

ARIZONA SUPREME COURT

JAVIER AGUILA, et al.,

Plaintiffs/Appellants,

v.

DOUG DUCEY, et al.,

Defendants/Appellees.

No. CV-20-0335-PR

Arizona Court of Appeals
No. 1 CA-CV-20-0598

Maricopa County Superior
Court No. CV2020-010282

**BRIEF OF AMICI CURIAE ARIZONA HOSPITAL AND
HEALTHCARE ASSOCIATION, HEALTH SYSTEM ALLIANCE
OF ARIZONA, ARIZONA MEDICAL ASSOCIATION AND
ARIZONA NURSES ASSOCIATION**

FILED WITH WRITTEN CONSENT OF ALL PARTIES

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Statement of *Amici Curiae*

¶1 *Amicus curiae* Arizona Hospital and Healthcare Association (“AzHHA”) is Arizona’s largest and most influential statewide trade association for hospitals, health systems, and affiliated healthcare organizations. AzHHA’s 64 hospital members and 14 healthcare members united with the common goal of improving healthcare delivery in Arizona and being a powerful advocate for issues that impact both the quality, affordability, and accessibility of healthcare for the patients, people, and communities of Arizona.

¶2 *Amicus curiae* Health System Alliance of Arizona (“Alliance”) is an advocacy organization that represents the interests of large, integrated health systems across Arizona including Banner Health, Dignity Health, HonorHealth, Tenet Healthcare, and Northern Arizona Healthcare. Alliance members have more than 80 acute hospitals and medical facilities across the state and employ more than 50,000 Arizonans encompassing nearly all segments of our healthcare economy.

¶3 *Amicus curiae* Arizona Medical Association (“ArMA”) is a voluntary membership organization of more than 4,000 Arizona medical and osteopathic physicians. It advocates for economically sustainable

medical practices, the freedom to deliver care in the best interests of patients, and health for all Arizonans. ArMA’s members provide care to patients across all specialties and in a variety of healthcare settings.

¶4 *Amicus curiae* Arizona Nurses Association (“AzNA”) is a statewide membership-based professional association of licensed nurses. Founded in 1919, AzNA is the oldest and largest nursing association in Arizona dedicated to advancing the nursing profession and promoting a healthy Arizona. Its 3,728 members represent all segments of nursing practice and come from all practice settings. And they seek to ensure that they can provide adequate care to all Arizonans who require it.

¶5 Collectively, *amici curiae* (“Healthcare Amici”) speak broadly – and hopefully loudly – on behalf of hospitals, integrated healthcare systems, and direct care providers. From different perspectives, they’ve witnessed firsthand the profound and troubling impact of the COVID-19 pandemic on Arizona’s healthcare system. They know the Governor’s difficult decision to order the closure of bars like those operated by Appellants is supported by science and the recommendations of Arizona’s public health officials. But more importantly, they know from their own difficult experiences that it is right.

¶6 The Healthcare Amici this Court to affirm the trial court’s order. They do so on behalf of their members, the countless patients throughout Arizona their members serve, and our State’s healthcare system as a whole. We are living in unprecedented times. With precious lives at stake, this Court should not second-guess steps taken in the name of public health – based on the unrebutted testimony of public health experts – to slow the spread of a deadly virus that has already claimed the lives of 15,897 Arizonans.

Argument

I. Arizona Law Should Permit Appropriate Responses to Public Health Crises Like the COVID-19 Pandemic.

¶7 It is a sad reality that neither public health crises nor legal disputes over the government’s response to those crises are new to our State.

¶8 A century ago, and in the middle of the 1918 influenza epidemic that killed nearly 50 million people worldwide and 675,000 Americans,¹ this Court first confronted a challenge to the authority of

¹ Centers for Disease Control and Prevention, 1918 Pandemic (H1N1 Virus), <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>

public health officials to order the closure of public spaces to prevent the spread of disease. In direct response to the epidemic, the Board of Health of the City of Globe issued an order declaring, among other things

[t]hat it shall be unlawful for two or more persons to congregate in the United States post office, any bank, store, meat market, or other business house, shooting gallery, pool hall, theater, motion picture show, skating rink, lodge, church, school, social gathering, card party, or other place of amusement or entertainment in the city of Globe or vicinity.

That it shall be unlawful to open up, conduct or hold any sessions of or services in any lodge, school building, church or like place in the city of Globe or vicinity.

Globe Sch. Dist. No. 1 of Globe, Gila Cty. v. Bd. of Health of City of Globe

(“*Globe*”), 20 Ariz. 208, 209 (1919). A school district challenged this order on various grounds, including a form of the non-delegation argument raised by Petitioners here.

¶9 This Court ultimately deferred to public health officials’ determination that an emergency existed and upheld the order closing schools. In words that ring particularly true today, the Court explained that “[n]ecessity is the law of time and place, and the emergency calls into life the necessity for the operation of the law. The emergency calls forth the occasion to exercise the power to protect the public health.” *Id.* at 218; *see also Alden v. State*, 20 Ariz. 235, 236 (1919) (affirming validity

of an arrest of a business owner arising out of violation of the public health order in *Globe*, and affirming that the order was “enforceable during the period of the existence of the epidemic, as a reasonable measure to prevent the spread of the disease”).

¶10 Just as there was an “emergency” justifying the exercise of emergency powers in 1919, so too was there an “emergency” that supported [Executive Order 2020-43](#) (“EO”), in which Governor Doug Ducey ordered the closure of bars. In taking this step, the Governor acknowledged that “community spread [of COVID-19] continues and at an exponential pace” and “essential and other health resources, including intensive care unit and in-patient facilities are limited, nearing capacity, and otherwise being exhausted.” *Id.* The Governor reached these conclusions in the face of staggering statistics about COVID-19 and Arizona. Cases were on a dramatic rise, the death toll soared, and the situation on the ground stretched hospital resources thin. As Dr. Marjorie Bessel of Banner Health testified [TR 178:1-3], our State was the “hottest hotspot for COVID in the world, which carried with it a significant strain and stress on the citizens of our community as well as the health care

delivery system.” Dr. Cara Christ, director of the Arizona Department of Health Services, characterized [TR 24:20-25] the issue well:

The public health emergency is really protecting our health care system, making sure we keep as few people from getting severely sick or dying and having access to those resources than it is just eradicating the disease.

¶11 In the proceedings below, the trial court considered and credited the un rebutted testimony of Dr. Christ and Dr. Bessel – both unchallenged experts – about the risks that bars pose to public health when there is unchecked community spread of COVID-19. The Healthcare Amici urge the Court to consider the testimony of these experts in its entirety. In a few words, however, bars are a “high risk activity” [TR 63:23], a conclusion supported by recommendations from the Centers for Disease Control, the United States Department of Health and Human Services, and the White House Coronavirus Task Force [*id.* 62:1-15]. They are a “uniquely dangerous environment for the spread of COVID-19” because, among other things:

- Groups of people “typically convene” there “and at times mix with other groups”;
- They are “often cramped indoor spaces with poor ventilation”;

- They often have “a layout that makes it difficult to physically distance or causes individuals to touch the same surfaces repeatedly”;
- Alcohol consumption – the point of a bar, after all – “slows brain activity” and can “result in individuals forgetting to exercise precautions” to slow the spread of COVID-19;
- The normally “loud environment” of bars can cause “greater projection of orally emitted viral droplets”;
- “[T]he acts of drinking and eating are incompatible with wearing a mask”;
- Dancing – a common activity at bars – “results in heavier breathing than is normal and increases respiratory droplet secretions into the environment”;
- Bars attract a younger demographic, one that statistically has a higher probability of carrying COVID-19 (asymptotically so in many cases); and
- Contact tracing is challenging with bars.

[Exhibit 125, ¶¶ 19-28, 34; *see also* TR 63:23-64:13 & IR 81, Ex. 2 ¶¶ 35-36 (elaborating on the risks posed by bars)]

¶12 When considering this “uniquely dangerous environment” alongside the strain that COVID-19 has placed on Arizona’s healthcare system, there’s little question that the Governor’s decision to order the closure of bars was reasonable, appropriate, and based on science. Indeed, over the summer, that system bent and nearly broke. As Dr. Bessel explained,

during that time the health care systems within the state of Arizona were experiencing very large numbers of very ill patients from COVID-19. We were becoming very stressed. We were having to import skilled staff from outside the state in order to take care of the number of patients that we were experiencing. These individuals are incredibly ill. When they’re in intensive care unit require a lot of staff to take care of them.

[...]

It was unbelievably stressful. It was incredibly difficult. These patients are unbelievably sick. When they are in our hospitals they have very long lengthy stay[s]. When they’re in our intensive care units they would require an incredible number of skilled individuals to care for them. They have a very long lengthy stay there as well. And, again, we did have to go search out and get additional skilled personnel to come to the state of Arizona to assist us to make sure that we had enough skilled personnel to care for that very large surge that we experienced.

[...]

We were headed towards a very, very difficult turning point. . . . Had there not been mitigation activities and a turn, we would have been stretched into crisis standards of care and that is not a great place for any health care delivery system to be and it wouldn't have just been us

[TR 168:19-169:17; 178:16-24; 181:22-182:22]

¶13 This reality was costly, both financially and mentally. Healthcare provider burnout was a serious problem; indeed, over the past year, healthcare workers experienced serious illness and death at an unprecedented scale for peacetime. The psychological toll of their experiences may not be fully appreciated for years. And for the first time, Arizona hospitals faced the activation of “crisis standards of care,” which would have required healthcare providers to employ a “triage process” that “could mean that people don’t receive the level of care that they need in order to stay alive.” [TR 81:1-19; 184:18-185:2] “We luckily didn’t reach that point” [*id.*], and the Healthcare Amici want to ensure that their providers – sworn to “do no harm” –never find themselves in that position.

¶14 Thankfully, there is some light at the end of the tunnel. After reaching shocking peaks over the summer and into the fall, case counts and deaths are on the decline. More than one million Arizonans have already received one dose of the COVID-19 vaccine, while 400,000 are fully vaccinated.² With any luck, an increase in vaccinations coupled with

² Ariz. Dep’t of Health Svcs., Data Dashboard – Vaccine Administration, <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/index.php> (last visited Feb. 26, 2021).

the development of more effective therapeutics will make COVID-19 simply “endemic to the region” so it won’t “cause [a] mass swell of hospital utilization when you get a number of cases.” [TR 24:13-19] When we reach that point, there “wouldn’t be a public health emergency anymore.” [Id.]

¶15 But the simple truth is that the emergency is not over. The Healthcare Amici – and indeed, our public health and healthcare systems overall – must remain vigilant, particularly as new variants of the virus that causes COVID-19 emerge. The CDC is already tracking international variants from the United Kingdom (B.1.1.7), South Africa (B.1.351), and Brazil (P.1).³ Arizona already has 14 confirmed cases of the United Kingdom variant.⁴ Beyond that, epidemiologists have confirmed several Arizona cases of a new variant from California, one that “not only spreads more readily than its predecessors, but also evades antibodies generated by COVID-19 vaccines or prior infection and [is] associated with severe

³ Centers for Disease Control & Prevention, *About Variants of the Virus that Causes COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html> (last visited Feb. 26, 2021).

⁴ Centers for Disease Control & Prevention, *US COVID-19 Cases Caused by Variants*, <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html> (last visited Feb. 26, 2021).

illness and death.” *‘The devil is already here’: Coronavirus variant in California looks increasingly dangerous*, KTLA (Feb. 23, 2021), <https://ktla.com/news/california/the-devil-is-already-here-coronavirus-variant-in-california-looks-increasingly-dangerous/>; see also Fay Fredericks, *New ‘California Variant’ of COVID-19 found in Arizona samples*, ABC15 (Feb. 19, 2021), <https://www.abc15.com/news/health/new-california-variant-of-covid-19-found-in-arizona-samples>. If any of these variants begin to predominate in Arizona, healthcare systems just now beginning to recover from record resource usage could again see dramatic surges. Caution, and not complacency, must govern our public health response going forward.

¶16 The Healthcare Amici are doing everything they can to protect the public, slow the spread of COVID-19, accelerate our State’s progress toward herd immunity, and end the current emergency. To that end, some of the Healthcare Amici’s members partnered with the State to set up the first vaccination “pods” to administer the vaccine to high-risk population and frontline healthcare workers as soon as it was available. They did so despite also dealing with record caseloads in recognition of the need for an aggressive, all-hands-on-deck approach to battling

COVID-19 and ending the pandemic. As much as anyone else, the Healthcare Amici want life in Arizona to return to normal as soon as possible. But the simple truth is that reaching that goal requires cooperation and acting collectively based on the advice of public health experts.

¶17 In sum, there is an ongoing public health emergency, and the Legislature saw fit to centralize decision-making in the Governor during exigent circumstances like these. In exercise of his emergency powers, the Governor made the reasonable and evidence-based decision to close bars, which are most often small venues where large numbers of people congregate for extended periods of time. Restricting their operation in the middle of rising COVID-19 numbers made perfect sense for Arizona's public health and healthcare infrastructure.

¶18 The Healthcare Amici support the temporary closure of establishments like Petitioners. They recognize the burden it imposes on business owners, while also recognizing that government at all levels has taken steps to try and mitigate the harm to businesses affected by closure orders and restrictions. In the end, however, concerns of public health must prevail; after all, no amount of government aid can offer relief to a

person who dies of COVID-19. And there is strong evidence that the Governor's action contributed to the decline in case counts and deaths. [TR at 29:3-6] Now is not the time to relax our mitigation efforts; it's the time to stay the course ensure that vaccination efforts can outpace the introduction of more infectious new variants.

Conclusion

¶19 “As all are painfully aware, our nation faces a public health emergency caused by the exponential spread of COVID-19” [*In re Abbott*](#), 954 F.3d 772, 779 (5th Cir. 2020). History will ultimately judge our response and ability to meet this ongoing emergency. And if Arizona does not take reasonable steps to prevent further COVID-19 cases and control hospital bed and resource usage, we will find ourselves on the wrong side of that judgment. To hold that those steps can't be taken now when there is some hope of normalcy soon would defy all logic and betray the sacrifices of so many Arizonans, including healthcare workers around the State. The Healthcare Amici wish to continue to provide full-spectrum healthcare services to Arizonans, a difficult task when a global pandemic rages on and high-transmission venues like bars are open. As in [*Globe*](#), “[t]he emergency calls forth the occasion to exercise the power

to protect the public health.” 20 Ariz. at 218. The emergency exists, the Governor has taken a reasonable step to protect public health, and the trial court’s order below should be affirmed.

RESPECTFULLY SUBMITTED this 26th day of February, 2021.

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