No. 16-1446

IN THE

Supreme Court of the United States

SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC.,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the Florida Supreme Court

PETITIONER'S REPLY BRIEF

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I. THE DECISION BELOW REWRITES FEDERAL LAW.

Respondents' defense of the decision below compounds the Florida Supreme Court's chief error: rewriting the federal Act to codify a state-law exception Congress never enacted. Because "it is never [a court's] job to rewrite a constitutionally valid statutory text," this Court should grant the petition and restore the law as written. See *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

1. To claim that the federal privilege turns on state law, Respondents point to the Act's exception for "information that is collected, maintained, or developed separately, or exists separately, from" a patient-safety system. §299b-21(7)(B)(ii). They say this language "expressly preserves … reporting and recordkeeping obligations under state law." Opp. 30. But it does not even *mention* state law. Congress could have drafted exceptions for information subject to "reporting and recordkeeping obligations under state law," *id.*, or "information … collected to comply with external obligations," Opp. 34. It did not.

Nor can Respondents find a state-law exception in §299b-21(7)(B)(iii)'s "clarification" that the Act does not limit "discover[ability]" or "reporting" for documents that *are not privileged*. Opp. 29-30. Respondents' argument simply begs the question of what counts as patient-safety work product.

The court below answered that question by adopting a "sole purpose" test. But even Respondents concede the Act does not limit privileged work-product to material created "solely" for patient-safety activities.

Opp. 32. Rather, the statute expressly permits privileged information to be used for multiple purposes. Pet. 18-19. Respondents insist that "[u]nder the court's rationale, reporting to a [PSO] need not have been the sole purpose for a document's creation." Opp. 32. This flatly contradicts what the court actually said: "the reports are not privileged … because Florida statutes and administrative rules require providers to create and maintain them, and thus, *they were not created solely for the purpose of submission to a patient safety evaluation system*." Pet. App. 31a (emphasis added). That standard cannot be squared with the Act, as Respondents concede.

Next, Respondents observe that the Act does not relieve providers from existing state-law reporting or recordkeeping obligations. Opp. 31. Baptist agrees. But this case is not about compliance with state-law obligations. No regulator has sought the disputed information or suggested Baptist violated any regulation. The only question is whether private plaintiffs may access documents developed for PSO reporting. Nothing in the Act or common sense suggests that the remedy for a state regulatory violation is the loss of the federal privilege and disclosure to private plaintiffs. Pet. App. 45a; 73 Fed. Reg. 70,732, 70,743-44 (2008) ("While the Patient Safety Act does not preempt state laws that require providers to report information that is not patient safety work product, a State may not require that patient safety work product be disclosed."). If a provider in fact violates state law, the State has its own enforcement remedy—which has nothing to do with a private plaintiff's circumvention of a federal privilege.

2. Respondents claim Baptist offers "a single-factor test of its own creation," which would apply to "virtu-

ally any information." Opp. 32, 34. The petition, however, described a two-part test drawn directly from the statute. Pet. 17-18. The document must fit within the categories of eligible material, §299b-21(7)(A) ("data, reports, records, memoranda, analyses (such as root cause analyses), [etc.] … which could result in improved patient safety, health care quality, or health care outcomes"), and it must be "assembled or developed … for reporting to a" PSO, §299b-21(7)(A)(i)(I).

Baptist's documents indisputably satisfy both criteria. Respondents (like the court below) simply ignore that those documents include "root cause analyses," which are *expressly* covered by the Act's privilege, §299b-21(7)(A), but *never mentioned* in the decision below or the opposition. In Respondents' view, the text does not matter; a state may override it by requiring providers to "report or maintain" root cause analyses. Any other result, Respondents complain, "would permit [providers] to shield from discovery" patient-safety documents "created or maintained to comply with state-law obligations and discoverable under state law." Opp. 33. Precisely: the federal privilege expressly preempts contrary state-law discovery rules. §299b-22(a)(2).

3. Respondents' central claim—a naked appeal to elevate perceived purpose over text—is that a plain reading of the statute "grants unprecedented, unchecked power to providers" to shield information from discovery. Opp. 33. Respondents are half-right. Congress enacted a new ("unprecedented") statute to replace the patchwork of state-level protections with a uniform privilege. To induce providers' participation, the federal protection needed to be "broad" and reliable. 73 Fed. Reg. at 70,741; see Pet. 4.

In Respondents' depiction, Congress was centrally concerned with preserving plaintiffs' access to information, and thus meant to protect only "new information" developed because of the Act. Opp. 34. Here again, Respondents confuse the Act's treatment of state reporting obligations (which it did not disturb) with the availability of a federal privilege independent of state discovery law (which it preempts). See *supra* p. 2. Respondents make no effort to explain why Congress would draft a federal privilege that perpetually retreats in the face of advancing State law.

Likewise, Respondents' claim (at 35) that providers can "feel confident" in the privilege is doubly wrong. Even the shriveled privilege Respondents articulate can be restricted at any time by State law—hardly a basis for providers to confidently record candid self-analysis. That providers have "flexibility" to pause and consider whether patient-safety information is needed to comply with state law (Opp. 34) is no answer. If the privilege does not reach "any records … relating to any adverse medical incident," Fla. Const. art. X, §25(a), nothing remains to protect.

Respondents' claim that the federal patient-safety system can coexist "harmoniously" with state-law disclosure obligations is equally senseless. HHS rulemaking *expressly rejected* using "separate recordkeeping systems" to satisfy state-law obligations and to collect information "for reporting to a" PSO, Opp. 35-36. *Compare* 73 Fed. Reg. at 70,742 ("providers *need not* maintain duplicate systems to separate information to be reported to a PSO from information that may be required to fulfill state reporting obligations").[1] And any

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[1] That HHS backtracked in informal guidance (Opp. 35-36) is immaterial. Unlike the Final Rule, the guidance did not go through notice-and-comment rulemaking and, as explained

document a provider creates for PSO reporting will *also* constitute a "record[] … relating to any adverse medical incident," Fla. Const. art. X, §25(a), which cannot be privileged under the decision below—no matter where it is kept.

Finally, Respondents misunderstand (at 35) the uniformity Congress sought to achieve: overriding piecemeal state-law protections with a federal law that would apply "uniform[ly] … in all states." 73 Fed. Reg. 8,112, 8,113 (proposed 2008). That purpose is defeated if, as the court below held, the federal privilege depends on state law's forbearance.

II. THE COURTS ARE SPLIT.

Remarkably, Respondents perceive no difference between the privilege as applied by the Kentucky and Florida Supreme Courts, the HHS guidance, and the Solicitor General's position in *Tibbs*.

Respondents simply misread the Kentucky Supreme Court's decision in *Clouse*. They claim it is "consistent with" the decision below because the court said "information that is usually contained in state-mandated reports" is not privileged. Opp. 27 (quoting *Baptist Health Richmond, Inc.* v. *Clouse*, 497 S.W.3d 759, 766 (Ky. 2016)). But that passage restates the view of the Kentucky court's plurality in *Tibbs*, which *Clouse* expressly rejected. Pet. 22-23. Respondents ignore *Clouse*'s actual holding: patient-safety "information within [a provider's] patient safety evaluation system" is privileged *unless* the "provider fails to fulfill" its "statutory and regulatory reporting obligations." 497 S.W.3d at 766. That holding was based on a different

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above, contradicts the Act. It warrants no deference. *See Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). And if the Court has doubts about the question, it should ask for the government's views.

statutory exception (for "original … record[s]," §299b-21(7)(B)(i)) that neither Respondents nor the court below embrace. 497 S.W.3d at 765. And *Clouse* explicitly rejected the "sole purpose" test adopted by the lower Kentucky courts and the Florida Supreme Court. *Id.* at 761; *supra* pp. 1-2. The court below was able to claim that *Clouse* "reached the same conclusion" (Opp. 27) only by ignoring these crucial rulings. Pet. App. 21a.

The decision below also conflicts with *Department of Financial and Professional Regulation* v. *Walgreen Co.,* 970 N.E.2d 552, 557-58 (Ill. App. Ct. 2012), which rejected a state agency's attempt to obtain, via subpoena, records "collected [and] maintained" only within the pharmacy's patient-safety system. Respondents claim there was "no suggestion that [these] documents were subject to state reporting or record-keeping requirements." Opp. 28. This ignores that a state agency's subpoena is a state-law obligation that, under the decision below, also would override the federal privilege. Pet. App. 19a.

Finally, Respondents' reliance on the Solicitor General's brief in *Tibbs*, and the HHS guidance on which it was based (Opp. 4, 6, 26, 28, 32-33), simply underscores the split of authority. If the government believed *Tibbs* was correct when that petition was before the Court, Opp. 33, it must now believe *Clouse* is incorrect, since (as just explained) *Clouse* rejected the broad rule adopted by the *Tibbs* plurality and the court below. Moreover, *Clouse* relied on the same statutory exception as did the HHS guidance and the Solicitor General's brief—for "original" patient records, §299b-21(7)(B)(i)—but applied it far more narrowly. The court below, by contrast, eschewed that exception, instead invoking the "separately-maintained" exception. §299b-21(7)(B)(ii). Thus, the Kentucky Supreme

Court, the Florida Supreme Court, and the federal government all *disagree* about the governing statutory provision, not to mention when (if ever) documents subject to state-law requirements are discoverable.

III. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW.

1. Respondents *agree* that "a state-court judgment may create an Article III case or controversy … by imposing 'a defined and specific legal obligation.'" Opp. 11 (quoting *ASARCO* v. *Kadish*, 490 U.S. 605, 618 (1989)). A ruling's prospective effects, Respondents recognize, may satisfy Article III if the dispute features "concrete adverseness" between parties with "ongoing interest[s]." Opp. 14-15 (quoting *Camreta* v. *Greene*, 563 U.S. 692, 701 (2011)). Unquestionably, an "ongoing injury" based on an adverse state-court decision may satisfy Article III. *Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000); Opp. 15-16.

This principle is not limited to qualified-immunity cases, *contra* Opp. 14, or to petitions from federal courts, *contra* Opp. 12-13. This Court's applications of the case-or-controversy requirement are cross-cutting: *Camreta*, a qualified-immunity decision from federal court,[2] cited *Pap's*, a First Amendment decision from state court, which cited *ASARCO*, a mineral-rights decision from state court. *Pap's*, 529 U.S. at 288. Re-

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[2] 563 U.S. at 698. Respondents (at 14) misleadingly quote *Camreta*'s discussion of *prudential* considerations regarding qualified immunity as if the Court created a "special category" of *constitutional* jurisdiction, which it did not and could not do. 563 U.S. at 704-05. Respondents also emphasize that *Camreta* satisfied itself of its jurisdiction before separately deciding the case was moot. Opp. 14-15. This undermines Respondents' position, which depends on the *conflation* of mootness and jurisdiction.

spondents emphasize *ASARCO*'s recognition of the differences between state and federal justiciability limits. Opp. 12-13. But they ignore *ASARCO*'s actual holding: the Court *had jurisdiction* to review the state-court decision because it "alter[ed] tangible legal rights." 490 U.S. at 619.

This Court's jurisdiction in each case rested on the ongoing legal effect of the lower court's decision. Try as they might, Respondents cannot gerrymander the scope of Article III to exclude Florida preemption cases. If anything, the risk of insulating the Florida Supreme Court's aggressive misinterpretation of federal law *favors* review. No jurisdictional principle rewards parties for litigating in state rather than federal forums by limiting the prospect of this Court's review, which would undermine the uniformity of federal law.

2. Respondents, therefore, are left to contend that the decision below lacks a sufficient prospective effect on the parties' "tangible legal rights." Opp. 11-12 (citing *ASARCO*, 490 U.S. at 619).

As to Baptist, Respondents hardly dispute the decision's significant effects on its participation in the federal PSO program. The decision binds all state courts to a rule that renders the federal privilege subservient to state law. Pet. App. 2a n.2. Whenever Florida law requires reporting or recordkeeping, *id.* at 18a, Baptist is "barred from enforcing" the federal privilege that shields its patient-safety work product, *Pap's*, 529 U.S. at 288. Tying Baptist's legal rights to state rather than federal law will alter its hospital operations, PSO participation, and post-event review, Pet. 32—prospective effects that will "change the way [Baptist] performs … duties" that it "regularly engages in," *Camreta*, 563 U.S. at 702-03, and thus "prevent the case from being moot," *Pap's*, 529 U.S. at 288.

Nothing about the settlement agreement alters these consequences. Opp. 15-16. When Florida courts order Baptist to produce federally-privileged work product, Baptist cannot resist based on its private agreement with Respondents. That the parties tried—and failed—to end these proceedings does not change that the state court rejected their stipulation of dismissal and issued a 32-page opinion deciding this question of "great public" and "statewide" importance. Opp. 7 (quoting Pet. App. 2a n.2). Whether Baptist must respond to the particular "motion to compel … in this specific case" is not the point. Opp. 15; Opp. 11. This Court's jurisdiction under *Camreta*, *Pap's*, and *ASARCO* rests on the "*prospective* effects" of the decision. 563 U.S. at 702-03 (emphasis added).

As to Respondents' ongoing interest, the Opposition (at 11-12, 15) asserts the parties are "no longer adverse" because Respondents "lack a continuing interest" in the case. As in *Camreta*, however, Respondents also have an interest in "preserving the [lower] court's holding" because they "may again be subject to the challenged conduct." 563 U.S. at 703. Respondents do not contend that the settlement repeals their continuing state-law right, explained in the Petition at 33, of "access to any records made or received … by a health care facility or provider relating to any adverse medical incident." Fla. Const. art. X, §25(a). That others in Florida and beyond *also* have an interest in the scope of the federal privilege, Opp. 16, does not defeat jurisdiction over this dispute. That argument was raised and rejected in *Camreta*. See 563 U.S. at 725-26 (Kennedy, J., dissenting). The significance of the question presented to others (like Baptist's *amici*) only strengthens the case for review.

Respondents' strident litigation before this Court, moreover, belies their purported lack of interest. The

petition suggested that a party other than Respondents might defend the judgment below. Pet. 33. Yet without waiting for the Court to call for a response, Respondents filed two extension requests, one motion, and a robust opposition brief. These circumstances surely reflect "concrete adverseness" between the parties "which sharpens the presentation of the issues" for this Court's review. Opp. 15 (quoting *Camreta*, 563 U.S. at 701).

3. Should jurisdictional considerations lead the Court to decline merits review, it should at least vacate the judgment below. This equitable remedy is available and appropriate because, according to Respondents, Baptist is subject to an adverse-but-unreviewable interpretation of federal law. To be sure, as Baptist noted, Pet. 34, granting the petition is preferable; vacatur is unusual when the parties' settlement restricts full review. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 29 (1994). But this Court has consistently emphasized that the vacatur "determination is an equitable one" and "exceptional circumstances" may counsel for vacatur even after a settlement. *Id.*

This is an exceptional case. In the normal course, litigants either "obtain[] the review to which they are entitled," *Camreta*, 563 U.S. at 712—including the possibility of review in this Court—or settle and avoid a merits ruling, *Bonner Mall*, 513 U.S. at 27-28. Respondents claim that Baptist has neither option and must abide by the incorrect state-court ruling on an important federal question. The remedy of vacatur, however, means the state-court decision need not be the final word on the scope of federal preemption.

Respondents claim this Court lacks the power to vacate a state-court decision following settlement, Opp. 21-22, but the statements on which they rely describe

the Court's practice rather than circumscribe its power. See *ASARCO*, 490 U.S. at 621 n.1 ("regular practice"); *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 283-84 (2001) ("our practice"); *Pap's*, 529 U.S. at 305 (Scalia, J. concurring) ("our recent jurisprudence"). Vacatur is not typically understood as an exercise of Article III jurisdiction equivalent to a ruling on the merits. *Bonner Mall*, 513 U.S. at 21. And despite comity considerations, the Court has in fact vacated state-court decisions in cases that became moot. See *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

4. Finally, Respondents' vehicle objections boil down to a reprise of their mistaken jurisdictional points. They ask the Court to wait for a "more appropriate vehicle," Opp. 36, and suggest the Court can "take up the question presented if and when a genuine dispute [among courts] develops," Opp. 37. But given the thorough and conflicting interpretations of the statute presented in the lower courts, Pet. 22-27; *supra* pp. 5-6, further delay is unnecessary and counterproductive for a federal program that depends on voluntary provider participation.

Accordingly, Respondents' assertion that "Florida hospital defendants … are continuing to resist Amendment 7 discovery," Opp. 36, is beside the point. The State's highest court has declared its view and bound all state courts on the question. Pet. App. 2a n.2. And there is no need for further percolation in other States: the decision below, the *Tibbs* plurality and dissent, the *Clouse* and *Walgreen* opinions, the HHS guidance, and the Solicitor General's briefing together afford the Court every conceivable view on the applicability of the privilege in the face of contrary state-law requirements. Finally, this issue is almost always litigated in discovery disputes in state trial courts. Pet. 32. The

theoretical possibility of "postjudgment appeals" in the state courts, Opp. 37, is unlikely to generate a more suitable vehicle than this petition.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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