**ARIZONA SUPREME COURT**

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| BENCHMARK INSURANCE c/o BENCHMARK ADMINISTRATORS,<br>Petitioner Insurance Carrier,<br>v.<br>SUPERSTITION FIRE & MEDICAL<br>Petitioner Employer,<br>INDUSTRIAL COMMISSION OF ARIZONA,<br>Respondent.<br>ROBERT VANDERKROL,<br>Respondent Employee. | No. CV-23-0211-PR<br><br>Arizona Court of Appeals No. 1 CA-IC 22-0046<br><br>Industrial Commission of Arizona ICA Claim No. 20210280125 |

# BRIEF OF AMICI CURIAE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS AND PROFESSIONAL FIRE FIGHTERS OF ARIZONA IN SUPPORT OF RESPONDENT (FILED WITH CONSENT OF THE PARTIES)


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## Interest of Amicus Curiae

The International Association of Fire Fighters ("IAFF") is a 501(c)(5) labor organization headquartered in Washington, DC, representing more than 340,000 professional fire fighters, paramedics, and other emergency responders in the United States and Canada. IAFF members in more than 3,500 IAFF local affiliates protect citizens' lives and property in nearly 6,000 communities in every state in the United States and province in Canada. The IAFF's local affiliates represent fire fighters throughout Arizona with respect to collective bargaining over the terms and conditions of employment, including health and safety issues. Consistent with its interest and capacity as an advocate for professional fire fighters, paramedics, and emergency responders in Arizona and across North America, and because of its extensive expertise and knowledge in this field, the IAFF is pleased to provide this Court with a valuable perspective on the issues in the case.

Joining the IAFF before this Court is its statewide Arizona affiliate, the Professional Fire Fighters of Arizona ("PFFA"). PFFA represents 8,123 fire fighters throughout Arizona. For nearly a century, PFFA (and its predecessor organization, the Arizona State Firemen's Association)

has fought to ensure fair working conditions and compensation for its members. Its members' collective voice is powerful in protecting both the profession and public safety, protection that must include helping fire fighters who become sick or injured while on the job. And with respect to cancer and other occupational disease presumptions, PFFA has been an active lobbyist at both the Legislature and the municipal level after seeing many of its members face endless red tape and years of litigation to secure the benefits guaranteed to them by state law. Arizona's fire fighters provide a critical public service, and PFFA has their backs.

The IAFF has significant experience lobbying for cancer and other occupational disease presumptions at both the federal and state level. The IAFF supported and secured enactment of the Federal Firefighters Fairness Act of 2022 (enacted as part of the National Defense Authorization Act of 2023, Pub. L. No. 117-263 (December 23, 2022)). The Act creates a rebuttable presumption that certain cancers contracted by federal fire fighters are job related for workers' compensation and disability retirement purposes. Later that same year, the International Agency for Research on Cancer published a study that concluded the occupation of fire fighting is itself carcinogenic. *See* Demers, Paul A., et

al., *Carcinogenicity of occupational exposure as a firefighter*, 23.8 The Lancet Oncology, 985-86 (2022).

The IAFF also led the efforts which resulted in the enactment of the Firefighter Cancer Registry in July 2018 and created a national registry for fire fighters to gather data on cancer incidence and trends among fire fighters. IAFF local affiliates' lobbying efforts have resulted in the enactment of cancer presumptions on the state level, including the Arizona cancer presumption at issue.

PFFA members testified before the Legislature in support of the fire fighters' presumption at issue when it was initially passed in 2001, and when it was later amended in 2017 and 2021. The IAFF has also offered its unique insights and expertise on presumptive occupational disease legislation as amicus curiae in other courts considering issues much like the instant appeal. *See, e.g., Aguirre v. Indus. Comm'n of Ariz.*, No. 1 CA-IC-22-0032 (Ariz. Ct. App. Div. 1 2022); *Nelson v. City of Pocatello*, 508 P.3d 1234 (Idaho 2022).

Because this Court's decision on the application of A.R.S. § 23-901.01 and the requirements of A.R.S. § 23-901.09 (the "2021 cancer presumption" or the "2021 amendments") will have a direct and

significant impact on fire fighters across Arizona, the IAFF and PFFA's members in Arizona have a substantial interest in this case.

## Summary of Argument

The court of appeals correctly applied the current version of the fire fighters' cancer presumption statute as most recently amended in 2021, rather than the pre-amendment version that was in place when Mr. Vande Krol filed his claim on October 28, 2020. As this Court has long held, "[t]he legislature [need not] use the expression, 'this statute shall be retroactive,' or any similar one. Any language that shows a legislative purpose to bring about this result is sufficient." *Schuster v. Schuster*, 42 Ariz. 190, 199 (Ariz. 1933). The 2021 amendments contain express retroactive language. Yet three years after he filed his claim, Mr. Vande Krol has yet to obtain a final decision on it.

Amici curiae will also briefly address retroactive application of the cancer presumption in the hypothetical scenario where the 2021 amendments did not contain expressly retroactive language – which they most certainly do. Here, retroactive application of the presumption would still be appropriate because the 2021 amendments altered only procedural rights or contingent, non-vested substantive rights.

Arizona law is clear: "a statute does not have [impermissible] retroactive effect if it is merely procedural and does not affect an earlier established substantive right." *In re Shane B.*, 198 Ariz. 85, 87 (2000) (alterations in original) (quoting *Bouldin v. Turek*, 125 Ariz. 77, 78 (1979)). And in the decision below, the court of appeals correctly observed that "[r]ights remain contingent 'when they are only to come into existence on an event or condition which may not happen[.]'" *Krol v. Indus. Comm'n of Ariz.*, 533 P.3d 557, 567 (App. 2023).

A fire fighter's right to the 2021 cancer presumption is contingent on meeting certain threshold requirements, as is an employer's right to rebut the 2021 cancer presumption by clear and convincing evidence. *See, e.g.*, A.R.S. § 23-901.09(B). Since substantive rights cannot depend on an earlier occurrence that may not happen, the 2021 amendments affected only procedural and not vested substantive rights – the way in which fire fighters prove they are entitled to the 2021 cancer presumption – and application of the 2021 amendments is appropriate in Mr. Vande Krol's workers' compensation claim.

## Statement of Facts and Background

In January 2021, Mr. Vande Krol, then recently employed by Superstition, Arizona ("Superstition") as a fire fighter and diagnosed with brain cancer, submitted a worker's report of injury and claim for benefits, listing his date of injury as October 28, 2020. Superstition's insurer, Benchmark Insurance Company ("Benchmark"), denied the claim.

On September 29, 2021, the legislature's most recent amendment to A.R.S. § 23-901.09 – the fire fighter cancer presumption – went into effect. Mr. Vande Krol requested a hearing on his claim and an Administrative Law Judge ("ALJ") held an evidentiary hearing over three non-consecutive days beginning on October 5, 2021, and concluding in March 2022. The ALJ determined that the recent statutory amendment did not apply to Mr. Vande Krol's claim, which therefore was not compensable. To reach that decision, the ALJ applied the version of the statute in effect before the September 2021 amendments, which required some evidence of occupational exposure to a carcinogen "reasonably related" to brain cancer – a requirement rescinded by the legislature in its September 2021 amendments. The ALJ's erroneous

conclusion that the statute as amended in 2021 did not apply to Mr. Vande Krol's claim compelled him to deny the claim upon finding Mr. Vande Krol had submitted no such evidence.

Mr. Vande Krol appealed. Below, the court of appeals held "the 2021 statute applies, which does not result in an impermissible retroactive application," and set aside the ALJ's decision, remanding for further proceedings on Mr. Vande Krol's claim under the 2021 statute. *Krol*, 533 P.3d at 560. This Court granted review on the question of "[w]hether the Court of Appeals erred in finding that amendments to A.R.S. § 23-901.01 applied retroactively to the claim for benefits in this case."

## Argument

### I. The 2021 Amendments Contain Explicitly Retroactive Language and Modify Only Contingent Non-Vested Rights in a Preexisting Statute.

In 2021, the Legislature made clear its intent to apply the fire fighter's cancer presumption to fire fighters like Mr. Vande Krol who are diagnosed with cancer "'not more than fifteen years after the firefighter's [ ] last date of employment as a firefighter…'" A.R.S. § 23-901.09(c).

The 2021 cancer presumption by its plain language applies to all former fire fighters diagnosed with cancer within fifteen years of their

last date of employment, regardless of the statute's effective date. A.R.S. § 23-901.09(c)(2). The court of appeals correctly found that the 2021 cancer presumption should have applied to Mr. Vande Krol's claim because the "legislature did not except application where the date of injury…occurred before the 2021 statute's effective date." *Krol*, 533 at 564; *see also Schuster*, 42 Ariz. at 199 (noting there is no requirement that "the legislature use the expression, 'this statute shall be retroactive,' or any similar [expression].") The statute's language providing for application of the presumption to any claim filed within fifteen years of a fire fighter's last date of employment is obviously not exclusively forward-looking language.

Even if one assumes the 2021 cancer presumption does not use language demonstrating its retroactive application – which it certainly does – the 2021 amendments affect only procedural rights and should thus apply retroactively. *Bouldin v. Turek*, 125 Ariz. 77, 78 (1979). ("[A] statute does have retroactive effect if it is merely procedural and does not affect an earlier established substantive right."); *see also State v. Nihiser*, 191 Ariz. 199, 203 (App. 1997) ("We view presumptions as procedural, rather than evidentiary, concepts… The role of presumptions in the law

is not to supplant the rules of evidence, but rather to provide a framework within which evidence is admitted.") (citation omitted). Here, the 2021 amendments altered only the method by which a workers' compensation claimant proves a presumption – an inherently procedural process – not a vested substantive right such as the claimant's entitlement to benefits under the statute. Because Arizona law traditionally considers presumptions procedural rather than substantive rights, and the 2021 amendments affected only the mechanisms for invoking and rebutting the fire fighters' cancer presumption, the 2021 amendments are properly applied retroactively to Mr. Vande Krol's claim.

### A. A.R.S. § 23-901.09 applies to workers' compensation benefit claims filed before the 2021 cancer presumption's effective date.

In Arizona, "[n]o statute is retroactive unless expressly declared therein." A.R.S. § 1-244. But there is no requirement that "the legislature use the expression, 'this statute shall be retroactive,' or any similar [expression]." *Schuster*, 42 Ariz. at 199. In other words, no magic words are required. Instead, "any language that shows a legislative purpose to bring about [retroactive application] is sufficient." *Id.* (citation omitted). And "[w]hen the plain text of a statute is clear and unambiguous, it

controls unless an absurdity or constitutional violation results." *4QTKIDZ, LLC v. HNT Holdings, LLC*, 253 Ariz. 382, 385 ¶ 5 (2022) (cleaned up). Beyond that, courts "liberally construe the Act to effect its purpose of having industry bear its share of the burden of human injury as a cost of doing business." *Landon v. Indus. Comm'n of Ariz.*, 240 Ariz. 21, 25 ¶ 12 (App. 2016) (citation omitted).

Here, the 2021 cancer presumption uses plainly retroactive language: that is, it "applies to . . . former firefighters . . . who are sixty-five years of age or younger and who are diagnosed with [brain cancer] not more than fifteen years after the firefighter's last date of employment as a firefighter[.]" *Krol*, 533 P.3d at 563-64 (quoting A.R.S. § 23-901.09(C)(2). The 2021 amendments do not apply to cancer diagnoses occurring only after 2021. Rather, the 2021 cancer presumption applies to any fire fighter who is 1) under the age of 65, and 2) is diagnosed with cancer *not more than fifteen years after* their last date of employment as a firefighter. Under the plain language of the 2021 amendments the presumption applies to any cancer diagnosis occurring before the fire fighter has been separated from fire service for 15 years. This broad

statutory language encompasses fire fighters' claims and cancer diagnoses that predate the enactment of the 2021 cancer presumption.

Indeed, applying the 2021 cancer presumption only to claims or injuries arising after its effective date would nullify the express language of A.R.S. § 23-901.09(c)(2). Arizona courts must "examine [a statute's] individual provisions in the context of the entire statute…and strive to give effect to each word or phrase of the statute." *Ames v. Ames*, 239 Ariz. 246, 249 (App. 2016); *see also Walgreen Ariz. Drug Co. v. Ariz. Dep't of Revenue*, 209 Ariz. 71, 73 (App. 2004) (Arizona courts must "give [the words of the statute] a fair and sensible meaning and [ ] avoid absurd results.") As detailed above, A.R.S. § 23-901.09(c)(2) states that the 2021 amendments apply to former fire fighters diagnosed with cancer "not more than fifteen years after the firefighter's [ ] last date of employment as a firefighter . . . ." An exclusively prospective application of the 2021 cancer presumption would preclude the claims of any former fire fighter with a cancer diagnosis predating 2021, a result clearly not supported by the statutory language and absurd in light of its purpose.

The 2021 amendments tie their applicability to the relationship between a fire fighter's date of cancer diagnosis and last date of

employment, not the date that the fire fighter filed a claim for benefits. Vande Krol was diagnosed with cancer on October 28, 2020, and filed his claim for benefits in January 2021. If Benchmark's position was adopted, a fire fighter who was diagnosed with cancer before October 28, 2020, could apply the cancer presumption set forth in the 2021 amendments, while Mr. Vande Krol could not. Why? Because the fire fighter who had the earlier cancer diagnosis filed his claim for benefits after September 29, 2021 (the date of adoption of the 2021 amendments). This would be an absurd result and nullify 2021 amendments' requirement that it apply to any cancer diagnosis within 15 years of a fire fighter's last date of employment.

Finally, cases such as *Bush v. Industrial Commission*, 136 Ariz. 522 (1983) and *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544 (2005) are inapplicable because – unlike the 2021 cancer presumption at issue – *Bush* and *Clear Channel* concerned the application of statutes that lacked expressly retroactive language. These cases do not alter the judiciary's obligation to apply the plain language of statutes, including statutory language that expressly provides for retroactive effect. *See Clear Channel*, 209 Ariz. at 548 ("No statute is retroactive unless

expressly declared therein…[however], statutory changes in procedures or remedies may be applied to proceedings already pending except where the statute effects or impairs vested rights.") (cleaned up).

In *Bush*, for example, this Court refused to retroactively apply a statute governing when a heart attack was work-related to a workers' compensation claim filed before the statute's effective date. 136 Ariz.at 523-524. The Court noted that employee claimant suffered the underlying heart attack in January 1980, while the statute at issue did not become effective until August 1980. *Id.* at 524. The Court reasoned that "[s]tatutes are not to be applied retroactively unless that intent is clearly expressed by the legislature …*and it was not so expressed in this case*." *Id.* (emphasis added). The question in *Bush* was whether the court of appeals correctly applied the standards of a statute governing work-related heart attacks to a workers' compensation claim filed before the statute's effective date, where the statute at issue contained no language providing for retroactive application. *Id. Bush*'s retroactivity analysis doesn't apply when – as here – the statute at issue contains retroactive language.

Similarly, in *Clear Channel*, this Court focused on whether A.R.S. § 9-462.02(C) – a statute that limited the time the City had to bring an enforcement action against nonconforming billboards and other signs to two years – applied to the City's enforcement action against Clear Channel, which was filed one day before the statute's effective date. 209 Ariz. at 547. The statute did not expressly state whether it applied to enforcement actions filed before its effective date. *Id.*

*Clear Channel*'s analysis is limited to a narrow situation not present here. The narrow question in *Clear Channel* was "whether a timely filed action is barred because the action would have been untimely under a [new] statute of limitations that became effective after the filing." *Id. Clear Channel* is instructive when a cause of action was timely filed because no statute of limitations or other regulation applied, but the retroactive application of a later enacted statute of limitations would bar the pending claim. Here, the statute was not only modified before Mr. Vande Krol's hearing, it also contains expressly retroactive language.[1]

[1] In *Clear Channel*, the court noted that "[e]very right or remedy created solely by a modified statute disappears or falls with the modified statute unless carried to final judgment before the repeal or modification." 209 Ariz. at 547. *Clear Channel* indicates that the version of the statute as amended in 2021 should apply to Mr. Vande Krol's claim for benefits

Given the expressly retroactive language in A.R.S. § 23-901.09, the retroactivity analyses in *Bush* and *Clear Channel* – where neither statute at issue contained retroactive language – are irrelevant to the question of whether A.R.S. § 23-901.09 was correctly interpreted and applied by the court of appeals. That is, *Bush* and *Clear Channel* offer no insight into the proper analysis of retroactive statutory language because neither statute at issue in those cases contained any retroactive language. When a statute contains retroactivity language, as the 2021 amendments do, that retroactive language must be applied.

### B. Even if A.R.S. § 23-901.09 lacked retroactive language, the 2021 cancer presumption amended a preexisting contingent non-vested statutory presumption.

Even if the 2021 cancer presumption did not use language demonstrating its legislative purpose to retroactively apply to Mr. Vande Krol's claim – which, as detailed above, it did – the 2021 amendments affected only procedural rights and should thus apply retroactively. "As in other jurisdictions, Arizona courts have engrafted an exception onto [the] general rule [set forth in section 1-244]. Under [this] exception, a

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because his claim had not reached final judgement by the effective date of the 2021 amendments.

statute does not have [impermissible] retroactive effect if it is merely procedural and does not affect an earlier established substantive right." *In re Shane B.*, 198 Ariz. at 87 (alterations in original).

Here, the 2021 amendments merely altered procedural contingent rights that have not yet vested. *See* Ariz. House of Reps., Summary of H.B. 2161 (2017 1st Reg. Sess.) (May 4, 2017) (explaining that the 2021 amendments' predecessor "[s]pecifies that cancer presumptions apply to firefighters or peace officers who are diagnosed not more than fifteen years after their last date of employment," and "permit[ing] a rebuttal to the cancer presumption by a preponderance of the evidence[.]") That is, the 2021 amendments altered the **process** by which a fire fighter proves their workers' compensation claim, not any vested **substantive** rights of the parties to such a claim. Thus, the court of appeals did not err when it found that the 2021 amendments were procedural, and therefore applicable to Mr. Vande Krol's claims. *Krol*, 533 P.3d at 565-567.

Decades ago, this Court correctly articulated the distinction between procedural and substantive law:

> the substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion. It is

> often said the adjective law pertains to and prescribes the practice, method, procedure or legal machinery by which the substantive law is enforced or made effective.

*State v. Birmingham*, 96 Ariz. 109, 110 (1964). In addition, this Court has held that "[t]he critical inquiry in retroactivity analysis is not whether a statute affects a substantive right but whether a statute affects a vested right," and "[t]hus, the implicit meaning of the statement 'substantive rights may not be retroactively impaired' is 'substantive rights may not be impaired *once vested*.'" *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 139-40 (1986). And "[a] vested right is one which is absolute, complete, and unconditional to the exercise of which no obstacle exists, and which is immediate and perfect in itself *not dependent upon a contingency*." *State v. Estes Corp.*, 27 Ariz. App. 686, 688 (1976) (emphasis added). A law thus applies retroactively where it affects only procedural rights or substantive rights that have not vested because they are contingent.

Here, the 2021 amendments affect only procedural rights. That is, the 2021 amendments only affect the method by which fire fighters pursue their workers' compensation claims in Arizona. As detailed above, the 2021 amendments alter the threshold requirements of the presumption, the universe of fire fighters it applies to, and the employer's

burden to rebut the presumption once granted – all of which are procedural not substantive changes.

Moreover, Arizona courts have long recognized that presumptions are inherently procedural. See *Seiler v. Whiting*, 52 Ariz. 542, 549 (Ariz. 1938) ("A presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue."); *see also State v. Grilz*, 136 Ariz. 450, 456 (1983) ("Properly understood, however, the presumption of sanity is a procedural device that places on the defendant the burden of producing evidence sufficient to raise a reasonable doubt as to sanity."). As a result, and because the 2021 amendments affected only the process by which fire fighters prove their workers' compensation claims, it was not error to apply the 2021 amendments to Mr. Vande Krol's claim.

Any argument advanced by Petitioners that the employer's right to rebut the presumption is a vested right must fail in light of the presumption's contingent nature. As stated above, a vested substantive right cannot be "dependent on a contingency." *Estes Corp.*, 27 Ariz. App. at 688. The application of the presumption and the employer's right to rebut the presumption is contingent upon a fire fighter establishing three

threshold requirements: a pre-employment physical examination, five years of hazardous duty, and a physical examination reasonable aligned with national fire protection association standard 1582. *See* A.R.S. § 23-901.09(B). A.R.S. § 23-901.09(B). The employer still retains every opportunity to challenge the claimant's evidence on these threshold showings. For this reason, it is uncertain if a fire fighter will be granted the presumption. Thus, the employer's right to rebut the presumption is not a vested substantive right because it is contingent on the claimant meeting the threshold requirements of the presumption itself.

Given that presumptions are procedural devices under Arizona law, and Petitioners cannot show a vested substantive right with which the 2021 amendment interfered, the court of appeals did not err when it found that the statutory presumption as amended in 2021 applies to Mr. Vande Krol's claim. *Krol*, 533 P.3d at 565-567.

## Conclusion

The IAFF and PFFA respectfully request that this Court affirm the opinion below. The Court should also do whatever it can to enter a final order in favor of compensation for Mr. Vande Krol on the existing record and without remand. This result would align with the clear intent of the

Legislature that fire fighters who perform years of hazardous duty in a carcinogenic occupation are to be compensated for claims filed within a reasonable time after being stricken by cancer. With no evidence on the record of a non-occupational cause of Mr. Vande Krol's brain cancer, let alone clear and convincing evidence, further proceedings are unnecessary to a final decision on Mr. Vande Krol's claim.[2]

RESPECTFULLY SUBMITTED this 17th day of January, 2024.

**COPPERSMITH BROCKELMAN PLC**

By /s/ D. Andrew Gaona
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[2] Evidence of a non-occupational cause of Mr. Vande Krol's cancer has always been a defense to his claim, no matter the version of the presumption applied. Petitioners thus had the chance to present any such evidence and would not be prejudiced by a final decision entered without further proceedings to afford Mr. Vande Krol timely relief.