IN THE
ARIZONA SUPREME COURT

ROBERTO TORRES, *et al.*, Petitioners, v. JAI DINING SERVICES (PHOENIX) INC., Respondent.	Arizona Supreme Court No. CV-22-0142-PR Arizona Court of Appeals, Division 1 No. 1 CA-CV 19-0544 Maricopa County Superior Court No. CV 2016-016688

Brief of Amicus Curiae Arizona Association for Justice/Arizona Trial Lawyers Association in Support of Petitioners

(Filed with written consent of the Parties. *See* Ariz. R. Civ. App. P. 16(b)(1)(A).)

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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

Although it began as an attack on *Young*,[1] JAI now advocates a dramatic reversal of Anti-Abrogation Clause jurisprudence. Accepting JAI's argument would require the Court to ignore the text and history of the Anti-Abrogation Clause. It would require the Court to diminish its traditional common-law role. It would require the Court for the first time to strip constitutional protection from a common-law right of action it explicitly recognized. And it would require the Court to overrule or disapprove decades of cases concerning numerous common-law claims.

JAI contends that *Cronin*[2] and *Dickey*[3] support this upheaval, but it should be telling that the strongest support for JAI's position lies in the dissenting opinions in

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[1] *Young v. DFW Corp.*, 184 Ariz. 187 (App. 1995).
[2] *Cronin v. Sheldon*, 195 Ariz. 531 (1999).
[3] *Dickey v. Cty. of Flagstaff*, 205 Ariz. 1 (2003).

Hazine[4] and *Franks*,[5] the overruled opinion in *Bryant*,[6] the vacated opinion in *Hays*,[7] and the arguments explicitly rejected in *Boswell*[8] and *Humana Hospital*.[9] JAI's real problem is not *Young* but the mountain of settled precedent on which it rests—all of which JAI now tries to recast as *dicta*. But there is no way to pluck *Young* from our common law without uprooting its entire family tree.

Such a radical departure would be contrary to the text, history, and traditional application of the Anti-Abrogation Clause and would fundamentally change Arizona tort law for the worse. This Court should reverse the judgment below.

ARGUMENT

I. The Anti-Abrogation Clause should be read to respect this Court's traditional common-law role.

Courts applying the Anti-Abrogation Clause have followed a clear and workable principle: when this Court exercises its common-law authority to recognize a right of action, the Anti-Abrogation Clause protects that right of action.

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[4] *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 346–48 (1993) (Martone, J., dissenting).

[5] *Franks v. U.S. Fid. & Guar. Co.*, 149 Ariz. 291, 301–04 (App. 1985) (Haire, J., dissenting).

[6] *Bryant v. Cont'l Conveyor & Equip. Co.*, 156 Ariz. 193, 195 (1988), *overruled by Hazine*, 176 Ariz. at 343–44.

[7] *Hays v. Cont'l Ins. Co.*, 172 Ariz. 573, 575–77 (App. 1992), *vacated sub nom. Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264 (1994).

[8] *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 17–18 (1986).

[9] *Humana Hosp. Desert Valley v. Superior Ct.*, 154 Ariz. 396, 399 (App. 1987).

This approach comports with the text and history of the Anti-Abrogation Clause, as well as the roles of the respective branches of government.

A. The text of the Anti-Abrogation Clause protects broadly "the right of action" rather than any particular action.

Determining the scope of the Anti-Abrogation Clause begins with its text, "the best and most reliable index of a provision's meaning." *See Arizona Free Enter. Club v. Hobbs*, 515 P.3d 664, 668, ¶ 10 (Ariz. 2022) (alteration and citation omitted). Article 18, Section 6 of the Arizona Constitution provides: "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 . . . ."

This language is clear. It is "simple, explicit and all-inclusive." *Kilpatrick v. Superior Ct.*, 105 Ariz. 413, 419 (1970). It "contains no restrictive adjectives or phrases." *Boswell*, 152 Ariz. at 13. Unlike neighboring provisions,[10] "[i]t mentions no particular type of damage, but speaks instead to the broad 'right . . . to recover damages for injuries.'" *Id.* As Petitioners' Supplemental Brief explores in detail, the text evinces the Founders' intent to protect tort victims' rights to recover.

[10] *See* Ariz. Const. art. 18, § 7 (concerning "accident" cases and "injury . . . caused by the negligence of the employee"); *id.* § 8 (requiring workers' compensation laws to address "personal injury" and "failure . . . to exercise due care"); *see also Burns v. Arizona Pub. Serv. Co.*, 517 P.3d 624, 631, ¶ 28 (Ariz. 2022) ("Where the drafters used different language in different provisions, we imply that a different meaning is intended.").

Both sides rely on corpus linguistics to support their positions. "[C]orpus linguistics is one tool—new to lawyers and continuing to develop—but not the whole toolbox." *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 440 (6th Cir. 2019) (Thapar, J., concurring in part). It is certainly not a means by which courts disregard settled precedent and start from scratch in every case. In *Matthews v. Indus. Comm'n of Arizona*, this Court employed corpus linguistics only after noting that "relevant case law is circuitous and contradictory and does not resolve this question." 520 P.3d 168, 172, ¶ 20 (Ariz. 2022). But the Court here is not writing on a blank slate.

No shortage of parties since the Founding have ignored the Anti-Abrogation Clause's broad language and tried to restrict its scope. Despite these efforts, this Court has already refused to limit the Anti-Abrogation Clause to only workplace injuries, only negligence actions, or only bodily injuries—rejecting the exact arguments JAI raises in its Supplemental Brief. *See Cronin*, 195 Ariz. at 538, ¶ 35; *Boswell*, 152 Ariz. at 12–19; *Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 444 (1926). Instead, this Court has determined that the Anti-Abrogation Clause "prevents abrogation of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions in tort which trace origins to the common law." *Cronin*, 195 Ariz. at 538, ¶ 35 (citing *Hazine*, 176 Ariz. at 343–44). JAI's assertion that the Court can rule in its favor without disturbing any prior caselaw is simply wrong.

B. This Court has recognized structural boundaries of the Anti-Abrogation Clause.

Though broad, the Anti-Abrogation Clause is not unlimited. After all, no single constitutional provision exists in a vacuum. "The meaning of words in our constitution must be drawn from the context in which they are used and considered in light of the document as a whole." *Fann v. State*, 251 Ariz. 425, 442, ¶ 60 (2021). Accordingly, this Court has read the Anti-Abrogation Clause to work in harmony with the overall structure of government and the different branches' roles. *Hazine*, *Cronin*, and *Dickey* reflect the Anti-Abrogation Clause's scope and structural boundaries.

Hazine largely answered the Issue Presented as rephrased by the Court. There, the Court explicitly rejected the argument that "the legislature could constitutionally restrict personal injury claimants to pre-statehood theories of liability and pre-statehood measures of damages." *Hazine*, 176 Ariz. at 344. Instead, the Court "agree[d] with the unanimous *Boswell* court that [the Anti-Abrogation Clause] 'is not limited to those elements and concepts of particular [causes of action] which were defined in our pre-statehood case law.'" *Id.* at 343–44 (quoting *Boswell*, 152 Ariz. at 18) (third alteration in original); *see also Petolicchio v. Santa Cruz Cnty. Fair & Rodeo Ass'n, Inc.*, 177 Ariz. 256, 259 (1994) (summarizing *Hazine*'s holding as "actions for damages are protected by our constitution, even if first recognized or

asserted after statehood"); *cf.* JAI's Supplemental Brief at 17 ("The provision does not cover post-statehood developments in the law.").

Cronin determined that claims created by statute do not carry constitutional protection. 195 Ariz. at 539, ¶ 37 ("[A] tort claim alleging wrongful discharge in violation of the ACRA-based public policy is *strictly statutory and thus* not within the *Hazine* doctrine." (emphasis added)). In other words, the legislature's constitutional authority to pass statutes necessarily includes the power to repeal or replace those statutes, and the Anti-Abrogation Clause does not supersede that power. Notably, even though *Cronin* concerned a statutory claim, *Cronin* specifically highlighted this Court's role to develop the common law. 195 Ariz. at 537, ¶ 26 ("To adopt the common law is, by definition, to adopt the plenary role of the judiciary in its continuing development.").

Dickey determined that under sovereign immunity principles, the Anti-Abrogation Clause does not protect tort claims against municipalities. The Court noted that "governments generally enjoyed sovereign immunity from suits sounding in tort, a tradition that carried over to this country." *Dickey*, 205 Ariz. at 3, ¶ 9 n.3. Like the fundamental legislative prerogative to pass and repeal statutes, it "is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the government's] consent." *Alden v. Maine*, 527 U.S. 706, 716 (1999) (citation omitted). Although municipalities are not sovereigns in the federalism-

sense, they are entitled to the same protection as states when they act "as the agent of the state in the exercise of strictly governmental functions." *See Dickey*, 205 Ariz. at 3, ¶ 10 (citation omitted). *Dickey* also did not purport to supplant "the *Hazine* doctrine" or to limit this Court's authority to recognize the common law. *See Cronin*, 195 Ariz. at 539, ¶ 37. Indeed, *Dickey* did not meaningfully discuss *Hazine* at all (even in dissent), which indicates that *Dickey*'s analysis was limited to the issue before it: sovereign immunity.

Together, *Cronin* and *Dickey* reflect that the Court "do[es] not read separate constitutional provisions to determine which prevails over the other; rather, [the Court] read[s] them to harmonize the provisions and give effect to each." *See Burns*, 517 P.3d at 631, ¶ 30.

C. The Anti-Abrogation Clause has always protected this Court's development of the common law.

Though it does not apply to strictly statutory claims or claims against the government, common-law claims have always been at the heart of the Anti-Abrogation Clause's protection.

"Arizona is not a code state; we are a common law state." *Zambrano v. M&RC II LLC*, 517 P.3d 1168, 1180, ¶ 43 (Ariz. 2022). And this Court has always had the authority to recognize changes to the common law. *Id.* ("Who declares the common law by focusing on public policy? We do, with appropriate restraint."). "Just as the common law is court-made law based upon the circumstances and

conditions of the time, so can the common law be changed by the court when conditions and circumstances change." *Nunez v. Pro. Transit Mgmt. of Tucson, Inc.*, 229 Ariz. 117, 123, ¶ 26 (2012) (citation omitted). Given the dynamic nature of the common law, this Court's role in recognizing it, and the Anti-Abrogation Clause's broad language, it would not make sense for the Founders to have meant to freeze protected rights of action in time.

For these reasons, courts determining whether claims or remedies "trace origins to the common law" or "evolved from rights recognized at common law," *Cronin*, 195 Ariz. at 538, 539, ¶¶ 35, 39, have not embarked on independent historical analyses. They instead looked to whether *this Court* has recognized an evolution in the common law. Doing so, Arizona courts have understood that the Anti-Abrogation Clause protects rights of action that this Court recognized to recover damages, including those unavailable to a plaintiff until after 1912. *See Hazine*, 176 Ariz. at 343–44 (Anti-Abrogation Clause protects strict products liability claim recognized in *O.S. Stapley Co. v. Miller*, 103 Ariz. 556 (1968)); *Boswell*, 152 Ariz. at 17–18 (Anti-Abrogation Clause protects emotional distress damages for defamation recognized in *Conard v. Dillingham*, 23 Ariz. 596 (1922)); *Young*, 184 Ariz. at 190 (Anti-Abrogation Clause protects dram-shop negligence claim recognized in *Ontiveros v. Borak*, 136 Ariz. 500 (1983)); *Franks*, 149 Ariz. at 299 (Anti-Abrogation Clause protects insurance bad faith claim recognized in *Noble*

v. Nat'l Am. Life Ins. Co., 128 Ariz. 188 (1981)),[11] *Humana Hospital*, 154 Ariz. at 399 (Anti-Abrogation Clause protects hospital negligent supervision claim recognized in *Tucson Med. Ctr., Inc. v. Misevch*, 113 Ariz. 34 (1976)). And in the limited circumstances where opinions departed from this principle, this Court corrected them. *See Bryant*, 156 Ariz. at 195, *overruled by Hazine*, 176 Ariz. at 343–44; *Hays*, 172 Ariz. at 575–77, *vacated by Hayes*, 178 Ariz. at 264.

A clear rule emerges from these cases: if this Court conducts a common-law analysis and recognizes a right of action, the Anti-Abrogation Clause protects that right of action. Such "a well-established and important legal principle will not be deemed to have been overruled by implication in subsequent decisions . . . unless the principle is directly involved and the inference is clear and impelling." *Pace v. Pace*, 128 Ariz. 455, 457 (App. 1981) (citation omitted). Reading isolated sentences from *Cronin* and *Dickey* to supplant decades of cases and create a new Anti-Abrogation Clause paradigm *sub silentio* would ignore the presumption against implied overruling and fall into the trap of "treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before

[11] Westlaw's KeyCite indicates that *Franks*' abrogation was recognized by *Hays*, 172 Ariz. at 573. However, *Franks* remains good law, despite its Westlaw "red flag." This Court vacated the court of appeals' opinion in *Hays*, *see Hayes*, 178 Ariz. at 264, and cited *Franks* with approval, *see Hazine*, 176 Ariz. at 344.

and after, and treating an isolated phrase as if it were controlling." *See Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

Further, JAI's reliance on the Supreme Court's interpretation of "the" in the Federal Constitution to demonstrate that constitutional protections are frozen in time is both inapt and self-defeating. State and federal constitutions and courts are fundamentally different. This Court is not a mini-federal court with no authority to recognize common law, *see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), nor should the Court relegate itself to that role. But even taking JAI's analogy at face value, the Supreme Court has held that "[*t*]*he* right of the people to be secure in their . . . houses" protects against thermal imaging scans, U.S. Const. amend. IV (emphasis added); *see Kyllo v. United States*, 533 U.S. 27 (2001) (Scalia, J.), and "*the* freedom of speech" protects video games, U.S. Const. amend. I (emphasis added); *see Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011) (Scalia, J.), neither of which existed at the founding. Constitutional rights apply to changing circumstances. In Arizona, historical dram-shop non-liability was a judicially-recognized exception to the negligence action based on the circumstances of the times. It was not a status-based immunity from all suits like sovereign immunity. Once circumstances change, it is the prerogative of a common-law court to recognize a change in the common law. If the Founders wanted to protect only certain rights of action and afford common law developments no force, they could have said so.

D. The Anti-Abrogation Clause protects this Court's development of the common law in *Ontiveros*.

The court of appeals departed from the framework set forth above and adopted the rule that Arizona courts—including this Court—have repeatedly rejected: "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." *Torres v. JAI Dining Servs. (Phoenix), Inc.* ("*Torres III*"), 253 Ariz. 66, 75, ¶ 31 (2022). This three-variable *de novo* analysis ignores this Court's fundamental role and creates an incoherent state of the law. Comparing *Young* and *Torres III* demonstrates the point.

The court of appeals' opinion in *Young* comports with the analysis that the AzAJ advocates. *Young* looked to this Court's opinion in *Ontiveros*, recognized that the Court was acting pursuant to its authority to develop the common law, and determined that the Anti-Abrogation Clause therefore protects the dram-shop negligence claim. *Young*, 184 Ariz. at 188–90.

Torres III applied JAI's proposed rule. Rather than deferring to this Court's common-law analysis in *Ontiveros*, the court of appeals independently reexamined the history of Arizona dram-shop liability. 253 Ariz. at 72, ¶¶ 18–23. It acknowledged that the Anti-Abrogation Clause protects claims that evolved from common law. *Id.* at ¶ 23. It acknowledged that this Court has the power to develop the common law. *Id.* at 77, ¶ 36. It acknowledged that *Ontiveros* was an opinion

addressing a common-law claim pursuant to this Court's common-law authority. *Id.* at 73, ¶ 19. But because this Court decided *Ontiveros* after 1912, *Torres III* concluded that *Ontiveros* was not a development of the common law entitled to constitutional protection. *Id.* at 75–76, ¶ 32. In other words, *Torres III* affords this Court's common-law analysis no force and makes *Ontiveros* a nullity.

Torres III did not at all mention why this Court's opinions in *Misevch* (recognizing hospital negligent supervision) and *Noble* (recognizing insurance bad faith) carry constitutional protection, *see Franks*, 149 Ariz. at 299; *Humana Hospital*, 154 Ariz. at 399, but *Ontiveros* (recognizing dram-shop negligence) does not. Nonetheless, because of *Torres III*, dram-shop negligence falls into in the same unprotected category as claims created by statute and claims against the government, rather than the same protected category as insurance bad faith and hospital negligent supervision claims.

The rule *Torres III* adopted seemingly also means that the Anti-Abrogation Clause protects a husband's loss-of-consortium claim but not a wife's, parent's, or child's. "The origin of the consortium action at common law was the right of the master to recovery for tortious injury to his servants," and "the child, like the wife, was relegated to the role of servant." *Frank v. Superior Ct.*, 150 Ariz. 228, 231–32 (1986). Accordingly, at common law, only a husband could recover for the loss of his family. *See Jeune v. Del E. Webb Const. Co.*, 77 Ariz. 226, 227 (1954) ("The

common law is and always has been that the wife has no such cause of action.”). But when the idea that the “very being or legal existence of the woman is suspended during the marriage”[12] faded from the mind and “the Dickensian era of brutal child labor”[13] came to an end, this Court recognized loss-of-consortium claims for wives, parents, and children. *See Villareal v. State, Dep’t of Transp.*, 160 Ariz. 474, 477 (1989) (discussing developments to the common law and overruling *Jeune*).

Recognizing these kinds of changes to the common law is—and always has been—one of this Court’s fundamental roles. *See Hageman v. Vanderdoes*, 15 Ariz. 312, 320–21 (1914). Ignoring the Court’s development of the common law and affording patchwork Anti-Abrogation Clause protection based on JAI’s proposed historical analysis would undermine that fundamental role.

II. JAI’s counterarguments lack merit.

JAI offers two primary countervailing structural arguments: *Torres III* (1) preserves the balance of power between the legislature and judiciary and (2) prevents a “race between the branches.” Neither argument holds a basis in law. And JAI’s last resort to the supposed consequences of recognizing *Ontiveros*’ constitutional force finds no basis in fact.

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[12] *Cty. of Glendale v. Bradshaw*, 108 Ariz. 582, 583 (1972) (citation omitted).
[13] *Frank*, 150 Ariz. at 232.

A. *Torres III* upsets the balance of power that the Anti-Abrogation Clause creates.

First, a persistent refrain of JAI's briefing is that the Anti-Abrogation Clause allows the legislature to delineate the scope of common-law claims. This argument is a sleight of hand that ignores the relevant Anti-Abrogation Clause analysis.

This Court conducts a two-step analysis to determine whether a statute unconstitutionally abrogates a right of action. *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 313, ¶ 28 (2003). At Step 1, the Court determines whether the claim at issue falls under the Anti-Abrogation Clause's protection at all. *Id.* At Step 2, the Court considers whether the statute at issues is a permissible regulation of the claim rather than an abrogation. *Id.* at ¶ 29. "[I]t is settled that [the Court] reach[es] the abrogation question only if the cause of action at issue is in fact protected by article 18, § 6." *Cronin*, 195 Ariz. at 538, ¶ 34. Thus, if a court determines at Step 1 that the claim is not constitutionally protected, the legislature can abrogate the claim—in whole or in part—as it sees fit. Case over.

Torres III determined at Step 1 that if a plaintiff could not bring a claim for a particular harm against a particular defendant in 1912, the Anti-Abrogation Clause affords the claim no protection. 253 Ariz. at 75, ¶ 31. In 1912, families of victims killed by drunk drivers could not successfully assert negligence claims against bars that overserved the drivers. Therefore, under *Torres III*, the legislature can abrogate the dram-shop negligence claim—in whole or in part—as it sees fit. Case over.

Whether A.R.S. §§ 4-311 and -312 collectively abrogate or regulate the dram-shop negligence claim is irrelevant because *Torres III* determined at Step 1 that the Anti-Abrogation Clause affords the claim *no protection*. Under *Torres III*'s reasoning, which JAI urges this Court to adopt, § 4-312 could eliminate dramshop liability *even if* § 4-311 did not create "obviously intoxicated" liability.

JAI's argument that *Torres III* preserves the balance between the judiciary's power to develop the common law and the legislature's power to regulate common-law claims conflates the two separate steps of the analysis. To justify *Torres III* allowing *complete abrogation* of dram-shop negligence, JAI simply declares over and over that the legislature can *regulate* common-law claims. But no one disputes that the legislature can regulate common-law claims; this truism is not a limiting principle, no matter how many times JAI repeats it.

Torres III does not preserve any balance between the judiciary and the legislature. *Torres III* makes the judiciary's development of the common law irrelevant and gives the legislature free rein to abrogate common-law claims. That cannot be how the Founders meant the Anti-Abrogation Clause's protection of common-law claims to work.

B. The legislature and judiciary are not racing.

Second, in defense of its disregard of this Court's common-law role, JAI argues that its interpretation of the Anti-Abrogation Clause prevents a "race between

the branches." This argument relies on a mischaracterization of the different branches' roles.

This Court does not act with ambition. It does not "race" the legislature to "create" claims and achieve its policy preferences. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (noting that courts "do not, or should not, sally forth each day looking for wrongs to right" (citation omitted)). To the contrary, this Court has expressed hesitancy to recognize common-law claims. *See Zambrano*, 517 P.3d at 1180, ¶ 43 ("The common law has its place in our democracy, and we establish and apply it appropriately and with fitting restraint."); *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 566, ¶ 19 (2018) ("[W]e exercise great restraint in declaring public policy."). Presumably, the Court exercises restraint because its recognition means something. There would be no need for hesitation if the legislature could freely abrogate common-law claims whenever it disagreed with the Court.

In the three decades since *Young* determined *Ontiveros* carries constitutional protection, Arizona courts have not sped to recognize common-law claims before the legislature could address an issue. And once the legislature acts in an area, statutes typically control this Court's determination of state public policy. *See Summerfield v. Superior Ct.*, 144 Ariz. 467, 473 (1985) (noting that "a statute is not an alien intruder in the house of the common law" (citation omitted)).

JAI seeks to upend decades of precedent to purportedly end a race that has not begun. Stripping tort victims of constitutional rights should require more.

C. JAI's premonitions of doom are unfounded.

Finally, JAI argues that if the legislature cannot freely abrogate dram-shop negligence, then "thousands" of statutory immunities protecting everyone from ammo manufacturers to dog rescuers could be unconstitutional as well. "But like most apocalyptic warnings, this one proves a false alarm." *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

As discussed above, courts determining whether and how Arizona common law has evolved for Anti-Abrogation Clause purposes look to reasoned judicial opinions. Because there is no *Ontiveros*-equivalent applicable to shooting ranges, tow-truck drivers, and the like, none of those statutory immunities are at risk. Nor is there any indication that this Court will rush in to declare immunities unconstitutional based on its own policy judgment once the legislature has spoken.

Moreover, the parade of horribles marches in both directions. Adopting JAI's proposed rule and unsettling this area of law would open the floodgates for interested parties to begin chipping away at common-law claims that have long since been understood to carry constitutional protection. These are the precise types of efforts that the Anti-Abrogation Clause was meant to avoid.

CONCLUSION

"It has been said that most legal controversies turn on two questions: who decides, and where do you draw the line?"[14] The parties in this case have focused largely on the latter question, drawing competing lines between the evolution of common-law claims and the creation of new causes of action. But a more fundamental question this case presents is *who decides* when and how Arizona common law evolves? The answer is the Arizona Supreme Court.

Because this Court performed its common-law duty in *Ontiveros* and recognized a dram-shop negligence right of action, the Anti-Abrogation Clause protects that right of action. Holding to the contrary would ignore the robust individual protection the Founders guaranteed in the Anti-Abrogation Clause, undermine the Court's traditional common-law role, and needlessly throw other rights of action into question.

If a party wants to challenge constitutional protection for dram-shop negligence, it should have to challenge this Court's common-law analysis in *Ontiveros* directly and meet its heightened burden of convincing this Court to overrule a prior opinion. There are no shortage of dram-shop negligence cases involving adult clubs from which a defendant like JAI could raise such a challenge.

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[14] *Ring v. Arizona*, Opinion Announcement at 0:07 (Ginsburg, J.), Oyez, https://www.oyez.org/cases/2001/01-488 (last visited May 9, 2023).

This Court should hold that the Anti-Abrogation Clause protects rights of action that the Court recognized while exercising its traditional role to identify Arizona common law. Such a holding would be consistent with prior cases in this area and would create a clear rule for litigants and lower courts to follow. Such a holding also necessarily means that *Young* was correctly decided, and the judgment of the court of appeals should be reversed.

RESPECTFULLY SUBMITTED this 15th day of May, 2023.

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