IN THE SUPREME COURT

STATE OF ARIZONA

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

AMICUS CURIAE BRIEF ON BEHALF OF ARIZONA ASSOCIATION OF DEFENSE COUNSEL

Filed With Written Consent of the Parties

Amanda Heitz (No. 026519)
Lauren Walter (No. 037677)
BOWMAN AND BROOKE LLP
2929 N. Central Ave., Ste. 1900
Phoenix, AZ 85012
Telephone: 602-643-2311
Facsimile: 602-248-0947
Amanda.heitz@bowmanandbrooke.com
Lauren.walter@bowmanandbrooke.com

Attorneys for *Amicus Curiae* Arizona Association of Defense Counsel

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INTRODUCTION

The Arizona Association of Defense Counsel (AADC) urges the Court to clarify that the anti-abrogation clause of Article 18, § 6 of the Arizona Constitution is limited to those specific rights of action to recover damages that could have been brought as of February 14, 1912. The inconsistent precedent expanding this provision is at odds with the text and leads to unpredictable applications of the law. They should be overruled.

ARGUMENT

I. The Arizona Association of Defense Counsel (AADC) is interested in the proper interpretation of the Arizona Constitution with respect to the development of the common law.

The AADC is a statewide organization of defense attorneys practicing mainly in the area of civil defense litigation. It is interested in proper constitutional interpretation and the interplay of the Arizona Constitution and the development of the common law. The anti-abrogation clause is of particular importance to the civil defense bar, whose clients' interests are materially affected by its application and interpretation.

II. The Court should confirm the temporal limitations of Arizona Constitution Article 18, § 6.

This case presents the Court with the opportunity to do away with nebulous standards created by decades of inconsistent caselaw concerning the anti-abrogation clause. Compelling reasons support overturning precedent, which expanded art. 18, §

6's protections without any basis in the text, ignores separation of powers, and creates untenable policy trajectories and unworkable standards for lower courts.

A. Four decades of shifting precedent has left Article 18, § 6's meaning unclear and its application unpredictable.

The anti-abrogation clause, which 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 . . . " is in Article 18—the "Labor" article of the Arizona Constitution. Article 18 is expressly devoted to labor and employment, such as the eight-hour day, child labor, and black-lists. Ariz. Const. art. 18, §§ 1, 2, 9. As Professor Bender has observed, based on its text and location, courts could have "easily limited application of the anti-abrogation right to employment litigation." Paul Bender, "*The Arizona Supreme Court and the Arizona Constitution: The First Hundred Years,*" 44 ARIZ. ST. L.J. 439, 447 (2012); *see also Cain v. Horne*, 220 Ariz. 77, 82 (2009) (using location of constitutional clauses to support interpretation).

For the first decades of statehood, this is precisely how courts and practitioners applied it. The earliest cases citing art. 18, § 6 were employee suits. *See, e.g.*, *Consol. Ariz. Smelting Co. v. Ujack*, 15 Ariz. 382 (1914) (involving right of employee to sue employer for negligence; citing art. 18, § 6 in dissent); *Morrell v. City of Phoenix*, 16 Ariz. 511 (1915) (involving city employee's claim against city); *Behringer v. Inspiration Consol. Copper Co.*, 17 Ariz. 232 (1915) (involving widow's claim for death of spouse killed in mine). Although two decades later, the Arizona Supreme Court suggested in dicta that this section could

have broader application, *see Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 444 (1926), well into the 1960s, Arizona courts continued to emphasize this provision's workplace context, s*ee, e.g.*, *Morgan v. Hays*, 102 Ariz. 150, 156 (1967).

Beginning in the mid-1960s, without ever acknowledging that they were charting new territory, much less offering any substantive analysis as justification, Arizona's appellate courts began to treat art. 18, § 6 as a general anti-abrogation clause applicable to all types of common law claims, not just labor and employment. *See Eastin v. Broomfield*, 116 Ariz. 576, 584 (1977), *Harrington v. Flanders*, 2 Ariz. App. 265, 266–67 (1965). Though in these early cases, the courts did not address their seeming acceptance of an expanded art. 18, § 6, they also did not invalidate statutes based on it. That changed in 1979 when Division Two invalidated a statute barring recovery against the insurer of an insolvent insured in a case arising from a motor vehicle collision. *McKinney v. Aldrich*, 123 Ariz. 488, 491 (App. 1979). Once again, the court did not address the anti-abrogation clause's scope.

After the courts expanded without comment art. 18, § 6's scope beyond the employment context during the 1970s, litigation about its meaning multiplied in the 1980s and 1990s. The result is a series of precedential cases broadening, tightening, and re-broadening the interpretation of the provision without squarely overruling or disapproving of prior inconsistent holdings. The confusion cries out for clarification with a principled, workable bright line rule from this Court.

In the 1980s, through a string of opinions written by Justice Feldman, the Arizona Supreme Court actively broadened the judicial construction of art. 18, § 6. *See Kenyon v. Hammer*, 142 Ariz. 69, 74 (1984) (concluding art. 18, § 6 is "more specific and stronger" than an open court provision); *Barrio v. San Manuel Div. Hosp. for Magma Copper*, 143 Ariz. 101, 107 (1984) (finding statute of repose violated art. 18, § 6).

In *Boswell v. Phoenix Newspapers, Inc.*, the Court held the protections of art. 18, § 6 were "not limited to those elements and concepts of particular actions which were defined in our pre-statehood case law." 152 Ariz. 9, 17–18 (1986). The Court rejected the defendants' argument that art. 18, § 6 protected only those rights of action "recognized by the common law when the constitution was adopted," *id.* at 12, based on the Court's skepticism that those "long dead" (the framers of the Arizona Constitution) could limit the "evolution of common-law actions to reflect today's needs and knowledge." *Id.* at 18.

The Court later tried to rein in these broad opinions, limiting them to actions for negligence and breach of warranty in *Bryant v. Cont'l Conveyor & Equip. Co.*, 156 Ariz. 193, 195 (1988), overruled by *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340 (1993). The Court declined to apply art. 18, § 6 to an action for strict products liability because "the tort of strict products liability did not exist at the time the constitutional provision was adopted." *Id.*

But the restraint was short lived. In *Hazine*, a divided Supreme Court—over the strong dissent of Justice Martone—overruled *Bryant*'s holding to conclude that "[t]he

evolution of common law rights of action—whether in duty, standard of care, or damages—falls within the broad coverage of art. 18, § 6." 176 Ariz. at 344. In other words, the Court determined that art. 18, § 6 protected from legislative abrogation not only all rights of action that existed at the time of statehood, but ***also its own later pronouncements about the common law.***

In *Cronin v. Sheldon*, the Court held that *Hazine*'s standard should be interpreted such that "the anti-abrogation clause applies only to tort causes of action that either existed at common law or ***evolved from rights recognized at common law***." 195 Ariz. 531, 539 ¶ 39 (1999) (emphasis added). But ten years after *Hazine*, in *Dickey v. City of Flagstaff*, the Court held (over Justice Feldman's dissent) that "Arizona's anti-abrogation provision was designed to protect rights of action in existence at the time it was adopted, but not necessarily those later created." 205 Ariz. 1, 5 ¶ 18 (2003).

Thus, three varying standards currently exist to evaluate statutes under art. 18, § 6. Under *Hazine*, a court must invalidate any statute in conflict with an Arizona judicial determination about the common law, ***whether or not it reflects the common-law rule at statehood***. 176 Ariz. at 344. But under *Cronin*, a statute is unconstitutional only if it abrogates the common law existing at the time of statehood ***or rights that evolved from it***. 195 Ariz. at 539 ¶ 39. And, unlike *Hazine*, *Dickey* held that art. 18, § 6 does not necessarily implicate all rights of action that arose after statehood. 205 Ariz. at 5 ¶ 18.

The decisions of successive courts to define and redefine art. 18, § 6, while failing to acknowledge they were doing so, has resulted in confusion. It has left lower courts and

practitioners without guidance. And it denies citizens and litigants the ability to rely on Arizona statutes when ordering their affairs. It is time for the anti-abrogation clause tug-of-war to end and for the Court to clarify what this constitutional provision means.

B. The Court should overrule *Hazine* and confirm Article 18, § 6's temporal limitations because stare decisis does not compel deference.

For decades before *Hazine,* Arizona courts reaffirmed that art. 18, § 6 applied only to those rights in existence at statehood. *See, e.g.*, *Indus. Comm'n v. Frohmiller*, 60 Ariz. 464, 468 (1943). And in the ten years immediately following *Hazine*, the Supreme Court walked back *Hazine*'s expansive language. This Court should return to the plain meaning of the text and hold that art. 18, § 6 bars the abrogation of those common law rights of action that existed at the time of statehood, not those which have arisen post-statehood, *Hazine*, 176 Ariz. at 344, or evolved from "rights recognized at common law," *Cronin*, 195 Ariz. at 539 ¶ 39; *see also Dickey*, 205 Ariz. at 5 ¶ 18.

Because this holding would require overruling *Hazine* and *Boswell*, it implicates the doctrine of stare decisis. Overruling a prior opinion is appropriate when "the reasons underlying it no longer exist or the opinion was 'clearly erroneous or manifestly wrong.'" *Laurence v. Salt River Project Agric. Improvement & Power Dist.*, No. CV-21-0292-PR, 2023 WL 3136641, at *4 (Ariz. Apr. 28, 2023) (quoting *State v. Agueda*, 253 Ariz. 388, 391–92 ¶ 20 (2022)). Respect for precedent means this Court overturns precedent "only for a compelling reason." *Young v. Beck*, 227 Ariz. 1, 6 ¶ 22 (2011) (internal quotations omitted). Yet as the Supreme Court has noted, "[s]tare decisis is not an

inexorable command," particularly "in constitutional cases, because in such cases correction through legislative action is practically impossible." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (internal quotations omitted); *see also Derendal v. Griffith*, 209 Ariz. 416, 424 ¶ 33 (2005) (internal quotations omitted) (Stare decisis does "not require [unbending] adherence to authority."); *State v. Hickman*, 205 Ariz. 192, 201 (2003) (noting application of stare decisis "corresponds to the subject matter of the case at issue" and holding a lower burden of proof required to overturn court-rules and constitutional interpretation than for statutory interpretation).

Three compelling reasons support overturning *Hazine* and its "evolution" standard. First, the plain meaning of art. 18, § 6 protects only those particular rights of action which existed as of 1912; the text does not authorize the sweeping expansion of such protection to common law rights created *after* statehood or to those rights which "evolved" from pre-statehood common law rights. Second, such an expansive interpretation violates the principles of separation of powers. And finally, this interpretation leads to untenable policy trajectories and leaves lower courts without guidance on what art. 18, § 6 means.

1. *The plain text limits Article 18, § 6's protections to those rights which existed as of the time of statehood.*

The *Hazine* "evolution" standard finds no support in the text of art. 18, § 6. Constitutional interpretation "begin[s] with the text," *Ariz. Free Enter. Club v. Hobbs*, 515 P.3d 664, 668 (Ariz. 2022), and "seek[s] 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 ¶ 29 (2022).

Notably, *Hazine* contains no textual analysis of art. 18, § 6. 176 Ariz. at 343 (noting only "[t]he text of Arizona's Constitution is broad [and] unambiguous" without further discussion). Rather, the *Hazine* court relied on its own supposition about the framers' intent: "[g]iven the history of art. 18, section 6, . . . it is inconceivable that the framers of the Arizona Constitution had any such intent" to limit art. 18, § 6 to pre-statehood theories of liability and pre-statehood measures of damages." *Id.* at 344. *See also Boswell*, 152 Ariz. at 15 (relying on perceived intent of framers rather than textual analysis to interpret art. 18, § 6).

But the plain meaning of a text, not a court's subjective beliefs about its drafter's intent, controls. *See Matthews*, 254 Ariz. at 175 ¶ 34 ("[W]ith due respect to our judicial forebears, we are neither authorized nor competent to discern the "spirit" of a constitutional provision nor to effectuate what we divine in that regard . . . . Rather, we apply the constitution's plain meaning.").

Both parties refer to dictionary definitions of words to support their readings of art. 18, § 6, and they largely agree on those individual definitions. Appellees, however, conclude that because the individual definitions of "the," "right of action," "damages," "injuries," or "abrogated" do not themselves include a temporal limitation, none exists. *See* Appellee's Br. at 2, 4, 5, 8, 9. This argument misunderstands the role of dictionary definitions in ascertaining the original public meaning of a constitutional provision.

Dictionaries define "the core meanings of a term." Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 418 app. A (2012). But "[b]ecause common words typically have more than one meaning," judges must "use the context in which a given word appears to determine its aptest, most likely sense." *Id.* Thus, definitions cannot be analyzed standing alone or outside of their context; rather, definitions are merely tools of one engaged in the legal interpretation. It is the judiciary's role to take those definitions and analyze ***them within their context*** to determine their meaning. In other words, dictionaries can help define individual words, but are of minimal value in determining what a series of words mean together in context.

The Court's recent opinion in *Matthews* illustrates this principle. 254 Ariz. at 157. There, a party argued that a statute requiring workers' compensation claimants prove mental injuries were caused by "unexpected, unusual or extraordinary stress," A.R.S. § 23-1043.01(B), violated art. 18, § 8, which ensures coverage for an "injury . . . from any accident" arising from "a necessary risk or danger" of the employment. *See id.* at 161, ¶¶ 17–18. The Court looked to dictionary definitions of "injury" and "accident" to conclude that "in 1912, the plain meaning" of the entire constitutional phrase at issue—"injury by accident"—was "physical damage caused by a singular, unexpected event." *Id.* at 164 ¶ 37. Thus, art. 18, § 8 did not apply to mental injuries caused by ordinary stresses presented by a specific job. *Id.* The Court defined the terms, then read them together in context to discern their meaning. *Id.*

Here, Appellees' failure to account for context undercuts their textual argument. They agree that the term "right of action" is an "entitlement to bring and maintain a civil action," but miss that for a "right of action" to exist, there must first be an "entitlement"—i.e., that the right to sue must already exist. Likewise, they do not address that for something to be "abrogate[d]"—"annulled, abolished, or repealed,"—it must first exist. Reading the framers' language in context refers to abrogating rights already in existence. To reach Appellees' conclusion, the Court must graft onto the Constitution new language applying to rights of action that could exist, but which do not yet exist. The framers knew that common law develops incrementally and could change; had they intended to enshrine all future and then-unknown common law rights of action in the Constitution, they could have adopted language to do so.

2. **Hazine*'s language transforms judicial opinions on common law rights of action into constitutional opinions, which violates separation of powers considerations.***

In addition to being inconsistent with the constitutional text, divorcing art. 18, § 6 from its temporal limitation also implicates separation of power concerns. *Hazine* suggests that all judicial development of common law torts have constitutional import. If true, this effectively transforms the judiciary into an undemocratic super-legislature declaring the public policy of the state. And it essentially turns all judicial opinions on tort law into constitutional opinions.

Though developing the common law is within the courts' purview, the court cannot concentrate power to make those common law developments beyond the reach

of other branches of government. *See Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶¶ 27–28 (2009). Such a result violates other provisions of the Arizona constitution and Arizona law. The legislature has expressly provided that the "common law . . . is adopted and shall be the rule of decision in all courts of this state," but only "so far as it is consistent with . . . the [Arizona] constitution or laws of this state." A.R.S. § 1-201 (2002). And under the Arizona Constitution, "judge-made substantive law is subordinated to contrary legislative acts validly adopted . . . [t]hus, when a substantive statute conflicts with the common law, the statute prevails under a separation of powers analysis." *Seisinger,* 220 Ariz. at 92 ¶ 28.

This case presents an excellent example: from 1912 to 1983, there was no common law right to sue a tavern owner. *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983). In *Ontiveros*, the court rejected the traditional common-law rule, finding that it was "'an anachronism, unsuitable to our present society.'" *Id.* at 507 (quoting *Lewis v. Wolf*, 122 Ariz. 567, 570 (App. 1979)). Three years after the Court's unabashed policy determination, the legislature enacted § 4-312, modifying the Court's policy pronouncement in *Ontiveros*. It should be obvious that art. 18, § 6 does not apply to § 4-312 because the judicially created right of action it modifies ***directly contradicts the common-law rule at the time of statehood***. The judge-made law should have been subordinated to the statute "under a separation of powers analysis." *Seisinger,* 220 Ariz. at 92 ¶ 28.

Yet under *Hazine* and its progeny, such common law is lifted to the status of constitutional opinion. This refusal to honor the Legislature's stated policy choices illustrates the problem with overly expansive views of art. 18, § 6. Not only have hundreds of thousands of dollars stebeen spent to brief and address art. 18, § 6 arguments on § 4-312, but holding that art. 18, § 6 invalidates this statute allows the unelected judiciary to effect a policy change that the elected legislature itself had been unwilling to implement, and then insulate its decision from the policymaking branch of government when it manifested its disagreement. This outcome diverges from separation of powers principles and the court's proper role.

3. Hazine*'s "evolution" standard results in untenable policy trajectories and unworkable standards for lower courts.*

Besides creating separation of powers issues, accepting the broadest reading of *Hazine* risks seriously eroding public trust in the judiciary. With "no influence over the sword or the purse," the judiciary's authority derives from the confidence of the public. Federalist No. 78, p. 412 (J. Pole ed. 2005) (A. Hamilton). Ordinary citizens should rightly be alarmed by an unelected judiciary granting itself the right to dictate nuances of public policy in a way that the democratically elected branches of government cannot reverse short of a constitutional amendment. Though judicial independence is one of the strengths of the Arizona judiciary, all too often, its independence and the merit selection that secures it is under attack. Public perception that courts act as unelected

legislatures only creates ammunition for those who bristle at and seek to undermine the independence of the judiciary.

Further, if the anti-abrogation clause enshrines post-statehood case law, then Arizona policy can move in only one direction: toward greater and greater civil liability. There is no mechanism for the Legislature to make policy decisions on torts recognized at common law except to expand liability. The framers intended to create a floor for tort liability in Arizona through art. 18, § 6, not an elevator.

Finally, the "evolution" standard creates an unworkable standard for lower courts. The doctrine of stare decisis is "rooted in the public policy that people should be able to rely on judicial precedent to know their rights and order their conduct accordingly." *Laurence*, 2023 WL 3136641, at *4. But the confusion created by *Hazine* and its "evolution" standard prevent people from knowing "their rights." Lower courts must choose between three conflicting standards; and if they do choose to apply the "evolution" standard, requiring courts to determine what later developments in the common law evolved from "rights recognized at common law" at the time of statehood is far from simple. *Cronin*, 195 Ariz. at 539 ¶ 39. Courts looking at historical records to determine what rights were "recognized" may draw conflicting conclusions. And it is hard to envision any right of action or principle that a clever lawyer could not argue "evolved" from a right that existed at the time of statehood.

CONCLUSION

For the foregoing reasons, the AADC respectfully submits that this Court should affirm the plain language of art. 18, § 6, and hold art. 18, § 6 protects only those specific common law rights of action to recover damages that could have been brought against specific defendants as of February 14, 1912.

RESPECTFULLY SUBMITTED this 16th day of May, 2023

BOWMAN AND BROOKE LLP

By: /s/Amanda Heitz
Amanda Heitz
Lauren L. Walter
Attorneys for *Amicus Curiae* Arizona Association of Defense Counsel