## SUPREME COURT OF ARIZONA

ROBERTO TORRES, et al.,

Plaintiffs/Appellees,

v.

JAI DINING SERVICES (PHOENIX) INC.,

Defendant/Appellant.

Arizona Supreme Court
No. CV-22-0142-PR

Court of Appeals
Division One
No. 1 CA-CV 19-0544

Maricopa County
Superior Court
No. CV2016-016688

# AMICUS BRIEF OF ARIZONA CHAMBER OF COMMERCE

(Filed with the written consent of the parties)

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## TABLE OF CONTENTS

**STATEMENT OF INTEREST** 1

**SUMMARY OF ARGUMENT** 1

**CONTEXT – THE CONDITION OF COMMON LAW AT FRAMING** 3

**THE ANTI-ABROGATION CLAUSE** 8

**Overview and 70 Years of Jurisprudence** 8

**The Text Alone Provides Some, But Not All, Answers** 11

***BOSWELL*'S FOLLY** 13

**HARMONIZATION OR REJECTION?** 16

**CONCLUSION** 19

## TABLE OF AUTHORITIES

**CASES**

*Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 242 P. 658 (1926) **10**

*Boswell v. Phx. Newspapers,* 152 Ariz. 9, 730 P.2d 186 (1986) **passim**

*Consol. Ariz. Smelting Co. v. Ujack,* 15 Ariz. 382, 139 P. 465, 466 (1914) **7**

*Cronin v. Sheldon*, 195 Ariz. 531, 991 P.2d 231 (1999) **17**

*Dickey v. City of Flagstaff*, 205 Ariz. 1, 66 P.3d 44 (2003) **17**

*Farwell v. Bos. & W. R. R. Corp.*, 45 Mass. 49 (1842) **6**

*Grammatico v. Indus. Comm'n*, 211 Ariz. 67, 70, 117 P.3d 786, 789 (2005) **8**

*Hazine v. Montgomery Elevator Co*., 176 Ariz. 340, 861 P.2d 625 (1993) **16**

*Kilpatrick v. Superior Court*, 105 Ariz. 413, 419, 466 P.2d 18 (1970) **10**

*Laurence v. Salt River Project Agric. & Improvement & Power Dist.*, No. CV-21-0292-PR, 2023 Ariz. LEXIS 113 (Apr. 28, 2023) **18**

*Lopez v. Cent. Ariz. Mining Co.*, 1 Ariz. 464, 478, 2 P. 748 (1883) **4, 5**

*Matthews v. Indus. Comm'n*, 520 P.3d 168 (Ariz. 2022) **11, 12**

*Oatman United Gold Mining Co. v. Pebley*, 31 Ariz. 27, 250 P. 255 (1926) **15**

*Red Rover Copper Co. v. Indus. Comm'n*, 58 Ariz. 203, 118 P.2d 1102 (1941) **8**

*S. Pac. Co. v. McGill*, 5 Ariz. 36, 40, 44 P. 302, 303 (1896) **5**, **6**

*State ex rel. Ariz. Dep't of Revenue v. Tunkey*, 524 P.3d 812, 818 (Ariz. 2023). **13**

*State ex rel. Brnovich v. City of Phx.*, 249 Ariz. 239, 468 P.3d 1200 (2020) **12, 18**

## CONSTITUTIONAL PROVISIONS

Ariz. Const. art. 18, § 3 **8, 9**

Ariz. Const. art. 18, § 4 **8, 9**

Ariz. Const. art. 18, § 5 **8, 9**

Ariz. Const. art. 18, § 6 **passim**

Ariz. Const. art. 18, § 7 **8, 9**

Ariz. Const. art. 18, § 8 **8, 9**

## OTHER AUTHORITIES

Beers, George E. “Contracts Exempting Employers from Liability for Negligence.” *The Yale Law Journal*, vol. 7, no. 8, 1898, pp. 352–61 **9**

Editors, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837 – 1860,* 132 U.Pa.L.Rev. 579 (1984) **6**

Roger C. Henderson, *Tort Reform, Separation of Powers, and the Arizona Constitutional Convention of 1910, 35 Ariz. L. Rev. 535 (1993)* ***3, 4, 11***

## I STATEMENT OF INTEREST OF AMICUS

The Arizona Chamber of Commerce and Industry ("the ACCI") is a non-profit organization advocating for free-market public policies and working to ensure economic growth and prosperity for all Arizonans. Among other things, the ACCI provides the business community's perspective to policy makers at the Arizona Legislature. The ACCI's policy goals consistently include common sense legal reforms, reforms that would reduce the cost of frivolous litigation that is ultimately borne by businesses and individuals alike.

The efforts of the ACCI and others in that pursuit are often thwarted by the extraconstitutional usurpation by the courts of the right of the people to self-governance that began with *Boswell* in 1986, and continues to the present. *Boswell v. Phx. Newspapers,* 152 Ariz. 9, 730 P.2d 186 (1986). The ACCI urges this Court to reject *Boswell* and return to the constitutional fidelity of its pre-*Boswell* jurisprudence.

## II SUMMARY OF ARGUMENT

This brief will argue that the anti-abrogation clause, a constitutional provision rebuking the courts by nullifying the repugnant court-developed common law of negligence was, 80 years into statehood, erroneously and spuriously “interpreted” by a court to be an endowment upon the judicial branch

of supreme and eternal dominion over the entire body of Arizona tort law, an error perpetuated to a degree in the question for review, and the clause consequently should be restored to its true and accurate meaning, and with it the state restored to the representative democracy promised by its constitution.

1. The common law of negligence at the turn of the century was oppressive for the working class, making it nearly impossible for an injured worker to make a financial recovery. The courts wielded harsh common law negligence defenses against workers, and in then recent years had developed through the common law the fellow servant doctrine, a blight on the working class. In the general public's view, the common law of negligence was contemptibly unfair.

2. In keeping with the broad public sentiment, the framers drafted provisions that took negligence law out of the courts' hands by constitutionally protecting a right of action for negligently inflicted personal injuries. The protected right of action was constitutionally spared from the sharpest teeth of the court-developed common law negligence defenses.

3. This Court maintained constitutional fidelity through its first 70 years of anti-abrogation clause jurisprudence, holding that the clause a) related only to

negligence right of action taken from 1912 common law, and b) established constitutional protection for that claim. The protected claim, per the court, was the common law negligence action as understood at the framing. The inhumane defenses developed by the previously unrestrained courts were banished from the courts' legal discretion or abrogated completely.

4. In 1986, the *Boswell* court turned the clause on its head. *Boswell*, with a wink but no nod to the constitution's text, jettisoned 70 years of coherent precedent, made hubristic and risible claims as to the framers' faith in the courts and common law, coopted unrelated constitutional provisions from other states, and ultimately applied the law of those other states and those unrelated provisions to our anti-abrogation clause. Said and done, the *Boswell* court found the anti-abrogation clause, far from being a rebuke of the courts' common law of negligence, endowed the courts with supreme authority over all tort law, forever.

5. *Boswell* and its progeny usurp the right of the people to self-governance. *Boswell* must be overturned.

## III CONTEXT – THE CONDITION OF COMMON LAW AT FRAMING

By the time of the convention, common law had evolved to the point that recovery for personal injuries seemed impossible for ordinary people, especially in the employment context, due to the "formidable trilogy" of defenses Appellant

references in its briefing. *citing* Roger C. Henderson, *Tort Reform, Separation of Powers, and the Arizona Constitutional Convention of 1910, 35 Ariz. L. Rev. 535, 614 (1993).* The offensive defenses were the fellow servant doctrine, assumption of risk, and contributory negligence.

These court-created and court-applied defenses made the common law of 1900 the working man's public enemy number one. The doctrines were "the main concern at this time across the country," and were, for the framers, the "only concern regarding damage suits documented in the [convention] party platforms." Henderson at 608. Doubtless the nature of most employment opportunities in turn-of-the-century Arizona (and across the West) fell too often under the spell of the trilogy.

Putting aside for a moment the fellow servant doctrine, the courts' application of the common law defenses of contributory negligence and assumption of risk would by itself have made a personal injury recovery hopeless to those who worked dangerous jobs. In *Lopez v. Central Arizona*, a widow/administratrix brought a negligence claim after her husband Florence Lopez ("FL") was killed in a mineshaft collapse. The complaint's allegation that the mine owner negligently cared for the maintenance and safety of the mine became an implicit admission of FL's contributory negligence and/or assumption

of risk. The court dismissed the case as a matter of law. FL's negligence? He worked at the mine.

> The facts stated in the complaint do warrant an inference that the plaintiff himself was negligent. The averment in the complaint is as follows: "That upon the said twenty-first day of June, A. D. 1881, and for a long period of time prior thereto, said defendant, in working and excavating upon said Vulture mine, wrongfully and carelessly neglected to keep in good and safe condition and repair, by building and maintaining in its tunnels, shafts, and excavations, proper and sufficient supports and pillars to prevent their tunnels and excavations from caving in, thereby endangering the lives of the servants and employees of said defendant, laboring in said mine."
>
> The allegations of the complaint, if true, warrant the inference that the dangerous condition of the mine was apparent and could be plainly seen, and that plaintiff did see and know its dangerous condition; and that the complaint, under the facts stated, would not state a cause of action unless it also stated that the plaintiff was ignorant of the dangerous condition, and could not [***11] have discovered it with reasonable care and diligence. For these reasons we contend that the complaint is a nullity, and that the court erred in permitting any evidence to be introduced under it.

*Lopez v. Cent. Ariz. Mining Co.*, 1 Ariz. 464, 478, 2 P. 748 (1883).

The mid-century introduction of the fellow servant doctrine was daunting in two ways. Fellow servant trumped *respondeat superior* and thereby precluded recovery from an employer in cases where the injured party was a co-worker of the tortfeasor.[1] *S. Pac. Co. v. McGill*, 5 Ariz. 36, 40, 44 P. 302, 303 (1896). From a

[1] With rare exceptions.

worker's perspective, it expanded the class of injuries for which a recovery was hopeless. If one wanted to work, the rule was that a "person entering the service of a corporation assumes all the risk naturally incident to his employment, including the danger which may arise from the negligence of a fellow-servant." *Id.*, at 40. A recovery would thus be precluded not just when mine shafts collapse or boulders fall down the mountain – now, with the fellow servant rule, even accidents in relatively safer employ could leave a worker disabled and destitute.

From a framer's perspective, the trilogy was a caution flag against achieving legal policy by case and controversy. But fellow servant carried a unique warning. It was Exhibit A for the speed with which the common law can "evolve" into something pernicious. The first United States application of the doctrine came in Massachusetts in 1842. *Farwell v. Bos. & W. R. R. Corp.*, 45 Mass. 49 (1842). By 1880, the fellow servant doctrine pervaded U.S. courts. Editors, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837 – 1860,* 132 U.Pa.L.Rev. 579 (citations omitted). By the turn of the century, "treatise writers warned legislatures and courts against tampering 'with a rule of the common law, based upon the wisdom and precedents of the ages.'" *Id.,* at 579.

The point of the foregoing litany of late 19th century common law horrors is two-fold. First, it contextualizes the "right of action" referenced in the anti-

abrogation clause, as discussed more fully in Section IV, below. As importantly, the litany can evoke a visceral understanding of the framers' contempt for the common law of negligence, i.e., it makes one *angry* that ordinary people who lost limbs and worse simply because employment carried risk, quotidian in the West, were left destitute by unfair treatment under the law. That sense of the framers' anger, in turn, exposes the utter absurdity of *Boswell*'s claim, that the framers would give the same courts that wrought the formidable trilogy *any* special role in lawmaking, let alone in preserving the common law of torts (discussed more fully in Section V, below).

This Court has itself, over the years, lamented the state of the common law in territorial days. One early decision implied the common law was inhumane, observing that the new constitution "declared for this state a different and more advanced as well as humane public policy, one in consonance with the present day enlightened thought and conscience by providing for the employers' liability and compulsory compensation in all hazardous or especially dangerous employments." *Consol. Ariz. Smelting Co. v. Ujack,* 15 Ariz. 382, 384, 139 P. 465, 466 (1914).

In 1941 the court again observed "before Arizona became a state the common law rule governed almost entirely the relation between employer and

employee, so far as accidents arising out of and in the course of the employment were concerned. Any liability of the employer for such an accident was based on his proven negligence, and he might raise the common law defenses of fellow servant, assumption of risk, and contributory negligence as matters of law for the consideration of the court." *Red Rover Copper Co. v. Indus. Comm'n*, 58 Ariz. 203, 210, 118 P.2d 1102 (1941).

And as recently as 2005, this Court noted the workers' plight - "[b]ut success with such actions was rare because not only did employees have to show that the employers were negligent and that that negligence had caused the injuries, but also because such actions were 'restricted further by the 'unholy trinity' of common law defenses - contributory negligence, assumption of risk, and the fellow servant rule.'" *Grammatico v. Indus. Comm'n*, 211 Ariz. 67, 70, 117 P.3d 786, 789 (2005)(citations omitted).

## IV THE ANTI-ABROGATION CLAUSE

### A. Overview and 70 Years of Jurisprudence

If not a commission to the courts to preserve the common law of torts, called absurd above, then what is the anti-abrogation clause? The anti-abrogation clause is the constitutional protection of a right of action for negligently inflicted personal injuries. Article 18, § 6 ("the anti-abrogation

clause") has meaning only in context. It should first be read in the context of the immediately preceding provisions (§§ 3-5), and then again in the larger context of §§ 3 – 8.

The anti-abrogation clause sits among six provisions with one thing in common – they relate to compensation for bodily injury. The clause is the fourth of the six provisions, and the three immediately preceding the clause relate to the common law action for negligence. § 3 prohibits employer-required contractual waivers of liability for personal injuries (provisions once enforceable under the common law of contracts[2]). § 4 abrogates the common law fellow servant doctrine. §5 establishes that assumption of risk and contributory negligence will no longer be questions of law for the common law courts to decide, but will be questions of fact for juries to decide. The three defenses are next completed with the inclusion of the claim against which they defended, i.e, the anti-abrogation clause's "right to recover." The four provisions together establish the right of action that can't be abrogated – the basic 1912 negligence claim, with fewer defenses. And the clause applies to *nothing at all* that is outside the text of the

[2] Beers, George E. "Contracts Exempting Employers from Liability for Negligence." *The Yale Law Journal*, vol. 7, no. 8, 1898, pp. 352–61

constitution itself, not all common law torts, not some common law torts, and not even common law negligence to any extent it evolved after 1912 .

From the broader context, it’s easy to see it clearly - the framers were wresting the negligence right of action from the courts’ control, and constitutionally protecting a claim that would remain unmolested by any further evolution in the courts’ common law.

This was clear to this Court for 70 years. During that time, this Court produced a coherent body of anti-abrogation clause caselaw that was faithful to the original meaning of the constitution. This Court recognized that article 18 established parameters for the right of action for negligently inflicted personal injuries – the plaintiff’s right of action for negligence, as it was then understood, but with the common law defenses modified or abrogated. “It is true that the action of negligence was originally a common-law one, but its status was, in our opinion, changed when article 18, section 6, was adopted.” *Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 443, 242 P. 658 (1926). It was unclear to the court how to characterize the protected claim, except to say that being separated at that moment from the courts’ control, it was “common law” no more. *Nothing* in common law is protected by the anti-abrogation clause.

The clause's only concern was to jealously guard the protected claim, from courts and the legislature. "This is an obvious reference to Section 6 of Article 18 because it is this section which preserves the right of a workman to sue *from legislative abrogation and judicial intermeddling*." *Kilpatrick v. Superior Court*, 105 Ariz. 413, 419, 466 P.2d 18 (1970)(emphasis added).

**B. The Text Alone Provides Some, But Not All, Answers**

The search for the clause's original meaning starts with the text itself. *Matthews v. Indus. Comm'n*, 520 P.3d 168 (Ariz. 2022). In that regard, the parties have already submitted detailed contemporary dictionary assessments. There is no need to repeat that exercise here. One debatable issue is whether the text, by itself, has anything to say about the identity of the subject referenced in "the right of action to recover damages for injuries."[3] That question can't be resolved by the text alone, but there are textual indicators precluding the "all torts" argument. (This point is already established for the reasons discussed above – but it is clear from the text too).

[3] Henderson suggests there's a strong case that the clause was "only intended to govern employment." We do not argue for the employment limitation because it is difficult to get there from the text. Instead we contend that a limitation to the negligence claim is a strongest argument. Henderson at 616.

First, as Appellant notes, the use of the definite article “the” suggests that the text is referring to a specific right of action. Second, the word “right” is singular, referring to a single right of action. Third, with respect to the word “injury” and its multiple possible uses as detailed in the parties’ pleadings, and as narrowed by this Court in *Matthews*, the intended use to mean “bodily injury” becomes clear only in context. *Id*. That said, it is hard not to notice the examples provided in Appellee’s Appendices showing, anecdotally at least, the “injury” usually meant bodily injury.

Because of the discord between the definite singular “the right of action,” and “for injuries,” which provides many possibilities (for which many rights of action exist), it would be impossible to determine the action referred to without some context. If the court ignored the singular (which it shouldn’t) for the phrase “rights of action,” and chose the broadest meaning for “injury” (“damage” for example) the words would then extend well past tort law to include every contested action over which courts preside. Ultimately, contextual analysis is necessary to determine the meaning of the clause. *State ex rel. Brnovich v. City of Phx.*, 249 Ariz. 239, 468 P.3d 1200 (2020).

Fortunately, context provides a compelling answer. The provision’s context within Article 18 is discussed above and, with that context alone, the negligence

right of action is compelled. When the view is expanded to the broad context of Arizona at the moment of constitutional convention (to be clear, for the purpose of finding the meaning of the words as understood right at the moment of framing), we see that recovery for negligence, specifically in the employment context, was *the* issue of the day, and with good reason. The town square scuttlebutt was work, injuries, and defenses, defenses, defenses. If a framer meant to enshrine a defamation claim, "right to recover for injury" would not have gotten there.

## V *BOSWELL*'S FOLLY

In 1986 *Boswell v. Phx. Newspapers* happened. 152 Ariz. 9, 730 P.2d 186 (1986).[4] *Boswell* was "say no more" proof positive for the proposition that the "open-ended expression of legislative interpretation invites judicial mischief." *State ex rel. Ariz. Dep't of Revenue v. Tunkey*, 524 P.3d 812, 818 (Ariz.

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[4] Defendant/Appellant provides some background on the *Boswell* court's misapprehension of the "open court" constitutional provisions of other states. The open court provisions of other constitutions preserve the right to due process in the courts and generally follow the pattern of this Alabama provision - "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." To adapt Justice Stewart, you know an open court provision when you see it. And our anti-abrogation clause is not an open court provision.

2023)(Bolick, J., concurring). Ironically, Boswell doesn't hide it - "[w]e turn, then, in our search for framers' intent, to the construction given [to wholly different provisions from other states]." *Boswell*, at 152.

*Boswell* concluded that the anti-abrogation clause "was intended to take the right to seek justice out of executive and legislative control, preserving the ability to invoke judicial remedies for those wrongs traditionally recognized at common law." *Id*., 152 Ariz. at 24-25. That conclusion is close to the polar opposite of what the clause actually means.

It is tempting dive into a rabbit hole of *Boswell* fodder, but among its foibles there's a point particularly relevant to this issues in the case and the road forward. Taking *Boswell* at face value, the court's self-reverential perspective blinded it to the framers' view of the common law of negligence. The opinion abounds with examples of the court's myopia as to who might be the target of the anti-abrogation clause. Here's one example: "it is difficult to believe that the framers would have intended to deprive the legislature of the power to abrogate the right to recover for negligent torts while allowing it the power to abrogate actions dealing with many of the things held most dear by the state's residents." *Id*. *Boswell*, it seems, never even considered the possibility that the framers' intended to deprive *the courts* of "the power to abrogate the right to recover for

negligent torts." If we substitute "courts" for "legislature," the statement no longer presents a conundrum --- it is very easy to believe that the framers would have intended to deprive the *courts* of the power to abrogate this solitary right to recover for negligent torts *because that is the exact same right to recovery that was under assault by the courts at the time of the framing*.

If *Boswell* had earnestly examined the text and context of article 18, it would have seen the obvious - that the clause *protects* injured workers *from the courts and common law*. Far from "preserving the ability to invoke judicial remedies for those wrongs traditionally recognized at common law," article 18 was *an emphatic rejection of the common law.*

Until *Boswell* came along, this Court saw it plain as day. "The entire trend of modern legislation in this field has been, so far as possible, to get away from the old common-law action of negligence and the rules governing it as between master and servant, and substitute therefor the doctrine that the industry must bear the burden of human, as well as material, wastage. This was the intent and the purpose of section 3-8, article 18, of our Constitution, and all of the legislation adopted thereunder." *Oatman United Gold Mining Co. v. Pebley*, 31 Ariz. 27, 32, 250 P. 255, 256 (1926).

The anti-abrogation clause does not mean what *Boswell* hoped - that the framers entrusted the safekeeping and future evolution of all tort law to the courts. The clause *could not* have had that meaning in 1912 Arizona. The text of Article 18, by itself, makes that conclusion untenable. When the framers' contempt for the court-developed common law of negligence is added to the mix, *Boswell* is no longer merely untenable – it's farcical.

*Boswell* is a paean to courts and common law. Article 18 is jeremiad against the negligence common law of the courts. By assuming the framers shared its sentiment, *Boswell* became the person laughing along with the crowd while never realizing that they are the butt of the joke.

## VI HARMONIZATION OR REJECTION?

The post-*Boswell* anti-abrogation caselaw is a series of fits and starts. Going full-*Boswell* only in *Hazine*, the court has here and there retreated, to a degree. *Hazine v. Montgomery Elevator Co*., 176 Ariz. 340, 861 P.2d 625 (1993). But *Boswell*'s core folly continues to taint the Court's jurisprudence so much that the entire oeuvre can rightly be called "*Boswell*'s progeny" despite its disharmony. Since *Boswell*, the court has consistently but erroneously framed anti-abrogation issues in terms of the legislature's authority to review tort common law.

As set forth above, it is discordant to suggest that provisions soundly rejecting the common law of negligence should be read to forever protect the common law of torts. Yet that is what the court continues to do. "As [an open courts provision], article 18, § 6 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 v. Sheldon*, 195 Ariz. 531, 538, 991 P.2d 231, 238 (1999).

The clear impetus for the constitution's rejection of the common law of negligence was the courts' mismanagement of the common law's evolution, resulting in the "formidable trilogy." It is thus even worse – fingernails on the chalkboard worse - to suggest that a constitutional rejection of common law, *itself spurred by the court-driven evolution of common law*, should be read to provide the courts with a constitutionally protected domain to further "evolve" the common law. Yet that is what the court continues to do. "It protects from legislative repeal or revocation those tort actions that 'either existed at common law or *evolved* from rights recognized at common law.'" *Dickey v. City of Flagstaff*, 205 Ariz. 1, 3, 66 P.3d 44, 46 (2003)(emphasis added).

Even the Hobson's choice question for review in this case is an indicator of *Boswell*'s beating heart. The Court of Appeals was bound here by precedent to

harmonize *Boswell* and its progeny. And the parties herein were bound to the same by prudence. But this Court is not bound to continue its error. This Court should reject *Boswell* and return to the constitutional fidelity observed during the first two-thirds of our history.

No principle of *stare decisis,* as set forth most recently in *Laurence,* inures to a case for perpetuating *Boswell's* grievous error. *Laurence v. Salt River Project Agric. & Improvement & Power Dist.*, No. CV-21-0292-PR, 2023 Ariz. LEXIS 113 (Apr. 28, 2023). *Boswell* and its progeny are clearly and manifestly erroneous and wrong. Not one person or thing is relying on the settled rule of *Boswell* to order their affairs with "consistency, continuity, and predictability." *Id.*, at ¶ 17 (citations omitted). Surely we don't presume tortfeasors are entitled to "reliability" to better "plan activities knowing what the law is". *Id.* And the legislature has in no way acquiesced to the terms of *Boswell*. Finally, *Boswell* creates constitutional disorder. "*Stare decisis* is 'at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" *State ex rel. Brnovich* at 607.

*Boswell* abandoned 70 years of precedent without a moment's thought for *stare decisis*. Instead, hiding behind an illusory veneer of novelty,[5] it cast its predecessors' judgment of the framers' intent as "difficult to believe" and even "incomprehensible." *Id.*, at 17-18. *Boswell* deserves far less respect from this Court than it gave to its own judicial forebears.

Anything short of the complete rejection of Boswell and its progeny is a continuing usurpation of the right of the people to self-governance.

## VII CONCLUSION

The anti-abrogation clause does nothing more than identify and protect a right of action for negligence. It doesn't preserve common law. It rejects common law. It gives nothing to the courts. It confiscates something from the courts. Our constitution, the written part, gives plenary legislative power to the legislature, and plenary includes torts. There is no justice in *Boswell*'s lawless garden path.

*Boswell* cannot abide.

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[5] "We do not find the language of any of the cases determinative. None of the cases cited actually dealt with the issue presented here. So far as we can determine from citations provided by counsel and from our own research, no Arizona appellate court has ever been asked to [***14] determine whether art. 18, § 6's protection is limited to the right to recover for negligent torts or for those torts in which bodily injury has been sustained. Thus, the issues before us are questions of first impression." *Boswell*, at 14.

RESPECTFULLY SUBMITTED this 16th day of May, 2023.

By /s/ Michael G. Bailey

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