SUPREME COURT 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 No. CV2021-090429

AMICUS CURIAE BRIEF OF THE STATE OF ARIZONA IN SUPPORT OF THE PETITION FOR REVIEW

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INTRODUCTION

With little briefing, no argument, and no opportunity for input from the Attorney General, the Court of Appeals held unconstitutional A.R.S. § 12-516, a statute that temporarily modified the duty owed by health care providers during an unprecedented statewide health emergency. The Court should grant the Petition for Review and reverse because the Opinion incorrectly determined that the statute violated the anti-abrogation clause, without considering other competing constitutional considerations.

In the alternative, the Court should grant the Petition and summarily vacate and remand the Opinion for failure to comply with A.R.S. § 12-1841. Arizona law gives the Attorney General an express right to defend State statutes against constitutional challenges. But the proceedings below extinguished that right; the Attorney General received no notice before the Court of Appeals held the statute unconstitutional. At a minimum, the Court should grant the Petition and vacate and remand to preserve the Attorney General's ability to be heard.

INTEREST OF AMICUS CURIAE.

The Attorney General submits this brief pursuant to ARCAP 16(b)(1)(B) to request that the Court observe the State's right to be heard

when a statute faces a constitutional challenge. The Attorney General has an interest in ensuring that the Court consider novel and statewide issues pertaining to the scope of the anti-abrogation clause, the legislature's exercise of emergency police powers, and the development of tort law.

REASONS TO GRANT REVIEW

I. The Opinion decides issues of statewide importance.

The Court should grant the Petition because this case implicates important constitutional interests that impact all Arizonans. The statute at issue, § 12-516, reflects the legislature's exercise of its police powers during a public health emergency. By concluding that the statute violates the anti-abrogation clause, the Opinion seriously undermines the government's police powers and ability to respond to emergency situations, without offering any insight into how to balance these competing constitutional considerations.

Moreover, as Petitioners point out, § 12-516's regulation of the duty of care owed by healthcare providers mirrors a number of other Arizona statutes that permit liability for gross negligence but not simple negligence. Thus, the Opinion has repercussions for numerous state laws and not just A.R.S. § 12-516. Pet. 13–14 & n.2.

II. The Opinion reaches the incorrect result.

A. The anti-abrogation clause prevents elimination of a right to recover damages but not regulation of tort liability.

The anti-abrogation clause provides that "[t]he right of action to recover damages for injuries shall never be abrogated." Ariz. Const. art. XVIII, § 6. The plain meaning of "abrogate" is "to abolish by authoritative action: annul." *Abrogate*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/abrogate (last visited Nov. 22, 2023); *see also State Farm Ins. Cos. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 228 ¶ 32 (2007) ("A statute that completely abolishes a right of action is by definition an unconstitutional abrogation."). Thus, the anti-abrogation clause prevents the government from eliminating "the ability to invoke judicial remedies for those wrongs traditionally recognized at common law." *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 17 (1986), *disapproved of on other grounds by Torres v. JAI Dining Servs. (Phoenix), Inc.*, 536 P.3d 790 (Ariz. 2023). For example, the legislature cannot adopt a statute eliminating strict products liability because "[t]he right to recover for injuries caused by products was, of course, recognized at common law; therefore, the development of strict liability causes of action to vindicate that right is . . . covered by art. 18, § 6." *Hazine*

v. Montgomery Elevator Co., 176 Ariz. 340, 344 (1993), *disapproved of on other grounds by Torres v. JAI Dining Servs. (Phoenix), Inc.*, 536 P.3d 790 (Ariz. 2023).

At the same time, "[t]he legislative authority of the state" remains "vested in the legislature." Ariz. Const. art. IV, pt. 1, § 1(1). Accordingly, the anti-abrogation clause does not prevent the legislature from "'regulat[ing] common law tort actions,' as long as a claimant is left 'a reasonable possibility of obtaining legal redress.'" *Nunez v. Pro. Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 122–23 ¶ 25 (2012) (citations omitted).

B. A.R.S. § 12-516 does not violate the anti-abrogation clause.

On its face, A.R.S. § 12-516 does not abrogate any right to recovery.

First, A.R.S. § 12-516 does not abolish anything. Rather, the statute provides a limited form of immunity to healthcare providers assisting in the state's response to an unprecedented public health emergency, by temporarily modifying the duty owed in the course of providing emergency care. The statute provides that if the governor declares a public health pandemic emergency,

> a health professional or health care institution that acts in good faith is not liable for damages in any civil action for an injury or death that is alleged to be caused by the health professional's or health care institution's action or omission *while providing health care services in support of this state's response to the state of emergency*

> *declared by the governor* unless it is proven by clear and convincing evidence that the health professional or health care institution failed to act or acted and the failure to act or action was due to that health professional's or health care institution's wilful misconduct or gross negligence.

A.R.S. § 12-516(A) (emphasis added).

The limited and temporary nature of this duty adjustment, which corresponds only to the period of a declared emergency and to services provided "in support of this state's response to the state of emergency," undercuts any claim that the statute has "abolished" any right to recover damages. Abrogation contemplates abolition—that is, a total elimination. *Abrogate*, *Black's Law Dictionary* (11th ed. 2019) ("Abrogate" means "[t]o abolish," "annul or repeal").

Indeed, in each of the cases this Court has held a statute unconstitutional under the anti-abrogation clause, the statute has permanently eliminated a right to recovery that previously existed. *See, e.g.*, *Hazine*, 176 Ariz. at 342 (statute eliminating any right of recovery for defective products after twelve years violated anti-abrogation clause); *Boswell*, 152 Ariz. at 18 (statute eliminating right to recover emotional distress damages for defamation violated anti-abrogation clause).

But § 12-516's adjustment to the duty of care applies during a narrow, carefully defined period only—during the course of a declared public health emergency. It thus differs fundamentally from statutes that purport to permanently eliminate a right to recover common law damages. In short, the narrowly tailored and time-limited modification in A.R.S. § 12-516 does not meet the plain definition of "abrogate."

Second, even setting aside the temporal limitations to § 12-516, modifying the duty of care owed by healthcare providers does not abolish the right to recover damages for injuries caused by negligent care.

Under § 12-516, a health professional or health care institution is liable for an "action or omission while providing health care services in support of this state's response to [a] state of emergency" if an injured party proves "wilful misconduct or gross negligence" by "clear and convincing evidence." A.R.S. § 12-516(A). In other words, the statute adjusts the duty owed and the evidence needed to prove a violation of that duty. By doing so, the legislature did not "prevent the possibility of redress for injuries; the claimant remains entirely free to bring his claim against all responsible parties." *Nunez*, 229 Ariz. at 123 ¶ 25 (citation omitted).

Providing for liability in instances of "gross negligence" "does not deprive an injured claimant of the right to bring the action." *State Farm*, 217 Ariz. at 229 ¶ 34. The question is whether the legislature exceeded its authority to regulate a plaintiff's right to bring an action for "the *same harm*" against "the *same type of defendant*" as was possible at statehood. *JAI*, 536 P.3d at 796 ¶ 16; *see also Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 106 (1984) ("The legislature may regulate the cause of action for negligence so long as it leaves a claimant reasonable alternatives or choices which will enable him or her to bring the action."). The "right of action hinges on the nature of the injury and the defendant," *JAI*, 536 P.3d at 797 ¶ 25, not, as the Court of Appeals held, whether the legislature "extinguish[ed] a particular type of claim available at common law," Op. at 9 ¶ 25.

Section 12-516 does not prevent an injured party from suing a defendant for a type of injury that would have been available in "common law actions for negligence." *Cronin v. Sheldon*, 195 Ariz. 531, 538 ¶ 35 (1999). It simply defines when a defendant "departs from its duty." *Nunez*, 229 Ariz. at 123 ¶ 25. Gross negligence involves "an unreasonable risk" of harm and "a high degree of probability" that substantial harm will result. *Scott v. Scott*,

75 Ariz. 116, 122 (1953). It deviates from ordinary negligence in the sense that "negligence suggests a failure to measure up to the conduct of a reasonable person[,] [a]nd, gross negligence generally signifies more than ordinary inadvertence or inattention, but less perhaps than conscious indifference." *Noriega v. Town of Miami*, 243 Ariz. 320, 328 ¶ 36 (App. 2017) (cleaned up).

The difference between ordinary and gross negligence is a question of the "particular standard of conduct" required. *Gipson v. Kasey*, 214 Ariz. 141, 143 ¶ 10 (2007) (citation omitted). The distinction has nothing to do with eliminating a "theory of recovery [that] protects different interests." *See Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 313 ¶ 31 (2003). Instead, requiring that health care providers avoid unreasonable risks calibrates the duty owed while still "recogniz[ing] a physician's obligation" to her patients. *Id.* at 314 ¶ 32 (citation omitted). Changing the contours of duty immunizes neither a "harm" nor a "type of defendant." *See JAI*, 536 P.3d at 796 ¶ 16 (emphasis removed).

Because alterations to the standard of care merely regulate a right of action, this Court held that abandoning the "highest degree of care" for common carriers in favor of a "reasonable care" standard did not violate the anti-abrogation clause because encumbering carriers with a lightened duty

of care did not "prevent a passenger from seeking damages caused by the negligence of a common carrier." *Nunez*, 229 Ariz. at 122–23 ¶ 25. In doing so, it recognized that "the existence of a duty of care is a distinct issue from whether the standard of care has been met in a particular case." *Id.* at 121–22 ¶¶ 18, 24 (cleaned up). By requiring that putative defendants avoid conduct carrying "an unreasonable risk" and a "high degree of probability" of substantial harm, A.R.S. § 12-516 likewise eliminated no duty; it just changed when that duty is breached. *See Scott*, 75 Ariz. at 122.

The Court of Appeals' reliance on recently overruled cases focusing on "an absolute bar to recovery of damages by a particular category of persons" is misplaced because A.R.S. § 12-516 extinguishes no duty. Op. at 9–10 ¶ 28. Unlike the statutes in those cases, A.R.S. § 12-516 does not "prevent a plaintiff from asserting an action . . . in appropriate circumstances" because it changed only what the duty entails. *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 27 ¶ 27 (2016).

It is often a legislative function to define the contours of a duty because duty can be "premised" on a public policy enunciated in statute. *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 567 ¶ 20 (2018). The legislature adjusts duty "based on concerns that potential liability would chill socially desirable

conduct." *Gipson*, 214 Ariz. at 146 ¶ 29. By striking down a limited shield for health care providers responding to an emergency, the Court of Appeals cast the contours of a duty "in constitutional concrete" even though it is often the legislature's role to fine-tune the standard of care. *JAI*, 536 P.3d at 795 ¶ 15; *see also* Pet. 13–14 & n.2.

C. The Court of Appeals did not consider the government's police powers during an emergency.

The Opinion also fails entirely to consider important competing constitutional considerations—namely, the government's police powers. *See, e.g.*, Ariz. Const. art. IV, pt. 1, § 1(1); Ariz. Const. art. V, § 4; A.R.S. § 26-303. The Court of Appeals invalidated A.R.S. § 12-516 without considering that it is "a *temporary* restraint" on the ability to bring a simple negligence action and that it is "within the range of the reserved power of the state to protect the vital interests of the community" during an emergency. *Pouquette v. O'Brien*, 55 Ariz. 248, 255 (1940) (citation omitted).

The legislature acts "within the police powers of the state" when it "enacts laws reasonably necessary for the preservation of the public health, safety, morals or general welfare." *State v. Harold*, 74 Ariz. 210, 216 (1952). Thus, the "legislature has plenary power to deal with any topic unless

otherwise restrained by the Constitution." *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶ 26 (2009).

Section 12-516 is such an emergency law; it applies only to the provision of "health care services in support of this state's response to the state of emergency declared by the governor." Health care services are a critical aspect of the functions necessary to respond to a public health crisis. *See, e.g.*, A.R.S. § 26-303(E)(1) (providing the governor with "complete authority over all agencies of the state government" and "all police power vested in this state"); *id.* § 36-787(A)(7) (permitting "temporary waivers of health care institution licensure requirements"); *id.* § 36-787(C)(1) (permitting mandatory "treatment or vaccination"); *id.* § 36-788(A) (providing for "isolation and quarantine").

Of course, the Constitution guarantees certain fundamental rights, including the "right to bring and pursue" a negligence action. *Kenyon v. Hammer*, 142 Ariz. 69, 83 (1984). But in some instances, a compelling government interest can justify certain limited burdens on fundamental rights. *See, e.g.*, *Governale v. Lieberman*, 226 Ariz. 443, 448 (App. 2011) (if a statute "limits a fundamental right," courts "apply strict scrutiny by which the statute must serve a compelling state interest and be necessary to achieve

that objective" (cleaned up)). As the United States Supreme Court has explained, there is an implied "reservation of the police power to the states, which is superior to all specific provisions of [the Federal] constitution and which may be called into play in periods of great public emergency, and when so called these police powers may *temporarily only* suspend the exercise of the specific powers or prohibitions of the constitution." *Pouquette*, 55 Ariz. at 254–55 (citation omitted). Because of the reserved state police power, the Supreme Court upheld a state law against a constitutional challenge because it was "appropriate" to the emergency with "reasonable conditions." *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934).

The reservation of the police power to the legislature extends to tort law because the "constitution gives the legislature plenary authority to develop the laws of the state." *JAI*, 536 P.3d at 795 ¶ 15. Although the anti-abrogation clause provides in absolute terms that the "right of action to recover damages for injuries shall never be abrogated," the ability to recover

in tort "presupposes the maintenance of a government," *Blaisdell*, 290 U.S. at 435, and thus must account for the police power.[1]

But the Court of Appeals never addressed the legislature's sovereign authority to regulate tort for the general welfare during emergencies. If it had, it may well have determined that § 12-516 satisfies strict scrutiny. First, an unprecedented public health emergency presents a compelling government interest. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (elected officials must "guard and protect" the "safety and the health of the people"). Second, § 12-516 is narrowly tailored to the compelling state interest, because it insulates only healthcare providers and institutions providing services in furtherance of the state's response to the health emergency, and the limited immunity is temporally limited to the declared state of emergency. *Desrosiers v. Governor*, 158 N.E.3d 827, 846 (Mass. 2020) (emergency orders limiting assembly were narrowly tailored to achieve government interest in reducing transmission of COVID-19).

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[1] Similarly, the First Amendment speaks in absolute terms, but infringements are reviewed for compelling state interests and least restrictive means. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); U.S. Const. amend. I ("Congress shall make no law . . . .").

For all of these reasons, the Court should grant the Petition and reverse the erroneous anti-abrogation decision by the Court of Appeals.

III. The proceedings below deprived the Attorney General of the opportunity to be heard.

As an alternative to granting the Petition for a merits determination, the Court should grant the Petition, vacate the Court of Appeals' holding that A.R.S. § 12-516 violates the anti-abrogation clause and remand for briefing and argument on that issue.

A. A.R.S. § 12-1841 requires notice to the Attorney General.

Arizona law recognizes that the Attorney General is "a key player in litigation concerning a statute's constitutionality." *State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997). Under A.R.S. § 12-1841(A), "the attorney general . . . *shall* be served with a copy of the pleading, motion or document" alleging that a state statute is unconstitutional and "*shall* be entitled to be heard." (Emphases added). And, if the Attorney General is "not served in a timely manner," on her motion, "the court *shall* vacate any finding of unconstitutionality and *shall* give the attorney general . . . a reasonable opportunity to prepare and be heard." A.R.S. § 12-1841(C) (emphases added).

The rule applies to "any proceeding," so "a party raising a constitutional challenge in an appeal must comply with the requirements of A.R.S. § 12-1841 if it has not previously done so." *DeVries v. State*, 219 Ariz. 314, 320 ¶ 14 (App. 2008). At least one court has implied that a failure to provide notice is evidence it "lacks jurisdiction" over a claim. *City of Scottsdale v. Stuart*, No. 1 CA-CV 20-0693, 2021 WL 4958841, at * 2 ¶ 8 (Ariz. Ct. App. Oct. 26, 2021) (mem. disposition).

Other courts have observed the importance of the rule by ordering the parties to provide notice. *See Seisinger v. Siebel*, 219 Ariz. 163, 165 ¶ 5 n.1 (App. 2008), *vacated on other grounds*, 220 Ariz. 85 (2009). Or courts have themselves provided notice to the Attorney General. *See Naslund v. Indus. Comm'n*, 210 Ariz. 262, 267 ¶ 21 n.4 (App. 2005). But without any of these ameliorative steps, it is impossible to conclude that "no harm resulted from the lack of notice" because the Court of Appeals found the statute unconstitutional. *See In re Pinal Cnty. Mental Health No. MH-201000076*, 226 Ariz. 131, 132 ¶ 6 n.1 (App. 2010). The failure to provide notice to the Attorney General that a statute faced the risk of being held unconstitutional is a sufficient reason to grant the Petition.

B. Plaintiff's noncompliance means statewide interests were not represented during the proceedings.

The Attorney General's involvement in constitutional challenges is not a procedural formality. This case is a prime example of when the courts can benefit from the Attorney General's intervention. For example, the parties' briefing on the constitutionality of A.R.S. § 12-516 did not address the legislature's emergency police powers at all. *See* Answering Br. at 26–28, *Roebuck v. Mayo Clinic*, 536 P.3d 289 (Ariz. Ct. App. 2023) (No. 1 CA-CV 22-0508), 2023 WL 2348398. The Attorney General is the party best positioned to present those arguments to the Court.

Furthermore, the Court of Appeals reached beyond the narrow question presented. Roebuck's briefing raised a facial challenge only to "the burden of proof in A.R.S. § 12-516." Opening Br. at 17, *Roebuck*, 536 P.3d 289 (No. 1 CA-CV 22-0508), 2023 WL 1815744. The Court of Appeals acknowledged that the legislature can "set burdens of proof" without running afoul of the anti-abrogation clause, but it went beyond Roebuck's stated claim to hold that "the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence." Op. at 8 ¶ 24. But because the Court expanded the issues of its own accord and declined to

hold oral argument, the parties did not have the opportunity to address the Court's concerns. *See* Order, *Roebuck*, 536 P.3d 289 (No. 1 CA-CV 22-0508), Dkt. 31.

In short, the failure to notify the Attorney General deprived her of the chance to "protect the state and its citizens." *Ethington v. Wright*, 66 Ariz. 382, 388 (1948). Thus, at a minimum, this Court should grant the Petition and vacate and remand for further proceedings so that the Attorney General may be heard on this important constitutional issue.

CONCLUSION

The Court should grant the Petition and review the opinion on the merits because it decides—incorrectly—critical constitutional law questions of statewide importance. In the alternative, the Court should grant the Petition and summarily vacate and remand the Opinion for further proceedings in light of the plaintiff's failure to comply with A.R.S. § 12-1841(A).

RESPECTFULLY SUBMITTED this 15th day of December, 2023.

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