ARIZONA COURT OF APPEALS

DIVISION ONE

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

DEFENDANT/APPELLANT JAI DINING SERVICES (PHOENIX) INC.'S SUPPLEMENTAL BRIEF

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BACKGROUND

This dramshop case returns on remand from the Supreme Court. For context, this brief provides an overview of the relevant law and the case's history.

I. Dramshop liability in Arizona.

No general negligence action for dramshop liability existed at common law. *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983). Thus, "a tavern owner [was] not liable for injuries sustained off-premises by third persons as the result of the acts of an intoxicated patron, even though the tavern owner's negligence in serving that patron was a contributing cause of the accident." *Id*. That changed in 1983 when the Supreme Court abandoned the common-law rule. *Id.*

The legislature enacted A.R.S. §§ 4-311 and 4-312 three years later. *See* 1986 Ariz. Sess. Laws, ch. 329, § 1 (2d Reg. Sess.). Under § 4-311(A)(1), liquor licensees may be liable for selling alcohol to patrons who are "obviously intoxicated" or underage. The statute defines "obviously intoxicated" as "inebriated to such an extent that a person's physical faculties are substantially impaired," as shown by obvious physical indicators "that would have been obvious to a reasonable person." A.R.S. § 4-311(D). Under

A.R.S. § 4-312(B), liquor licensees are "not liable" for property damage, personal injury, or death allegedly caused by selling, furnishing, or serving liquor to patrons, "except as provided in § 4-311." Together, these statutes expressly preempt the amorphous common-law liability created by *Ontiveros* and replace it with a clearly defined statutory liability based on objective, observable, and workable standards.

In 1995, however, Division Two found A.R.S. § 4-312(B) unconstitutional for violating the Constitution's anti-abrogation clause. *See Young Through Young v. DFW Corp.*, 184 Ariz. 187, 190 (App. 1995); Ariz. Const. art. 18, § 6 ("[t]he right of action to recover damages for injuries shall never be abrogated").

Since then, however, the Supreme Court has clarified that if a claim "could not have been maintained at the time the anti-abrogation provision was instituted it is not protected by" art. 18, § 6. *See Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 5, ¶ 18 (2003).

In light of *Dickey*, *Young* is no longer good law and should be overruled.

II. This case.

The plaintiffs here sued JAI for both common-law negligence/ dramshop liability and statutory negligence per se under A.R.S. § 4-311. [IR-1 (complaint) at 7-13; *see also* IR-146 (jury instructions) at 5-8 (APP082-85).] JAI unsuccessfully moved for judgment as a matter of law before and after trial based on duty and proximate cause. [IR-202 at 150:20-156:12 (APP162-68); IR-180.] JAI did not argue preemption. Even if it had, the superior court would have been bound to follow *Young* and deny the motion.

The jury rendered an unusual split verdict: it found for the plaintiffs on common-law liability, but found for JAI on the statutory claim. [IR-148 to IR-150 (verdicts) (APP090-94).] JAI appealed, raising three issues: preemption, duty, and proximate cause. (Opening Br. at 14-15.) The plaintiffs argued that JAI waived the preemption issue, but nevertheless addressed preemption on the merits. (Answering Br. at 30-44.) This Court reversed on proximate cause and thus did not reach preemption or duty. Op. ¶ 34 & n.9.

The plaintiffs petitioned the Supreme Court for review. JAI raised preemption in its opposition to the petition, and again in its post-grant supplemental brief. *See* PR Response at 21; Sup. Ct. Supp. Br. at 10-19.

The Supreme Court reversed on causation. It remanded for consideration of the issues raised but not decided, i.e., preemption and duty. Sup. Ct. Op. ¶¶ 19-20.

ARGUMENT

The Court should reverse for two independent reasons: preemption and duty.

I. A.R.S. § 4-312(B) preempts common-law dramshop liability.

The Court should exercise its discretion to address preemption because the normal rationales for waiver do not apply (§ I.A.1), several well-settled exceptions to the waiver doctrine apply (§ I.A.2), and this case presents an unusually good vehicle for addressing the issue (§ I.A.3).

A.R.S. § 4-312(B) expressly preempts the only claim on which the plaintiffs prevailed. (§ I.B.) That statute does not fall within the anti-abrogation clause because dramshop claims did not exist at common law in 1912. (§ I.C.) The Court should reverse.

A. The Court should address preemption.

1. The fundamental rationales for waiver do not apply.

The waiver doctrine exists "[b]ecause a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects

before error may be raised on appeal." *In re MH 2006-000023*, 214 Ariz. 246, 248, ¶ 8 (App. 2007) (citation omitted). In other words, a trial judge should not be faulted for not correcting an error not drawn to that judge's attention.

This rationale does not apply here because the superior court was bound by controlling precedent. Even if JAI had raised preemption below, the disposition would have been exactly the same because "trial courts are required to follow the decisions of a higher court." *Sell v. Gama*, 231 Ariz. 323, 330, ¶ 31 (2013). Raising preemption would have been futile. The superior court *could not* have accepted JAI's preemption argument because it was bound to follow *Young* until this Court or the Supreme Court holds otherwise.

The fact that the superior court had no power to deviate from *Young* underscores why considering the issue presents no unfairness to the plaintiffs. Fundamentally, the waiver doctrine "serves objectives of fair notice, and promotes both the ability to meet issues and judicial efficiency." *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 482 (1986). The doctrine "is intended to prevent surprise." *Stokes v. Stokes*, 143 Ariz. 590, 592 (App. 1984).

Here, "both parties have briefed and argued the issue extensively and there is no claim of surprise." *Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, 143, ¶ 11 (App. 2002). There is no surprise; this is the fifth appellate brief in which JAI has raised preemption in this case.

Courts routinely address new issues on appeal with less notice. In *Dombey*, 150 Ariz. at 482, the Supreme Court addressed a legal issue of statewide importance notwithstanding waiver. The Supreme Court has even addressed issues "first advanced in this court by [amicus curiae]." *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406 n.9 (1995).

The touchstone of fairness is the opportunity to brief and argue the issue. *See, e.g.*, *Jimenez*, 183 Ariz. at 406 (considering issue that was "briefed and argued"). This Court has accordingly considered an issue first raised on appeal when the opposing party "has been afforded the opportunity to, and did in fact, respond to [the waived issue] in its answering brief." *City of Tucson v. Tanno*, 245 Ariz. 488, 494, ¶ 23 (App. 2018). Likewise here, the plaintiffs were "afforded the opportunity to, and did in fact, respond to" the preemption issue: they briefed the issue in their answering brief and addressed it at oral argument before this Court and the Supreme Court.

Courts also address new issues after giving both sides "the opportunity to file supplemental briefs on th[e] issue." *Evenstad v. State*, 178 Ariz. 578, 582 n.2 (App. 1993); *accord Jimenez*, 183 Ariz. at 406 n.9 (Court "received supplemental briefing"). These supplemental briefs, and the invitations to potential amici, also justify considering the issue.

The plaintiffs have not even tried to claim that addressing preemption unfairly prejudices them. Instead, they claim JAI failed to show "fundamental error." (Supp. Br. at 7-8.) But JAI is not invoking the fundamental error exception to the general waiver rule, which is only one of "many exceptions" courts apply. *Town of S. Tucson v. Bd. of Supervisors of Pima Cnty.*, 52 Ariz. 575, 582 (1938). The plaintiffs have not disputed that the preemption issue falls within *other* exceptions to the waiver rule.

For these reasons, the foundational rationales for the waiver doctrine—fairness to the trial court and parties—do not apply. Addressing the issue would cause no surprise or unfairness.

2. Several exceptions to the waiver doctrine warrant considering preemption.

In addition to the lack of unfairness, several other reasons justify reaching the merits of preemption. The waiver doctrine "is merely a rule of

procedure, and not a matter of jurisdiction." *Tucson*, 52 Ariz. at 582. Several exceptions exist, including for "questions of a general public nature, affecting the interests of the state at large, . . . particularly . . . when the question raised for the first time is one of substantive law which is not affected by any dispute as to the facts of the case." *Id.* at 583.

Fundamentally, this is a question about the constitutional validity of a state statute. For twenty-five years, A.R.S. § 4-312(B) has been considered unconstitutional, when in fact it is a proper exercise of legislative power. The constitutionality of a statute should not turn on whether a particular litigant raised an issue in trial court. As this Court explained, "when we are considering the interpretation and application of statutes, we do not believe we can be limited to the arguments made by the parties if that would cause us to reach an incorrect result." *Evenstad*, 178 Ariz. at 582.

Second, "[i]f application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law, it is appropriate for [the Court] to consider the issue." *Id.* This principle applies with particular force "when the question raised for the first time is one of substantive law which is not affected by any dispute as to the facts of the case." *Tucson*, 52 Ariz. at 583. Considering whether § 4-312(B)

constitutionally preempts common-law liability is an outcome-determinative pure question of law. It does not turn on any case-specific facts, and can be resolved on the existing record without requiring any additional evidence or further proceedings.

Third, this issue presents a constitutional separation-of-powers issue: Does the judicial decision in *Ontiveros* restrict the legislative power to delineate liability? The Court's power to answer this question should not depend on a private actor's trial-court decisions. *See Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 104 (1984) ("We believe that the constitutional [anti-abrogation] issue in the case at bench is sufficiently important that it should be considered even though not raised in the trial court."). In addition, because § 4-311 affects practically every restaurant, bar, hotel, stadium, and other liquor licensee in the state, it is "a matter of statewide importance," which further justifies considering the issue. *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 231 Ariz. 236, 238, ¶ 8 (App. 2012).

Fourth, *Young* was simply incorrectly decided. This Court has a strong interest in clearing bad decisions from the books. The Court should take this opportunity to correct *Young*'s mistake now rather than letting the bad law linger.

3. This case is the ideal vehicle.

To top it off, this case is an unusually good vehicle to "correctly explain the law" on dramshop liability. *See Liristis*, 204 Ariz. at 143, ¶ 11. The preemption question is uniquely outcome-determinative in this case because of the split verdict. The jury found that JAI violated the common-law obligations created by *Ontiveros* but not the statutory obligations imposed on liquor licensees. (*See* Opening Br. at 21-22; Reply Br. at 8-11.) Accordingly, if § 4-312(B) validly preempts the common-law claims, the judgment must be reversed.

Properly addressing this issue essentially requires a case with this type of mixed verdict, which is also appealed, something that might not occur again for years. "[T]he public interest is better served by having the issue considered rather than deferred." *Dombey*, 150 Ariz. at 482.

B. The plaintiffs' common-law claims are preempted.

A.R.S. § 4-311 defines the scope of a bar's liability for negligence. A bar is liable only if it serves alcohol to a patron who is "obviously intoxicated" or underage. In A.R.S. § 4-312(B), the legislature expressly preempted all other types of liability for serving alcohol: "*except as provided in § 4-311*, a person, firm, corporation or licensee *is not liable in damages* to

any person who is injured, or to the survivors of any person killed, or for damage to property which is alleged to have been caused in whole or in part by reason of the sale, furnishing or serving of spirituous liquor." *Id.*

Thus, as explained in both JAI's Opening Brief (at 18-21) and Reply Brief (at 16-19), § 4-312(B) expressly preempts all other claims against liquor licensees alleging the negligent sale, service, or furnishing of alcohol, including the common-law claims on which the plaintiffs prevailed in this case.

The plaintiffs cite *Estate of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244 (1994), and *Petolicchio v. Santa Cruz Cnty. Fair & Rodeo Ass'n, Inc.*, 177 Ariz. 256 (1994), for the proposition that *other* common-law claims are not preempted. (Answering Br. at 39; Supp. Br. at 12-15.) But § 4-312(B) does not purport to preempt *all* claims involving alcohol. It applies only to claims of harm allegedly resulting from a licensee's "sale, furnishing, or serving" of liquor. The existence of other negligence actions involving alcohol, such as claims against social hosts (non-licensees), or claims from theft (rather than sale), does not change the fact that A.R.S. §§ 4-311 and 4-312 define the scope of liability for ordinary commercial sales of alcohol by licensees. (*See* Reply Br. at 16-19.)

Here, the plaintiffs alleged common-law negligence against JAI—a licensee—for damages allegedly caused "by selling, dispensing, or otherwise furnishing spiritous liquor," [IR-7 at 8, ¶ 52], which squarely fits within § 4-312(B)'s preemption of claims based on the "sale, furnishing or serving of spiritous liquor." This claim therefore is preempted by A.R.S. § 4-312(B), even if others may not be.

In sum, the plaintiffs prevailed against JAI solely on common-law claims for negligence/dramshop liability. [IR-148 to IR-150 (verdicts) (APP090-94).] Because those claims are preempted by A.R.S. § 4-312(B), the Court should reverse and direct entry of judgment for JAI.

C. A.R.S. § 4-312(B) does not implicate the anti-abrogation clause because this type of claim was rejected at common law.

The anti-abrogation clause "preserv[es] the ability to invoke judicial remedies for those wrongs traditionally recognized at common law." *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 17 (1986). Under the modern understanding, the clause "was designed to protect rights of actions in existence at the time it was adopted, but not necessarily those later created." *Dickey*, 205 Ariz. at 5, ¶ 18; *see also id.* at 5, ¶¶ 15-17 (anti-abrogation provisions do not protect "a right to sue for damages that did not exist" at

common law). Thus, the central question is whether the action in question "could [] have been maintained" when Arizona adopted the anti-abrogation provision in 1912. *See id.* at 5, ¶ 18.

Around the time of *Young*, changes in "the composition of the [Supreme] [C]ourt" created uncertainty about "whether the nonabrogation clause protects causes of action that came into being after the adoption of our constitution." *Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 345-46 (App. 1992). In just five years, the Supreme Court flipped on whether the anti-abrogation clause protects A.R.S. § 12-551, which limits products liability for manufacturers and sellers. The Court first upheld the statute "because the tort of strict products liability did not exist at the time the constitutional provision was adopted." *Bryant v. Cont'l Conveyor & Equip. Co., Inc.*, 156 Ariz. 193, 195 (1988). Five years later, the Court overruled *Bryant* and ruled § 12-551 unconstitutional, reasoning that "the right to recover for injuries caused by products was, of course, recognized at common law; therefore, the development of strict liability causes of action to vindicate that right is . . . covered by art. 18, § 6." *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344 (1993).

Given this muddled backdrop, it is not surprising that *Young* assumed the anti-abrogation clause protects the general negligence action for dramshop liability created by *Ontiveros*. *See Young*, 184 Ariz. at 189 (citing *Hazine*). In fact, *Young* did not even determine whether the right to recover against dramshops for negligence existed at common law; it simply assumed that the clause applied. *See id.* at 188-90.

But modern Supreme Court decisions have clarified the anti-abrogation clause's scope, confirming that it does not constitutionalize the right to recover in tort for any injury cognizable at common law. Instead, the clause considers whether the right to recover for the particular type of harm, and against the particular type of defendant, existed at common law in 1912. 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 affords that claim no protection today.

In *Cronin v. Sheldon*, 195 Ariz. 531 (1999), the analysis focused on the particular type of harm. The Court considered whether the anti-abrogation clause protected claims for wrongful discharge. *Cronin* held that although "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," it does not "extend constitutional protection to all tort causes of action, whenever or however they may have arisen." *Id.* at 538-39, ¶¶ 35-36. Instead, it "applies only to tort causes of action that either existed at common law or evolved from" a recognized common-law right to recover for the injury. *Id.* at 539, ¶ 39.

Applying this framework, *Cronin* held that the legislature could abrogate a claim for employment discrimination because it "neither existed in 1912 when statehood was achieved, nor did it evolve from common law antecedents." *Id.* at 539, ¶ 37. *Cronin* distinguished *Hazine*'s broad "evolution" approach by explaining that "because a right of action for injuries caused by defective products *was* recognized at common law," the legislature could not abrogate right to recover for defective products. *Id.* at ¶ 36.

Dickey ex rel. Dickey v. City of Flagstaff extended *Cronin*'s reasoning to a common-law negligence action similar to the one at issue here. This time, the Court's analysis focused on the particular type of defendant. In *Dickey*, the plaintiff challenged A.R.S. § 33-1551, which immunized municipalities from certain negligence claims. 205 Ariz. at 1-2, ¶ 1. Like with dramshop liability, American courts had considered and *rejected* negligence liability for

municipalities at the time of statehood, but Arizona courts later abandoned the common-law rule of municipal immunity. *Id.* at 3, ¶ 10 (citing 1913 treatise for nonliability); *id.* at 4, ¶ 14 ("this court abolished the common-law rule of sovereign immunity"). When it abolished common-law municipal nonliability, the Supreme Court invited the legislature to delineate the scope of liability, much like it did in *Ontiveros*. *See id.* The legislature accepted the Court's invitation and established the contours of liability for certain negligence actions against municipalities—again, much like dramshop liability. *See id.*

Dickey applied *Cronin*'s clarified standard: "to fall within the protection of the anti-abrogation provision of the Arizona Constitution, [the] right of action . . . must have existed at common law or have found its basis in the common law at the time the constitution was adopted." *Id.* at 3, ¶ 9. Under that standard, a general negligence claim against a municipality—which was not recognized at common law, then judicially recognized, and then legislatively restricted—is not protected "because a suit against a city for simple negligence *could not have been maintained* at the time the anti-abrogation provision was instituted." *Id.* at 3-5, ¶¶ 9-18 (emphasis added).

The history of dramshop negligence actions in Arizona follows the same pattern as the municipal negligence actions in *Dickey*. Both types of actions were rejected at common law, then judicially recognized (by explicitly abolishing of the common-law rule), and then legislatively restricted. Under *Cronin* and *Dickey*, therefore, the anti-abrogation clause does not prohibit the legislature from delineating the scope of liability for the type of claim first created by *Ontiveros*, and § 4-312(B)'s preemption provision is constitutional.

These modern anti-abrogation cases show that even if *Hazine*'s "evolution" concept remains good law, it applies only if the right to recover for the particular type of harm (e.g., injury from defective products), against the particular type of defendant (e.g., producers and sellers of defective products), existed at common law. The plaintiffs simply fail to grapple with these modern cases. They do not seriously confront *Cronin*'s core holding, and they do not cite *Dickey* at all, even though it is the centerpiece of JAI's argument (*e.g.*, Opening Br. at 16 ("*Young*, however, is not good law after *Dickey*"), and is controlling precedent.

Cronin and *Dickey* also teach that even accounting for evolution, the anti-abrogation clause does not protect types of liability that had already

been considered and rejected by 1912. In *Cronin*, the Supreme Court specifically "emphasize[d]" that pre-statehood, American courts had specifically considered and *rejected* the type of liability at issue. 195 Ariz. at 539, ¶ 38 ("American courts abandoned the English rule"). Likewise in *Dickey*, American courts had considered and rejected municipal liability for negligence, citing a 1913 treatise for the proposition that "*The rule is firmly established* . . . ." 205 Ariz. at 3, ¶ 10 (citation omitted).

So too here. By 1912, people injured by dramshop patrons had already tried to hold dramshops liable. But a lawsuit for dramshop liability would have been a complete nonstarter—not because no one thought to try, but because many had tried and courts uniformly *rejected* those efforts. *See Collier v. Stamatis*, 63 Ariz. 285, 290 (1945) ("[I]t has been held by *all the courts* and by *every commentator*" that dramshops are not liable) (emphases added); *Ontiveros*, 136 Ariz. at 504 (citing 1889 and 1911 cases). Because this type of claim against this type of defendant had already been considered, tried, and rejected at common law, § 4-312(B) fits within *Cronin*'s and *Dickey*'s holdings, not *Hazine*'s.

Hazine's evolution concept also does not fit dramshop liability because when *Ontiveros* created the new liability, it used words of revolution, not

evolution. Sharply departing from common law, *Ontiveros* held that "the common law doctrine of tavern owner nonliability is *abolished* in Arizona." 136 Ariz. at 513 (emphasis added). In one fell swoop it expressly overruled or disapproved of seven prior Arizona opinions. *Id.* at 507-08. Under *Dickey*'s bright-line rule, this type of claim "could not have been maintained at the time the anti-abrogation provision was instituted, [and therefore] is not protected by that provision." *Dickey*, 205 Ariz. at 5, ¶ 18.

The fact that the common law recognized general negligence actions also does not bring dramshop claims within the anti-abrogation clause's scope. *Dickey* itself involved "a lawsuit sounding in simple negligence." *Id.* at 3, ¶ 8. But even though "negligence suits certainly have their basis in common law," that does not protect rights of recovery unavailable at common law. *Id.* at 3 n.3.

Multiple other decisions have upheld legislative restrictions of negligence actions. *See, e.g.*, *Lerner v. DMB Realty*, 234 Ariz. 397 (App. 2014) ("negligent failure to disclose [in real estate transaction] is not protected by the anti-abrogation clause"); *Goodman v. Samaritan Health Sys.*, 195 Ariz. 502, 506-07, ¶¶ 16-18 (App. 1999) ("claims of negligence" in peer-review process). If, for a particular kind of wrong and against a particular type of defendant,

"negligence could not have been maintained at the time the anti-abrogation provision was instituted, it is not protected by that provision." *Dickey*, 205 Ariz. at 5, ¶ 18.

These principles make perfect sense. The legislature unquestionably could have passed A.R.S. §§ 4-311 and -312 any time between 1912 and 1982 without implicating the anti-abrogation clause because no Arizona court had created dramshop liability. It cannot be the case that legislation that would have been constitutional if enacted in 1982 is unconstitutional if enacted in 1986, merely because the Supreme Court created brand new liability in 1983. That is not how the legislative power works. The fact that a court got to the issue first does not strip the legislature of its power to delineate the scope of liability. To hold otherwise would violate the separation of powers between the courts and the legislature.

For example, in 1985 the legislature immunized social hosts from liability for serving alcohol. *See* A.R.S. § 4-301 ("A person other than a licensee . . . is not liable in damages"). And because social hosts "were not liable at common law[,] A.R.S. § 4-301 is constitutional" under article 18, § 6. *Bruce v. Chas Roberts Air Conditioning*, 166 Ariz. 221, 225 (App. 1990). It

cannot be the case that social-host immunity would have been unconstitutional if a court had created social-host liability in 1984.

The plaintiffs go so far as to claim that "[o]nce the Supreme Court recognizes a common-law cause of action, it is 'constitutionalized.'" (Supp. Br. at 24.) *Cronin* directly rejected this notion: "What we did not do in *Hazine*, however, is extend constitutional protection to all tort causes of action, whenever or however they may have arisen." *Cronin*, 195 Ariz. at 539, ¶ 36. Judicial decisions that *jettison* the common law do not immediately become "constitutionalized."

This does not limit the development of the common law. The judiciary remains free to change the common law, but the legislature has the constitutional power to delineate the scope of liability, including narrowing or expanding liability for claims the common law rejected.

Indeed, courts have repeatedly recognized that "[w]hether Arizona needs a dramshop law is a matter for the legislature to decide." *Profitt v. Canez*, 118 Ariz. 235, 236 (1977); *accord Ontiveros*, 136 Ariz. at 513 ("If we are mistaken in this, it is possibly within the legislative power to confer upon the liquor industry some special benefit exempting it from liability."); *Brannigan v. Raybuck*, 136 Ariz. 513, 519 (1983) ("If the legislature considers

it to be unwise, it has the means of so informing us."). Moreover, even after deciding that bars may face liability, delineating the precise bounds of liability and striking the right balance between regulatory enforcement and civil liability all involve complex decisions that fall squarely within the legislative role.

The legislature accepted the judiciary's invitation in 1986. The legislature did not restore the pre-*Ontiveros* rule of nonliability, but instead defined the contours of liability in objective terms. The resulting statutes are a proper exercise of the legislative power. *See* Ariz. Const. art. 4, pt. 1, § 1(1) ("The legislative authority of the state shall be vested in the legislature . . . .").

The Court should revisit *Young* and either expressly overrule it or decline to follow it in Division One.

II. As a matter of law, JAI did not breach its duty.

Duty provides an independent basis for reversing. As JAI's prior briefing explains, the only relevant duty imposed on liquor licensees by common law or statute is the duty not to serve alcohol to an obviously intoxicated person. (Opening Br. at 43-59; Reply Br. at 31-35.)

The Supreme Court's modern duty cases have clarified that "[t]he primary source for identifying a duty based on public policy is our state statutes." *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 566, ¶ 18 (2018). "[I]n the absence of a statute, [courts] exercise great restraint in declaring public policy." *Id.*, ¶ 19; *accord CVS Pharmacy, Inc. v. Bostwick*, 251 Ariz. 511, 517 ¶ 21 (2021).

Ontiveros held that liquor licensees have a "duty to exercise due care in *ceasing to furnish* intoxicants to customers in order to protect members of the public who might be injured as a result of the customer's *increased intoxication*." 136 Ariz. at 511 (emphases added). *Ontiveros* based this duty in part on A.R.S. § 4-244(14), which made it unlawful to sell, serve, or furnish alcohol to an already intoxicated or disorderly person. *Id.* at 509-10. Reasoning that § 4-244(14) reflected the legislature's intent to impose an obligation on tavern owners for the safety of others, *Ontiveros* "recognize[d] the duty described in that statute as a duty imposed by statute and adopted by the common law." *Id.* at 510-11.

After *Ontiveros*, the legislature clarified the duty. The law now prohibits the sale of alcohol to a "disorderly or *obviously intoxicated* person,"

A.R.S. § 4-244(14), and licensees may be liable for serving "*obviously* intoxicated" patrons, A.R.S. § 4-311(A). (Emphases added.)

Although courts make public policy, they do so "subject to legislative correction." *Cronin*, 195 Ariz. at 537, ¶ 27 (quotation marks omitted). Thus, even if not preempted by § 4-312(B), the scope of common-law dramshop duty under *Ontiveros* is coextensive with a liquor licensee's statutory obligations. Under either common law or statute, JAI's duty is to avoid selling alcohol to obviously intoxicated patrons.

Moreover, as explained in the prior briefing, the duty cannot, and does not, extend beyond the bar's control. (Opening Br. at 52-56.) The Supreme Court recently confirmed the link between duty and control under Arizona law. *See Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 375, ¶ 20 (2021) (scope of duty based on control).

Accordingly, even if the Court declines to reach or reverse on preemption, JAI is entitled to judgment as a matter of law because the jury necessarily found that JAI did not serve alcohol to an obviously intoxicated or underage patron. [IR-148 to IR-150 (verdicts) (APP090-94); IR-146 (jury instructions) at 5-8 (APP082-85).] (*See also* Opening Br. at 44-59; Reply Br. at 8-14.)

CONCLUSION

The Court should vacate, reverse, and remand for entry of judgment for JAI.

RESPECTFULLY SUBMITTED this 21st day of January, 2022.

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