**SUPREME COURT OF ARIZONA**

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| ROBERTO TORRES, et al.,<br><br>Plaintiffs/Appellees,<br><br>v.<br><br>JAI DINING SERVICES (PHOENIX) INC.,<br><br>Defendant/Appellant. | Arizona Supreme Court No. CV-22-0142-PR<br><br>Court of Appeals<br>Division One<br>No. 1 CA-CV 19-0544<br><br>Maricopa County<br>Superior Court<br>No. CV2016-016688 |

# DEFENDANT/APPELLANT JAI DINING SERVICES (PHOENIX) INC.'S SUPPLEMENTAL BRIEF

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## ISSUE PRESENTED

Are the protections of Article 18, § 6 of the Arizona Constitution limited to only specific common law rights of action to recover damages that could have been brought against specific defendants as of February 14, 1912, or do the protections apply to common law rights of action to recover damages that Arizona courts have recognized post-statehood?

## INTRODUCTION

Fundamentally, article 18, § 6 protects only specific common law rights of action to recover damages that could have been brought against specific defendants as of February 14, 1912. The framers did not view themselves as creating perpetually expanding constitutional rights that would give constitutional weight to future, unknown developments in the law. They especially did not view themselves as prospectively constitutionalizing judicial decisions that *departed* from the common law and created new liability that the common law had already rejected.

## ARGUMENT

To assist the Court with the Issue Presented, this brief begins by showing that the court of appeals reached the correct result in this case under existing precedent. This confirms that article 18, § 6 does not apply to common law rights of action to recover damages that Arizona courts have recognized post-statehood. This brief then turns to a textual analysis of article 18, § 6's original public meaning, which confirms that this provision goes no further than the limitation set forth in the Issue Presented. In the final section, this brief explains that existing caselaw failed to properly construe article 18, § 6, which caused confusion among the lower courts

(as this case demonstrates). The Court should accordingly clarify the meaning of article 18, § 6 to assist the lower courts and parties going forward.

The Court should hold that A.R.S. § 4-312(B) is constitutional.

## I. The court of appeals reached the correct result under existing precedent.

### A. The arc of interpretation: the Court's expansion and contraction of article 18, § 6's scope.

As explained in more detail in JAI's response to the petition (at 13-16) and in the court of appeals' opinion (¶¶ 22-30), initially the Court correctly held that article 18, § 6 protects only the right to recover that "existed at the time these constitutional provisions were adopted." *Indus. Comm'n v. Frohmiller*, 60 Ariz. 464, 468 (1943).

That correct interpretation lasted for decades. Then, beginning with *Boswell v. Phx. Newspapers, Inc.*, 152 Ariz. 9, 18 (1986), and culminating in *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344 (1993), the Court held that the anti-abrogation clause covers the "evolution" of the common law after 1912.

Soon thereafter, the Court began retreating from that expansive characterization. In *Cronin v. Sheldon*, 195 Ariz. 531, 538-39 ¶¶ 35-36 (1999), the Court held that the anti-abrogation clause does not "extend constitutional protection to all tort causes of action, whenever or however they may have arisen." *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 3-5 ¶¶ 9-18 (2003), then held that article 18, § 6 did not apply "because [the] suit . . . could not have been maintained at the time the anti-abrogation provision was instituted."

### B. The court of appeals correctly held that article 18, § 6 does not bar A.R.S. § 4-312(B) based on existing law.

In light of this precedent, the court of appeals gave three bases to uphold A.R.S. § 4-312(B). First, the court correctly held that "if a plaintiff could not have asserted a claim for a particular type of harm against a particular defendant in 1912, then the anti-abrogation clause provides that claim no protection." (Op. ¶ 31.) As more fully explained in the response to the petition for review (at 17-18) and in the court of appeals' opinion (¶¶ 31-36), this holding follows directly from *Cronin* and *Dickey*, and does not run afoul of either *Boswell* or *Hazine*. (*See* Resp. to Pet. at 17, notes 2-3.) In 1912, a plaintiff could not have successfully maintained an action against a tavern for harm caused by a third-party patron.[1] The Court could therefore affirm the court of appeals on this basis without disturbing any caselaw.

Second, the court of appeals correctly held that the provision does not protect claims that "were (1) rejected at common law, then (2) judicially recognized by abolishing the common law rule, and then (3) legislatively addressed." (Op. ¶ 31.) This result follows directly from *Dickey*, so the Court could affirm on this basis, too, without disturbing any existing caselaw. This rejected-recognized-legislated sequence makes this case easier in some ways. It may be more conceptually difficult

[1] In light of the Court's order granting review on a narrow rephrased issue, JAI does not further address this point. For additional analysis, *see* Resp. to Petition at 19-22; *see also* Court of Appeals Op. at ¶ 18.

to analyze a theory of liability never considered at common law, but it should be comparatively easy to hold that the anti-abrogation clause does not protect claims that were affirmatively rejected at common law.

Third, the court of appeals correctly held that even if article 18, § 6 applies, A.R.S. § 4-312(B) (paired with A.R.S. § 4-311) is "permssibl[e] regulat[ion]," not abrogation. (Op. at 15 n.7.) "The legislature may regulate the cause of action," so long as it does not abolish it. *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 106 (1984). The Court could affirm on this basis, as well, without disturbing existing caselaw.

## II. Article 18, § 6 protects only rights of action that were viable as of 1912 against specific types of defendants for specific types of harm.

The original public meaning of article 18, § 6 also confirms that it protects only specific common law rights of action to recover damages that could have been brought against specific defendants as of February 14, 1912. The text, structure, and purpose of article 18, § 6 all support this interpretation and confirm that the provision does not protect post-statehood developments in the law.

### A. Article 18, § 6's text indicates that it protects only an existing right based on facts that would have supported a damages claim in 1912.

"When interpreting a constitutional provision, we begin with the text," *Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, 482 ¶ 10 (2022) (quotation marks and citation omitted), and "seek to give terms the original public meaning understood by

those who used and approved them," *Matthews v. Indus. Comm'n of Ariz.*, 254 Ariz. 157, 163 ¶ 29 (2022). "Our examination of original public meaning starts with dictionary definitions from the time the provision was adopted." *Matthews*, 254 Ariz. at 163 ¶ 33.

In relevant part, article 18, § 6 reads: "The right of action to recover damages for injuries shall never be abrogated . . . ." Three terms warrant special focus: (1) "The," (2) "right of action to recover damages for injuries," and (3) "abrogated."

**1. "*The*" right of action means a particular right of action that existed in 1912.**

The provision's first word—the definite article "The"—introduces a bounded concept, both grammatically and as a matter of legal interpretation. As this Court has explained, "[u]nlike the indefinite article 'a', 'the' is a definite article used in reference to a particular thing." *Smith v. Melson, Inc.*, 135 Ariz. 119, 121 (1983).

The definite article had the same meaning when Arizona's Constitution was adopted. Contemporaneous dictionaries confirm that the definite article "the" restricts the noun that follows to a particular, well-known set: "Before a noun which it indicates as denoting what is well known." *The*, Webster's New Int'l Dictionary 2138 (1909); *see also id.* (Usage note: "A demonstrative word used esp. before a noun to particularize its meaning, having a force thus distinguished from the indefinite distributive force of a, an . . .").

Caselaw of the era also recognized the boundaries indicated by the definite article. *See, e.g.*, *Work ex rel. McAlester-Edwards Coal Co. v. U.S.*, 262 U.S. 200, 208 (1923) ("[T]he language would not have been '*the*' appraisement but '*an*' appraisement. The use of the definite article means an appraisement specifically provided for. . . . Construing the Acts of 1912 and 1918 together, the appraisement can only refer to that so elaborately provided for in 1912.").

In constitutional provisions, the definite article restricts the constitutional term to *preexisting* rights. As Justice Scalia explained, "the First Amendment does *not* say that government shall not abridge freedom of speech. It says that government shall not abridge 'THE freedom of speech'—that is, that freedom of speech which was the understood right of Englishmen." Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith & Life Well Lived* 203-04 (2017). Likewise, the Second Amendment's protection of "the right of the people to keep and bear arms" refers to "a *pre-existing* right." *Id.* at 209 (emphasis added).

Here, article 18, § 6 refers to "*The* right of action," not *a* right of action. It therefore refers to a particular right of action that was already well known and pre-existing by February 14, 1912. The framers' use of the definite article confirms that the provision has substantive limits, and that they did not intend to prospectively constitutionalize an amorphous, evolving, unknown body of law. Any post-

statehood developments would not have been well known or pre-existing when article 18, § 6 was adopted and therefore cannot fall within its scope.

**2. The "right of action to recover damages" requires facts that would have supported a viable damages claim in 1912.**

The next term in the provision—"right of action to recover damages"—also had a specific, substantive meaning at statehood. That phrase appears nowhere else in our Constitution or in the current Arizona Revised Statutes. But at the time of the constitutional convention, a "right of action" had to arise from a particular injury or state of facts: "The right to bring suit; a legal right to maintain an action, *growing out of a given transaction or state of facts and based thereon*." *Right of Action*, Black's Law Dictionary 1039 (2d ed. 1910) (emphasis added).

Contemporaneous judicial opinions likewise tied a "right of action" to a particular state of facts that would support a viable claim: "A cause of action is the *fact or combination of facts* which gives rise to a *right of action*, the existence of which affords a party a right to judicial interference in his behalf." *Baltimore & O.R. Co. v. Larwill*, 93 N.E. 619, 621 (Ohio 1910) (emphases added); *accord Davidson v. Fraser*, 84 P. 695, 696 (Colo. 1906) ("A cause of action is the *fact, or combination of facts*, which gives rise to a *right of action*." (emphases added)).

In other words, a "right of action" exists only in certain situations. Only some fact patterns will create a right of action. If a particular type of defendant has no

obligation to a plaintiff for a particular type of harm, then that fact pattern does not create a "right of action."

Contemporaneous dictionaries also indicate that the facts had to give rise to a *viable* claim that a plaintiff could *actually maintain*. *See, e.g.*, *Right of Action*, 34 *Cyclopedia of Law and Procedure* 1766 (1910) ("A right to commence *and maintain* an action." (emphasis added)); *Right of Action*, Webster's New International Dictionary 1835 (1909) ("A right to begin *and prosecute* an action in the courts." (emphasis added)).

Cases before and after Arizona achieved statehood likewise confirm that the "right of action" must lead to a legal remedy. *See Graham v. Scripture*, 26 How. Pr. 501, 507 (N.Y. 1864) ("A cause of action is synonymous with *right of action—a right of recovery*, and a complaint which does not show *a right of recovery*, fails to show a cause of action. The complaint should state *facts sufficient*, if admitted or proved, to authorize a *recovery* of judgment." (emphasis added)); *Jacobus v. Colgate*, 111 N.E. 837, 839 (N.Y. 1916) (If the state "recognized [a loss] as a wrong [but] gave no redress for it," then "the injured owner had suffered an impairment of his right, [but] he had none the less no *right of action*." (emphasis added)).

Moreover, article 18, § 6 does not stop at "the right of action"; it refers to "[t]he right of action *to recover damages for injuries*." As a textual matter, this

means that the right of action must support a damages recovery to warrant protection. The phrase "to recover damages" confirms that the claim must be viable.

This principle—that the Constitution protects only claims that would have been *viable* in 1912—makes sense. The framers would not have viewed themselves as protecting theories of liability that had already been rejected.

If any doubt remains about the meaning of this phrase, "[o]ur work also can be aided by corpus linguistics . . . ." *Matthews*, 254 Ariz. at 174 ¶ 33. A corpus linguistics review of the term "right of action" between 1900 and 1920 reveals no usages disconnected from specific fact patterns, viable claims, and the right to recover a remedy, which confirms the conclusions from the other contemporaneous sources. *See* Search of "right of action" (1900-1920), Corpus of Hist. Am. Eng., https://www.english-corpora.org/coha/?c=coha&q=113669691.

In sum, under the original public meaning, a "right of action to recover damages" exists only if the particular set of facts would have created a viable claim for damages at statehood. It does not cover post-statehood developments because "[t]o supply a remedy where previously there was none of any kind is to *create* a right of action." *Jacobus*, 111 N.E. at 839 (emphasis added). Article 18, § 6, however, merely *preserves* "[t]he right of action to recover damages for injuries" against future "abrogat[ion]."

### 3. "Abrogated" implies rights that existed in 1912 because a right that does not already exist cannot be abrogated.

The term "abrogated" also had a particular meaning at statehood, referring to annulling something that already existed. At the time of the constitutional convention, "abrogate" meant "[t]o annul by an authoritative act; to abolish by the authority of the maker or his successor; to repeal." *Abrogate*, Webster's New Int'l Dictionary 7 (1909). Black's Law Dictionary likewise defined "abrogate" as "[t]o annul, repeal, or destroy." *Abrogate*, Black's Law Dictionary 9 (2d ed. 1910).

Both before and after statehood, Arizona courts used "abrogate" in this same sense, including in connection with the abrogation of common law rights. In *Trimble v. Territory*, 8 Ariz. 281, 284 (1903), for example, the territorial Supreme Court construed a statute "abrogat[ing]" the "distinction between an accessory before the fact and a principal." *Id.* The "common law" had recognized these accessory/principal distinctions "at the time of its adoption in the states of this country," the court noted, but our statute "depart[ed]" from it "in the abolishment of these technical distinctions." *Id.*; *see also Boquillas Land & Cattle Co. v. Curtis*, 11 Ariz. 128, 136-37 (1907) ("[A]ny right granted by the statute was not intended to become property in such a sense that it might not be abrogated by future legislation."); *Hageman v. Vanderdoes*, 15 Ariz. 312, 324 (1914) ("[T]he common-law liability of the husband for the voluntary torts of the wife is abrogated . . . by married women's statutes").

In ordinary, common usage, something can be annulled, abolished, repealed, or destroyed only if it already exists. If it does not already exist, then there is nothing to annul. A corpus linguistics review of the term "abrogated" between 1900 and 1920 reveals no usages that suggest abrogating something that did not already exist. *See* Search of "abrogated" (1900-1920), Corpus of Hist. Am. Eng., https://www.english-corpora.org/coha/?c=coha&q=113669635.

So, under the original public meaning of article 18, § 6, the only things that could be "abrogated" were things that already existed in 1912. The framers would not have viewed themselves as protecting from abrogation (i.e., annulment) anything that would not spring to life until many years later.

* * *

In sum, the definite article "the" restricts the phrase to the well-known, pre-existing right at statehood. The original public meaning of "right of action to recover damages for injuries" includes only particular sets of facts and circumstances that would have established a "right of action" and supported a viable claim for "damages." And a right cannot be "abrogated" if it did not already exist.

Putting these terms together, article 18, § 6 means that if a particular set of facts would have supported a viable claim for damages at statehood, under then-existing caselaw, then no one may annul that right of action today. The provision does not cover post-statehood developments in the law.

### B. The structure confirms article 18, § 6's narrow scope.

The Arizona Constitution's structure confirms that article 18, § 6 has this narrow scope. This Court considers structural factors, such as "placement within a single section of the constitution," when interpreting the Constitution and statutes. *Taxpayer Prot. All. v. Arizonans Against Unfair Tax Schemes*, 199 Ariz. 180, 181 ¶ 4 (2001); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 167 (2012) (body of law should be read "to consider the entire text, in view of its structure and of the physical and logical relation of its many parts").

1. To begin, the provision is located in article 18, titled "Labor." As discussed below (Argument § II.C), there are strong indications that the framers intended the provision to apply solely to labor claims. At a minimum, its placement under "Labor" indicates that the founders intended the provision to address a particular kind of mischief, and should not be given an expansive interpretation that would "constitutionalize[] the law of torts." *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 346 (1993) (Martone, J., dissenting).

2. Note too that although article 18, § 6 protects "the amount recovered" from only "*statutory* limitation," it protects "[t]he right of action to recover damages for injuries" against *any* "abrogat[ion]." (Emphases added.) This structure indicates that the anti-abrogation provision reaches both *legislative* and *judicial* abrogation. *See* Roger C. Henderson, *Tort Reform, Separation of Powers, and the Arizona*

*Constitutional Convention of 1910*, 35 Ariz. L. Rev. 535, 614 (1993) (provision "also could be read to enjoin the courts as well as the legislature in this respect."); *cf. Hazine*, 176 Ariz. at 347 (Martone, J., dissenting) ("Does the anti-abrogation clause restrict abrogation by the legislature, but not this court?"). That would make sense, because the doctrines that prompted the provision were judge-made, not legislative. *See* Henderson at 608 ("[T]he main concern at this time . . . was the plight of the worker who, when injured on the job, was faced with a formidable trilogy of [judicially created] defenses—fellow-servant doctrine, assumption of risk, and contributory negligence-when a tort action was brought against the employer.").

If that is correct, then article 18, § 6 prohibits both the legislature and the courts from abrogating the common law right of action that existed in 1912. So far, so good. But interpreting the provision to apply to post-statehood developments in the law would entail consequences that our framers could not have intended. If every judicial decision recognizing a new tort claim had constitutional dimension, then no court could ever overturn such a decision. Yet nothing indicates that article 18, § 6 creates such a form of turbocharged stare decisis. Although the provision prohibits reconsideration of *pre*-statehood common law, nothing suggests that courts should be prohibited from developing the law *post*-statehood. Such a prohibition would arrest the development of the common law, which requires flexibility, not rigidity.

3. More broadly, the Constitution "vest[s]" the "legislative authority of the state . . . in the legislature." Ariz. Const. art. 4, pt. 1, § 1(1). Delineating the contours of civil claims falls squarely within the legislative power. Article 18, § 6 doubtless limits this authority, but interpreting that provision too broadly—e.g., by giving constitutional weight to every tort decision—would invade the legislative power and thus violate the separation of powers. *See* Ariz. Const. art. 3 ("The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."). Construing article 18, § 6 to cover only the well-known, pre-existing law as of 1912 would properly respect the roles of the legislature and the courts. The courts remain free to develop the common law, including creating new liability, but those decisions would not be constitutionally immune from legislative changes.

### C. The purpose and history of article 18, § 6 confirm that it does not apply to post-statehood developments.

The founders intended for article 18, § 6 to address a particular problem. "[T]he main concern at this time across the country, as well as in Arizona, was the plight of the worker who, when injured on the job," faced obstacles to recovery. Henderson at 608. The tort reform effort of the time "was directed only to proposals

for change in the rules of liability and remedies available to employees injured on the job." *Id.* at 569.

With this effort in mind, the delegates to our constitutional convention advanced what became the anti-abrogation provision as part of "Proposition 88, which was clearly billed as an employers' liability law." Henderson at 611. Proposition 88 "was intended to embody an employers' liability act," and "the three sections contained in it only applied to employees and employers . . . ." *Id.* at 601. Accordingly, the anti-abrogation provision was codified in Article 18, "Labor."

In light of this narrow focus, "there is a very serious question of whether Section 6 of Article XVIII was ever intended to apply outside the employment context." *Id.* at 608-09. "There was no mention or even a suggestion that any of the provisions discussed would apply outside the employer-employee context." *Id.* at 613. Simply put, "there does not appear on the basis of the evidence available today to be any real justification for holding that the guarantees under Section 6 of Article XVIII were ever intended for 'the benefit of all.'" *Id.* at 617.

JAI is not asking the Court to confine article 18, § 6 to the labor context. The Court rejected that interpretation in a dictum, *see id.* at 609-10 (discussing *Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 443-44 (1926)), and it need not reconsider it now. But the relevant history demonstrates that, contrary to the plaintiffs' assertion (Petition at 13-15), article 18, § 6 was not part of a sweeping movement aimed at

constitutionalizing every tort decision. Nor was it motivated by "distrust[] of state legislatures" in favor of courts. (Petition at 14). Instead, as explained above (Argument § II.B), article 18, § 6 was motivated by judge-made doctrines. This history therefore confirms that article 18, § 6 was never intended to have the expansive reach the plaintiffs advance.

## III. The Court should clarify the proper scope of article 18, § 6.

As JAI's response to the petition explained, the existing cases render the state of the law somewhat unclear. Although not necessary to decide this case, the Court should now clarify for lower courts that article 18, § 6 does not cover post-statehood "evolution" in the law.

### A. The Court's prior cases suggest that article 18, § 6 has a remarkably expansive scope.

Much of the confusion about the scope of this provision comes from *Boswell* and *Hazine*. *Boswell* relies heavily on the notion that "our common law is not frozen as of 1912," but "must allow for evolution of common law actions to reflect today's needs and knowledge." 152 Ariz. at 17-18. This observation, however, does not imply that the article 18, § 6 must expand with every post-1912 evolution in the common law. On the contrary, attaching constitutional status to every successive common law development does not facilitate the common law's development, it impedes it. As Justice Martone noted in dissent, "By locking our newly developed tort law into the concrete of constitutional protection, we now lose the very

flexibility the court seeks to preserve." *Hazine*, 176 Ariz. at 348 (Martone, J., dissenting).

Moreover, *Boswell* and *Hazine*'s "evolution" concept rests on a flawed analysis. For example, *Boswell* ascribes to article 18, § 6 the meaning of an open-courts provision that was rejected. It says that "Article 18, § 6 protects the *right of people to seek 'remedy by due course of law'* for injury to their 'lands, goods, person, or reputation.'" 152 Ariz. at 18 (emphases in original). But that quotation came from the *Proposed* Constitution of 1891, not the adopted constitution. "This type of 'open court' provision was introduced at the Arizona Constitutional Convention [of 1910], but it was not included in the final version of the constitution." Henderson at 577 (footnote omitted). Even if it had been adopted, it would shed no light on the anti-abrogation clause. *See id.* at 577-78. And although it may be appropriate to consider proposed laws, *Boswell* contains no such nuanced analysis, and instead directly attributes to article 18, § 6 the meaning of a rejected provision.

**B. The Court should return to the provision's original meaning.**

Although *Cronin* and *Dickey* partially retreated from the errors in *Boswell* and *Hazine*, they left intact other problematic aspects of the older decisions. For example, *Cronin* and *Dickey* say in dicta that the anti-abrogation clause protects a claim that "evolve[d] from common law antecedents" or "found its basis in the common law." *Cronin*, 195 Ariz. at 539 ¶ 37; *Dickey*, 205 Ariz. at 3 ¶ 9. As the

response to the petition explained (at 21), however, every expansion or invention of liability evolved from common law antecedents. That is how the common law works. No judicial opinions make law without invoking precedent. Those statements, and the analysis in *Boswell* and *Hazine*, improperly expand article 18, § 6 to swallow the entire body of common law torts and give constitutional weight to every judicial opinion creating new liability. The Court should disclaim those troublesome phrases that have distorted the law and return to the original meaning of article 18, § 6.

### C. The plaintiffs' argument to give post-statehood developments constitutional stature would lead to absurd results.

Attaching constitutional status to every post-statehood "evolution" in the common law, as urged by the plaintiffs, would produce absurd results.

1. Under this approach, the constitutional status of a tort claim would depend on which coordinate branch of government recognized it first—the judiciary or the legislature. Here, if the legislature had enacted A.R.S. §§ 4-311, -312(B) between 1912 and 1983, no one would have questioned their validity because they would not have abrogated any right that had *ever* been recognized in Arizona. Under the "evolution" approach, those same statutes are unconstitutional merely because the judiciary acted before the legislature. Article 18, § 6 does not work this way.

2. Social host immunity provides another example. As explained in the response to the petition (at 11), the legislature statutorily immunized social hosts in

1985. Under the evolving-constitution view, the same statute would have been unconstitutional if the judiciary had made social hosts liable before the legislature could act. (*See* Op. ¶ 35.) The anti-abrogation clause should not create a race between the legislature and the judiciary. (*See* Op. ¶ 34.)

3. Nor should it create a race within the judiciary. Assuming it applies to courts (*see* Argument § II.B, above), the evolving-constitution view would mean that whichever judicial decision created the greatest liability would be cloaked with constitutional protection. Under this view, *Ontiveros* carries constitutional weight, transforming it into super precedent that can only be expanded, and never curtailed. Under this ratcheting effect, liability can always increase, but can never decrease.

4. Consider what this would mean if the Court in *Ontiveros* had gone further and ruled that serving alcohol triggered strict liability instead of negligence. Creating new liability is mere evolution of the common law. But later reconsidering that decision would be, in this view, unconstitutional abrogation. *Cf. Hazine*, 176 Ariz. at 348 (Martone, J., dissenting) ("Under today's decision, can we overrule our cases which first acknowledged strict liability in tort?"). This absurd result should be rejected. Article 18, § 6 creates a floor, not a ratchet. It establishes a bounded right; it does not create automatic, forever-expanding constitutional rights.

5. Consider also what it might take to invoke the ratchet. Suppose the court of appeals recognizes a new tort claim in a published decision and the losing

party does not petition for review. Does that represent an evolution of the common law that triggers the anti-abrogation clause's protections, so that even this Court cannot reconsider the issue in a subsequent case? That cannot be the law.

6. As JAI's response to the petition explained (at 19-22), the types of generic legal propositions offered by the plaintiff (Petition at 17-18), such as general obligations to avoid harm to others, would jeopardize thousands of Arizona statutes. Those types of statutes protect businesses from claims that would not have been viable in 1912, and therefore fall outside the original public meaning of "[t]he right of action to recover damages." Using such broad principles to invalidate A.R.S. § 4-312(B) would give article 18, § 6 a far broader scope than the founders ever intended.

## CONCLUSION

The Court should hold that A.R.S. § 4-312(B) does not violate article 18, § 6. Accordingly, it should affirm the court of appeals, which reversed and vacated the judgment against JAI and remanded to the superior court for entry of judgment in favor of JAI.

RESPECTFULLY SUBMITTED this 9th day of May, 2023.

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