ARIZONA SUPREME COURT

ROBIN ROEBUCK, Plaintiff/Appellant/ Respondent, v. MAYO CLINIC, et al., Defendants/Appellees/ Petitioners.	)	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 ARIZONA HOSPITAL AND HEALTHCARE ASSOCIATION IN SUPPORT OF PETITIONERS

FILED WITH WRITTEN CONSENT OF THE PARTIES

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Introduction

"As all are painfully aware," Arizona—like the rest of the country and the world—"was gripped with an unprecedented public health emergency caused by COVID-19." *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 460 (5th Cir. 2021). Despite an evolving medical landscape and shifting guidance on how to properly treat and prevent COVID-19's spread, Arizonans needed their dedicated healthcare providers to provide critical healthcare services throughout the pandemic to treat what was by definition a novel disease with no known treatment.

To that end, in April 2020, Governor Ducey issued Executive Order 2020-27 ("Good Samaritan Order"). The Good Samaritan Order recognized the risks and uncertainties with providing healthcare services during a public health crisis. It acknowledged that health professionals were "concerned" that they were potentially "subjecting themselves to liability" by providing healthcare services to patients with COVID-19 when there were "no defined treatments" for it, and there was a global "shortage of hospital beds and equipment for treating such patients."

Governor Ducey protected Arizona's healthcare providers. The Good Samaritan Order provided (¶¶ 1-5) health professionals and

healthcare institutions limited immunity from civil liability for acts that they performed in good faith to support Arizona's response to the pandemic unless they acted with gross negligence or willful misconduct. As Governor Ducey found, these protections served "the public interest" and "ensure[d] that Arizonans ha[d] access to treatment when needed."

The Arizona Legislature agreed that this limited immunity served the public interest. The Legislature enacted A.R.S. § 12-516 to encourage Arizona's healthcare providers to provide necessary healthcare services during public health emergencies. Section 12-516—like the Good Samaritan Order—provides health professionals and healthcare institutions limited immunity from civil liability for acts that they perform in good faith to support Arizona's response to "public health pandemic[s]," including the COVID-19 pandemic. A.R.S. § 12-516(A). A plaintiff can overcome this limited immunity by proving by clear and convincing evidence that a health professional or healthcare institution acted with gross negligence or willful misconduct. *See id.*

The court of appeals held (¶¶ 17-29) that A.R.S. § 12-516 violates the Arizona Constitution's anti-abrogation clause. *See* Ariz. Const. art. XVIII, § 6. The court rightly noted that the Legislature "may regulate the

cause of action for negligence so long as it leaves claimants reasonable alternatives or choices for bringing their claims." (Citation omitted). But the court concluded that A.R.S. § 12-516 does not meet that standard. According to the court, "the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence."

The Arizona Hospital and Healthcare Association ("AzHHA") urges this Court to grant Mayo Clinic's petition for review. This case presents an important and purely legal question of first impression: Can the Legislature—consistent with the anti-abrogation clause—encourage health professionals and healthcare institutions to provide crucial healthcare services during public health emergencies by providing them limited immunity from civil liability? The answer has broad implications. By casting A.R.S. § 12-516 to the waste bin based on a distinction between ordinary negligence and gross negligence, the court of appeals' decision undermines a host of materially indistinguishable immunity statutes that encourage Arizonans to step in and act when doing so serves the public interest. The decision below is wrong on the merits, but in any event, this is a statewide issue meriting this Court's attention.

This Court should also grant review because the court of appeals' decision betrays healthcare providers' reliance interests. When the pandemic started, health professionals rang the alarm bells. They expressed "concern[]" that they were potentially "subjecting themselves to liability" by providing necessary healthcare services to patients with COVID-19. Arizona's executive and legislative branches responded to those concerns—and encouraged providers to continue providing healthcare services to all Arizonans—by granting providers limited immunity from civil liability. The decision below pulls the rug out from under these providers long after they provided the services that Arizonans desperately needed. That is unjust. At a minimum, this Court should hold that any new legal principle established by the decision below applies prospectively only. Fairness to those who sacrificed so much to protect us all during a public health emergency demands no less. These healthcare heroes deserve our thanks, not the back of the hand.

Interests of Amicus Curiae

AzHHA is Arizona's largest and most influential statewide trade association for hospitals, health systems, and affiliated healthcare organizations. AzHHA's 73 hospital members and 13 healthcare

members unite 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 in Arizona.

AzHHA submits this brief in furtherance of its goals and because it's uniquely situated to provide this Court a practical perspective on:

- The circumstances that led Governor Ducey and the Arizona Legislature to protect healthcare providers by providing them limited immunity from civil liability during the pandemic; and
- Healthcare providers' reliance on that limited immunity when they provided necessary healthcare services to all Arizonans.

As we explain below, AzHHA urges this Court to grant Mayo Clinic's petition for review because this case has statewide importance for Arizona's health professionals, healthcare institutions, and patients.

Argument

I. This case presents a significant and purely legal question of first impression that is likely to recur.

The key question here is whether A.R.S. § 12-516 violates the Arizona Constitution's anti-abrogation clause. *See* Ariz. Const. art. XVIII, § 6. The superior court held that it does not. [Minute Entry (Apr. 27, 2022) at 3-5] The court of appeals reversed (¶¶ 17-29). No matter

whether the superior court or the court of appeals reached the right result, this Court should resolve this important and purely legal constitutional issue of first impression for Arizona. *See* *Simpson v. Miller*, 241 Ariz. 341, 344 ¶ 6 (2017) (granting review to address a "constitutional issue" that was "one of first impression and statewide importance").

This Court should also grant review because this question is likely to recur. Section 12-516 provides health professionals and healthcare institutions throughout Arizona limited immunity from civil liability. The immunity extends far beyond these specific parties. In addition, the immunity applies whenever there is a "public health pandemic." A.R.S. § 12-516(A). The immunity thus applies to healthcare services that health professionals and healthcare institutions provided during the COVID-19 pandemic. And it also applies to healthcare services that Arizona's healthcare providers will provide in any future emergency that we may confront. That makes this issue likely to recur.

That's not all. As the next section details, the answer to this question implicates several other immunity statutes—only confirming that the underlying issue is likely to recur. The court of appeals concluded (¶ 24) that A.R.S. § 12-516 violates the anti-abrogation clause because

"the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence." That statement not only defies this Court's precedent, but it also ignores all the materially indistinguishable statutes that immunize a person who performs certain conduct from civil liability unless the person acts with gross negligence or willful misconduct. These other immunity statutes reinforce that this issue is likely to recur. This Court should thus grant review. *See, e.g.*, *State v. Chambers*, 255 Ariz. 464, 467 ¶ 12 (2023) (accepting special action jurisdiction when a case presented an issue of "statewide importance" that was "likely to recur"); *State v. Ewer*, 254 Ariz. 326, 329 ¶ 9 (2023) (granting a petition for review for the same reasons).

II. This case implicates scores of other immunity statutes.

Statutes that provide limited immunity from civil liability unless a person acts with gross negligence or willful misconduct are commonplace in Arizona. The court of appeals' decision does not acknowledge that these statutes exist, but its reasoning undercuts their foundation.

Arizona's common law imposes a duty of "due care" on any person who "voluntarily undertakes an act" and holds such a person "liable for any lack of due care in performing it." *Lloyd v. State Farm Mut. Auto Ins.*,

176 Ariz. 247, 250 (App. 1992). The harsh consequences that can flow from this rule can (quite understandably) cause people to decline to undertake acts—including acts that all agree serve the public interest. To encourage people to perform these acts, the Arizona Legislature has enacted scores of statutes that displace the common-law rule and replace it with limited immunity from civil liability unless a person acts with gross negligence or willful misconduct. Examples abound:

Statute	Immunity
A.R.S. § 12-564(A) (Students in Training Programs)	A student in an educational or training program who provides healthcare services under the supervision of a healthcare provider is immune from civil liability "unless gross negligence is established by clear and convincing evidence."
A.R.S. § 12-571(A) (Health Care at Nonprofit Clinics)	A health professional who provides medical, optometric, or dental treatment or care for no compensation at a nonprofit clinic is immune from civil liability "unless the health professional was grossly negligent."
A.R.S. § 12-820.05(C) (Emergency Aid)	A public entity is immune from civil liability when a public officer renders emergency care in a public building, at a gathering on the grounds of a public building, or at the scene of an emergency "unless the public officer, while

Statute	Immunity
	rendering the emergency care, is guilty of gross negligence."
A.R.S. § 13-3623.01(F) (Baby Safe Havens)	A safe haven provider who receives a newborn infant is immune from civil liability for acts relating to maintaining custody of the newborn infant unless the safe haven provider acts with "gross negligence."
A.R.S. § 32-1471 (Emergency Aid)	A person who renders emergency care in public or at the scene of an emergency is immune from civil liability "unless such person, while rendering such emergency care, is guilty of gross negligence."
A.R.S. § 32-1472 (Emergency Aid)	A healthcare provider who voluntarily attends an amateur athletic event to be available to render emergency health care and, in fact, renders emergency health care is immune from civil liability unless the provider acts with "gross negligence."
A.R.S. § 36-420(D) (First Aid to Fallen Persons)	A person who renders first aid to a person who has fallen is immune from civil liability "unless the person acted with gross negligence while rendering the first aid."
A.R.S. § 36-883.03(A) (Employer-Subsidized Child Care)	An employer that subsidizes child care through a licensed child care facility is immune from civil liability because of an act or omission by the child care facility "unless the employer is guilty of

Statute	Immunity
	gross negligence in recommending the child care facility."
A.R.S. § 36-916(A), (C), (D) (Donation of Food Items)	A person who donates food items—and a nonprofit organization that receives such donations and donates them to those in need—is immune from civil liability "unless [an] injury or death is a direct result of the intentional misconduct or gross negligence" of the donor or donating person or organization.
A.R.S. § 36-2226(A), (B) (Epinephrine Administration)	A person who administers epinephrine to a person suffering from a severe allergic reaction is immune from civil liability "unless the person acts with gross negligence, wilful misconduct or intentional wrongdoing."
A.R.S. § 36-2267(A), (B) (Opioid Antagonist Administration)	A person who administers an opioid antagonist to a person experiencing an opioid-related overdose is immune from civil liability "unless the person while rendering the care acts with gross negligence, wilful misconduct or intentional wrongdoing."

Many more statutes fit this same mold.[1] Each statute encourages a person to perform an act that the Legislature has determined would serve

[1] *See, e.g.*, A.R.S. § 5-395(M); A.R.S. § 5-395.01(H); A.R.S. § 12-556(A); A.R.S. § 13-3102(K); A.R.S. § 13-3102.01(C); A.R.S. § 15-183(GG);

the public interest. It does so by replacing the common law "due care" standard with a gross negligence or willful misconduct standard. Under the decision below, all these statutes supposedly violate the anti-abrogation clause because "the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence." And it's not clear that the court of appeals ever considered that its decision would upend decades of important legislative enactments that encourage Arizonans to help one another – by providing basic needs like food and emergency assistance – without fear of facing a lawsuit.

The court of appeals got it wrong. AzHHA incorporates Mayo Clinic's briefing on the merits. *See* Pet. for Review at 4-12. In sum, the court of appeals' decision rests on the premise that gross negligence is a different tort than ordinary negligence—such that the availability of relief for only gross negligence "abrogate[s]" a plaintiff's claim for ordinary negligence. Ariz. Const. art. XVIII, § 6. But that is not the law.

A.R.S. § 15-512(H); A.R.S. § 16-1019(E); A.R.S. § 26-314(A); A.R.S. § 27-129(G); A.R.S. § 28-674(J); A.R.S. § 28-678(E); A.R.S. § 28-1388(F); A.R.S. § 28-1390(D); A.R.S. § 28-8283(C); A.R.S. § 28-8289; A.R.S. § 36-407.02(D); A.R.S. § 49-283.01(A). Other immunity statutes require proof by clear and convincing evidence without a gross negligence component. *See, e.g.*, A.R.S. § 12-572(A), (B); A.R.S. § 12-573(A), (B).

"Gross negligence and wanton conduct have generally been treated as one and the same." *Williams v. Thude*, 188 Ariz. 257, 259 (1997). Wanton misconduct—*i.e.*, gross negligence—is not "a tort wholly separate from negligence." *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 566 (1979). Rather, it is "aggravated negligence." *Id.*; *see also, e.g.*, *Williams*, 188 Ariz. at 259 ("[W]illful, wanton, and reckless conduct have commonly been 'grouped together as an aggravated form of negligence.'") (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34 at 212 (5th 3d. 1984)); *Franklin v. Clemett*, 240 Ariz. 587, 593 ¶ 15 n.5 (App. 2016) ("[W]illful or wanton conduct is a form of negligence."). And the "rules by which liability for wanton misconduct is determined are the same as those by which liability for simple negligence is decided." *DeElena*, 121 Ariz. at 567. The availability of relief for gross negligence thus does not abrogate a plaintiff's claim for negligence. The negligence claim is still intact. These immunity statutes merely regulate it. That is permissible under the anti-abrogation clause. *See, e.g.*, *State Farm Ins. Co. v. Premier Manufactured Sys., Inc.*, 217 Ariz. 222, 229 ¶ 34 (2007) ("[T]he abolition of joint and several liability in strict products liability cases does not deprive an injured claimant of the right to bring the action.

Nor does it prevent the possibility of redress for injuries; the claimant remains entirely free to bring his claim against all responsible parties. Thus, § 12-2506 does not on its face violate the anti-abrogation clause.").

The court of appeals' decision essentially erases A.R.S. § 12-516 and all these other immunity statutes. It resurrects the common-law rule that the Legislature saw fit to displace to serve the public interest. And it bars the Legislature from providing anyone limited immunity in this form under other circumstances where it wishes to encourage people to act.

That's especially problematic here. Ordinary negligence standards are appropriate under conventional standards of care. But during the COVID-19 pandemic, the Arizona healthcare system experienced crisis and contingency standards of care. The Legislature wisely exercised its police powers to apply a standard that tracked this reality. The decision below strips this power to regulate claims from the Legislature. Worse still, the court of appeals wrongly decided this issue as a matter of constitutional law. Now, only this Court can fix it. This Court should grant review given these sweeping and statewide consequences.

III. Any new legal principle should apply prospectively only.

Even if this Court doesn't grant review to address the merits, it should grant review to protect Arizona healthcare providers' reliance interests. As the Good Samaritan Order explains, at the pandemic's beginning, healthcare providers expressed "concern[]" that they were potentially "subjecting themselves to liability" by treating patients with COVID-19. These concerns were understandable. After all, at the time, there were "no defined treatments" for COVID-19, and there was a "shortage of hospital beds and equipment" for treating patients.

Arizona's executive and legislative branches responded to those concerns to make sure that "Arizonans ha[d] access to treatment when needed." Governor Ducey issued the Good Samaritan Order, and the Legislature enacted A.R.S. § 12-516. Both encouraged Arizona's healthcare providers to continue providing necessary healthcare services to all Arizonans by providing them limited immunity from civil liability. We shudder to think of an Arizona at that time without the Good Samaritan Order or A.R.S. § 12-516. And neither was novel. As the previous section shows, the Legislature has enacted several immunity

statutes in precisely this form in other circumstances. No court has ever suggested that these statutes might violate the anti-abrogation clause.

Healthcare providers worked bravely and tirelessly throughout the pandemic under incredibly challenging circumstances. Over 1.1 million Americans have died from COVID-19, and over 6.5 million Americans have been hospitalized.[2] Arizona alone has recorded over 2.5 million COVID-19 cases,[3] 143,000 hospitalizations,[4] and 33,000 deaths.[5] The stress, severity, and longevity of the pandemic has had a severe negative effect on health professionals. Studies report that these professionals have suffered significant declines in their mental and emotional health.[6]

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[2] *See COVID Data Tracker*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Dec. 19, 2023).

[3] *See Demographics*, Ariz. Dep't of Health Servs., https://www.azdhs.gov/covid19/data/index.php#demographics (last visited Dec. 19, 2023).

[4] *See Hospitalization*, Ariz. Dep't of Health Servs., https://www.azdhs.gov/covid19/data/index.php#hospitalization (last visited Dec. 19, 2023).

[5] *See COVID-19 Deaths*, Ariz. Dep't of Health Servs., https://www.azdhs.gov/covid19/data/index.php#deaths (last visited Dec. 19, 2023).

[6] In a survey of 1,000 nurses, for example, 66% reported feeling depression related to the pandemic and over half reported experiencing trauma, extreme stress, or PTSD. *See 2021 Frontline Nurse Mental Health & Well-Being Survey*, TrustedHealth (May 2021), https://uploads-

Many paid the ultimate price.[7] All Arizonans should be grateful for these providers' sacrifices throughout this unprecedented public health crisis.

The court of appeals' decision upends these providers' reliance interests long after they provided the healthcare services that Arizonans desperately needed. That is unfair. Even if this Court were to agree with the court of appeals that "the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence," this Court should apply this new legal rule prospectively only.

Whether to give an opinion "prospective application only is a policy question" within this Court's "discretion." *Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 44 (2010) (citation omitted). "In addressing retroactivity," this Court considers several factors, including whether an opinion "establishes a new legal principle . . . whose resolution was not

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ssl.webflow.com/5c5b66e10b42f155662a8e9e/608304f3b9897b1589b14bee_mental-health-survey-2021.pdf. On average, respondents reported a 28% decline in their mental health. *See id.*

[7] *See Excess Mortality Among U.S. Physicians During the COVID-19 Pandemic*, Jama Network (Feb. 6, 2023), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2800889 (reporting that U.S. physicians experienced over 600 more deaths than expected from March 2020 through December 2021).

foreshadowed" or whether "retroactive application would produce substantially inequitable results." *Id.* (citation omitted).

Here, were this Court to agree with the court of appeals, it should apply its opinion prospectively only. No Arizona court before the court of appeals below has decided or foreshadowed that "the availability of relief for gross negligence is not a reasonable alternative to a claim for ordinary negligence" under the anti-abrogation clause. To the contrary, this Court has long held that gross negligence is not "a tort wholly separate from negligence." *DeElena*, 121 Ariz. at 566. There was thus no notice that a statute that provided limited immunity from civil liability unless a person acts with gross negligence could "abrogate" a plaintiff's claim for negligence. This new legal principle should apply prospectively only.

This Court should also apply any opinion affirming the court of appeals prospectively only because retroactive application would produce extremely inequitable results. The Legislature enacted a host of immunity statutes to encourage people to perform acts that serve the public interest that they might not have performed under Arizona's common-law rule. It would be inequitable to induce people to perform these acts on the promise that they will have limited immunity from civil

liability and then break that promise after they've already performed the act that the statute encourages. These inequitable results strongly favor prospective application. *See, e.g.*, *Turken*, 223 Ariz. at 351 ¶ 45, 352 ¶ 49 (limiting an opinion's application to "transactions occurring after the date of this opinion" when, among other things, "a number of public-private transactions were entered into . . . under a similar misapprehension" about the legal standard); *Lowry v. Indus. Comm'n*, 195 Ariz. 398, 402-03 ¶¶ 18-19 (1999) (an opinion should apply prospectively only when a retroactive application would produce substantially inequitable results); *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 597 (1990) (similar).

Conclusion

AzHHA urges this Court to grant Mayo Clinic's petition for review. This case has statewide importance because:

- It presents a significant and purely legal constitutional question;
- The answer to this question will impact several other materially indistinguishable immunity statutes;
- The court of appeals' answer is wrong on the merits; and
- The court of appeals' decision decimates reliance interests.

This Court should thus grant review and reverse the decision below.

RESPECTFULLY SUBMITTED this 19th day of December, 2023.

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