

**SUPREME COURT  
STATE OF ARIZONA**

ROBIN ROEBUCK,

Plaintiff/Appellant/Respondent,

v.

MAYO CLINIC; MAYO CLINIC  
ARIZONA; MAYO CLINIC  
HOSPITAL; NICOLE SECREST; and  
ROBERT SCOTT,

Defendants/Appellees/Petitioners.

**Case No. CV-23-0262-PR**

Arizona Court of Appeals  
Case No. 1 CA-CV 22-0508  
Maricopa County Superior Court Case  
No. CV 2021-090429  
(Hon. Rodrick J. Coffey)

**AMICUS CURIAE BRIEF OF  
ARIZONA ASSOCIATION FOR  
JUSTICE/ARIZONA TRIAL  
LAWYERS ASSOCIATION**

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## Legal Argument

The present controversy traces its origin to March 11, 2020, when Governor Douglas Anthony Ducey, Jr., signed a “Declaration of Emergency” proclaiming that a state of emergency existed in Arizona because of the Covid-19 outbreak. The declared state of emergency ended on March 30, 2022.

At the urging of healthcare special-interest groups, the Arizona Legislature passed Senate Bill 1377, 55th Legis., First Reg. Sess., 2021.

Senate Bill 1377 created two new immunity statutes—A.R.S. §§ 12-515 and 12-516. The statutes purported to bestow immunity from liability to care providers, health professionals, healthcare institutions, and others whose acts and omissions in dealing with a “public health pandemic” might have caused injury or death.

A plaintiff seeking to impose liability against a defendant because of acts and omissions committed in relation to a “public health pandemic” would now supposedly have to prove by “clear and convincing evidence” that the defendant person, provider, health professional, or health care institution acted or failed to act because of “wilful misconduct or gross negligence.” *See* A.R.S. § 12-515(A) and A.R.S. § 12-516(A).

### **1. Applying Senate Bill 1377 retroactively would impair vested rights.**

Before diving into substantive constitutional issues, we note that, in Section 2 of Senate Bill 1377, the Legislature stated: “This act applies retroactively to from

and after March 10, 2020.” (The Legislature omitted the usual commas in that sentence.) In general, however, “legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events.” *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 205 ¶ 15 (1999).

A vested right is a right that “is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust.” *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 139 (1986). Indeed, “once substantive rights have vested, they cannot be impaired.” *Hall v. Elected Officials’ Retirement Plan*, 241 Ariz. 33, 44 ¶ 31 (2016).

It is true that statutory changes in procedures or remedies may be applied to proceedings already pending, “unless the statute affects or impairs vested rights.” *State Compensation Fund of Arizona v. Fink*, 224 Ariz. 611, 613 ¶ 10 (App. 2010) (citing *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 548 ¶ 11 (2005) and *Wilco Aviation v. Garfield*, 123 Ariz. 360, 362 (App. 1979)).

The statutory change in the burden of proof from “preponderance of the evidence” to “clear and convincing” affects and impairs the vested right to sue for negligence related to acts and omissions committed during the “public health pandemic.” Indeed, it so affects and impairs them as to wipe them out in certain circumstances where they would have survived as viable causes of action before Arizona because a State in 1912.

**2. Senate Bill 1377 violates the anti-abrogation clause.**

Senate Bill 1377 violates Article 18, § 6 of the Arizona Constitution (the “anti-abrogation clause”) because its purpose and effect are to make it impossible to prevail in a negligence action unless liability can be proved under the “clear and convincing” standard—even in cases where liability could have been proved under the “preponderance of the evidence” standard that was in effect for negligence actions before Senate Bill 1377 went into effect and that was in effect before Arizona became a State in 1912.

In relevant part, Article 18, § 6 of the Arizona Constitution provides that: “The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.”

It is true that the Legislature has some ability to regulate a few aspects of a tort cause of action. But although the legislature may regulate a cause of action, it still must leave “a claimant reasonable alternatives or choices which will enable him or her to bring the action. It may not, under the guise of ‘regulation,’ so affect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action.” *Lo v. Lee*, 231 Ariz. 531, 534 ¶ 11 (App. 2012) (quoting *Duncan v. Scottsdale Medical Imaging, Ltd.*, 205 Ariz. 306, 313 ¶ 30 (2003), quoting *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 106 (1984)). See also *Baker v. University Physicians Healthcare*, 231

Ariz. 379, 388 ¶ 34 (2013).

But here, there are no reasonable alternatives or choices. The *only* path to a recovery is by satisfying the stringent new “clear and convincing” standard of proof for a negligence action that Senate Bill 1377 imposes. The new standard of proof is not one that existed under the common law for negligence cases when Arizona became a state. Before February 12, 1912, the burden of proof in negligence actions was simply preponderance of the evidence. *See, e.g., Phoenix Light & Fuel Co. v. Bennett*, 8 Ariz. 314, 321-22 (Terr. 1903) (The “proof must be made by a preponderance of the evidence.”); *Southern Pacific Co. v. Hogan*, 13 Ariz. 34, 40 (Terr. 1910) (The “plaintiff must establish [his or] her case by a preponderance of the evidence.”).

Pre-statehood, the “clear and convincing proof” standard only applied in matters where a litigant was trying to prove some form of fraud, an intentional tort. *Costello v. Friedman*, 8 Ariz. 215, 219 (Terr. 1903). It appears that no requirement of proof by clear-and-convincing evidence existed in an Arizona negligence case until decades after Arizona became a state.

In operation, therefore, Senate Bill 1377 would, as here, operate to eliminate the common-law, preponderance-of-evidence, ordinary-negligence right of action to recover for damages caused by negligence unless a plaintiff can satisfy the higher “clear and convincing” burden of proof. That is not regulation. That is

abrogation of an essential part of the pre-Arizona-statehood negligence cause of action.

The Court of Appeals’ reasoning that A.R.S. § 12-516 violates the anti-abrogation clause because it eliminates all claims for ordinary negligence that arise out of the provision of Covid-related medical treatment is consistent with Arizona precedent and—more important—with the anti-abrogation clause’s plain terms. *Opinion* ¶¶ 24-27.

It is an accepted principle that, under Article 18, § 6, causes of action for medical wrongdoing survive attempted legislative tampering and destruction since they were part of the common law before Arizona became a State. For instance, in the Medical Malpractice Act, the legislature tried to abrogate a patient’s common-law right to bring a battery claim against a healthcare provider who performs a medical procedure on a patient without the patient’s consent.

But under the present and pre-statehood common law: “An actor is subject to liability to another for battery if the actor intentionally engages in an act that results in harmful or offensive contact with the person of another.” *Duncan v. Scottsdale Medical Imaging, Ltd.*, 205 Ariz. 306, 309 ¶ 9 (2003). In *Duncan*, a healthcare provider had injected a patient with a drug against a patient’s express wishes—a classic claim for battery.

The patient sued. The healthcare provider moved for summary judgment on

the theory that the claim for battery had to be classified as a medical-malpractice action under A.R.S. § 12-562(B), which provides that a “medical malpractice action brought against a licensed health care provider shall not be based upon assault and battery.” *Id.* The trial court agreed, “ruling that [the patient’s] claim was for medical malpractice and that the governing statutes were constitutional as a ‘regulation’ of common law battery” and that the patient had to support her claim with expert testimony on the standard of care. *Id.* at 309 ¶ 6. When the patient filed a petition for special action seeking correction of that error, the Court of Appeals declined jurisdiction. *Id.*

Ultimately, the trial court dismissed the battery claim, because “evidence of the applicable standard of care and causation was essential to the claim” for battery. *Id.* at 309 ¶ 7. The Court of Appeals found that the facts did not support a claim for battery and declined to reach the constitutionality issue. *Id.* at 309 ¶ 8.

This Court confirmed the “law is well established that a health care provider commits a common law battery on a patient if a medical procedure is performed without the patient’s consent.” *Duncan*, 205 Ariz. at 309 ¶ 9 (citing *Hales v. Pittman*, 118 Ariz. 305, 310 (1978)). This Court confirmed that “claims involving lack of consent, i.e., the doctor’s failure to operate within the limits of the patient’s consent, may be brought as battery actions.” *Id.* at 310 ¶ 13.

This Court further held that “when a patient gives limited or conditional

consent, a health care provider has committed a battery if the evidence shows the provider acted with willful disregard of the consent given.” *Id.* at 311, ¶ 18. In addition, “if a patient’s consent is obtained by a health care provider’s fraud or misrepresentation, a cause of action for battery is appropriate.” *Id.* at 311, ¶ 20.

Having concluded that the patient in *Duncan* had a viable claim for battery against her healthcare provider, this Court confirmed that the “anti-abrogation clause ‘prevents abrogation of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions in tort which trace origins to the common law.’” *Id.* at 313 ¶ 28 (emphasis omitted) (quoting *Cronin v. Sheldon*, 195 Ariz. 531, 538, ¶ 35 (1999)). Because battery was a tort “whose origins are the common law,” this Court concluded that “the protection of Article 18, Section 6 extends to the right of action asserted in the case at bar.” *Id.*

This Court then turned to the issue of whether the Medical Malpractice Act “simply regulates a patient’s right of action to recover damages for injuries for battery or completely abrogates that right.” *Id.* at 313 ¶ 29.

At that point, the Court applied the so-called “reasonable election” test to distinguish between regulation and abrogation, holding that, under “the ‘reasonable election’ test, the legislature may regulate a right of action protected by Article 18, Section 6, but it must ‘leave[ ] a claimant reasonable alternatives or choices which will enable him or her to bring the action. It may not, under the guise of

‘regulation,’ so affect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action.” *Id.* at 313 ¶¶ 29-30 (quoting *Barrio v. San Manuel Division Hospital for Magma Copper Co.*, 143 Ariz. 101, 106 (1984)).

This Court further explained that, in the Medical Malpractice Act, “the legislature has not merely regulated the right to sue but abrogated the patient’s basic common law right to enforce his right of self-determination, in violation of Article 2, Section 31 and Article 18, Section 6 of the Arizona Constitution.” *Id.* at 314 ¶ 32 (quoting *Rubino v. De Fretias*, 638 F.Supp. 182, 185-86 (D. Ariz. 1986)).

In *Rubino*, Judge Earl H. Carroll (1925-2017) of the United States District Court for the District of Arizona acknowledged that “Arizona courts have long recognized that the [Anti-]Abrogation Clause, in conjunction with the constitutional proscription of statutory limitation on the amount to be recovered in a suit for damages, confers a constitutional right to recover damages for injuries as existing under the common law.” *Rubino*, 638 F.Supp. at 185.

And so we return to the present case, where the legislative attempt to impose a clear-and-convincing standard in a medical-negligence case is not any mere regulation of the common-law negligence action, but is a direct attack on the unique Arizona right to recover damages for injuries under the standard of simple negligence, which was how that right existed under pre-statehood common law.

The Arizona Legislature cannot constitutionally abrogate the pre-statehood right to bring a negligence action by eliminating the preponderance-of-evidence standard and substituting a clear-and-convincing-evidence standard.

**3. There are other constitutional issues the Court should consider.**

“When a court defers to legislative judgments about the constitutionality of statutes, it abdicates its most essential constitutional duty.” *State v. Arevalo*, 249 Ariz. 370, 381 ¶ 42 (2020) (Bolick & Pelander, JJ., concurring).

The constitutional arguments presented in the following sections may not have been considered at the trial court or Court of Appeals. But they should have been. “Even when the parties do not fully develop their argument on [an] Arizona constitutional provision where it constitutes a question on which we granted review, we are duty-bound to construe it.”<sup>1</sup>

Whether to consider a constitutional argument that a party failed to raise or fully develop at the trial court is not a jurisdictional matter but is purely a matter of discretion. Amicus submits this Court should allow parties to raise and develop state constitutional arguments to encourage a greater appreciation for and reliance

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<sup>1</sup> *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 306 ¶ 168 (2019) (Bolick, J. concurring) (quoting Ariz. Const. art. 2, § 32 (“The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”) and (citing *State v. Stummer*, 219 Ariz. 137, 140 ¶ 1 (2008) and *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm’n*, 160 Ariz. 350, 356 (1980) (“Because the parties explicitly invoked Arizona’s constitution, we must implement whatever protection it extends.”)).

on our state's unique, fundamental state charter. Otherwise, Arizona constitutional law will remain powerless and stagnant, with key protective provisions of the Arizona Constitution unconstrued, ignored, and unenforced because there are no published opinions that have construed, acknowledged, and enforced them, because no trial court or trial lawyer even thought about them. It is a terrible cycle of disrespect for the Arizona Constitution that this Court and the Arizona Court of Appeals must break.

In any event, is it an accepted principle that appellate courts may decide to consider an amicus curiae's new issue when "the issue is one of constitutional dimension and statewide importance, and 'the public interest is better served by having the issue considered rather than deferred.'" *Legacy Foundation Action Fund v. Citizens Clean Elections Comm'n*, 254 Ariz. 485, 493 ¶ 28 (2023) (quoting *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 482 (1986)). That is the case here.

For instance, in the landmark *Jimenez* opinion, this Court considered the constitutional issues the Arizona Trial Lawyers Association first raised on appeal because the "issues raised by the constitutional argument [were] fundamental, affect[ed] an entire body of legislation, and [were] advanced in other cases but not squarely decided." *Jimenez v. Sears, Roebuck and Co.*, 183 Ariz. 399, 406 n.9 (1995). This Court stated that it "believe[d] that the system is best served by

considering and settling these questions.” *Id.* In the present case as well, the system is best served by considering all relevant state constitutional protections.

Unfortunately, Arizona courts and lawyers often overlook and fail to enforce the Arizona Constitution’s unique but clear protections. Amicus hopes that will not occur in the present case and will stop occurring in others.

**4. Senate Bill 1377 violates the ban against enacting “special laws.”**

“Among other provisions that are unknown to the Federal Constitution, the Arizona Constitution forbids ‘local or special’ laws in 20 different categories.” Clint Bolick, *Vindicating the Arizona Constitution’s Promise of Freedom*, 44 Ariz. St. L. J. 505, 507 (2012).

Here, Senate Bill 1377 violates the Arizona Constitution’s unique, clear ban against “special laws,” which, in relevant part, states that: “No local or special laws shall be enacted in any of the following cases, that is to say: . . . 3. Changing rules of evidence. . . . 5. Regulating the practice of courts of justice. [or] Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises.” Ariz. Const. art. 4, pt. 2, § 19.

Senate Bill 1377 hits the trifecta because: (1) it changes the rules of evidence, (2) regulates the practice of the courts, and (3) grants to corporations, associations, and individuals special or exclusive privileges and immunities that belong to no others.

Special laws favor one person or group over others by “granting them a special or exclusive immunity, privilege, or franchise.” *Arizona Downs v. Ariz. Horsemen’s Found.*, 130 Ariz. 550, 557 (1981); *Gallardo v. State*, 236 Ariz. 84, 88 ¶ 10 (2014). Under the ban against special laws, statutes “are unconstitutional which violate the inhibition against the granting of special privileges or immunities.” *Valley Nat’l Bank v. Glover*, 62 Ariz. 538, 554 (1945). The “fundamental intent of these prohibitions on local or special laws is to prevent the enactment of statutes bestowing special favors on preferred groups or localities.” *City of Tucson v. Woods*, 191 Ariz. 523, 529 (App. 1997).

Our state constitution’s Framers banned special laws because they encourage “selfish and private schemes in the way of securing monopolies and excluding competition in trade” conducted under the “mask” of police-power legislation. *State v. Childs*, 32 Ariz. 222, 233 (1927) (discussed in Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 Ariz. St. L.J. 355, 424 (Summer 2017)).

It does not matter what sort of excuse or basis the Legislature can devise for enacting a prohibited special law. If a statute is a prohibited special law, it is per se unconstitutional. Indeed, a “statute may withstand equal protection review, yet still be found unconstitutional under the special/local law provision.” *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 149 (1990).

**5. Senate Bill 1377 violates the “equal privileges and immunities” clause.**

Further, Senate Bill 1377 violates the constitutional “equal privileges and immunities” clause, which provides that: “No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.” Ariz. Const. art. 2, § 13. That clause requires that “all citizens of our State, regardless of their financial status, must be afforded an equal opportunity to the courts and an equal opportunity to appeal.” *Hampton v. Chatwin*, 109 Ariz. 98, 99 (1973).

The framers of our state constitution sought to go beyond the “mere guarantee of equal protection to each citizen” that the 14th Amendment of the federal constitution provides, and instead “chose to forbid the legislature absolutely from extending and special privileges to any person or group.” Stanley G. Feldman and David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty under the Arizona Constitution*, 20 Ariz. St. L.J. 115, 140 (1988).

Senate Bill 1377 grants privileges and immunities to a special class of citizens and corporations that do not belong equally to all citizens or corporations. It is thus unconstitutional.

**6. Senate Bill 1377’s unintelligibility makes it invalid and unenforceable.**

“When a statute is so incomplete or unintelligible that we cannot divine its

purpose and intent, or how to implement it, it is invalid and unenforceable.” *State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 247 ¶ 34 (2020). “An unintelligible text is inoperative.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 134 (2012). Indeed, the “statutory language must be sufficiently definite so that those who are to execute the law may do so in a rational and reasoned manner.” *Cohen v. State*, 121 Ariz. 6, 9 (1978).

Senate Bill 1377 creates immunity based on a defendant’s “good faith” and “reasonable policies.” As used in Senate Bill 1377, the terms are undefined and unintelligible. No one conscientiously trying to understand and implement the statute would know what “good faith” and “reasonable policies” mean. Senate Bill 1377 is thus invalid and unenforceable under the unintelligibility doctrine.

### **Conclusion**

The Court of Appeals’ anti-abrogation-clause analysis was accurate.

In addition, Senate Bill 1377’s relevant provisions are not enforceable since: (1) they improperly impair vested rights; (2) they violate Ariz. Const. art. 4, pt. 2, § 19’s ban against special laws; (3) they violate Ariz. Const. art. 2, § 13’s “equal privileges and immunities” clause; and (4) they are unintelligible. Amicus thus urges the Court to decline to grant the petition for review.

**DATED** this 5th day of December, 2023.

**AHWATUKEE LEGAL OFFICE, P.C.**

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### **Certificate of Compliance**

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 3,333 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

### **Certificate of Service**

On this date, the above-signing lawyer electronically filed this document with the Clerk of the Arizona Supreme Court and electronically delivered it to:

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