jurisdiction over this declaratory action, and there is no other possible basis for statutory jurisdiction. Thus, for the reasons argued herein, this Court should affirm the district court's dismissal of Shands' declaratory action for lack of subject-matter jurisdiction.

CREED & GOWDY, P.A.

*/s/ Bryan S. Gowdy*
**Bryan S. Gowdy**
Florida Bar No. 176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
**Meredith A. Ross**
Florida Bar No. 120137
mross@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
*Attorneys for Defendant-Appellee George Lorenzo Morgan*

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Rule 32(a)(7), Federal Rules of Appellate Procedure, in that it contains 9,520 words (including words in footnotes), excluding the parts of the document exempted by FRAP 32(f), according to the word-processing system used to prepare this brief. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

/s/*Bryan S. Gowdy*
Attorney

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY service by Federal Express and CM/ECF a true and correct copy of the foregoing along with seven copies upon the following clerk of court on January 7, 2021:

**Clerk of Court**
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

I FURTHER CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system which will serve a Notice of Docket Activity on this January 7, 2021, to the following:

**Ronald L. Harrop**
rharrop@oconlaw.com
**Derek J. Angell, B.C.S.**
dangell@oconlaw.com
O'CONNOR & O'CONNOR, LLC
800 N. Magnolia Avenue, Suite 1350
Orlando, Florida 32803
*Counsel for Plaintiff-Appellant*

**D. Andrew Vloedman**
andy.vloedman@gmail.com
PERRY, VLOEDMAN & BRADY
2790 N.W. 43rd Street, Suite 200
Gainesville, Florida 32606
*Co-Counsel for Defendant-Appellee Morgan*

**Peter G. Fisher**
peter.fisher@usdoj.gov
UNITED STATES ATTORNEY'S OFFICE
111 N. Adams Street, 4th Floor U.S. Courthouse
Tallahassee, Florida 32301
*Counsel for Defendants-Appellees Azar and Price*

**Thomas S. Edwards, Jr.**
se@edwardsragatz.com
service@edwardsragatz.com
kah@edwardsragatz.com
EDWARDS & RAGATZ, P.A.
4401 Salisbury Road, Suite 200
Jacksonville, Florida 32216
*Co-Counsel for Defendant-Appellee Morgan*

**Derek M. Daniels**
ddaniels@mccumberdaniels.com
**Amy L. Dilday**
adilday@mccumberdaniels.com
kmccnn@mccumberdaniels.com
eservice@mccumberdaniels.com

**Christine Riley Davis**
cdavis@carltonfields.com
sdouglas@carltonfields.com
CARLTON FIELDS, P.A.
215 S. Monroe St., Suite 500
Tallahassee, FL 32301

MCCUMBER, DANIELS, BUNTZ, HARTIG, PUIG & ROSS, P.A.
4401 W. Kennedy Blvd., Suite 200
Tampa, Florida 33609
*Co-Counsel for Plaintiff-Appellant*

*Counsel for Appellant Shands Teaching Hosp. Clinics, Inc. d/b/a UF Health Shands*

**Robin Locke Nagele (Pro Hac Vice)**
rnagele@postschell.com
**Elizabeth M. Hein (Pro Hac Vice)**
ehein@postschell.com
POST & SCHELL, P.C.
1600 JFK Boulevard., 13th Floor
Four Penn Center
Philadelphia, PA 19103
*Counsel for Amicus Curiae, Alliance for Quality Improvement and Patient Safety*

**Earl E. Googe, Jr.**
egooge@smithhulsey.com
SMITH HULSEY & BUSEY
1 Independent Drive, Suite 3300
Jacksonville, FL 32202
*Counsel for Amicus Curiae, Alliance for Quality Improvement and Patient Safety*

/s/*Bryan S. Gowdy*
Attorney