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 Petition for Review

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INTRODUCTION

Article 18, Section 6 of the Arizona Constitution (the "Anti-Abrogation Clause") creates an important limitation on legislative power: "The right of action to recover damages for injuries shall never be abrogated . . . ."

Almost 40 years ago, this Court recognized a common-law right of action for dram-shop liability in *Ontiveros v. Borak*, 136 Ariz. 500 (1983). Shortly thereafter, the legislature attempted to abrogate the common-law dram-shop right of action and replace it with a claim of the legislature's creation. *See* A.R.S. §§ 4-311, 4-312. In *Young v. DFW Corp.*, the court of appeals held that the dram-shop right of action this Court recognized was indeed a "right of action" protected by the Anti-Abrogation Clause and was, therefore, not subject to legislative preemption. 184 Ariz. 187 (App. 1995). This Court denied review of *Young*.[1]

And this Court's denial made sense. *Young*'s reasoning was consistent with the court of appeals' earlier opinions holding that the Anti-Abrogation Clause *did* protect insurance bad faith and hospital negligent supervision claims—both

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1 *See* Order Denying Review, *Young v. DFW Corp.*, CV-95-0241-PR (Dec. 19, 1995), included as **Appendix 1, at 15**.

common-law torts recognized after the founding. *See Humana Hosp. Desert Valley v. Superior Ct.,* 154 Ariz. 396 (App. 1987); *Franks v. U.S. Fid. & Guar. Co.*, 149 Ariz. 291 (App. 1985). This Court had denied review of those cases as well and later cited them with approval. *See Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344 (1993).

Almost 30 years after *Young*, however, a different panel of the court of appeals held that the right of action to recover damages for injuries may *sometimes* be abrogated. The panel expressly disagreed with *Young* and held that the Anti-Abrogation Clause did *not* protect the common-law dram-shop right of action. *Torres v. JAI Dining Servs. (Phoenix), Inc.* ("*Torres III*"), 508 P.3d 1148, 1154, ¶¶ 2, 16 (Ariz. Ct. App. 2022). The court of appeals erroneously reasoned that two of this Court's cases since *Young* compelled its conclusion. *Id.* at 1151, ¶¶ 26–34 (discussing *Cronin v. Sheldon*, 195 Ariz. 531 (1999), and *Dickey v. City of Flagstaff*, 205 Ariz. 1 (2003)).

The opinion below is by any measure extraordinary. It created a split of authority among various published court of appeals opinions, disavowing *Young* and ignoring the holdings of *Humana Hospital* and *Franks*. It rendered several of this Court's opinions, including *Ontiveros*, effectively meaningless. And by doing so, it stripped a large class of tort victims of the Arizona Constitution's protection. If ever a case called for this Court's review, this is the one.

REASONS TO GRANT THE PETITION

This case meets all this Court's traditional criteria for granting review. *First*, *Torres III* conflicts with several published court of appeals opinions. *Second*, this case presents issues of statewide importance. *Third*, the opinion below is wrong, and only this Court can correct its errors.

I. The opinion below conflicts with several prior court of appeals opinions in addition to *Young*.

Both Petitioner and Respondent recognize that *Young* and *Torres III* are in direct conflict, which is itself enough to merit review.[2] In addition to creating a conflict between dram-shop cases, *Torres III* also conflicts with the court of appeals' application of the Anti-Abrogation Clause to insurance bad faith and hospital negligent supervision claims.

This Court in *Noble v. Nat'l Am. Life Ins. Co.*, 128 Ariz. 188 (1981), recognized the tort of insurance bad faith. In *Franks*, the court of appeals held that the right of action *Noble* recognized was protected by the Anti-Abrogation Clause. 149 Ariz. at 291.[3] In so holding, the *Franks* majority rejected the dissent's position

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2 This Court has granted review as a matter of course to ensure the uniform application of Arizona law. *See, e.g.*, *Varela v. FCA US LLC*, 252 Ariz. 451, 458, ¶ 6 (2022); *David C. v. Alexis S.*, 240 Ariz. 53, 55, ¶ 7 (2016); *State v. Whitman*, 234 Ariz. 565, 566, ¶ 4 (2014).

3 Westlaw's KeyCite indicates that *Franks*' abrogation was recognized by *Hays v. Cont'l Ins. Co.*, 172 Ariz. 573 (App. 1992). This Court, however, vacated the court of appeals' opinion in *Hays*, *see Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264 (1994), and

that "Art. 18, § 6 does not apply to causes of action which have been created subsequent to the adoption of the Arizona Constitution." *Id.* at 304 (Haire, J., dissenting); *see id.* at 299 (disagreeing with the dissent's characterization and noting that "[i]ntentional torts were well-recognized at the time of adoption of the Constitution"). The insurance company in *Franks* filed a petition for review, which this Court denied.[4]

Similarly, *Purcell v. Zimbelman* recognized a right of action against a hospital for negligent supervision. 18 Ariz. App. 75 (1972), *review denied* (Oct. 10, 1972); *see also Tucson Med. Ctr., Inc. v. Misevch*, 113 Ariz. 34, 36 (1976) (accepting and applying the claim recognized in *Purcell*). Again, challengers to the negligent supervision claim argued that the "cause of action is not protected by the anti-abrogation clause because it does not apply to actions which did not exist at common law in 1912, when Arizona's constitution was adopted." *Humana Hosp.*, 154 Ariz. at 399. And the court of appeals again rejected that argument, holding that the "clause protects all common law principles and causes of action, not just those existing in 1912," and accordingly, "the anti-abrogation clause applies to negligent

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cited *Franks* with approval, *see Hazine*, 176 Ariz. at 344. Accordingly, *Franks* continues to be good law, despite its Westlaw "red flag."

4 *See* Order Denying Review, *Franks v. U.S. Fid. & Guar. Co.*, CV-86-0138-PR (Apr. 23, 1986), included as **Appendix 2, at 18**.

supervision actions." *Id.* Humana Hospital filed a petition for review, which this Court denied.[5]

This Court later cited both *Franks* and *Humana Hospital* with approval. *See Hazine*, 176 Ariz. at 344. Thus, at the time the court of appeals decided *Young*, the principles governing the Anti-Abrogation Clause to post-1912 rights of action were not "shifting and unsettled," as JAI asserts. **[Response to Petition for Review ("Resp.") at 6]** To the contrary, *Franks*, *Humana Hospital*, and *Hazine* established a clear and workable rule: when this Court recognizes a common-law right of action, the Anti-Abrogation Clause protects that right of action. That rule accords respect to this Court's traditional role to recognize the State's common law that the Founders protected in the Anti-Abrogation Clause.

Torres III marks a radical departure from this clear principle. It instead adopted the often-made and as-often-rejected argument 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." *Torres III*, 508 P.3d at 1157, ¶ 31. This Court should grant review and reject that argument, as every court had before.

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5 *See* Order Denying Review, *Humana Hosp. Desert Valley v. Superior Ct.*, CV-87-0340-PR (Oct. 21, 1987), included as **Appendix 3, at 19**.

II. Whether the legislature can abrogate a common-law right of action that this Court recognized is an issue of statewide importance.

The correct interpretation of the Arizona Constitution is an issue of statewide importance. *See Rumery v. Baier*, 231 Ariz. 275, 278, ¶ 13 (2013). The provision of the Constitution at issue in this case makes it particularly worthy of review.

A. The opinion below strips constitutional protection from a large class of tort victims.

Although many state constitutions contain provisions guaranteeing access to courts, the Anti-Abrogation Clause creates a unique and robust protection of substantive rights to recover damages for injuries. "Article 18, § 6 is stronger and more explicit than the open court provisions contained in other state constitutions." *Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 105 (1984); *see also Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1209, ¶ 52 (Utah 1999) (Stewart, J., concurring) (recognizing Arizona's Anti-Abrogation Clause as "the strongest of all such state constitutional provisions"). The Clause protects a particularly vulnerable class of individuals'—tort victims'—right to recover for injuries.

This case presents the paradigm example. Before *Torres III*, the families of victims killed by a drunk driver had rights of action against a bar that served the driver alcohol by the "mega bucket." *See Torres v. JAI Dining Servs. (Phoenix) Inc.*, 250 Ariz. 147, 149, ¶¶ 5–6 (App. 2020), *vacated and remanded*, 252 Ariz. 28 (2021).

And the Anti-Abrogation Clause protected their rights. *See Young*, 184 Ariz. at 189. *Torres III* strips those families of that right to recover.

If a ruling were to pull a class of victims out from under the Constitution's protection, that ruling should come from this Court. *See Waters by Murphy v. U.S. Fid. & Guar. Co.*, 369 N.W.2d 755, 759 n.3 (Wis. Ct. App. 1985) ("[I]f a rejection of longstanding common law is to take place in this state, it will come from the supreme court; it will not come from the court of appeals. The function of plotting the general direction of the common law is reserved for the supreme court.").

B. Accepting JAI's position would undermine this Court's traditional common-law role.

In defending the holding of *Torres III*, JAI dismisses this Court's traditional common-law role and renders the Anti-Abrogation Clause toothless—if not entirely meaningless. JAI argues that "[l]egislation that was permissible in 1982 does not become impermissible in 1984 merely because a court created new common-law liability." **[Resp. at 11]** This argument is fundamentally wrong.

Under our Constitution, this Court is not just "a court" and its common-law holdings are not "merely" inconveniences for the legislature to disregard at its whim.[6] If that were the case, the Founders would not have included the Anti-Abrogation Clause in our Constitution.

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6 And, as discussed below in Section II.C., this Court did not just "create" dram-shop liability in *Ontiveros*.

This Court has recognized its "obligation to participate in the evolution of tort law so that it may reflect societal and technological changes." *Nunez v. Pro. Transit Mgmt. of Tucson*, Inc., 229 Ariz. 117, 123, ¶ 26 (2012) (citation omitted). Such is the traditional role of every state's highest court. *See Walker v. Rinck*, 604 N.E.2d 591, 594 (Ind. 1992) ("[I]t is the traditional role of the highest court of a state to determine the common law of that state even if such determination results in an innovative growth of the common law.").

For this reason, JAI's observation that "Arizona's Constitution places the legislative power in the legislature" misses the point. **[Resp. at 12]** Arizona's Constitution also places the judicial power in the judiciary. *See* Ariz. Const. art. 6, § 1. The state judiciary (and this Court in particular) has always had the authority to recognize changes to the common law. *See Hageman v. Vanderdoes*, 15 Ariz. 312, 320–21 (1914). And the Anti-Abrogation Clause has always "perpetuate[d] the common-law action to recover damages for personal and other injuries inflicted negligently." *Behringer v. Inspiration Consol. Copper Co.*, 17 Ariz. 232, 241 (1915) (Cunningham, J., concurring).[7]

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[7] At the time *Behringer* was decided in 1915, the Court was composed of three Justices, two of whom—Justices Cunningham and Ross—had been members of the 1910 Constitutional Convention. Justices Cunningham and Ross were presumably well-acquainted with the intent of the drafters and convention members regarding the meaning of the Anti-Abrogation Clause.

The Anti-Abrogation Clause is one of the Constitution's limitations on legislative power. *See also* Ariz. Const. art. 2, § 31. That limitation is at the very core of this case. Accepting JAI's argument would require this Court to ignore its traditional common-law role and the Anti-Abrogation Clause's protection of common-law claims. This Court should decline JAI's invitation to do so.

C. *Ontiveros* was a natural evolution of the common law entitled to protection.

Although JAI characterizes *Ontiveros* as "creat[ing] liability," **[Resp. at 13]** *Ontiveros* was a textbook example of this Court exercising its common-law role. *Ontiveros* examined the common-law decisions that purported to justify the dram-shop liability exception and found the reasoning of those cases erroneous. *See* 136 Ariz. at 508 (*overruling Pratt v. Daly*, 55 Ariz. 535 (1940), *and Collier v. Stamatis*, 63 Ariz. 285 (1945)).

Specifically, *Ontiveros* recognized that the dram-shop liability exception was based on a faulty analysis of causation and duty. *Pratt* and *Collier* had reasoned that a dram shop overserving a patron was never the proximate cause of a victim's injuries because that chain of causation was "superseded by the voluntary act of the purchaser in imbibing the drink." *Collier*, 63 Ariz. at 288. It was no radical change for the *Ontiveros* court to reject that view. Indeed, this Court recently rejected a similarly cramped view of causation in its prior Opinion in this very case. *See Torres v. JAI Dining Servs. (Phoenix) Inc.*, 252 Ariz. 28, 32, ¶ 16 (2021) ("We agree with

Plaintiffs that the risk created by a liquor licensee overserving a patron exists as long as the patron drives while intoxicated, regardless of when or where the patron travels and even with a short stop at home.").

Regarding duty, this Court in *Mendelsohn v. Superior Court*, 76 Ariz. 163, 169 (1953), had recognized that liquor laws were designed "to protect the welfare, health, peace, temperance, and safety of all the citizens." *Ontiveros* reasoned that the common-law dram-shop liability exception was inconsistent with the public policy of those statutes, as well as the existence of liability for "one who lends an automobile or dangerous instrument to an inexperienced or intoxicated person." *See* 136 Ariz. at 509–11. Again, this Court's modern cases have vindicated the *Ontiveros* court's conception of duty. *See Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 565, ¶ 15 (2018) ("A statute reflecting public policy may create a duty when a plaintiff is within the class of persons to be protected by the statute and the harm that occurred . . . is the risk that the statute sought to protect against." (citation omitted)).

Because the *Ontiveros* court conducted this common-law analysis, *Ontiveros is the common law* of Arizona.[8] The question in this case is whether the Anti-

8 It bears mention that, unlike JAI, the plaintiffs in *Ontiveros* proceeded in the appropriate manner: they challenged *Pratt* and *Collier* directly and met their heightened burden to convince this Court to overrule those cases by demonstrating the erosion of their doctrinal underpinnings. JAI is attempting to avoid this heightened burden entirely by undermining *Ontiveros* indirectly through an attack on *Young*.

Abrogation Clause allows the legislature and the court of appeals to disregard *Ontiveros*' common-law holding. The answer is no.

Torres III, however, answered that question in the affirmative and took upon itself the authority to sit in judgment of this Court's common-law analysis. Its holding consequently renders *Ontiveros* meaningless. But the court of appeals does not have such authority. *See McKay v. Indus. Comm'n*, 103 Ariz. 191, 193 (1968) ("Whether prior decisions of the highest court in a state are to be disaffirmed is a question for the court which makes the decisions. Any other rule would lead to chaos in our judicial system.").

Compounding its errors, *Torres III* reached its conclusion by determining that *Cronin* and *Dickey* departed from *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9 (1986), and *Hazine*. However, as discussed below, *Cronin* and *Dickey* do not represent a change in rationale by the Court; they instead describe the natural contours of *Boswell* and *Hazine*'s reasoning.

In sum, *Torres III* upends years of this Court's precedent and leaves this area of constitutional law in a state of uncertainty that only this Court can clarify. The Court should grant review to do so.

III. The opinion below is wrong.

Finally, even setting aside *Torres III*'s conflicts with several lines of cases and its magnitude, *Torres III* standing on its own is poorly reasoned, internally inconsistent, and should be corrected by this Court.

A. *Torres III* incorrectly analyzed *Cronin* and *Dickey*.

As discussed above, the court of appeals reasoned that "[r]ead together, *Cronin* and *Dickey* confirm 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." *Torres III*, 508 P.3d at 1157, ¶ 31. But this conclusion relies on an over-reading of both *Cronin* and *Dickey*.

Cronin considered an Anti-Abrogation Clause challenge after the Employment Protection Act (EPA) abrogated a wrongful termination claim created by the Arizona Civil Rights Act (ACRA). 195 Ariz. at 538, ¶¶ 33–34. *Cronin* framed the question it addressed as, "does article 18, § 6 of the constitution prevent the EPA's elimination of public policy tort claims where the policy which forms the basis for the claims *traces its origin to the legislative enactment of ACRA and to no other source*?" *Id.* at ¶ 34 (emphasis added). This case, however, does not concern the abrogation of a claim created by legislative enactment; it concerns the abrogation of a common-law right of action recognized by this Court.

Similarly, *Dickey* concluded that the Anti-Abrogation Clause did not protect a negligence claim against a municipality under common-law principles of sovereign immunity. 205 Ariz. at 3–5, ¶¶ 10–18. But—needless to say—liability exceptions for dram shops do not implicate the same fundamental government interests as sovereign immunity. Sovereign immunity has afforded the government a fortress of protection both before and after our nation's founding. *See, e.g.*, U.S. Const. amend. XI. The legal principles of sovereign immunity are as relevant today as they ever were. By contrast, historical tavern non-liability is a product of judicially imposed limits of tort liability—concepts based on the particular circumstances of a bygone era. By 1983, public policy towards drunk driving had changed. The Bureau of Transportation Statistics began to inform the public of the serious threat that drunk driving had created. Naturally, the common-law action against tavern owners evolved to promote safety and hold those negligent accountable. Thus, dram-shop liability is squarely within the evolution of common law actions that *Hazine* protects. *See* 176 Ariz. at 344. Unlike tort claims against the government, injuries caused by the negligent acts of others have always been afforded a common-law remedy. Because this case involves only private parties and does not impose on the government's sovereign interests or immunities, it falls outside *Dickey*'s scope.

By ignoring these material distinctions, *Torres III* read both *Cronin* and *Dickey* to decide an issue that neither *Cronin* nor *Dickey* addressed.

B. *Torres III* is poorly reasoned and internally inconsistent.

Finally, throughout the opinion, *Torres III* speaks in expansive terms and determines that the Anti-Abrogation Clause provides the common-law dram-shop right of action no protection. 508 P.3d at 1151, 1157, ¶¶ 1–2, 31–33. But contrary to its own broad language, *Torres III* concludes by holding that "although the judiciary remains free to change the common law, the legislature retains the constitutional power to recraft the parameters or scope of a court-pronounced common law cause of action." 508 P.3d at 1158, ¶ 36; *see also id.* at 1157, ¶ 31 ("[T]he anti-abrogation clause does not prohibit the legislature from delineating the scope of liability for the common law dram shop claim . . . ."). JAI echoes this position in its Response to the Petition for Review. **[Resp. at 8–9** ("These statutes do not eliminate liability. They instead delineate the parameters for liability . . . ."); **Resp. at 10** ("The court of appeals correctly held at the legislature may delineate the contours of liability.")**]** But if the Anti-Abrogation Clause provides a particular right of action *no protection*, as *Torres III* held, it is unclear why the legislature would be limited to "recraft[ing] the parameters" or "delineating the scope" of a claim rather than abrogating it entirely. Neither *Torres III* nor JAI provide an explanation.

Given the holes in its reasoning, *Torres III* should not be the final word on the issue.

CONCLUSION

JAI attempts to frame this case as a choice between disciplined judicial restraint and unwieldy judicial evolutionism. But looking past this false choice, this case presents a fundamental question about this Court's power to recognize Arizona common law and the force the Court's recognition carries. Specifically, whether this Court in *Ontiveros* had the power to recognize a common-law right of action protected by the Anti-Abrogation Clause or whether the Court lost that power at some point between 1912 and 1983. The answer, of course, is that the Court has never lost its common-law authority, and its holding in *Ontiveros* carries the constitutional protection the Anti-Abrogation Clause affords.

For the foregoing reasons, this Court should grant the Petition for Review and reverse the judgment below.

RESPECTFULLY SUBMITTED this 26th day of July, 2022.

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