

**IN THE SUPREME COURT  
OF THE STATE OF ARIZONA**

ROBIN ROEBUCK,

Plaintiff/ Appellant/  
Respondent,

v.

MAYO CLINIC, et al,

Defendants/ Appellees/  
Petitioners.

Arizona Supreme Court No.  
CV-23-0262-PR

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

Maricopa County Superior  
Court Case No. CV2021-090429

**SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* HEALTH SYSTEM  
ALLIANCE OF ARIZONA  
FILED WITH THE WRITTEN CONSENT OF ALL PARTIES**

Dated: October 15, 2024

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Amicus Curiae Health System Alliance of Arizona (“HSAA”) submits this Supplemental Amicus Brief in support of Defendant Mayo Clinic to (a) respond to new arguments advanced in Plaintiff’s Supplemental Brief and Response to HSAA’s Petition for Review Amicus Brief and (b) clarify how Plaintiff’s authorities comport with the correct legal framework.

### **IDENTITY AND INTEREST OF AMICUS CURIAE**

HSAA represents the policy interests of large, integrated health systems across Arizona. HSAA’s members represent nearly 80% of hospital-related care in Arizona in more than 40 cities and towns. HSAA employs nearly 80,000 employees, including physicians, nurses, and other providers. HSAA’s members include emergency care, acute care, and specialty medical group facilities; trauma, urgent care, outpatient, and rehabilitation centers; academic medicine, and pharmacies. Through its network, HSAA expands Arizonans’ access to cost-effective, coordinated health care.

HSAA has a vested interest in the constitutionality of A.R.S. § 12-516’s and other statutory qualified immunities for providers during an emergency. During the COVID-19 pandemic, HSAA’s members shouldered enormous burdens to care for the community. In addition to onerous legal

mandates issued by governmental agencies, HSAA's members also faced surges of critically ill patients, longer working hours, supply chain shortages, stress, grief, and workplace burnout. Due to the unprecedented demand on member emergency rooms, providers with other specialties were thrust into critical care units. Out-of-state practitioners were also transferred into Arizona and retirees were called back to assist. Under gubernatorial and Arizona Department of Health ("ADHS") emergency measures, HSAA members were required to regularly transfer patients from urban to rural areas to relieve overwhelmed emergency rooms. HSAA's members relied on protections in the Governor's Executive Orders—later codified by A.R.S. § 12-516—in making rapid, systemic changes to care for patients with the novel COVID-19 virus.

HSAA also has an interest in this case's impact on other qualified immunity statutes if this Court does not correct the court of appeals' erroneous anti-abrogation analysis. If the opinion stands, providers and health care facilities will be hesitant to provide life-saving care in emergency, charity, or educational settings for fear of undue exposure.

This brief is filed with the written consent of all parties and no party

or its counsel authored this brief, in whole or part. ARCAP 16(a), (b)(1)(A).

## ARGUMENT

Plaintiff's response to HSAA's policy arguments supplant his own judgment for that of the Legislature. Indeed, the Legislature properly exercised its police powers when they were at their peak: enacting A.R.S. § 12-516 to address the COVID-19 public health emergency. If Plaintiff's self-interested policy interests are to prevail, it will result in a ripple effect of unintended consequences in Arizona, such as health care providers being held unjustly liable during a time where the standard of care was changing on a weekly, even daily, basis. This is particularly troublesome given there is no constitutional violation requiring a deviation from the Legislature's properly enacted statute.

Arizona's anti-abrogation clause protects rights of action available at statehood. Rights of action protect an individual's ability to recover for an alleged *harm* against a particular type of defendant. Plaintiff cannot, as a matter of law, show that there is any fundamental *right* to bring a *simple* negligence action. This is because simple negligence is a cause of action, not a right of action. And Plaintiff has failed to present any case or other legal

support to demonstrate that at statehood, an individual had a common law right to recover for injuries or death against a health care provider amid a public health emergency. Regardless, Plaintiff still has a right of action to bring a type of negligence action—gross negligence—that addresses the same harms addressed by a simple negligence action.

Lastly, the court of appeals’ decision, if it stands, will impact other qualified immunity statutes protecting the administration of medical care during emergency or public policy-driven situations. Plaintiff fails to demonstrate how these statutes are immune from the court of appeals’ decision, or how this can be reconciled with a medical providers’ legal duty to provide care in a hospital, regardless of the circumstances.

For all these reasons, this Court should reject the new policy arguments raised in Plaintiff’s Supplemental Brief and Response to HSAA’s PR Amicus Brief and vacate the court of appeals’ opinion.

**I. A.R.S. § 12-516 Is Justified by Important Public Policy Interests.**

Plaintiff’s new public policy arguments are unpersuasive.

First, under Plaintiff’s theory and the court of appeals’ opinion, courts should override the policy decisions codified in A.R.S. § 12-516 and allow a

plaintiff to bring simple negligence claims for injuries incurred from medical services provided during a state of emergency and global pandemic. Problematically, this ignores the driving force behind A.R.S. § 12-516's public policy: it is challenging (or even impossible) to justly discern liability on how another physician would act in similar circumstances during the COVID-19 pandemic. This is because the recommended course of treatment for those infected was changing everyday as the science progressed, the government issued new and contrary mandates, and the virus mutated.

For example, 75,000 scientific papers were published on COVID-19 between December 2019 and November 2020 with a third of those being published as preprints (not fully reviewed). *See* William A. Haseltine, *How COVID Changed Science* (Sci. Am., May 25, 2021).<sup>1</sup> While the novelty of the COVID-19 virus positively resulted in global collaboration and daily information sharing, it also sometimes led to retractions of initial conclusions due to concerns of inaccurate data. *See id.*

The daily evolution of the science surrounding the COVID-19

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<sup>1</sup> <https://www.scientificamerican.com/article/how-covid-changed-science>

pandemic also led to ever-changing guidance from the Centers for Disease Control and Prevention (“CDC”) over the course of the pandemic and even today. This is reflected in the CDC’s archives, which currently populates 4,596 search results for “COVID-19.” See CDC Archive, *Search Results for “COVID-19”*.<sup>2</sup> Due to the abundance of outdated information that is no longer recommended for treating physicians to follow, it is unsurprising that many of these “archived” links have been disabled by the CDC. Even as recently as March 2024, the CDC updated protocols for COVID-19 infections related to testing, self-isolating, and masks. See CDC, *Preventing Spread of Respiratory Viruses When You’re Sick* (CDC, Mar. 1, 2024).<sup>3</sup> And this is long after the state of emergency triggering A.R.S. § 12-516 has ended.

Second, any arguments regarding the retroactive application of A.R.S. § 12-516 overlook that the executive orders in place at the time implemented the same measures. The fact that the Legislature ratified the Governor’s emergency order strengthens the policy interests underpinning A.R.S. § 12-

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<sup>2</sup> <https://archive.cdc.gov/#/results?q=COVID-19&start=0&rows=10>

<sup>3</sup> <https://www.cdc.gov/respiratory-viruses/prevention/precautions-when-sick.html>.

516's retroactive application. See HSAA PR Amicus at 5–6.

Amid the state of emergency caused by the global pandemic, A.R.S. § 12-516's qualified immunity was essential to ensure medical professionals, who were risking their lives to treat others, could adapt to the ever-evolving treatment recommendations without fear of being held unjustly liable.

## II. The Anti-Abrogation Clause Only Protects Rights of Action.

As articulated in HSAA's Amicus Brief in support of the Petition for Review (at 10–15), the “anti-abrogation clause only prohibits abrogation of *rights of action* that existed at statehood or that are based in *rights of action* existing at statehood.” *Torres v. JAI Dining Servs. (Phoenix), Inc.*, 256 Ariz. 212, 216 ¶ 13 (2023). Importantly, this Court clarified that “the anti-abrogation clause’s language, [] does not limit itself to protecting specific ‘*causes of action*’ but rather protects ‘*the right of action.*’ Because a right of action is ‘merely the right to pursue a remedy,’ the anti-abrogation clause extends to all injuries remediable at the time of statehood.” *Id.* at 218 ¶ 16 (internal citations omitted) (emphasis added); see, e.g., *id.* at ¶ 17 (noting at statehood a plaintiff had the right of action to allege defamation against a newspaper and strict-products-liability claim for injury caused by a defective product

but *not* for wrongful termination of employment in violation of public policy or negligence against a city for recreational use of land).<sup>4</sup>

Accordingly, because simple negligence is a cause of action, rather than a right of action, A.R.S. § 12-516(A)'s situational and temporary unavailability of that cause of action during a public health emergency is not protected by the anti-abrogation clause. The court of appeals erred by conflating these terms. *Cf. Francisco v. Affiliated Urologists Ltd*, 553 P.3d 867, 876–87 ¶¶ 38–42 (Ariz. 2024) (holding the right of action to negligence was not violated under the anti-abrogation clause when the Legislature permissibly regulated the cause of action for negligence); *see also* HSAA PR Amicus at 11–15.

Plaintiff argues that *Nunez v. Professional Transit Management of Tucson, Inc.*, somehow recognizes a common law right to simple negligence at

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<sup>4</sup> While the court of appeals did not have the benefit of this Court's reasoning in *Torres*, this Court has distinguished between a right of action and a cause of action for over thirty years. *See Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344 (1993) (in a paragraph left unaffected by *Torres*, the *Hazine* Court adopted a reading that "Article 18, § 6 was not enacted to protect particular doctrines, theories or '*causes of action*.' The text of the constitution protects a broader concept—'*the right of action* to recover damages for injuries.'" (emphasis added)).

statehood. 229 Ariz. 117 (2012); see Roebuck Supp. Br. at 10. Not only is *Nunez* a 2012 case and irrelevant to rights existing at statehood, this reading stretches *Nunez* too far. Plaintiff's quoted text, in full context, simply recites the standard of care for medical negligence. *Nunez*, 229 Ariz. at 121 ¶ 19 ("In the medical context, however, the common law imposed upon the surgeon only the duty to act as a reasonable surgeon would under the circumstances. The standard of reasonable care 'may be modified by the surrounding circumstances of the time place and persons.'" (internal citation omitted)).

Plaintiff also argues that the court in *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1 (2003) implicitly recognized a "right to bring a lawsuit sounding in simple negligence." Roebuck Supp. Br. at 9-10. However, Plaintiff quotes the *Dickey* plaintiff's argument, not the Court's conclusion.

Instead, "[w]hen deciding whether a specific right of action is 'based in' a right cognizable at the time of statehood, courts should consider whether a plaintiff alleging the *same harm* could have recovered damages against the *same type of defendant* at statehood." *Torres*, at 218 ¶ 16 (emphasis in original). Thus, to prevail on his anti-abrogation claim, Plaintiff was required to present evidence that at statehood, a patient could have

recovered for any “injury or death” caused by “a health professional or health care institution that acts in good faith . . . while providing health care services in support of this state’s response to the state of emergency” for a public health pandemic. *See* A.R.S. § 12-516(A).

*Dickey* reinforces the above framework. In *Dickey*, a statute prohibited the plaintiff from bringing simple negligence against a city, requiring gross negligence be proven instead. *Dickey*, 205 Ariz. at 3 ¶ 8. The Court held that the statute was constitutional because plaintiff failed to establish that a right of action for simple negligence against a specific type of defendant, a city engaged in a government function, existed at common law. *Id.* at 4 ¶ 9, 5 ¶ 18.

Like *Dickey*, Plaintiff here has failed to establish – through case citation or otherwise – that a right of action for simple negligence existed at statehood in any kind of good Samaritan situation, much less for actions against defendants providing medical services in response to a state of emergency caused by a global pandemic.

Rather, case law suggests that at statehood, Arizona’s founders understood and valued the utility of adjusted legal standards to promote the

greater good. Indeed, during times of emergency, such as the Spanish influenza epidemic in 1919, the Legislature's police powers (and statutorily delegated powers of conduct to local health boards) are broad. *See Globe Sch. Dist. No. 1 of Globe v. Bd. of Health of City of Globe*, 20 Ariz. 208, 219 (1919) ("Especially in the presence of a great calamity and in times of great public danger, courts will go to the greatest extent, and give the widest discretion, in reviewing regulations adopted by boards of health" and enable the State "to prohibit all things hurtful to the comfort and welfare of society.").

*Globe*, decided shortly after the Constitution's enactment, confirms that a pandemic response requires flexible and results-oriented delegations of power "during the existence of said disease in epidemic form in said community." *Id.* at 221. Here, A.R.S. § 12-516 accomplishes the same thing, except rather than the Spanish influenza, the State exercised its police powers and passed A.R.S. § 12-516 to protect against COVID-19.

In sum, because the court of appeals and Plaintiff fail to point to any case law at statehood that supports there was a right of action for the same harms against the *same type of defendants* contemplated under this statute, his anti-abrogation clause argument must fail.

### III. A.R.S. § 12-516 Does Not Abrogate Plaintiff's Right of Action.

Even if Plaintiff had made the threshold showing that the right of action allegedly impacted by A.R.S. § 12-516 is protected by the anti-abrogation clause, he did not show that his right to recover this type of harm has somehow been abrogated. Plaintiff's Supplemental Brief and expanded discussion of authorities does nothing to change that.

Namely, A.R.S. § 12-516 does not abrogate Plaintiff's right of action because gross negligence is still available to him and is a reasonable alternative to simple negligence (especially under the circumstances of a global health emergency). *See* HSAA PR Amicus at 13–14 (explaining that elimination of a higher or lower standard of care but making the other available is a reasonable alternative); Mayo Clinic Supp. Br. at 1–7 (same).

Plaintiff argues that *Hazine* and *Duncan v. Scottsdale Medical Imaging, Ltd.*, 205 Ariz. 306 (2003) demonstrate that gross negligence is not a reasonable alternative to simple negligence. Roebuck Supp. Br. at 13–14.

But *Hazine* only concluded that “a right to sue in negligence or express warranty is not a reasonable alternative to a products liability action.” 176 Ariz. at 343. *Hazine* says nothing about whether gross negligence is a

reasonable alternative to simple negligence. And, the portions of *Hazine* that were not disapproved by the Court in *Torres* only reinforce that the anti-abrogation clause protects rights of action, not causes of action. *Id.* at 344.

In *Duncan*, the Court held the Medical Malpractice Act violated the anti-abrogation clause because it abolished battery actions against a health care provider and found negligence was not a reasonable alternative. 205 Ariz. at 314 ¶ 33. The Court explained that “a regulation that limits the theories of liability under which a plaintiff may sue is nonetheless an abrogation when the ‘alternative’ theory of recovery protects different interests.” *Id.* at ¶ 31. In other words, alternative theories of recovery can be a “reasonable alternative” when those theories protect the same interests.

Unlike products liability or battery, gross negligence is designed to protect the same interests as simple negligence: circumstances upon which a person owes another person a standard of care and that duty is breached. *See generally* Mayo Clinic Supp. Br. at 1-7. The only difference is that society has determined that certain circumstances require a “higher degree” of culpability, Roebuck Resp. to HSAA PR Amicus at 7 (citation omitted), such as responding to a public emergency.

Contrary to Plaintiff's suggestion, this additional element of proof does not "'dramatically transform[] the nature of' the right of action for ordinary negligence that existed in 1915, so that medical malpractice 'as known at common law would no longer exist.'" Roebuck Supp. Br. at 18 (quoting *Duncan*, 205 Ariz. at 314 ¶ 33). If Plaintiff is somehow correct, then *any* difference in an element of proof would create a new right of action, and claims and rights of action would carry the same meaning. This reading is not supported by the framers' inclusion of both "right of action" and "cause of action" in the Constitution. *See* Ariz. Const. art. XVIII, § 6, art. XIV, § 8.<sup>5</sup>

Finally, Plaintiff relies on *Lindsay v. Cave Creek Outfitters*, 207 Ariz. 487 (App. 2003) to argue that a plaintiff can only elect to waive its right to ordinary negligence in lieu of gross negligence. Roebuck Supp. Br. at 14–15. However, the court of appeals' reasoning in *Lindsay* is affected by the same interpretive error as its reasoning in *Roebuck v. Mayo Clinic*, 256 Ariz. 161

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<sup>5</sup> When interpreting the Constitution "a matter not covered is to be treated as not covered" to ensure an "absent provision cannot be supplied by the courts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93–94 (2012). Therefore, this Court should not read "cause of action" into the anti-abrogation clause when the framers knew how to, *see* Ariz. Const. art. XIV, § 8, but chose not to in Ariz. Const. art. XVIII, § 6.

(App. 2023). Outside of direct quotes to the anti-abrogation clause’s plain language, *Lindsay* exclusively, and erroneously, uses or relies on “cause of action” for its analysis. See *Lindsay*, 207 Ariz. at 493–94 ¶¶ 21–24. *Lindsay* should be clarified to ensure consistency with *Torres* (and the Constitution). See *Torres*, 256 Ariz. at 216 ¶ 13, 218 ¶ 16; see also Ariz. Const. art. XVIII, § 6.

But even if the Court disagrees, *Lindsay* still cuts against the court of appeals’ rationale. In *Lindsay*, the court of appeals determined that a statute was constitutional when it limited *causes of action* for ordinary negligence for injured equine riders who signed a waiver expressing as such, reasoning it did not eliminate simple negligence for all other equine riders. *Lindsay*, 207 Ariz. at 493–94 ¶ 24. Here, simple negligence is not being abrogated in its entirety, merely excluded in specific circumstances, just like *Lindsay*. Even then, gross negligence is still available, which is the same right of action as simple negligence. Unfortunately, *Lindsay* does not contemplate this distinction due to its interchangeable use of claims and rights of action.<sup>6</sup>

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<sup>6</sup> Plaintiff points to *Cronin v. Sheldon*, 195 Ariz. 531 (1999) to support his legal standard for analyzing the anti-abrogation clause. But *Cronin* is another example of a court using rights and claims of action interchangeably. See generally *id.* Importantly, *Cronin* is also an example of the Court finding no

For all these reasons, and those stated in HSAA’s PR Amicus Brief, the court of appeals’ *Roebuck* opinion is incorrect, and this Court should clarify that A.R.S. § 12-516 does not violate the anti-abrogation clause.<sup>7</sup>

**IV. Invalidating A.R.S. § 12-516 May Invalidate Other Qualified Immunity Statutes.**

The court of appeals’ ruling puts other qualified immunity statutes that mandate a gross negligence standard in potential jeopardy. *See* A.R.S. § 12-571(A) (nonprofit clinics); § 12-572(A) (emergency room and disasters); § 12-573(A) (emergency delivery of baby); § 12-564 (students); § 32-1471 (limited immunity to health care providers who gratuitously provide emergency care at the scene of an emergency); §§ 9-500.02, 36-420(C), and 32-1472 (providing qualified immunity for providers in additional emergency settings); *see also*

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anti-abrogation clause violation because there was no common law right of action at statehood.

<sup>7</sup> If A.R.S. § 12-516 had placed some burden on Plaintiff’s constitutional right of action, the unique circumstances of the global pandemic would have justified that burden. Indeed, even where fundamental rights are involved, public health emergency measures are upheld so long as they have some “real or substantial relation” to the public health crisis and are not “beyond all question, a plain, palpable invasion of [constitutional] rights.” *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). That low standard is met here. *See* HSAA PR Amicus at 15-17.

HSAA PR Amicus at 7-10.

In response to this concern, Plaintiff argues that “[n]one of these statutes deal with the treatment of a specific disease like COVID-19, or with the nature of medical care associated with the treatment of COVID-19, or with the connectedness between COVID-19 and other pre-existing medical conditions, as was the case with Plaintiff Robin Roebuck.” Roebuck Resp. to Amicus HSAA at 3. Plaintiff is correct, which is precisely why the anti-abrogation clause is not offended. Namely, A.R.S. § 12-516 is not abrogating any common law right of action to simple negligence, but rather temporarily eliminating simple negligence for *specific defendants* performing medical treatment in furtherance of the State’s response to COVID-19.

Nevertheless, while this distinction is imperative to analyzing A.R.S. § 12-516’s constitutionality under the anti-abrogation clause, it does not save related qualified immunity statutes from being held unconstitutional in *Roebuck’s* wake. If the court of appeals’ erroneous opinion stands, the mere elimination of simple negligence in favor of gross negligence in any statute could be in jeopardy under *Roebuck’s* faulty analysis. Reason being, *Roebuck* determined gross negligence is not a reasonable alternative to simple

negligence when preserving the right of action to negligence under the anti-abrogation clause, regardless of the specific harm and specific defendant the statute addresses. *See Roebuck*, 256 Ariz. at 168 ¶ 24.

If the anti-abrogation clause required the courts to look to the different causes of action, this would hold more muster. But *Torres* and the plain language of the Constitution reflect that it is the right of action that matters exclusively. *See Torres*, 256 Ariz. at 261 ¶ 13, 218 ¶ 16; *see also* Ariz. Const. art. XVIII, § 6. Yet, as it stands *Roebuck* threatens well established statutes that promote Arizona's public health and is tension with other governmental mandates which give providers no choice but to provide care.

Specifically, holding qualified immunity statutes unconstitutional, including A.R.S. § 12-516, will likely create a plethora of unintended consequences in Arizona. This largely includes subjecting health care providers who have a duty to respond and treat patients in emergency situations to undue liability. For example, many providers subject to these statutes are also subject to the Emergency Medical Treatment and Active Labor Act ("EMTALA"). EMTALA "is a federal law that *requires hospitals that accept Medicare payments to provide emergency healthcare to anybody*

regardless of citizenship or immigration status or their ability to pay.” Will Humble, *EMTALA & Ebola* (Ariz. Dep’t of Health Servs., Feb. 24, 2015) (emphasis added).<sup>8</sup> Despite Plaintiff’s objections to using a “broad brush of qualified immunity to any COVID-19 related medical care,” Roebuck Resp. HSAA at 4, it is the Legislature’s role, not Plaintiff’s alone, to make this public policy decision. *See Torres*, 256 Ariz. at 221–22 ¶¶ 34–35 (Bolick, J., concurring).

Indeed, statutes like A.R.S. § 12-516 and the similarly identified qualified immunity statutes exist for valuable policy reasons. In Arizona and federally, laws require medical providers to provide medical services in states of emergencies. But medicine is a practice, not an exact science. This is particularly true in the context of the novel COVID-19 virus which impacted community interaction, access to medical care, and necessitated a flexible government emergency response. Because there is no ability for a medical provider to guarantee every patient will receive a successful outcome despite their best efforts, statutes that limit simple negligence in states of

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<sup>8</sup> <https://directorsblog.health.azdhs.gov/emtala-ebola/>

emergency are an essential element to a functioning society. The Court should not interfere with these interests endorsed by the Legislature and Governor, especially when the Constitution and applicable authority support upholding these statutes.

### CONCLUSION

In sum, if the court of appeals' erroneous ruling stands, Arizona is poised to face unintended policy repercussions related to protecting providers under A.R.S. § 12-516 and similar statutes. As *Torres* and the anti-abrogation clause instruct, when determining whether the Constitution was violated, courts must look to rights of action, not causes of action, existing in common law at the time of statehood. *See Torres*, 536 P.3d 794 ¶ 13, 796 ¶ 16; *see also* Ariz. Const. art. XVIII, § 6. Without having the benefit of *Torres* as guidance, the court of appeals incorrectly conflated these two terms and erroneously concluded that A.R.S. § 12-516 violated the anti-abrogation clause. This Court should overturn the court of appeals' decision and hold that A.R.S. § 12-516 does not violate the anti-abrogation clause.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of October, 2024.

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