

**IN THE SUPREME COURT  
STATE OF ARIZONA**

ROBIN ROEBUCK,

Plaintiff/Appellant,

vs.

MAYO CLINIC, et al.,

Defendants/Appellees.

No. CV-23-0262-PR

Court of Appeals, Division One  
No. 1 CA-CV 22-0508

Maricopa County Superior Court  
No. CV2021-090429

**BRIEF OF AMICUS CURIAE AMERICAN MEDICAL ASSOCIATION,  
ARIZONA MEDICAL ASSOCIATION, PHOENIX CHILDREN'S  
HOSPITAL, HONORHEALTH, AND MUTUAL INSURANCE  
COMPANY OF ARIZONA**

**IN SUPPORT OF MAYO CLINIC'S PETITION FOR REVIEW**

**FILED WITH CONSENT OF THE PARTIES**

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## INTEREST OF AMICI CURIAE

The American Medical Association (“AMA”) is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA’s policymaking process. The AMA, founded in 1847, promotes the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including Arizona, and every medical specialty.

The Arizona Medical Association (“ArMA”) is a voluntary membership organization for Arizona physicians. It currently represents nearly 4,000 physicians and physicians-in-training from all specialties and practice settings. ArMA’s vision is to make Arizona the best place to practice medicine and receive care. It is 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. ArMA has frequently represented its membership at the state capitol on issues affecting

physicians and patients and has provided amicus support in appellate matters regarding the same.

The AMA and ArMA appear as separate entities speaking for their members and the AMA Litigation Center. The Litigation Center is a coalition among the AMA and medical societies of every state and the District of Columbia. The Litigation Center is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the courts. It brings lawsuits, files amicus briefs, and otherwise provides support or becomes actively involved in litigation of general importance to physicians.

Phoenix Children's Hospital, Inc. is one of the nation's largest pediatric health systems and has provided inpatient, outpatient, trauma, emergency and urgent care to children and families for over 38 years. The health system is comprised of Phoenix Children's Hospital—Main Campus, Phoenix Children's Hospital—East Valley at Dignity Health Mercy Gilbert Medical Center, four pediatric specialty and urgent care centers, 11 community pediatric practices, 20 outpatient clinics, two ambulatory surgery centers and six community-service-related outpatient clinics throughout the state of

Arizona. Phoenix Children's employs more than 400 pediatric physicians and more than 1,300 FTEs on its nursing staff. Phoenix Children's Care Network includes more than 850 pediatric primary care providers and specialists who deliver care across more than 75 subspecialties.

HonorHealth is a locally-owned, non-profit, integrated health system that resulted from a merger between John C. Lincoln Health Network and Scottsdale Healthcare. It has 3,400 expert physicians, and 11,600 employees who serve six hospitals, 70 primary and specialty care clinics, a cancer care network, plus research and community services in Phoenix and Scottsdale.

Mutual Insurance Company of Arizona (MICA) is the leading medical professional liability (MPL) insurer in Arizona and ranks among the largest MPL insurers in the United States on the basis of direct premium written. MICA is a physician- and advanced healthcare professional-owned and directed mutual insurance company. MICA presently insures approximately 6,746 insureds in Arizona, including physicians, advanced healthcare professionals, their medical entities and "stand alone" outpatient medical facilities.

As healthcare workers on the front lines of the COVID-19 battle, the foregoing entities and their members and employees have a deep-seated

interest in the constitutionality of [A.R.S. § 12-516](#). Amici fully agree with the Mayo Clinic petitioners that increasing the burden of proof for some negligence claims in some situations does not abrogate an entire “right of action,” and that the court of appeals erred in ruling otherwise. As importantly, amici have an equally deep-seated interest in protecting legislation designed to ensure the availability of quality medical care throughout Arizona, especially during a statewide healthcare emergency. The court of appeals’ decision undermines that effort and unlawfully disrespects the legislature’s constitutionally-enacted policy choices on this critical issue.

Both parties have consented to the filing of this amicus brief. No person or entity other than the amici curiae identified herein prepared or provided financial resources for this brief.

## REASONS REVIEW SHOULD BE GRANTED

1. The court of appeals' decision is legally erroneous. As the petition notes, the anti-abrogation clause protects "a right of action," and the right of action here is negligence. "Ordinary" negligence is not a separate right of action from "gross" negligence as the court of appeals suggested. See Opinion, ¶ 24 (stating that the statute "bars all claims for ordinary negligence"). Instead, the legislature properly and within its authority increased the burden of proof in order to "address a serious substantive problem." *Seisinger v. Siebel*, 220 Ariz. 85, 96 (2009) (legislature may increase burden of production in medical malpractice actions to address the effect on public health of increased malpractice insurance rates and the reluctance of qualified physicians to practice here). The fact that this increase in the burden of proof might make it more difficult to obtain relief in a negligence action does not abrogate the entire negligence right of action. *Franklin v. Clemett*, 240 Ariz. 587, 595 (App. 2017) ("A statute does not 'effectively' abrogate a claim . . . by making it more difficult for the claimant to obtain a recovery"). That is constitutionally permissible regulation, not abrogation. See Pet., pp. 5-12.

The court of appeals' citation to *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340 (1993), and *Rubino v. De Freitas*, 638 F. Supp. 182 (D. Ariz. 1986), demonstrates its error. Opinion, ¶¶ 25-17. The statute in *Hazine* was unconstitutional because it operated to bar an entire product liability claim before the plaintiff was even injured. A negligence claim was not an available alternative theory for the plaintiff, because a product liability claim protects different interests and has completely different elements than a negligence claim. See *Hazine*, 176 Ariz. at 343, citing, *inter alia*, *McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59, 64 (Wyo.1989) (negligence addresses the reasonableness of the defendant's conduct; product liability addresses the defective nature of the product itself).

So, too, in *Rubino v. De Freitas*, the statute was unconstitutional because it barred an entire battery claim—a wholly different right of action, protecting “different societal interests” with entirely different elements than the assertedly alternative negligence claim. 638 F. Supp. at 185 (“in the context of informed consent, battery and negligence (malpractice) constitute separate causes of action. The battery theory sustains a patient's right of self-determination; the negligence theory recognizes a physician's obligation to provide reasonable disclosure of the available choices with respect to the

proposed procedures and the dangers inherently and potentially involved in each”). As such, the negligence claim was not a viable alternative to the barred battery claim. *See also Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 314 (2003) (negligence action requires proof of elements not present in a common law action for battery, including duty, breach, and causation, so statute that precludes battery claim is unconstitutional abrogation).

The key here is not the “inexact” definitions of gross negligence or the “aggravated character” of gross negligence, as Plaintiff asserts. [Resp. to PR, pp. 8-9.] Nor is it relevant that plaintiffs would find it harder to prove gross negligence in a medical malpractice context. [*Id.*, p. 9.] The key is that ordinary and gross negligence claims are simply points along the continuum of one right of action. They share the same elements and protect the same societal interests: encouraging people to act reasonably so as not to harm others. This is what differentiates this case from *Hazine* and *Rubino*. And this is why heightening the burden of proof in situations of public health emergencies does not completely bar the right of action; it regulates the negligence right of action where public policy requires it. That is regulation, not abrogation. *See, e.g., Pangburn v. Saad*, 326 S.E.2d 365, 372 (N.C. App.

1985) (statute protecting state psychologist from ordinary negligence claim but not gross negligence claim did “not abolish a cause of action and leave the injured plaintiff without her remedy, but only defines the circumstances in which relief will be available. The statute, as construed, is thus constitutional and does not violate the ‘open courts’ provision. . . .”). Review and relief are necessary to correct this fundamental error of law.

2. Relatedly, the court of appeals’ decision disrespects the legislature’s authority—indeed its duty—to exercise its police power to enact laws that are “reasonably necessary for the preservation of the public health, safety, morals, or general welfare of the public.” See *State v. Harold*, 74 Ariz. 210, 216 (1952). A.R.S. § 12-516 is just such a law. By the time the legislature enacted and the Governor approved the statute, healthcare practitioners had already been putting their lives at risk treating COVID-19 patients for over a year of unprecedented uncertainty and peril. According to an article in the National Library of Medicine, of the 6,271,313 laboratory-confirmed COVID-19 cases that the CDC reported from January 1, 2020, to October 12, 2021, more than seven percent (440,044) were healthcare

workers. Lin, et al., “COVID-19 Symptoms and Deaths among Healthcare Workers, United States,” *Emerg Infect Dis.*, v. 28(8), 2022 Aug.<sup>1</sup>

Three surges of COVID-19 infections and deaths had occurred in the United States around April 2020, July 2020, and November 2020–January 2021. *Id.* The April 2020 initial surge led to a profound increase in healthcare workers’ exposure to the virus – likely the result of inadequate intensive care units and hospital beds, insufficient PPE supply, inadequate training and experience treating the virus, and heavy workloads due to a large and rapid influx of patients. *Id.* Healthcare workers also were suffering a higher rate of almost all the severe symptoms of COVID-19. *Id.* In fact, almost one third of the healthcare worker deaths in the United States occurred in June 2020, and over 40% occurred in the summer months (June–August) of 2020. *Id.*

The foregoing led then-Governor Ducey to issue Executive Order (“EO”) 2020-27, the “Good Samaritan Order,” on April 9, 2020. Noting that frontline healthcare workers were subjecting themselves to liability while heroically battling COVID-19 with no defined treatments and a shortage of hospital beds, the EO established qualified immunity for healthcare workers

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<sup>1</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9328912/>

responding in good faith to the pandemic.<sup>2</sup> The Governor recognized (a) a “compelling need to maximize participation of medical providers and healthcare facilities in treating COVID-19 patients to ensure that Arizonans have access to treatment when needed; (b) that healthcare professionals were concerned about their potential liability in caring for patients with COVID-19 when there was no defined treatment and a shortage of hospital beds and equipment; and (c) that it was in the public interest to afford such individuals protection from liability for their good faith efforts to respond to the emergency. *Id.* The EO was extended twice: once from June 2020 to December 2020, and again from December 2020 to March 31, 2021.<sup>3</sup>

It was against this backdrop that the legislature on March 30, 2021, passed SB 1377 to codify the protections laid out in the Governor’s Executive Orders. Clearly, the statute was enacted to ensure (a) the continued availability of medical care to Arizona citizens in times of a declared healthcare emergency, and (b) that for frontline healthcare workers stepping

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<sup>2</sup>[https://azgovernor.gov/sites/default/files/eo\\_2020-27\\_the\\_good\\_samaritan\\_order.pdf](https://azgovernor.gov/sites/default/files/eo_2020-27_the_good_samaritan_order.pdf).

<sup>3</sup>[https://d3n8a8pro7vhmx.cloudfront.net/azhha/mailings/236/attachments/original/eo\\_2020-63\\_%281%29.pdf?1609974394](https://d3n8a8pro7vhmx.cloudfront.net/azhha/mailings/236/attachments/original/eo_2020-63_%281%29.pdf?1609974394)

up to provide care during a healthcare emergency, their legal exposure would be more manageable and their legal risks more predictable. Indeed, with the benefit of hindsight, it seems unlikely that armies of healthcare providers will volunteer for frontline duty during the next public health crisis if they are vulnerable to high-stakes lawsuits and liability for the essential medical services that they provide.

This is exactly the type of policy decision that the legislature is entitled to make. See *Seisinger, supra*; *Harrison v. Laveen*, 67 Ariz. 337, 344 (1948) (“[T]he matter of determining what is ‘good public policy’ is for the executive and legislative departments . . . .”); *Valerie M. v. Arizona Dep’t of Econ. Sec.*, 219 Ariz. 331, 336 (2009) (the legislature is empowered to set burdens of proof as a matter of substantive law). And “when the legislature has exercised its power and prerogative to regulate conduct in the interest of the health, safety and general welfare of the citizenry, such regulation becomes the standard of minimum care which shall be controlling.” *Konow v. S. Pac. Co.*, 105 Ariz. 386, 389 (1970). In short, by erring on the constitutional analysis, the court of appeals’ invalidation of the statute results in a separation of powers violation by improperly intruding into the

legislature's policy-making realm. Review and relief are necessary to correct this legal problem of statewide concern.

### CONCLUSION

For the foregoing reasons, Amici Curiae American Medical Association, Arizona Medical Association, Phoenix Children's Hospital, HonorHealth, and Mutual Insurance Company of Arizona respectfully request the Court to grant review, vacate the court of appeals' decision, and rule that [A.R.S. § 12-516](#) is constitutional.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of December, 2023.

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