Lincoln Combs, Esq. (025080)
O'STEEN & HARRISON, PLC
300 W. Clarendon Ave., Suite 400
Phoenix, AZ 85013-3424
602-252-8888
602-274-1209 FAX
lcombs@vanosteen.com
Counsel for Amicus Curiae
Arizona Association for Justice

IN THE COURT OF APPEALS
STATE OF ARIZONA, DIVISION ONE

ROBERTO TORRES, et al., Plaintiffs/Appellees, v. JAI DINING SERVICES (PHOENIX) INC., Defendant/Appellant.	**Case No. 1 CA-CV 19-0544** Maricopa County Superior Court Case No. CV 2016-016688 Hon. Sherry K. Stephens **BRIEF OF AMICUS CURIAE ARIZONA ASSOCIATION FOR JUSTICE**

Amicus Curiae Arizona Association for Justice, pursuant to the Court of Appeals' Order for Supplemental Briefing, respectfully submits this amicus brief. Amicus has asked the parties for their consent to the filing of this brief, and neither side had any objection to the filing of this amicus brief.

I. Summary of Argument.

This brief addresses the two issues posed on remand by the Arizona Supreme Court: (1) whether an exception to the waiver doctrine is warranted in this case and, if so, (2) whether Plaintiffs' negligence and common law dram shop

claims have been preempted by A.R.S. § 4-312(B).

There is no dispute that JAI waived its preemption argument by raising it for the first time on appeal. And the rule is that appellate courts—absent rare and extraordinary circumstances not present here—will not consider an issue raised for the first time on appeal. There is no reason to circumvent that universal rule in this case and there will be other opportunities for litigants to make JAI's preemption argument in the proper course.

Because the issue was waived, there is no reason to reach the preemption argument in this case. Further, the argument is foreclosed by *Young v. DFW Corp.*, 184 Ariz. 187 (App. 1994) (and the long-line of cases following *Young*), which found A.R.S. § 4-312(B) unconstitutional under the Arizona Constitution's Anti-Abrogation Clause, Article 18, Section 6. An unconstitutional statute cannot

II. There is no justification for considering JAI's long-waived preemption argument at this late stage.

It is well-settled that parties cannot raise issues for the first time on appeal. Only in rare circumstances will courts consider a waived issue on appeal. The waiver rule promotes the orderly administration of justice and protects a party against whom the waived argument is made from surprise. *See Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503 (1987) (declining to review constitutional challenge to punitive damages raised for the first time on appeal). "Efficient and orderly administration requires some point in time at which it is too late to raise new issues

on appeal." *Id.*

Cases in which courts have forgone application of the waiver doctrine illustrate why this case presents no such circumstances. Generally, those case involve purely legal interpretations of a statute, or fundamental constitutional arguments. *See Home Builders Ass'n of Central Arizona v. City of Maricopa*, 215 Ariz. 146, 151 n.3 (App. 2007) (statutory interpretation); *In re MH 2008-00028*, 221 Ariz. 227, 280 ¶11 (App. 2009); *In re HM 2008-002659*, 224 Ariz. 25, 27 ¶ 11 (issue of pure statutory interpretation).

So, while appellate courts have the power to review issues raised for the first time on appeal, sound policy limits a review of waived issues to those cases presenting "extraordinary circumstances." *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994).

The circumstances here are not extraordinary. First, A.R.S. § 4-312(B) is not a new statute. It has been on the books since 1986 and there is no reason why JAI could not have raised preemption with the trial court. Nor is this a purely legal issue of statutory interpretation where there is no prejudice to the parties from failure to waive it. Laying in the weeds until appeals to raise a potentially case-killing issue gave no notice to Plaintiffs that their claims may depend entirely on the statutory dram shop case. As a result, Plaintiffs had no opportunity (or need) to develop evidence and focus their trial presentation on the statutory dram shop

elements, with knowledge that that claim may ultimately prove the only viable path for a verdict.

There is a serious jurisprudential issue regarding Defendants' waiver position. Our courts have always encouraged lawyers to present all issues to the trial court for development of facts and arguments, and full consideration by the trial judge. It has always been the rule that, except in exceptional circumstances, failure to present an argument in the trial court will be considered a waiver.

Defendants could have presented that argument in four briefings and in oral argument to the trial court but did not. As a result, this case has gone from the trial court to the Court of Appeals to the Supreme Court, and back to the trial court. Such piecemeal adjudication is not in the best interests of the public or of the judicial system.

A finding of waiver would be an open invitation in many types of future cases. Nor is there any excuse for these Defendants—with competent, experienced counsel familiar with this type of case—to fail to raise their preemption argument when they should have. This is simply not a valid waiver issue.

Litigation is not a game of Whack-A-Mole where one party can try out claims or defenses in serial fashion, hoping for a better outcome each time. Instead, our rules are designed to "secure the just, speedy, and inexpensive determination of every action and proceeding." Consideration of a new,

dispositive defense after disclosures, discovery, trial, jury deliberations and post-trial motions is anathema to these fundamental goals.

III. Arizona negligence and common law dram shop claims are not preempted.

Not only has JAI's preemption argument been waived, it also lacks merit.

In *Estate of Hernandez v. Arizona Board of Regents*, the Arizona Supreme Court had occasion to consider § 4-312(B) in the wake of *Ontiveros v. Borak*, which held that a liquor licensee could be liable to third persons injured by a patron overserved by the licensee. 177 Ariz. 244 (1983). Section 4-312(B) was enacted three years later. In *Estate of Hernandez*, the Court faced a claim that § 4-312(B) immunized from liability all non-licensees who furnished alcohol to minors. After canvassing the legislative history, the Court found that the "most reasonable construction is that by enacting § 4-312(B), the legislature protected only licensees and those associated with a licensee's permitted activities from personal liability, 'subject to' the common law liability expressed in *Ontiveros* and *Brannigan* and codified in § 4-311." 177 Ariz. at 252. In construing § 4-312(B) to be "subject to" the common law dram shop liability recognized in *Ontiveros* and *Brannigan*, the Court did not need to reach the issue of whether the statute was an unconstitutional violation of the anti-abrogation clause in Ariz. Const. art. 18, § 6. *Id.*

But the constitutionality of § 4-312(B) was squarely presented and addressed in *Young v. DFW Corporation*, 184 Ariz. 187 (App. 1995). In that case, the trial

court precluded a plaintiff injured by an intoxicated motorist from submitting a general negligence jury instruction in a lawsuit against the bar where the motorist became intoxicated. 184 Ariz. at 188. The trial court agreed with the bar that, based on § 4-312(B), Mr. Young could prevail in his claims only if he proved that the motorist was served while she was "obviously intoxicated" as defined by § 4-311. *Id.* In other words, as JAI belatedly argues here, § 4-312(B) made the statutory dram shop claim set forth in § 4-311 the exclusive means of establishing dram shop liability, effectively abrogating common law dram shop liability principles set forth in *Ontiveros*. *Id.*

The Court of Appeals rejected this argument and reversed. It found that § 4-312(B) was unconstitutional:

> [W]e find that, because section 4-312(B) limits dram shop liability to that found in section 4-311, section 4-312(B) deprives at least one foreseeable class of plaintiffs injured by intoxicated drivers a reasonable alternative to the general negligence action for dram shop liability recognized in Ontiveros. That class includes plaintiffs injured by drivers who are not obviously intoxicated as defined by section 4-311(C), but who have consumed a sufficient number of alcoholic drinks that the licensee knows or should know that they are intoxicated.

Id. at 189.

As the *Young* court recognized, common law negligence dram shop claims play an important role in ensuring safe service of alcohol. While there may be situations where a liquor licensee can be liable under both statutory and common

law negligence dram shop theories, the two claims are not coextensive. The statutory claim has a shorter statute of limitations and also is limited—as it relates to the case over non-underage patrons—to licensees who serve patrons who are (1) obviously intoxicated and (2) who consume the alcohol on the premises. A.R.S. § 4-311. Statutory liability is strict; it applies whether the licensee knew or should have known the patron was obviously intoxicated.

Negligence common law dram shop duties are different. They focus on what the licensee knew or should have known. *Ontiveros*, 136 Ariz. at 508-09. The *Young* court noted the hypothetical of a man who enters a bar and purchases eight shots of 100 proof alcohol in ten minutes and tells the bartender that he is going to drive from the bar to Phoenix to his home in Tucson. *Id.* 189-90. In that situation, the bartender would not have statutory liability because the man would not be "obviously intoxicated" at the time he purchased the shots. Yet a jury could reasonably conclude that the bartender was negligent for allowing the patron to take eight shots of hard liquor and then attempt to drive 120 miles to Tucson.

Common law negligence is appropriately broader than § 4-311 liability. There are many situations where a patron may not be "obviously intoxicated" when purchasing liquor, but nonetheless become a threat to the public through becoming intoxicated at a bar or restaurant. Consider the situation of a bar that runs a promotion of selling an entire bottle of liquor to a patron who consumes it

on premises. So long as the patron was not impaired at the time of sale, there would be no statutory liability for allowing the patron to drink an entire bottle of liquor and then drive away if the patron hurt or killed someone.

Likewise, a bar could theoretically allow one patron to purchase drinks for another, with the drinking patron sitting quietly at a table and never interacting with bar staff. If that patron was served—via drinks sold to the purchasing patron—to the point of impairment and caused injury or death on his or her way home, the bar could, under the strict language of § 4-311, again evade liability on the basis that the *purchaser* was not obviously intoxicated. On the other hand, a negligence claim would allow the victim to make arguments based upon what the licensee should have known or be critical of the bar for not adopting policies that protect against such a situation.

Gone are the days where

> 'most people walked and a few had horses or carriages, . . . [T]he situation then and the problem in today's society of the imbiber going upon the public highways and operating a machine that requires quick response of mind and muscle and capable of producing mass death and destruction are vastly different.'

Id. at 507 (quoting *Meade v. Freeman*, 462 P.2d 54 (1969) (Prather, J. dissenting)). Imposition of negligence common law dram shop liability is consistent with Title 4's overall goal of ensuring the safe and responsible service of liquor. Negligence-based claims provide broader protection to the public from the threat of drunk

driving. Because § 4-312(B) eliminates causes of action those injured by impaired patrons who were not "obviously intoxicated" within the meaning of § 4-311(D), § 4-312(B) is unconstitutional under Ariz. Const. art 18, § 6 and therefore invalid. *Young*, 184 Ariz. at 189. Because an unconstitutional statute cannot preempt common law negligence claims, JAI's arguments fail.

IV. Conclusion

There are no extraordinary circumstances excusing JAI's waiver of its preemption argument in this case. But the threat of people being overserved alcohol injuring or killing members of the public is just as extraordinary now as it was in 1983 when the Arizona Supreme Court recognized a common law duty of liquor licensees to serve responsibly. A.R.S. § 4-312(b) cannot constitutionally abrogate that right, and it therefore cannot preempt negligence and common law dram shop claims.

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O'STEEN & HARRISON, P.L.C.

/s/ Lincoln Combs
Lincoln Combs
300 W. Clarendon Ave., Suite 400
Phoenix, AZ 85013
Attorney for Amicus Curiae
Arizona Association for Justice