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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** **Arizona Court of Appeals** **Case No. 1 CA-CV 19-0544** Maricopa County Superior Court Case No. CV 2016-016688 Hon. Sherry K. Stephens

PLAINTIFFS/APPELLEES' RESPONSE TO THE AMICUS CURIAE BRIEFS

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Scope of the Response

Plaintiffs/Appellees submit this combined response to the seven amicus curiae briefs filed on May 15 and 16, 2023. These are the briefs:

- Brief of Amicus Curiae Arizona Association for Justice/Arizona Trial Lawyers Assoc. in Support of Petitioners (May 15, 2023).
- Amicus Curiae Brief of the Arizona Restaurant and Hospitality Association (May 15, 2023).
- Amicus Brief of the Ariz. Licensed Beverage Assoc. (May 16, 2023).
- Amicus Brief of Arizona Chamber of Commerce (May 16, 2023).
- Supplemental Brief of Amicus Curiae Mothers Against Drunk Driving—MADD Arizona Chapter (May 16, 2023).
- Amicus Curiae Brief of Homicide Survivors, Inc. (May 16, 2023).
- Amicus Curiae Brief on Behalf of Arizona Association of Defense Counsel (May 16, 2023).

Legal Argument—What Matters Is the Text

"We're all textualists now," Justice Elena Kagan famously declared in 2015 during the Antonin Scalia Lecture series at Harvard.[1] "Textualism" is the "doctrine that the words of a governing text are of paramount concern and that what they fairly convey in the context is what the text means." *Black's Law Dictionary* 1779 (11th ed. 2019). We ask the Court to ascertain the meaning of the words in the

[1] Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:28 (11/17/2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [http://perma.cc/3BCF-FEFR].

anti-abrogation clause by applying textualist principles.

"In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 16 (2012). "The exclusive reliance on text when interpreting text is *textualism*." *Id*. "Textualism, in its purest form, begins and ends with what the text says and fairly implies." *Id*.

> Textualism is not always easy, but the method is plain: Take a text, look to the common definitions of the words at the time the text was enacted, and apply canons of construction. In some cases, this can be hard work and involve significant research. It is not glamorous, but it is the standard stuff of lawyering.

Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 St. John's L. Rev. 303, 312 (2017).

Preparing Plaintiffs/Appellees' simultaneous supplemental brief in this case, for example, took several months of hard work to locate a broad selection of the constitution-making era's English dictionaries, relevant newspaper articles, and other contemporary materials to determine the contemporary common public meaning of the key terms of Article 18, § 6's phrase: "The right of action to recover damages for injuries shall never be abrogated."

Textualism asks what the words of a statute or constitutional provision fairly meant to a competent user of the English language at the time of enactment. There

are various ways of describing the textualist process. For instance, Judge Frank E. Easterbrook wrote that: "We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words." *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 65 (1988).

"Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem." *Id*. at 61. *See also District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008) ("Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."); *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

In 2020, the United States Supreme Court described the textualist approach to interpreting legal texts, and the reasons for it:

> This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731, 1738 (2020).

One of textualism's main tenets is the ordinary-meaning canon, which posits that words in a statute or constitutional clause are presumed to have their everyday meanings unless something about them suggests a technical sense. "Textualists give primacy to the semantic context—evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words." John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 91 (2006).

Textualism is a part of Arizona's legal heritage. In 1908, the Supreme Court of the Territory of Arizona warned against the use of legislative intent to construe statutes since "it is the duty of all courts to confine themselves to the words of the Legislature—nothing adding thereto; nothing demitting." *Flowing Wells Co. v. Culin*, 11 Ariz. 425, 429 (Terr. 1908).

"The court has no authority to extend a law beyond the fair and reasonable meaning of its terms, because of some supposed policy of the law, or because the Legislature did not use proper words to express its meaning." *Id*. That 1908 plain-meaning method of construing a statute applies with equal force to construing all legal texts, including to construing the anti-abrogation clause adopted two years later at the Arizona Constitutional Convention.

In 1916, this Court emphasized that, if a law's "language is plain, it is the

duty of the court to give it effect by following it." *Wuicich v. Solomon-Wickersham Co*., 18 Ariz. 164, 166 (1916). In 1923, this Court added that "courts cannot go outside of the plain, unambiguous language of a statute or Constitution to determine its meaning." *Fairfield v. Foster*, 24 Ariz. 146, 151 (1923).

Echoes of the early-statehood and territorial-era textualism increasingly appear in cases noting the "traditional method of constitutional construction that accords to words their plain and simple meaning," *Kotterman v. Killian*, 193 Ariz. 273, 286 ¶ 41 (1999), or acknowledging that this Court is "obliged to interpret constitutional language according to its plain meaning." *Sun City Home Owners Assoc. v. Arizona Corporation Comm'n*, 252 Ariz. 1, 7 ¶ 25 (2021).

What is needed here and in all other constitutional cases is a consistent use of textualism that is both faithful to Arizona's legal heritage and allows for a fair, consistent interpretation of the constitutional text. After all, this Court's duty is to "apply the constitution's plain meaning." *Matthews v. Industrial Comm'n of Arizona*, 254 Ariz. 157, 164 ¶ 34 (2022). "Our role in constitutional interpretation is to construe the text, when possible, in accord with its plain meaning." *Burns v. Arizona Public Service Co.*, 254 Ariz. 24, 30 ¶ 23 (2022).

"In discerning the text's meaning, the most objective criterion available is the accepted meaning of the words, in context, when the provision was adopted. If the text is unambiguous, we apply its express terms without applying secondary

methods of construction." *Arizona Free Enterprise Club v. Hobbs*, 253 Ariz. 478, 453 ¶ 10 (2022). "We interpret constitutional and statutory provisions as they are written, and we are constrained from rewriting the law under the guise of interpreting it even if we divine a more desirable intended outcome than the text allows." *Id*. at 489 ¶ 38. "We look first to the language of the provision, for if the constitutional language is clear, judicial construction is neither required nor proper." *Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992).

Textualism is again a respected interpretative method at the United States Supreme Court. That is a return to its vital, original role in federal constitutional interpretation. "The words" of a constitution "are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816).

Joseph Story (1779-1845), *Martin*'s author and a constitutional scholar and Justice of the United States Supreme Court from 1812 to 1845, added that:

> In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.

Joseph Story, *Commentaries on the Constitution of the United States* Book III, § 451 at 436-37 (1833).

Justice Story's commentaries on constitutional interpretation apply to the Arizona Constitution's text, which was created during the common business of forming a state constitution for the 48th State to join the Union, was adapted to the common wants of Arizona's people, was designed for their common use, and was fitted for their common understanding.

Arizona's constitutional convention delegates drafted our state constitution. Arizona's voters then ratified it. They must be supposed to have read it with the help of their common sense, especially when the full text of its 1910 final version was published in newspapers[2] and was mailed to Arizona's voters[3] before the 1911 elections in which they adopted it.[4] The drafters and ratifiers of the anti-abrogation clause cannot be presumed to have given its plain words any of the mysterious, extraordinary, philosophical, elaborate shades of meaning—or the metaphysical

[2] *See The Proposed Constitution as it Has Been Signed and Sealed*, Arizona Republican 1, 7-10 (Dec. 10, 1910) (full text of constitution as it was adopted at the convention).

[3] *Five Clerks Address Constitution Copies*, Tucson Citizen 8 (Dec. 22, 1910) ("Five additional clerks are at word in the office of the assistant secretary of Arizona, addressing envelopes in which the 40,000 copies of the newly made constitution will be mailed to the voters of the territory. The copies are to be mailed December 28.").

[4] *Constitution Ratification*, Arizona Republican 1 (Feb. 10, 1911) (the constitution is adopted); *Democratic Landslide*, Arizona Republican 1 (Dec. 13, 1911) ("The amendment eliminating the recall from the constitution has carried.").

subtlety and many niceties of expression—that JAI, and most of the amici curiae, long to unearth in the clause's plain constitutional text.

In interpreting any constitutional text, courts must be guided by the basic principle that a constitution "was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931).

Some of the amicus curiae briefs are exceptionally well-written, but they all share a flaw. Namely, they all avoid any in-depth analysis of the original common, public meaning of the anti-abrogation clause's key terms of "right of action," "damages," "injuries," and "abrogated."

None of the amicus curiae briefs cites constitution-making-era dictionaries. None cites to any other contemporary source to help determine the common public meaning of the anti-abrogation clause's words when they were drafted and ratified. But what most matters for interpreting and applying the anti-abrogation clause is the original common public meaning of its words in the constitution-making and constitution-adopting era of 1910 to 1912.

Arizona Common-Law Causes of Action—Past and Present

There is much more on the table than common-law dram-shop liability. If this Court declines to apply the plain text of the constitution-making-era's phrase "right of action to recover damages for injuries," the Arizona Legislature will

finally be free to weaken or wipe out many common-law causes of action.

The following list features those common-law causes of action this Court specifically recognized pre-statehood (with yellow highlighting) and features the common-law causes of action that Arizona appellate courts specifically recognized after February 14, 1912 (with no yellow highlighting).

Abuse of process – *Sarwark Motor Sales, Inc. v. Woolridge*, 88 Ariz. 173 (1960).

Alienation of affection – *McNelis v. Bruce*, 90 Ariz. 261, 265 (1961).

Assault – *Iager v. Metcalf*, 11 Ariz. 283 (Terr. 1908).

Battery – *Iager v. Metcalf*, 11 Ariz. 283 (Terr. 1908).

Common-law dram-shop liability – *Ontiveros v. Borak*, 136 Ariz. 500 (1983).

Common-law wrongful discharge from employment – *Fleming v. Pima County*, 141 Ariz. 149, 153 (1984).

Conversion of chattels – *Hereford v. Pusch*, 8 Ariz. 76 (Terr. 1902).

False arrest – *Christiansen v. Weston*, 36 Ariz. 200 (1930).

False imprisonment—*Williams v. Tidball*, 2 Ariz. 50 (Terr. 1885).

False light invasion of privacy – *Reed v. Real Detective Pub. Co*., 63 Ariz. 294 (1945).

Fraud – *Stewart v. Albuquerque National Bank*, 3 Ariz. 293 (Terr. 1891); *Bianconi v. Smith*, 3 Ariz. 320 (Terr. 1892).

Insurance bad faith—*Farmers Insurance Exchange v. Henderson*, 82 Ariz. 335 (1957).

Intentional infliction of emotional distress – *Savage v. Boies*, 77 Ariz. 355 (1954).

Intentional misrepresentation – *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486 (1971).

Interference with contractual relationship – *Tipton v. Burson*, 73 Ariz. 144 (1951).

Legal malpractice – *Talbot v. Schroeder*, 13 Ariz. App. 230 (1970).

Liability for conducting abnormally dangerous or ultrahazardous activities – *Paul v. Holcomb*, 8 Ariz. App. 22 (1968), *Correa v. Curbey*, 124 Ariz. 480 (App. 1979).

Libel – *Johnston v. Morrison*, 3 Ariz. 109 (Terr. 1889).

Malicious prosecution – *McDonald v. Atlantic & Pacific Railroad Co.*, 3 Ariz. 98 (Terr. 1889); *Sullivan v. Garland*, 5 Ariz. 188 (Terr. 1897).

Medical malpractice – *Butler v. Rule*, 29 Ariz. 405 (1926).

Negligence – *Prescott & Arizona Central Railway Co. v. Rees*, 3 Ariz. 317 (Terr. 1892)

Negligent infliction of emotional distress – *Keck v. Jackson*, 122 Ariz. 114 (1979).

Negligent misrepresentation – *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486 (1971).

Negligent product liability – *Stewart v. Crystal Coca-Cola Bottling Co.*, 50 Ariz. 60 (1937).

Private nuisance – *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190 (Terr. 1909).

Public nuisance – *Thorpe v. Clanton*, 10 Ariz. 94 (Terr. 1906).

Strict product liability – *Colvin v. Superior Equipment Company*, 96 Ariz.

113 (1964).

Tortious interference with contract – *Meason v. Ralston Purina Co*., 56 Ariz. 291 (1940).

Trespass to chattels – *Mountain States Tel. & Tel. Co. v. Kelton*, 79 Ariz. 126 (1955).

Trespass to land – *Eldred v. Warner*, 1 Ariz. 175 (Terr. 1875).

Special-interest groups—from healthcare providers to insurers, from product manufacturers to liquor purveyors, and many more—would be overjoyed if they could pressure and cajole pliant legislators needing campaign contributions, post-legislative employment, and/or other gifts and favors to "reform" post-statehood-recognized rights of action until those pesky rights of action no longer exist or are so weakened that they would be almost impossible to assert successfully.

Conclusion

"It is the duty of the judiciary to enforce the text of our constitution and statutes and the fundamental rights protected within them." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 305 ¶ 165 (2019).

Purpose, public policy, and intent may matter greatly when a constitutional text is unclear or ambiguous. That is not the case here. The anti-abrogation clause's text is clear and unambiguous. What matters is that clause's plain text.

"The right of action to recover damages for injuries shall never be abrogated." Ariz. Const. art. 18, § 6. Those words mean there can be no

nullification of a person's right to bring a lawsuit seeking a monetary recovery for harm the injured person has suffered. The text has no time limit. That is, nothing in the anti-abrogation clause's text limits its protection to rights of action that the Supreme Court of the Arizona Territory had recognized by February 14, 1912.

Our duty as jurists and lawyers seeking to understand and apply the text of the anti-abrogation clause is to determine the simple, common, public meaning of its words when the framers chose them and Arizona's voters ratified them.

DATED this 22nd day of May, 2023.

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Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 2,731 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations; and (4) has less than 20 substantive pages.

Certificate of Service

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The undersigned lawyer certifies that copies of the foregoing will be mailed to the Office of the Arizona Attorney General, to the Speaker of the Arizona House of Representatives, and to the President of the Arizona Senate, in conformity with A.R.S. § 12-1841(B).

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