



Center for Justice & Democracy's
Public Policy Clinic
New York Law School
185 West Broadway
New York, NY 10013

April 15, 2022

Governor Doug Ducey
Office of the Governor
1700 W Washington Street
Phoenix, AZ, 85007

Dear Governor Ducey

Re: SB 1377 §12-515; Liability Shield for Businesses

My name is Haley Fallin and I am a student intern with the Center for Justice & Democracy. We have been studying the impact of Covid-19 liability shields on businesses, including Arizona's SB 1377. While I am currently attending law school in New York, I was born and raised in Arizona. I am still an Arizona voter as I maintain residency there. Further, my family and many of my friends still live in Arizona. Interestingly, I also went to school with the Governor's son, Jack. Thus, I feel a deep connection with Arizona, its citizens, and our government leaders who we elected to protect our interests. I am writing to urge you to support repeal of SB 1377.

Background

SB 1377, signed into law on April 5, 2021, immunizes businesses from pandemic-related injury claims. The law confers immunity so long as a business follows some safety regulation, guideline, or suggestion no matter how vague and irrespective of how unsafe the workplace actually is. Even businesses that do not comply with any guidelines are immunized from claims so long as they "attempted to do so in good faith."¹ For the reasons explained below, we believe law is unconstitutional, harmful, and unnecessary.

The Law Strips Arizonians of their Constitutional Rights

Article 8 §16 of the Arizona Constitution states, "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."² Arizona courts have said, "A statute that completely abolishes a right of

¹ Arizona SB1377: 2021: Fifty-fifth legislature 1st regular, LegiScan, <https://legiscan.com/AZ/bill/SB1377/2021>

² Arizona Constitution - Arizona State Legislature, https://www.azleg.gov/const/Arizona_Constitution.pdf

action is by definition an unconstitutional abrogation.”³ While “the legislature may regulate the cause of action for negligence,” they must also “leave a claimant reasonable alternatives or choices which will enable him or her to bring the action.”⁴ SB 1377 does not leave any alternatives. As attorney Barry Aarons explained in his testimony before the Senate Judiciary Committee on February 21, 2021, the good faith requirement and the law’s burdensome evidentiary standards “virtually guarantees that there will never be an opportunity to pursue a pandemic related claim.”⁵ Therefore, this law violates the language and intent of the Arizona Constitution.

SB 1377 §12-515 forces Arizona residents to give up important legal rights, which should never be done lightly, even in an emergency. Here, by keeping harmed individuals and families from being able to file legitimate lawsuits and be heard before a jury, the law violates Arizona’s constitution.

The Law is Harmful and Unsafe

Before the law passed, opponents argued that the good faith standard was highly confusing in terms of its practical application. On multiple occasions, proponents of the bill were unable to answer questions about what “good faith” meant.⁶ However, one thing is clear – companies that act negligently and fail to make their premises safe are not accountable under this law. As others have said, these types of liability shields “could give businesses a green light to take fewer or even no precautions to limit the spread of the virus among their customers and workers.”⁷ I personally experienced the adverse effects of this law in the summer of 2021.

That summer, bars and clubs in Arizona were permitted to operate at full capacity without any distancing or mask requirements.⁸ Young people, including those of neighboring states, were itching to go out on the town after months of lockdown. Both out-of-towners and locals flocked to Old Town Scottsdale in search of a night out. The neighboring states with more conservative mandates still in place watched in shock as Arizona Covid-19 rates soared as a result.⁹

While I was one of the lucky patrons who did not contract the virus out in Old Town (as I had Covid-19 previously and got both vaccine shots), nearly all of my friends who visited bars and nightclubs that summer contracted Covid-19, likely as a direct result of going to these establishments. While sick, my friends missed work, putting additional strain on their already short-staffed employers. My friends in the restaurant industry lost their main source of income, tips, while they were sick. They struggled to pay their bills in the subsequent weeks.

³ *State Farm Ins. Cos. v. Premier Manufactured Sys.*, 217 Ariz. 222, 228, 172 P.3d 410, 416 (2007)

⁴ *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 102, 692 P.2d 280, 281 (1984)

⁵ Arizona State Senate - Fifty-fifth Legislature - First Regular Session, Arizona Legislature, <https://www.azleg.gov/videoplayer/?eventID=2021021085&startStreamAt=8869>

⁶ *Id.*

⁷ *Dying covid liability shield laws prompt push for their revival*, Bloomberg Law (2022), <https://news.bloomberglaw.com/daily-labor-report/dying-covid-liability-shield-laws-prompt-push-for-their-revival>

⁸ Tirion Morris, *El Hefe nightclub in Scottsdale reopens after a tumultuous year and \$1 million renovation*, The Arizona Republic (2021) <https://www.azcentral.com/story/entertainment/dining/2021/09/02/el-hefe-nightclub-reopens-scottsdale/5681922001/>

⁹ *Partygoers have been packing Arizona bars. now the state is a coronavirus hot spot*, The Los Angeles Times (2021), <https://www.latimes.com/world-nation/story/2020-06-15/partygoers-have-been-packing-arizona-bars-and-nightclubs-now-the-state-is-a-coronavirus-hot-spot>

This experience showed me the dangerous and costly consequences of laws like SB 1377 §12-515, which remove legal accountability for negligence and weaken the financial incentive for businesses to operate safely.

The Law is Unnecessary

Supporters said this law was necessary in order to prevent a wave of lawsuits that would hurt the state’s recovery. But according to a litigation tracker set up by the law firm Hunton Andrews Kurth, LLP, relatively few have filed Covid-exposure claims around the country.¹⁰ This is true nationally, regardless of whether or not a liability shield like Arizona’s exists in the state. This is because the tort system already places significant obstacles in the way of those bringing negligence suits by requiring proof of causation. This is nearly impossible to do in a Covid-19 related exposure case without precise contact tracing, which does not exist in the United States.

Lawmakers at the federal level, where similar legislation was considered but did not pass, have recognized that these laws were a solution in search of a problem. As Georgetown Professor Vladeck testified before the U.S. Senate Judiciary Committee in relation to these laws:

“Our liability system thus defends the reasonable and punishes the unreasonable and irresponsible. It does so to ensure that wrongdoers bear the costs they impose on others, and to deter others from engaging in similarly risky conduct. Immunity does the opposite: immunity rewards the unreasonable and irresponsible at the expense of others, and immunity could punish reasonable businesses by giving the unreasonable and irresponsible ones an advantage in the marketplace.”

Indeed, SB 1377 places safe businesses that have tried to protect their employees and customers at a competitive disadvantage. The *Arizona State Law Journal* published an oppositional article that stressed: “broad immunity penalizes businesses who incur costs protecting stakeholders from coronavirus exposure by rendering them less competitive in relation to negligent actors in the same market.”¹¹

Finally, even if one could argue that such a law was warranted a year ago, today the state has already largely recovered from the pandemic. According to the *Back-to-Normal Index* published by Moody’s Analytics, Arizona’s economy is operating at 97% of where it was in March 2020. In fact, in the Governor’s recent State of the State Address, he emphasized Arizona’s “unprecedented economic momentum and rapidly growing advanced industries.”¹²

Conclusion

While SB1377 enjoyed some support at the time of its enactment, the Arizona Legislature’s bill position tracker now shows that the number of parties opposing the bill is nearly double the amount of people who currently support it.¹³ The sweeping scope of the bill is especially unnecessary given the declining rates of Covid-19 and the availability of vaccines in

¹⁰ Covid-19 complaint tracker, Hunton Andrews Kurth LLP, <https://www.huntonak.com/en/covid-19-tracker.html>

¹¹ Sean Krieg, *Inoculating businesses against liability: What works for Arizona?*, *Arizona State Law Journal* (2021), <https://arizonastatelawjournal.org/2021/02/04/inoculating-businesses-against-liability-what-works-for-arizona/>

¹² *Governor Ducey's 2022 agenda includes further strengthening Arizona's workforce, economy*, Arizona Commerce Authority, <https://www.azcommerce.com/news-events/news/2022/1/governor-ducey-s-2022-agenda-includes-further-strengthening-arizona-s-workforce-economy/>

¹³ Arizona Legislature, Bill Status Inquiry, <https://apps.azleg.gov/BillStatus/BillOverview/75402>

Arizona.¹⁴ SB 1377 §12-515 runs afoul of the state's constitution, stripping Arizonians of their rights. The bill negatively impacts the economy and businesses doing their best to maintain safe workplaces. We urge you to support repeal of this law as soon as possible.

Thank you for your time and consideration. If you have any questions, please contact me at Haley.Fallin@law.nyls.edu or Professor Joanne Doroshow at Joanne.Doroshow@nyls.edu.

Sincerely,

A handwritten signature in black ink, appearing to read "Haley Fallin". The signature is written in a cursive, flowing style.

Haley Fallin

¹⁴ Arizona coronavirus map: Tracking the trends, Mayo Clinic, <https://www.mayoclinic.org/coronavirus-covid-19/map/arizona>