

ARIZONA SUPREME COURT

ARIZONA SCHOOL BOARDS
ASSOCIATION, INC., an Arizona
nonprofit corporation, *et al.*,

Plaintiffs/Appellees,

v.

STATE OF ARIZONA, a body politic,
Defendant/Appellant.

Arizona Supreme Court
No. CV-21-0234-T/AP

Court of Appeals, Division One
No. CA-CV 21-0555

Maricopa County Superior Court
No. CV2021-012741-00063

**BRIEF OF *AMICI CURIAE*
ARIZONA HOSPITAL AND HEALTHCARE ASSOCIATION AND
ARIZONA MEDICAL ASSOCIATION**

FILED WITH WRITTEN CONSENT OF THE PARTIES

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Introduction

It's an unfortunate reality that, in the middle of an unprecedented public health emergency, and right before Arizona's schools and universities returned to in-person instruction, the Arizona Legislature enacted various statutory provisions prohibiting schools, universities, and other entities from implementing reasonable, effective, and evidence-based preventive measures to slow the spread of COVID-19.

Fortunately, the Superior Court held that those provisions are “void and unenforceable.” *Amici curiae* the Arizona Hospital and Healthcare Association (“AzHHA”) and the Arizona Medical Association (“ArMA”) (collectively, “the Healthcare Amici”) urge this Court to affirm the Superior Court's decision because those provisions—should they take effect—will have devastating consequences on Arizona's healthcare systems and the greater population. Current data shows, among other things, a high rate of COVID-19 community transmission in all Arizona counties; the number of new COVID-19 cases is most prevalent among the populations most affected by these new provisions—children and young adults; and despite the best efforts by Arizona's dedicated healthcare workers, Arizona's hospital and healthcare systems are already incredibly strained by the effects of the COVID-19 pandemic. All Arizonans would therefore suffer significant harm were the Superior Court's decision overturned. This Court should thus affirm the Superior Court's decision that these provisions are void and unenforceable.

Interests of *Amici Curiae*

AzHHA is a statewide trade association for hospitals, health systems, and affiliated healthcare organizations. AzHHA's 64 hospital members and 14 healthcare members give Arizona hospital and healthcare partners a voice to collectively build better healthcare and health for all Arizonans. These members are united with the common goals of improving healthcare delivery in Arizona and being powerful advocates for issues that impact the quality, affordability, and accessibility of healthcare for the patients, people, and communities in Arizona.

ArMA is the largest organization in the state representing the interests of all physicians. With nearly 4,000 members, its membership includes physicians, physician assistants, resident physicians, and medical students from all specialties and practice settings. ArMA's vision is to make Arizona the best place to practice medicine and receive care. It has become the foremost advocate and resource in the state for economically sustainable medical practices, the freedom to deliver care in the best interests of patients, and health for all Arizonans.

Argument

At a time when Arizona is suffering from rising COVID-19 cases, hospitalizations, and deaths, the Arizona Legislature should be doing everything in its power to protect the health, safety, and well-being of Arizonans. But the Legislature has instead elected to do the opposite by prohibiting schools,

universities, and other entities from implementing reasonable, effective, and evidence-based public health mitigation measures when the circumstances call for them. This Court should affirm the Superior Court’s decision because these prohibitions—should they take effect—will no doubt lead to increased COVID-19 transmission, especially among children and young adults, which will inevitably spill over into Arizona’s already strained healthcare systems.

Arizona, like the rest of the country and the world, is in the middle of an unparalleled “public health crisis.” *Xponential Fitness v. Arizona*, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *1 (D. Ariz. July 14, 2020) (citation omitted). “COVID-19 is a novel, potentially deadly, severe acute respiratory illness caused by a virus that is most commonly transmitted person to person.” *Slidewaters LLC v. Wash. State Dep’t of Lab. & Indus.*, 4 F.4th 747, 752 (9th Cir. 2021). It “primarily spreads through airborne particles that accumulate in enclosed spaces with inadequate ventilation, respiratory droplets produced when a person coughs, sneezes, or talks, and occasionally through contact with objects contaminated with the virus.” *Resurrection Sch. v. Hertel*, 11 F.4th 437, 442 (6th Cir. 2021).

Since the pandemic last year began, over 715,000 Americans have died from COVID-19.¹ Arizona has alone recorded about 1,100,000 cases,² 78,000 hospitalizations,³ and 20,000 deaths.⁴ The rate of new COVID-19 cases, hospitalizations, and deaths fortunately declined from their January 2021 peaks, after vaccines became widely available for people 12 years old and older.⁵ But over the last several months, new COVID-19 cases have increased by about 300% nationwide, with increases in both hospitalizations and deaths in tow.⁶

This explosion in cases is mainly because of the “highly transmissible” Delta variant, currently the predominant variant of the SARS-CoV-2 virus—the virus that causes COVID-19—in the United States.⁷ “The Delta variant is more than two times

¹ See *COVID Data Tracker*, Ctrs. for Disease Control & Prevention, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Oct. 15, 2021).

² See *Demographics*, Ariz. Dep’t of Health Servs., <https://www.azdhs.gov/covid19/data/index.php#demographics> (last visited Oct. 15, 2021).

³ See *Hospitalization*, Ariz. Dep’t of Health Servs., <https://www.azdhs.gov/covid19/data/index.php#hospitalization> (last visited Oct. 15, 2021).

⁴ See *COVID-19 Deaths*, Ariz. Dep’t of Health Servs., <https://www.azdhs.gov/covid19/data/index.php#deaths> (last visited Oct. 15, 2021).

⁵ See *Guidance for Implementing COVID-19 Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccination Coverage*, Ctrs. for Disease Control & Prevention (July 30, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7030e2.htm>.

⁶ *Id.*

⁷ *Id.*

as transmissible as the original strains circulating at the start of the pandemic and is causing large, rapid increases in infections.”⁸

Federal and state public health authorities strongly recommend people take evidence-backed preventive measures to slow the spread of the Delta variant.⁹ Those preventive measures include obtaining a COVID-19 vaccine for any person 12 years old or older, for whom it’d be medically appropriate; wearing masks indoors in areas of substantial or high transmission; testing for COVID-19 when a person has come into close contact with someone who might be infected; and practicing social distancing.¹⁰

The Arizona Legislature has decided to actively legislate against these reasonable preventive measures. It recently enacted several statutory provisions, summarized in the below chart, limiting the ability of schools, universities, and other governmental entities to take these recommended steps. It specifically prohibited these entities—in various ways and contexts—from requiring that people obtain a COVID-19 vaccine, wear a mask, or even get tested.

⁸ *Id.*

⁹ *See How to Protect Yourself & Others*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Oct. 15, 2021); *Everyone—Current Guidance*, Ariz. Dep’t of Health Servs., <https://www.azdhs.gov/covid19/index.php#everyone-guidance> (last visited Oct. 15, 2021).

¹⁰ *See id.*

Budget Reconciliation Bill	Summary of the Provisions Relating to COVID-19
House Bill 2898	Prohibits schools from “requir[ing] the use of face coverings by students or staff” and from “requir[ing] a student or teacher to receive a vaccine for COVID-19 or to wear a face covering to participate in in-person instruction.”
Senate Bill 1819	Prohibits counties, cities, and towns from adopting ordinances “related to mitigating the COVID-19 pandemic that impacts private businesses [or] schools,” which includes a prohibition on ordinances that “mandate[] using face coverings .”
Senate Bill 1824	Prohibits the State of Arizona, counties, cities, and towns from “establishing a COVID-19 vaccine passport” or requiring that any person “be vaccinated for COVID-19.”
Senate Bill 1825	Prohibits the Arizona Board of Regents, universities, and community colleges from “requir[ing] that a student obtain a COVID-19 vaccination or show proof of receiving a COVID-19 vaccination or place any conditions on attendance or participation in classes or academic activities, including mandatory testing or face covering usage , if the person chooses not to obtain a COVID-19 vaccination” and limits their authority to test for COVID-19 unless there is “a significant COVID-19 outbreak” in the dorms.

Current data about the COVID-19 pandemic’s impact on Arizonans and Arizona’s hospitals and healthcare systems confirms there would be terrible consequences were this Court to overturn the Superior Court’s decision that these provisions are “void and unenforceable.” That data establishes these facts:

There is a high rate of COVID-19 community transmission in all Arizona counties.¹¹ After the January 2021 peak, the rate of new COVID-19 cases slowed and remained steady for a couple of months. But the recent emergence of the Delta variant has caused the number of new COVID-19 cases to substantially increase. During the week of August 6, Arizona had a rate of 195 new cases per 100,000 residents. *See* Exhibit A (Declaration of Ann-Marie Alameddin), Ex. 1 at 1. The next week, the rate rose to 255 per 100,000 residents, and to 278 a week later. *See id.*, Ex. 2 at 1, Ex. 3 at 1. The week this suit was filed, there were 299 new cases per 100,000 residents. *See id.*, Ex. 4 at 1.

Consistent with this data, the following chart shows (in blue blocks) a very noticeable upward trend of new COVID-19 cases in Arizona. It also shows (in orange dotted lines) a similar upward trend of people undergoing COVID-19 diagnostic testing in Arizona, also signaling the number of new cases is rising.

¹¹ *See COVID-19 Integrated County View*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#county-view|Risk|community_transmission_level (last visited Oct. 15, 2021).

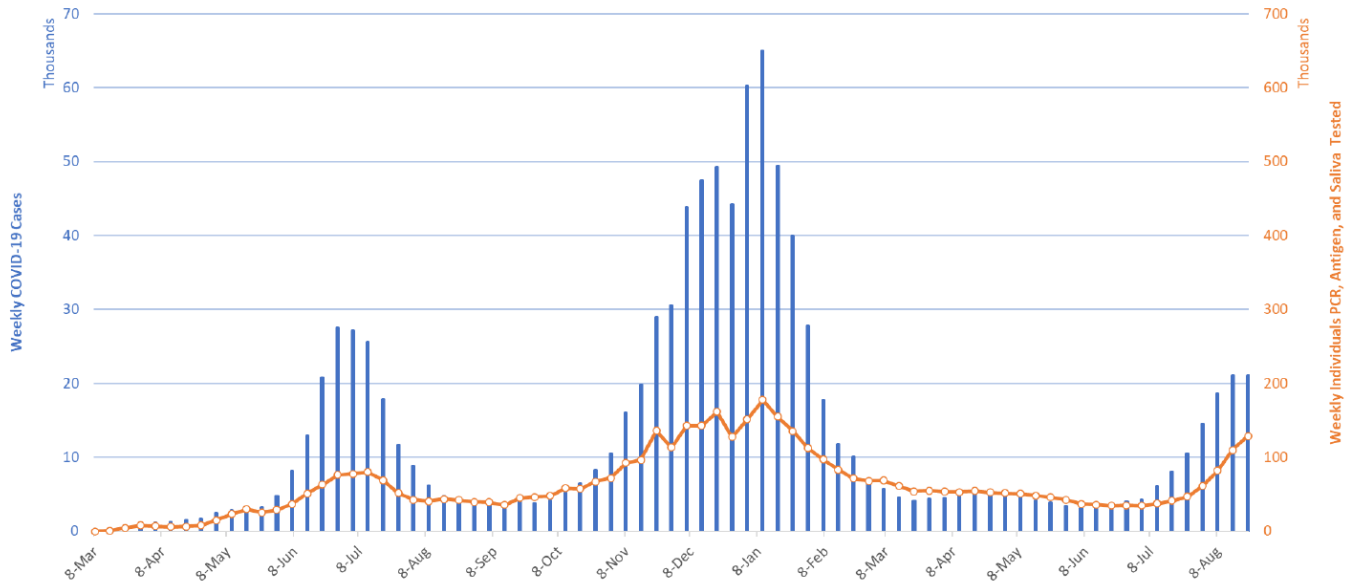


Figure 1. Weekly COVID-19 Cases in Arizona and Number of Individuals Undergoing COVID-19 Diagnostic Testing March 1, 2020 – August 22, 2021.

Id. at 1. This data confirms that “Arizona continues to experience high levels of community transmission.” *Id.* at 8. And this trend will likely continue because Arizona’s schools and universities recently returned to in-person instruction. *See id.*

Dr. Joe Gerald, a professor at the University of Arizona’s Zuckerman College of Public Health, noted in a recent report on COVID-19’s outlook in Arizona: “Even though vaccination remains the most effective and important mitigation strategy, non-pharmacologic interventions like mask mandates, limited gathering sizes, and targeted business mitigations are still needed to slow transmission and ensure this wave does not reignite.” *Id.* at 1. Given that the Arizona Legislature prohibited schools, universities, and other governmental entities from requiring precisely these preventive measures, there is a significant risk Arizona will experience a crushing wave of new cases were these prohibitions to take effect.

Arizona’s children and young adults are contracting COVID-19 more than any other age group. For the first time in this pandemic, transmission among children and young adults is “poised to surpass rates among all other groups.” *Id.* at 2. As the chart below demonstrates, the number of new cases among children younger than 15 years old has nearly quadrupled since early July. Likewise, the number of new cases among adolescents aged 15 to 24 years old has also nearly quadrupled in that period and is now the highest rate of any age group.

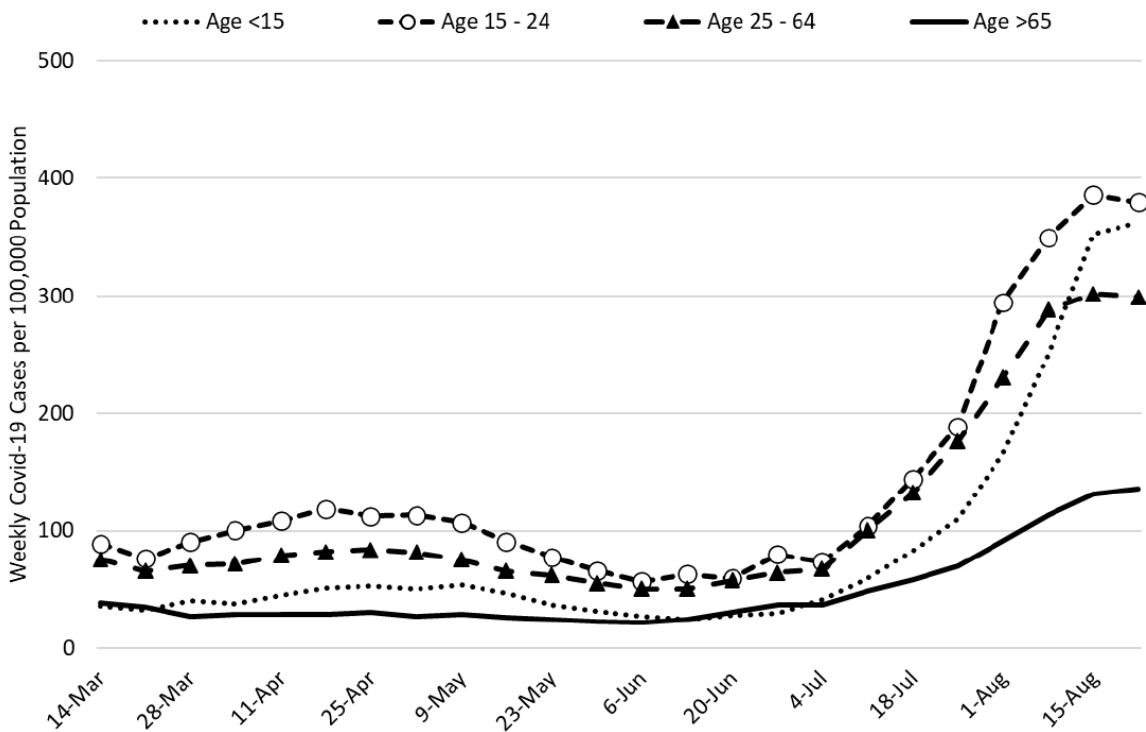


Figure 2a. COVID-19 Cases in Arizona by Age Group March 7, 2020 – August 22, 2021.

Id. The steep rise in the number of new COVID-19 cases over the last two months among children and young adults is all the more startling when compared to the circumstances at the same time last year. As the following chart shows, a year

ago, when instruction was mostly virtual, there were about 25 cases per 100,000 children aged 10 through 14. This year, when instruction was moved in-person, the rate among children in the same age group rose to about 500.¹²

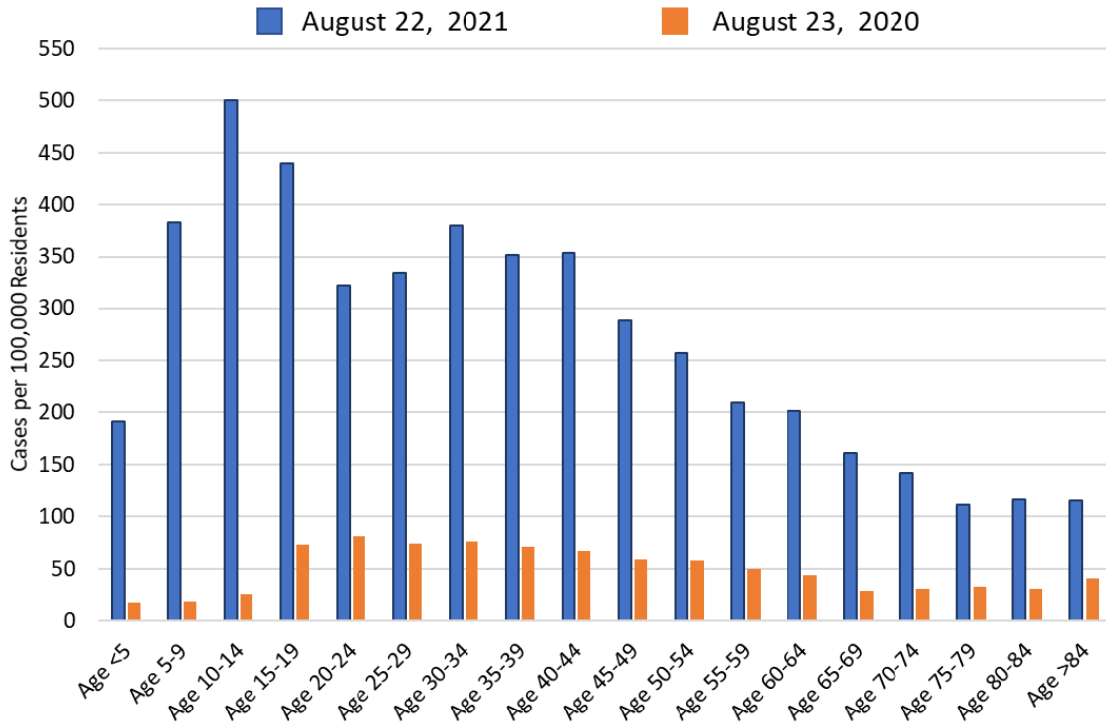


Figure 2c. COVID-19 Cases in Arizona by Age Group August 23, 2020 versus August 22, 2021.

¹² The chart, of course, shows an increase in new cases across all age groups. That increase is largely attributable to the “highly transmissible” Delta variant. *Guidance for Implementing COVID-19 Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccination Coverage*, Ctrs. for Disease Control & Prevention (July 30, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7030e2.htm>. But the increases in new cases have disproportionately affected Arizona’s children and young adults.

Id. at 3. Dr. Gerald reports that these exponential increases among children and young adults are driven by the resumption of “in-person instruction in the face of high community transmission, inadequate vaccination, prohibited masking, and inadequate surveillance testing.” *Id.*

To be sure, the Healthcare Amici do not oppose in-person educational instruction; in fact, students benefit from in-person learning. But in the middle of an ongoing pandemic, it is imperative that Arizona’s schools and universities have the discretion to implement the safety recommendations urged by the country’s top healthcare authorities. And here, the CDC recommends eligible students obtain a COVID-19 vaccine; schools require indoor masking of students, teachers, and others regardless of vaccination status; and everyone undergo testing when exposed to someone who might be infected.¹³ The masking recommendation is especially important in K-12 schools because the vast majority of school-aged children are not eligible for a vaccine, and so masking is critical to protect them from exposure.¹⁴

Not only did the Arizona Legislature refuse to adopt or even encourage these “layered prevention strategies,” it completely divested Arizona’s schools and universities of the ability to implement them.¹⁵ Given the current high rate of

¹³ *See Guidance for COVID-19 Prevention in K-12 Schools*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last updated Aug. 5, 2021).

¹⁴ *See id.*

¹⁵ *Id.*

COVID-19 community transmission in Arizona, it is not difficult to imagine the harm that would arise were these provisions to take effect. Indeed, the CDC just reported that Arizona schools without mask requirements are 3.5 times more likely to have COVID-19 outbreaks than schools with mask requirements.¹⁶

Hospitalizations of COVID-19 patients have seriously threatened the stability of Arizona’s healthcare systems. When the rate of new COVID-19 cases declined following the January 2021 peak, the rate of hospitalizations for COVID-19 patients also declined and moderated for several months. But in July, COVID-19 related medical-surgical and ICU hospitalizations began to steadily rise. As the chart below reveals, as of August 25—two weeks after this suit was filed—almost 2,500 (or 23%) of Arizona’s general ward hospital beds were occupied by COVID-19 patients—a level not seen since February. *See id.* at 4. Only 8% of general ward hospital beds were available as of that date.¹⁷ *See id.* ICU hospitalizations have

¹⁶ *See Association Between K–12 School Mask Policies and School-Associated COVID-19 Outbreaks — Maricopa and Pima Counties, Arizona, July–August 2021*, Ctrs. for Disease Control & Prevention (Oct. 1, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7039e1.htm>.

¹⁷ The picture on the ground is even worse than these statistics suggest. This is because the 8% available capacity exists in specialty care and at other hospitals that treat targeted populations or conditions (like orthopedics). As a result, the hospitals that actually treat COVID-19 patients are at capacity levels much greater than 92%. Moreover, COVID-19 patients held in overflow units because there are no hospital beds available are not counted against the available capacity figures. Accounting for these overflow patients, the Healthcare Amici members report many of their facilities are over capacity on any single day.

similarly risen. As of August 25, 487 (or 28%) of Arizona’s ICU beds were occupied by COVID-19 patients. *See id.* Only 8% of ICU beds remained available. *See id.* These are historically low figures that must be corrected because hospitals simply lack the bed capacity to sustain another rise in the rate new COVID-19 cases.

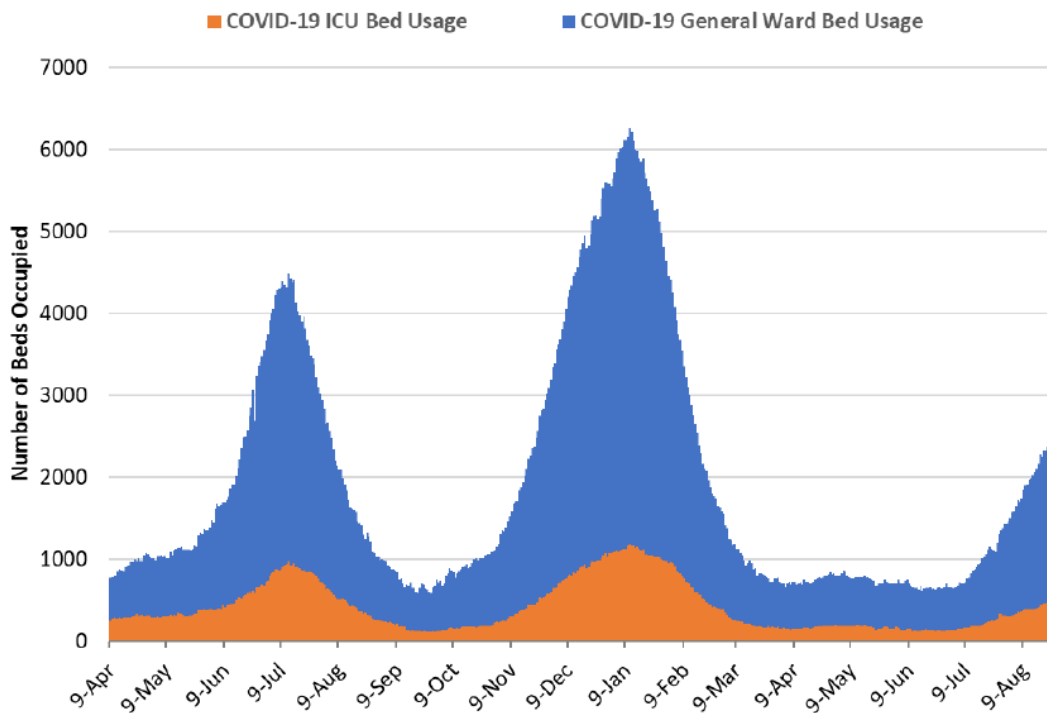


Figure 4. Arizona Daily COVID-19 General Ward and ICU Census April 9, 2020 – August 25, 2021.

Id. It is therefore no surprise that Valleywise Health Medical Center’s (“Valleywise”) Chief Medical Officer recently warned that Valleywise is experiencing both a “continued surge of COVID-19 patients who are mostly younger than 60” as well as “diminishing hospital bed capacity.”¹⁸

¹⁸ *Hospitals Urge Arizonans to Get Vaccinated Amid Staff Shortages and a COVID-19 Surge*, AZCentral (Aug. 25, 2021),

But the most alarming development is the increase in hospitalizations of children. When this suit was filed, an average of 369 pediatric COVID-19 patients were “admitted to hospitals every day.”¹⁹ And as this case was pending below, the United States Department of Health and Human Services reported almost 2,400 children were hospitalized with COVID-19—a “record-high” figure.²⁰ Maricopa County is seeing similar trends. The Medical Director of Maricopa County’s Department of Public Health recently said that “more than one in four COVID-19 cases in the county are now among children”—a rate “never seen before.”²¹

The stress, severity, and longevity of the COVID-19 pandemic have had a detrimental effect on Arizona’s healthcare professionals. Several studies and surveys have recently reported on the experiences of a diverse range of members of the nation’s healthcare workforce. The results all have one thing in common: the COVID-19 pandemic has acutely and negatively affected the professionals who have dedicated the last 18 months to fighting it.

<https://www.azcentral.com/story/news/local/arizona-health/2021/08/25/hospital-leaders-calling-unvaccinated-arizonans-take-action/5592424001/>.

¹⁹ *Child Covid-19 Hospitalizations Reach a New High as Schools Reopen. That’s Not The Only Reason to Protect Kids from Delta, Doctors Say*, CNN (Sept. 8, 2021), <https://www.cnn.com/2021/09/08/health/delta-variant-in-kids/index.html>.

²⁰ *Id.*

²¹ *School COVID-19 Outbreaks up Dramatically in Maricopa County*, AP News (Aug. 30, 2021), <https://apnews.com/article/health-arizona-coronavirus-pandemic-c02144ff2d653e4fce9d52db6f4953ee>.

In one survey of 400 frontline nurses, 22% of the respondents said that “they may leave their current position providing direct patient care within the next year.”²² The top three reasons were insufficient staffing, a demanding workload, and the emotional toll of the job—all factors exacerbated by the pandemic.²³ In another survey of over 1,000 nurses, 46% of the respondents reported that the pandemic has weakened their commitment to the profession; of those, nearly 1 in 4 are looking for work outside of nursing or are retiring from nursing altogether.²⁴

Studies on the mental health of healthcare professionals show similarly worrying patterns. In a survey of 1,000 nurses, 66% reported feeling depression related to the COVID-19 pandemic, and over half have experienced trauma, extreme stress, or PTSD.²⁵ On average, respondents reported a 28% decline in their mental health.²⁶ And a study of nurse leaders only highlights that no group has been spared:

²² *Nursing in 2021: Retaining the Healthcare Workforce When We Need it Most*, McKinsey & Co. (May 11, 2021), <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/nursing-in-2021-retaining-the-healthcare-workforce-when-we-need-it-most>.

²³ *See id.*

²⁴ *See 2021 Frontline Nurse Mental Health & Well-Being Survey*, Trusted Health (May 2021), https://uploads-ssl.webflow.com/5c5b66e10b42f155662a8e9e/608304f3b9897b1589b14bee_mental-health-survey-2021.pdf.

²⁵ *See 2021 Frontline Nurse Mental Health & Well-Being Survey*, Trusted Health (May 2021), https://uploads-ssl.webflow.com/5c5b66e10b42f155662a8e9e/608304f3b9897b1589b14bee_mental-health-survey-2021.pdf.

²⁶ *See id.*

as of August 2021, 36% of nurse managers, 17% of Chief Nursing Officers, and 26% of directors reported being “not or not at all emotionally healthy.”²⁷

* * *

Although the above data paints a grim picture, there is still time to reverse course. But to do so, schools, universities, and other entities need the authority to implement evidence-based public health guidance. The Arizona Legislature has made it very hard for them to take those steps. Should these statutory provisions take effect, these troubling trends will only worsen. As a result, this Court should affirm the Superior Court’s decision that these provisions are “void and unenforceable.”

Conclusion

The Healthcare Amici respectfully request this Court affirm the Superior Court’s decision that these provisions are “void and unenforceable.”

²⁷ See *AONL COVID-19 Longitudinal Study August 2021 Report: Nurse Leaders’ Top Challenges, Emotional Health, and Areas of Needed Support, July 2020 to August 2021*, Am. Org. for Nursing Leadership (Sept. 8, 2021), <https://www.aonl.org/system/files/media/file/2021/09/AONL%20COVID-19%20Longitudinal%203%20Written%20Report.pdf>.

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